

DOCUMENT RESUME

ED 135 339

IR 004 365

TITLE National Commission on New Technological Users of Copyrighted Works Meeting Number Eight (Los Angeles, California, September 16-17, 1976). Vol. 1 and 2.

INSTITUTION National Commission on New Technological Uses of Copyrighted Works, Washington, D.C.

REPORT NO PE-259-749

PUB DATE Sep 76

NOTE 371p.; For related documents see ED 127 935-942

EDRS PRICE MF-\$0.83 HC-\$19.41 Plus Postage.

DESCRIPTORS Advisory Committees; Computer Oriented Programs; Computers; *Copyrights; Data Bases; Federal Legislation; Information Retrieval; *Information Science; Information Storage; *Information Systems; Information Utilization; Laws; Legal Problems; Meetings; Policy; *Reprography; *Technology

IDENTIFIERS Fair Use; National Comm New Tech Uses Copyrighted Works

ABSTRACT

Several presentations were made at the eighth meeting of the National Commission on New Technological Uses of Copyrighted Works (CONTU). The president of the Association for Computing Machinery addressed the issue of interactions of computer technology and economics, education, and society. A representative from the Center for Educational Media (NICEM) discussed the relation of the information storage and retrieval system of nonprint materials to the proposed copyright changes. Representatives from Documentation Associates Information Services, Inc. presented their views of copyright implications to the information brokerage business, especially the legality of their services and their accessibility to data bases. Representatives from Rand Corporation and Stanford Research Institute discussed respectively the technological advances of the computer, and implications and cases of computer abuses. Issues dealing with the copyrightability of computer programs, protecting investment in computer software, enforcement problems, fair use, and possible results of copyright legislation on users and producers were also covered in presentations and commission staff discussions. (SC)

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PB 255 143

NATIONAL COMMISSION ON NEW TECHNOLOGICAL
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REPORTER'S TRANSCRIPT, taken at 9:50
A.M., Thursday, September 16, 1976, at
the Law School Building, Room 2423,
UCLA, Los Angeles, California, by
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IR 004365



BIBLIOGRAPHIC DATA SHEET	1. Report No 76-07	2.	3. Recipient's Accession No.
	4. Title and Subtitle TRANSCRIPT -- CONTU Meeting No. 7		5. Report Date Sept. 1976
7. Author(s) National Commission on New Technological Uses of Copyrighted Works		8. Performing Organization Rept. No.	
9. Performing Organization Name and Address National Commission on New Technological Uses of Copyrighted Works Washington, D. C. 20558		10. Project/Task/Work Unit No. P.L. 93-573	11. Contract/Grant No.
12. Sponsoring Organization Name and Address same as box 9		13. Type of Report & Period Covered Sept. 16-17, 1976	
15. Supplementary Notes		14.	
16. Abstracts Presentations by: Dr. Herbert R. J. Grosch, President, Association for Computing Machinery; Dr. M. Thomas Risner, Director, National Information Center for Educational Media (NICEM), University of Southern California; Ms. Patricia Ferguson and Ms. Donna Chamberlain, Documentation Associates Information Services, Inc.; Dr. Peter Weiner, Rard Corporation; and Mr. Donn Parker, Stanford Research Institute			
17. Key Words and Document Analysis. 17a. Descriptors Information Retrieval Proprietary Rights Copyright Software Data Bases Information Systems Information Storage and Retrieval Systems Computers Computer Programs Computers and Legal Implications 17b. Identifiers/Open-Ended Terms 17c. COSATI Field Group			
18. Availability Statement Release Unlimited		19. Security Class (This Report) UNCLASSIFIED 20. Security Class (This Page) UNCLASSIFIED	21. No. of Pages

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1
2 NATIONAL COMMISSION ON NEW TECHNOLOGICAL
3 USES OF COPYRIGHTED WORKS

4 Law School Building, Room 2423, UCLA,
5 Los Angeles, California

6 Thursday, September 16, 1976
7 9:50 A.M.

8 COMMISSIONERS:

9 JUDGE STANLEY H. FULD, Chairman
10 MELVIALE NIMMER, Vice Chairman
11 RHODA H. KARPATKIN
12 HERSHEL SARBIN
13 E. GABRIEL PERE
14 JOHN HERSEY
15 DAN LACY
16 ROBERT WEDGEWORTH
17 ALICE WILCOX
18 ARTHUR MILLER

19 ALSO PRESENT:

20 ARTHUR LEVINE
21 ROBERT FRASE
22 MICHAEL KEPLINGER
23 DOLORES DOUGHERTY
24 MARLENE MORRISEY
25
26

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A G E N D A

<u>TIME</u>		<u>PAGE NO.</u>
9:50 A.M.	Opening remarks, Judge Fuld	3
10:00 A.M.	Commission discussion and staff report	
12:00 Noon	Lunch	
1:50 P.M.	Dr. Herbert R. J. Grosch, President, Association for Computing Machinery	80
2:50 P.M.	Dr. M. Thomas Risner, Director, National Information Center for Educational Media (NICEM), University of Southern California	119
3:48 P.M.	Commission discussion	137

Concluded at 5:25 P.M.

2

1 LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 9:50 AM

2
3
4 JUDGE FULD: Let me call to order this meeting of
5 CONTU -- its eighth -- in these pleasant surroundings and,
6 in being so, I express the Commission's deep appreciation
7 to the UCLA Law School where our distinguished Vice-
8 Chairman holds forth for his kindness in providing us
9 with these facilities.

10 May I add these remarks for the record: We are
11 here today and tomorrow to begin an in-depth examination
12 of the propriety of and necessity for copyright protection
13 of data bases. As you know, in our previous meetings we
14 have heard about the technological aspects of this topic
15 but we shall now attempt to learn in greater detail the
16 nature of the data base industry and the problems it faces.
17 The purpose of this meeting is to address, among other
18 things, the following questions:

- 19 1. What is a data base?
- 20 2. How are data bases created?
- 21 3. In what ways are various data bases
22 similar to or different from one another?
- 23 4. How are they used?
- 24 5. When in computer-sensible media are
25 they sufficiently tangible to amount to a writing?

26 The information explosion of the post-war era

1 has led to many changes in the way in which research can
2 be done. One of the most significant is the development of
3 data bases which can be both stored in and searched by
4 computers. It is now possible for one person, equipped
5 with a telephone and a teletypewriter or cathode ray
6 terminal, to have entire libraries literally at his finger-
7 tips. Even more important than the quantity of data
8 available in this manner are the speed and flexibility
9 with which it can be collected. One person with access
10 to a computerized data base can now perform tasks with
11 greater speed than could several persons working by
12 traditional methods. Whether he is seeking legal prece-
13 dents, economic statistics, or a bibliography dealing with
14 a specific topic he can achieve in seconds what would
15 otherwise take days.

16 Our guests are representatives of organizations
17 which are deeply concerned with differing aspects of data
18 bases. They include Dr. Herbert R. J. Grosch, who while
19 speaking as an individual is President of the Association
20 for Computing Machinery; Dr. M. Thomas Risner, Director of
21 the National Information Center for Educational Media;
22 Patricia Ferguson and Donna Chamberlain of Documentation
23 Associates Information Services, Inc.; and Donn Parker of
24 the Stanford Research Institute. Several other invitees
25 who are unable to attend this meeting will soon be
26 submitting their comments in writing. In addition, we

1 shall hear about new works created by computers from Dr.
2 Peter Weiner of the Rand Corporation. It is our hope
3 that these sessions will enable the Commission to gain
4 a fuller understanding of data bases and to make
5 specific recommendations to Congress regarding this
6 vitally important new technological medium. I would like
7 to add that we plan further inquiry into the data base
8 question at our November meeting.

9 May I now ask our director, Arthur Levine, to
10 bring us up-to-date on the guidelines for the proviso
11 contained in Section 108(g)(2).

12 MR. LEVINE: Thank you, Judge Fuld. I have a couple
13 of announcements. One is, this room, tomorrow, is being
14 taken up by a student group and our meeting will be next
15 door.

16 MR. NIMMER: That is 2435, the next room over.

17 MR. LEVINE: Lunch for those who are fearful of
18 never finding the Law School again if they wander too far
19 off campus will be held at the Faculty Club and Mel has
20 another announcement.

21 MR. NIMMER: After the meeting, I would like to invite
22 all of the Commissioners and staff and spouses who would
23 like to come over to my house, which is a couple of blocks
24 away, for a little wine and cheese. I hope you can make it.

25 MR. LEVINE: Let me bring you up-to-date, first of
26 all, on where the copyright revision Bill stands.

1 Yesterday the Rules Committee gave a rule, technically
2 that is the language, to the Revision Bill in the House
3 Rules Committee. The rule provides that there shall be
4 one hour of debate on S22. Those who remember 1967 when
5 the House went into session, I think at 10:00 in the
6 morning and adjourned at 7:00 in the evening the first
7 day and then went back for the second day the following
8 week for almost the same amount of time, will realize the
9 resolution of problems that has taken place since that
10 time.

11 A half-hour will be devoted to Congressman
12 Kastenmeier and the proponents of the Bill. A half-hour
13 will be reserved for those who have opposing viewpoints.

14 If there are to be amendments to S22, they must
15 be in the Congressional Record 72 hours before the Bill
16 goes to the floor of the House. The Bill is scheduled to
17 go to the floor of the House on Wednesday. So things are --

18 MR. LACY: Proponents of the amendment will have to
19 get their amendments in the second half-hour?

20 MR. LEVINE: I assume out of the second half-hour,
21 but, as I said, the amendment must be in the Congressional
22 Record 72 hours prior.

23 MR. PERLE: Scheduled for on Wednesday?

24 MR. LEVINE: A week from yesterday.

25 MR. LACY: Which is the 22nd?

26 MR. LEVINE: The 22nd.

1 JUDGE FULD: Do you have any idea of the success or --

2 MR. LEVINE: I think there is no question at this
3 point that if time permits that the Bill is going to pass.

4 MR. NIMMER: What is the prognosis on that?

5 MR. LEVINE: If we are talking about September 22nd,
6 that leaves a good week and a half for the conferees to
7 get together and agree or --

8 MR. NIMMER: Does it ever happen that the Houses both
9 pass it but the Congress meeting does not meet in time?

10 MR. LEVINE: I am sure it has happened, but it seems
11 very unlikely.

12 MR. PERLE: They are not planning on a conference at
13 this time?

14 MR. LEVINE: The last word I got from Tom Brennan,
15 who is the counsel for the subcommittee on Patents, Trademarks
16 and Copyrights of the Senate Judiciary Committee, was that
17 there would be a conference and a conference report.

18 MR. PERLE: When did they switch that around?

19 MR. LEVINE: That is what he told me on Tuesday.

20 MR. NIMMER: So that after there is a conference
21 agreement it has to go back to each House to approve?

22 MR. FRASE: Yes.

23 MR. PERLE: It is a mere formality.

24 Do you have extra copies of the record?

25 MR. LEVINE: I think copies are being mailed.

26 MR. LACY: Did Tom give you any indication to what

1 the position was, if the Senate conferees would accept
2 the House Bill or would they be trying to get some
3 compromise on changes?

4 MR. LEVINE: He did not.

5 MR. LACY: There was a good deal of talk that the
6 conferees might not accept the House Bill.

7 MR. PERLE: Title 8 is under a lot of discussion and
8 Tom --

9 MR. LEVINE: Title 8?

10 MR. PERLE: The Tribunal, Chapter 8. Did I say "Title"?
11 I understand that the Senate is going to propose an entirely
12 new Chapter 8. So that may bog it down.

13 MR. NIMMER: Do you know what the substance is?

14 MR. PERLE: Going back to what Brennan wrote in the
15 first place.

16
17 I understand they want to go back to the
18 Tribunal. The Senate does.

19 MR. WEDGEWORTH: There is likely to be controversy
20 over NTIS's position that was inserted at the last minute,
21 allowing them to copyright their products.

1 That gets us to 108(g) (2). Tom Brennan said
2 that the last -- absolutely the last moment that he can
3 get guidelines on 108(g) (2) would be September 27, which
4 is a week from Monday. I think he said early in the
5 morning. So time is running out on reaching an agreement
6 on guidelines.

7 JUDGE FULD: And he insists on agreement between the
8 groups?

9 MR. LEVINE: That is right. He also said that unless
10 the major organizations agreed to the guidelines that, as
11 far as he was concerned, the conference report would
12 simply say "We urge the parties to get together and agree
13 on how to operate under 108(g) (2)"; that they would not
14 include in the report a recommendation from CONTU that had
15 not been --

16 JUDGE FULD: Agreed upon?

17 MR. LEVINE: -- agreed upon by the parties. This
18 does, I think, square also with what the House report says
19 on 108(g) (2).

20 The National Commission on New Technological
21 Uses of Copyrighted Works offered to provide their good offices
22 in helping to develop these guidelines. This offer was
23 accepted and also the final text of the guidelines has
24 not been achieved. The Committee has reason to hope that
25 within the next month some agreement can be reached on an
26 initial set of guidelines covering practices under Section

1 108(g) (2) .

2 JUDGE FULD: At the moment, that seems rather remote?

3 MR. PERLE: No.

4 MR. LEVINE: I think it seems very probable. I do not
5 want to characterize it one way or another, but I do not
6 think the parties are very far apart.

7 JUDGE FULD: They were when I left that conference.

8 MR. LEVINE: Well --

9 MR. NIMMER: There was more heat than substance.

10 MR. LEVINE: Let me then go back a little bit and
11 bring everybody up to the point where we are today on the
12 guidelines. At our April meeting we offered our good
13 offices to the House to develop these guidelines. That
14 was accepted by Congressman Kastenmeier on behalf of the
15 subcommittee.

16 At our June meeting the Commission sat down and
17 substantially agreed on what it considered to be fair
18 guidelines on inter-library loan under Section 108(g) (2),
19 the proviso to Section 108(g) (2).

20 A draft was then prepared primarily by Gabe Perle,
21 circulated to the parties and the six major library
22 associations agreed to the guidelines that CONTU had
23 drafted with the proviso that no changes be made, no
24 substantive changes be made in those guidelines, and with
25 the suggestion that the guidelines be reviewed within five
26 years.

1 The author-publisher groups had problems with
2 some aspects of the guidelines. Primarily, three pro-
3 visions: One, that under the draft guidelines articles
4 in contributions published later than five years --
5 articles in periodicals published five years later than
6 the time the request was made could be photocopied in
7 unlimited quantity. That was one of their objections.

8 Second objection was that under the guidelines
9 as drafted, if a library subscribed to a periodical -- and
10 this is also true of books, but I will take periodicals as
11 the shorthand because it is simpler -- if the library
12 subscribed to a periodical, it could request in inter-
13 library loan, as many photocopies as it wished.

14 The third was that the author-publisher groups
15 believe that the guidelines should not apply to an agency
16 or institution, public or private, which existed for the
17 specific purpose of providing a central source for photo-
18 copies.

19 Then subsequent to that response, several
20 Commissioners met in New York City. Among those present
21 were Alice Wilcox, Bill Dix, Gabe Perle, Dan Lacy, and
22 George Cary. The feeling from that meeting was that
23 insofar as we were able to do it, we would attempt not to
24 change the guidelines as originally drafted but come up
25 with introductory language that might go toward solving
26 some of the concerns of the authors and publishers. Gabe,

1 Dan, and Bill Dix submitted their thoughts in draft
2 language to us. We put them together and sent out what
3 is in this document. The original introductory material
4 that followed the July meeting is the material that is in
5 there and that is lined out. The material here that is
6 underlined was a subsequent draft by Gabe at the end of
7 August. That draft that Gabe came up with at the end of
8 August was given to the author-publisher groups and they
9 made amendments to that draft and that is the written-in
10 material that you see on the material that I handed out to
11 you.

12 MR. WEDGEWORTH: The marginal notes?

13 MR. LEVINE: The marginal notes. And the --

14 JUDGE FULD: Deletions.

15 MR. PERLE: That does not include Charles's last
16 letter, does it?

17 MR. LEVINE: No, it does not, except for the "not."
18 There was a "not" included.

19 MR. PERLE: I drafted all three.

20 MR. LEVINE: New paragraph, new 3.

21 MR. HERSEY: In the guidelines themselves?

22 MR. PERLE: Page 2, "not" comes out. Paragraph 3.

23 MR. WEDGEWORTH: Paragraph --

24 MR. HERSEY: This "not" here.

25 MR. PERLE: It was revised from --

26 MS. WILCOX: Where are you?

1 MR. PERLE: When it was revised from "no" to "a."

2 MR. LEVINE: After we had offered our good offices to
3 the House to come up with these guidelines, Senator
4 McClellan wrote to Judge Fuld and a copy of that letter
5 was distributed with the material before the June meeting
6 asking that anything that is done by CONTU be reported not
7 only to the House Subcommittee but to the Senate as well
8 and asking us to also begin considerations of clearing-
9 house and licensing procedures for library photocopying,
10 particularly in those libraries that were not covered by
11 Section 108.

12 We are now at the point where this is what the
13 publishers and authors believe are acceptable guidelines
14 to them. They would eliminate most of the introductory
15 material. They have suggested --

16 MR. LACY: That introductory material has never been
17 formally submitted to be approved by the library groups,
18 anyway.

19 MR. LEVINE: That is correct. It was sent to the
20 CONTU members requesting comments. Mr. Hersey commented;
21 Mr. Dix commented. I think they were the only written
22 comments that we received.

23 If we can go to the guidelines, because I think
24 that is the substance.

25 MR. WEDGEWORTH: I do have one question before you
26 go there. On Page 4 of the introductory material it says

1 that you are going to delete that paragraph, but substitute
2 that 'guidelines will be needed for older material.'

3 MR. HERSEY: That depends on what happens in the
4 guidelines, so it probably does make sense to talk about
5 that first. It has to do about this section on the five-
6 year-old material.

7 MR. WEDGEWORTH: I see.

8 JUDGE FULD: The Bill would not include the intro-
9 duction in any event to the guidelines.

10 MR. LEVINE: No, the Bill would not.

11 MR. LACY: The Bill does not include it.

12 MR. NIMMER: You mean the report?

13 JUDGE FULD: Would the report include that intro-
14 duction?

15 MR. LACY: Well, the report would include whatever
16 the Committee chose to say about it. This is really just
17 suggestions to the language the Committee might use and,
18 yes, I would think they might want to use introductory
19 language.

20 JUDGE FULD: What I am getting at, does the introduc-
21 tion add anything or is it desirable to have an introduction?

22 MR. LEVINE: In some cases it does. There is some
23 substance in the introductory material. The most substance
24 is in the very last paragraph where it says, "These guide-
25 lines do not apply to organizations which exist for the
26 specific purpose of providing a central source for

1 photocopies." What is for short called the Boston Spa
2 situation.

3
4 What resulted from the author-publisher
5 objection to the June guidelines was the language after
6 the semicolon in Paragraph 1(a) in the first page of the
7 guidelines, which says essentially that any copies after
8 five years shall not be included in such computation if
9 the request is reasonable under the circumstances of the
10 request. The author-publishers suggest that that simply
11 say that "guidelines need to be developed for material
12 after five years," rather than using the standard
13 "reasonableness."

14 MR. NIMMER: Art, I think that was the extent of the
15 author-publisher's suggestion, but what that in essence
16 means -- and I do not know whether it should say it
17 there -- is that the statutory standard of aggregate
18 quantity, et cetera, would, of course, still be applicable,
19 the Statute applies in any event. It is just what
20 constitutes an aggregate number will not be covered by
21 the guidelines now but may at some future time.

22 MR. LEVINE: If I may just say: Mel Nimmer and Judge
23 Fuld, Gabe Perle, and I met last Wednesday with the author-
24 publisher representatives, Charles Lieb, Irwin Karp,
25 Bella Linden, and Alex Hoffman, who is chairman of their
26 subcommittee, to hear what they had to say and to get their
objections to the guidelines. This is essentially what

1 they handed us at that point and what they gave us and,
2 that precisely, they say whatever aggregate quantity is
3 so as to substitute for a subscription to or purchase of
4 such work should be the standard after five years.

5 As to the --

6 MR. NIMMER: Are you --

7 MR. HERSEY: Does it have to say anything there?

8 Because some account has to be taken of this difficulty
9 about the exemption of material more than five years old.
10 If you say nothing, then the six or more copies would
11 apply without limit in time, would it not?

12 MR. NIMMER: It might imply that there is, as far as
13 the guidelines are concerned, there is no limit beyond the
14 five-year period.

15 MR. WEDGEWORTH: Yes. But it is an assumption either
16 way you go. If you say what you suggested to be said,
17 then you are assuming that there is a problem where we do
18 not really have any evidence that there is a problem. If
19 you say what is presently there, you are assuming that the
20 six limit would take into consideration whatever problems
21 might develop, and they are objecting to this saying that
22 it might not be appropriate.

23 MR. PERLE: If I may, what the author-publisher
24 groups really want is for us to say, "With respect to
25 material from periodicals more than five years old, these
26 guidelines do not apply, there are no guidelines for that.

1 We leave it to the courts to decide whether or not the
2 material is in that aggregate quantity."

3 MR. HERSEY: I might say that this is a fall-back
4 position. What the authors and publishers really wanted
5 was a further proviso that material more than five years
6 old should have an additional limit of five mor copies.

7 MR. LACY: Ten copies in all.

8 MR. HERSEY: Yes. And that this is an effort to
9 fall back from that position to something that might be
10 more acceptable.

11 MR. LACY: Actually, I wonder if the ten-copy limit
12 would not be more acceptable.

13 MR. PERLE: That strikes me as so bizarre because
14 Bella and Irwin both, after you left, Judge, took the
15 position that five might be too much with respect to
16 material more than five years old because, that is, the
17 material which was requested might be more important, so
18 that I think that the author-publishers idea would -- the
19 feeling that I left with, was they would be happier if we
20 simply said nothing.

21 MR. HERSEY: I am not so sure that is true, Gabe. I
22 think the difficulty with the five-year limit is that very
23 little journal copying more than five years old is done,
24 relatively little. But the older material gets more of
25 the general material that is copied and I think that was
26 the concern.

1 JUDGE FULD: Alice, go ahead.

2 MS. WILCOX: Are you finished?

3 MR. HERSEY: Go ahead.

4 MS. WILCOX: We have talked about what they objected
5 to. Could you tell me what they agreed to in the guide-
6 lines?

7 MR. PERLE: They agreed to take the guidelines really
8 almost in their entirety except for those points that
9 Arthur outlined.

10 JUDGE FULD: As to this paragraph.

11 MS. WILCOX: There is nothing in the guidelines
12 except --

13 MR. LACY: Well, they agreed to the five years, which
14 was really -- I mean, Bob's initial suggestion, the guide-
15 lines were built around that subject.

16 MS. WILCOX: Yes. But there are consistent holes.
17 The concept of the five was based on the possibility of
18 some proviso for the more than five years and --

19 MR. LACY: I should not be the spokesman for this
20 position because I am not attempting to represent my
21 position, just as I understand their position. What was
22 a sense of uneasiness was what seemed to them to imply
23 that there was absolutely no limit if it was over five
24 years old. You could do a hundred or five hundred or
25 whatever. They were willing at one time to accept a
26 substantially higher limit and make it ten if it was over

1 five years, or to say the guidelines just are not addressed
2 to that, as they are not addressed to other things. And it
3 would be left to the courts if it ever came up or sub-
4 sequent negotiation, or either one of those two positions.

5 MR. NIMMER: May I have a point of information before
6 we go on to the substance? Have there been any conversa-
7 tions by you, Art, or anyone from the Commission, with the
8 library representatives, per se, since that discussion?
9 Are you going to bring us up-to-date as to what their
10 position is?

11 MR. LEVINE: Fine. You and I spoke to Bob Wedgeworth
12 and just brought him up-to-date on what the author-
13 publisher groups had said. I met on either Monday or
14 Tuesday with John Lorenz, who is the Executive Director
15 of the Association of Research Libraries, and Bill Dix,
16 who asked me to express his regrets to you all for not
17 being here today. I discussed the author-publisher
18 objections and John Lorenz said with a couple of slight
19 changes, which I will mention, which are not of any
20 substance at all, I believe, he personally felt the
21 changes were all right with him. He said that he was not
22 speaking for either his association or any other associa-
23 tion, but he felt that he did not find these objectionable.

24 MR. LACY: As I recall --

25 JUDGE FULD: Go right ahead.

26 MR. LACY: As I recall the discussion the last time,

1 the reason that the five limit was applied only to the
2 last five years was not from any -- as I understood it --
3 assumed at the time, or any belief on the part of the
4 librarians that they needed a larger limit for a greater
5 amount of copying over five years; but, on the contrary,
6 that the copying for more than five years was so relatively
7 small and so unlikely -- so remotely unlikely to be of
8 sufficient quantity to justify not having a subscription,
9 that it was not worth the paper work of over five years
10 old. It was not that they felt a much bigger exemption.

11 MF. HEPSEY: We do not have the data on that. The
12 Boston Spa figures show that half of their copying is more
13 than three years old.

14 JUDGE PULD: That was the point made at the meeting, that
15 there was no support for the assumption.

16 MF. LACY: The assumption was not only that it was
17 small. There are some other studies that have been done,
18 the Fry study, and so on. They suggested that very shortly
19 after five years, but that it would not be difficult to make
20 the case that such copying that took place after five years
21 was replacing a subscription.

22 JUDGE PULD: What would be the language in the second
23 part of (a)? Or would there be no language? What is the
24 suggestion that was ultimately made at that meeting?

25 MF. LACY: I do not know if there was any specific
26 language suggested, but the idea was, as Art here has

1 written, that that would be reserved for further future
2 guidelines, but I am wondering whether --

3 MR. LEVINE: Excuse me. Just for clarification, these
4 handwritten notes are not mine. These are Charles Lieb's
5 and --

6 MR. NIMMER: That was not an attempt at specific
7 language, as I take it.

8 MR. LEVINE: Right.

9 MR. NIMMER: Bob. do I understand your suggested
10 reservation is that by referring to future guidelines that
11 that makes it appear there is a problem where you really
12 think there is not a problem?

13 MR. WEDGEWORTH: It seems to me that -- I was simply
14 questioning what precisely CONTU should say with regard to
15 that situation.

16 MR. NIMMER: Am I correct that isn't it the essence
17 of what everybody is saying that nobody has a guideline
18 for that earlier period but everybody also agrees that --
19 as they must by the law if the law passes -- that the
20 statutory standard nevertheless applies to the aggregate
21 number, so there just is not a guideline to interpret what
22 that statutory standard means as to that earlier five-year
23 period?

24 MR. WEDGEWORTH: There is mild disagreement as to
25 whether there is a need for such a guideline.

26 MR. NIMMER: It is not relevant, really. What

1 difference does it make whether people agree or disagree
2 on a need? All we are really talking about is what do
3 aggregate amounts mean and we are not going to try to say
4 what it means in terms of numbers in that earlier than
5 five-year period.

6 MR. WEDGEWORTH: What precisely would you be suggest-
7 ing that CONTU put in that section of the guidelines?

8 JUDGE FULD: That is what I asked.

9 MR. LEVINE: If I may, originally, I have, in the
10 first handed-out amended guidelines that we were given
11 last Wednesday, the author-publishers had written in at
12 the second to the last line that "if such request is
13 permissible under the provisions of the copyright law."

14 JUDGE FULD: That does not mean very much.

15 MR. PERLE: It throws it back to the courts.

16 MR. LEVINE: This would come after "is." "Request is
17 permissible," and the rest of that.

18 MR. WEDGEWORTH: This is in this paragraph that is --

19 MR. LEVINE: Paragraph A.

20 MR. NIMMER: Where would it start?

21 MR. LACY: As a matter of fact, the guidelines that
22 were submitted in June, which the library groups agreed to,
23 provide a guideline only for material less than five years
24 old. All the authors and publishers are saying is that
25 we should say it only applies to material five years old.
26 They are not asking for any change. They are simply --

1 MR. WEDGEWORTH: That would be perfectly acceptable
2 to me.

3 MR. LACY: I do not think it changes a thing. It
4 just states what is the truth, that these do not provide
5 anything for over five years old.

6 MR. HERSEY: What they want is language which does
7 not leave the earlier material open to unlimited copying.

8 MR. LACY: There is not a statute -- the earlier
9 language did not say anything about over five years old.
10 All this would say is that it does not say anything about
11 it.

12 MR. PERLE: Look at Page 3 of the guidelines them-
13 selves, (a)(1), which says, "excluding copies of articles
14 made from any issues," and so on. That would be reworded
15 to say that, "With respect to articles more than five
16 years old, the copies shall not be in excess of those
17 permitted by Section 108," period.

18 MR. LACY: We do not have any -- that is just stating
19 the obvious. We have absolutely no authority to say --

20 MR. PERLE: What it says is these guidelines do not
21 apply.

22 MR. MILLER: It is better said that way.

23 MR. WEDGEWORTH: That is what I am getting at. If
24 we can state these guidelines --

25 MR. PERLE: Let us merely say that it does not apply.
26 What are you saying about "certification"? Nothing?

1 JUDGE FULD: Does that go with the proviso section?
2 Where would you have that?

3 MR. PERLE: That would go with Section --

4 JUDGE FULD: A?

5 MR. PERLE: No. (a)(1) on Page 3. The tail end of
6 3(a)(1).

7 MR. HERSEY: No. 4.

8 MR. LEVINE: The new No. 4.

9 MR. PERLE: New No. 4.

10 MR. MILLER: You have got an ambiguity still left.
11 I am just asking the question. Are we saying that we are
12 not speaking at all to the more than five-year situation?
13 Or are we saying that the first sentence of A applies to
14 the five-year situation, but we are not speaking beyond
15 the first sentence in A? You get a different effect.

16 JUDGE FULD: I would think it --

17 MR. MILLER: Because you could end up with somebody say-
18 ing that if the guidelines literally do not apply to the
19 post five-year situation then this definition in A, sentence
20 1, does not apply to the post five-year situation.

21 MR. PERLE: We have to revise that to say, "periodicals
22 published within the last five years."

23 MR. MILLER: Right.

24 MR. WEDGWORTH: In A, "With respect to any given
25 periodicals published within" --

26 MR. PERLE: Right.

1 MR. MILLER: What would you say in your second
2 sentence? "These guidelines do not address" --

3 MR. HERSEY: I think you would have to add something
4 or refer to this later paragraph that Gabe just mentioned.

5 MR. MILLER: I think it has got to be fastened down.

6 MR. HERSEY: Yes, it has.

7 Gabe, would you get the language in the later
8 section that you read before?

9 MR. PERLE: On Page 3?

10 MR. HERSEY: Yes. Starting with "excluding."

11 MR. PERLE: "Excluding"? This is the certification.
12 Just simply say it is less than five years away, published
13 within five years or less.

14 MR. HERSEY: Wait a minute now.

15 MR. LEVINE: May I make a suggestion? That rather
16 than we being a group of drafters as a whole that we
17 attempt to reach an agreement as to the substance of
18 what we are trying to do and then we will try and sit
19 down and draft --

20 MR. PERLE: Simply exclude everything over five years;
21 right?

22 MR. WEDGEWORTH: Okay. Well, we will get to that.

23 MR. NIMMER: Exclude from the guidelines --

24 MR. PERLE: Periodicals.

25 MR. NIMMER: Obviously, we do not have the power to
26 exclude from the Statute, but we do not want to be

1 purporting to be doing that, either.

2 MR. PERLE: Simply say the guidelines do not apply.
3 In that respect, I think we should make clear that through
4 inadvertence these guidelines say something very peculiar,
5 and God knows I did not intend them this way.

6 There is one standard for articles from
7 periodicals and another for those materials that are not
8 articles. Because the way the guidelines are phrased, it
9 says, "copies of an article or articles." It does not say,
10 "or other contribution to a periodical."

11 Now, that was an inadvertence. It is accept-
12 able to the authors and publishers. I spoke to Bob about
13 it and he was going to think about it.

14 If I may clear what I have done by accident?

15 MR. WEDGEWORTH: Don't we have to go to (b) first
16 before it becomes entirely clear?

17 MR. LEVINE: Yes.

18 MR. PERLE: Well, it covers other things.

19 MS. WILCOX: It will cover editorials.

20 MR. PERLE: I do not know about an editorial. It
21 would certainly cover a cartoon. It would cover some
22 illustrative material.

23 MR. HERSEY: "And other material" takes care of that.

24 MR. MILLER: Ann Landers?

25 MR. PERLE: Well, I think the court would have to
26 decide, certainly. I am not going to worry about that.

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JUDGE FULD: Shouldn't we be more systematic with it and go to the first (1)(a)? What language should we put in, if any, instead of the provided portion?

MR. PERLE: If I may, Judge, I think that if we understand the principles, then some of us can sit down, some of us lawyers, and make another mistake, like I made before.

MR. HERSEY: You went too fast on that. I do not think the principle that you simply cut it off at five years is enough. I agree with Arthur. You have to pin down what you mean by that.

MR. PERLE: We mean -- and the suggestions with the author-publisher groups -- revolved clearly around articles and all material appearing in periodicals other than articles --

MR. HERSEY: I am sorry. I am going back to the five-year thing.

MR. LEVINE: The five years.

MR. HERSEY: On the five-year thing, you were just saying you would exclude everything more than five years old.

MR. PERLE: As to articles. These guidelines do not apply to articles published more than five years prior to the date when the request was made. I think further guidelines must be developed with respect to those or the courts

1 will have to decide the application of 108(g)(2) to those.

2 MR. HERSEY: That is all right.

3 MR. PERLE: I think we can get that sort of language
4 that will be okay. Is that okay with everybody?

5 MR. WEDGEWORTH: You mean you are saying we should
6 state all of that?

7 MR. PERLE: Yes. Whether it be in the preamble or
8 in the guidelines themselves, but it has to be made
9 unequivocally clear that we are not condoning the repro-
10 duction of materials nor condemning it.

11 MR. WEDGEWORTH: It seems the simplest way of making
12 that clear is to put a direct pointer back to the language
13 itself, because the language itself is not ambiguous. It
14 makes it clear that you cannot copy unlimited quantities
15 and rather than going into all that, this is what I am
16 saying. It can get too complicated. You need to say --
17 for example, the group you met with, technically is correct.
18 These guidelines do not apply to 108(g)(2). They only
19 apply to the proviso and in looking at it from that point
20 of view, the guidelines should say that they do not apply
21 to material older than five years, and that with respect
22 to those materials you give a pointer back to the Statutes,
23 which is the proviso -- I mean, the interpretation of the
24 Statutes, which is the proviso itself.

25 MR. MILLER: I think there is consensus around the
26 table that the methodology for articulating is left to a

1 small committee on style.

2 MR. LACY: That is true.

3 MR. WEDGEWORTH: There is no disagreement on substance.
4 It was just how you make it simple and clear.

5 MR. HERSEY: It falls short on our part because it
6 simply says when we are drafting guidelines to interpret
7 the aggregate quantity; that we are unable to draft the
8 guidelines on this point. We should face that.

9 MR. MILLER: Yes. Without embarrassment.

10 MR. LEVINE: We could draft a guideline on that
11 portion, but we cannot draft a guideline on which all
12 parties will agree on this point.

13 MR. HERSEY: I think we could.

14 MR. LACY: Lieb's initial proposal was to put ten in
15 for five years and I assume that would have been acceptable
16 except for the paper work of recording, but the number, I
17 think, would be acceptable.

18 MR. WEDGEWORTH: I do not think that would be
19 acceptable, not because there is any implication that they
20 are interested in going over ten, but that everybody would
21 insist that we keep records for everything that we could
22 possibly do and that is just driving us nuts.

23 MR. LACY: That is what I said. There would not be
24 any objection to the number, per se, but the paper work.

25 MR. LEVINE: Let me just, for the record, state that
26 John Lorenz's position was that it would be better if that

1 language were rephrasing of the statutory language, not
2 in such aggregate quantities. So that is consistent with
3 what you are saying.

4 MR. PERLE: Let us do it.

5 MR. LEVINE: That gets us to (b) in the portion of
6 material that kind of, I guess, fell between the cracks.
7 There are articles and there are other materials and there
8 are also contributions to collected works. It was contri-
9 butions to collective works --

10 MR. NIMMER: That are not articles?

11 MR. LEVINE: Well --

12 MR. PERLE: Technically speaking, the language in (b)
13 is okay because inasmuch as (a), as a matter of draftsman-
14 ship, specifies only articles, then everything else is in
15 (b). It is okay with me to say "fiction, poetry, and other
16 material." It just underscores.

17 MR. WEDGEWORTH: Except that in (d) it is a little
18 confusing, Gabe, because in 108(d) it says, "contributions
19 to a copyrighted collection or periodical issue."

20 MR. NIMMER: Where are you reading from?

21 JUDGE FULD: Statute.

22 MR. HERSEY: What we are doing is really to make the
23 distinction between a case which is, for the most part,
24 the problem. That is, the technical journal article and
25 other material. We cannot get around the idea of articles
26 excluding redefining what is technical and what is not

1 technical, so it tries to make a distinction just simply
2 between articles and other sources of materials.

3 MR. WEDGEWORTH: I understand that. What I am saying
4 is I think that in the drafting that you are going to have
5 to pay very close attention to the language which is used
6 in 108(d) rather than simply say "any other material
7 described in Section 108."

8 MR. PERLE: You can say "no more than one article,"
9 so when you say "other material," it is other contributions to
10 copyrighted collections or any other contribution to a
11 periodical issue. Technically, from an interpretive stand-
12 point, it is okay.

13 MR. NIMMER: It makes it ambiguous, Gabe, if you
14 insert this "fiction, poetry, and" because then "other
15 material" could mean other than fiction and poetry, not
16 other than articles.

17 MR. WEDGEWORTH: That was the point I was trying to
18 get at. It really makes it much more ambiguous and it
19 can cover the point that John is trying to make.

20 MR. PERLE: Subsequently, down on (b) on Page 3, it
21 specifically says "any other material." I think it
22 really should say "with respect to any other material."

23 MR. NIMMER: Without inserting "fiction, poetry."
24 Do you agree, John?

25 MR. HERSEY: Well, so long as the interpretation is
26 not put on this that fiction and poetry are considered

1 articles. You see, that is the difficulty.

2 MR. LEVINE: Perhaps the introductory material can
3 say that fiction and poetry are not considered articles.

4 MR. HERSEY: I am a little leery of that because I
5 think the likelihood is that the report language will use
6 guidelines and probably not use much of the --

7 MR. NIMMER: Another way it could be done is, "with
8 respect to any other material (including fiction and
9 poetry)."

10 MR. HERSEY: That would be all right.

11 MR. PERLE: "Including" without limitation.

12 MR. LACY: I think we should get an assurance from
13 Brennan that if we told him the introduction was essentially
14 the interpretation of the guidelines, there would be no
15 problem.

16 MR. PERLE: I think it is easier to do it Mel's way:
17 "Any other material including."

18 MR. WEDGEWORTH: I think that --

19 MR. HERSEY: I would go for that.

20 MR. PERLE: If we put right after 108 (d) "including
21 poetry and fiction." Certainly anything we can do not to
22 change it any more, we should do.

23 MR. LEVINE: Yes. "Including a collective work." Is
24 that --

25 MR. PERLE: No. Just "including." It would go after --

26 MR. LEVINE: I am moving down, now. I am sorry. I

1 am moving to the next --

2 MR. PERLE: Again, it is redundant. It is superfluous.
3 But if they want it left in, it does not do any harm.

4 JUDGE FULD: "Any other material including fiction
5 and poetry"?

6 MR. PERLE: I think that word "copyrighted" should
7 stay in there. I really do. I do not think that ought
8 to come out.

9 MR. NIMMER: What word are we talking about?

10 MR. PERLE: In 1(b) they want to strike the word
11 "copyrighted," and I do not think they should.

12 MR. LEVINE: Doesn't the next clause "covered by
13 Subsection 2 shall be protected by copyright"?

14 MR. PERLE: You are right.

15 MR. LEVINE: The next major change is new Paragraph 3,
16 old Paragraph 2.

17 MR. PERLE: "Not" has to come out.

18 MR. LEVINE: This was a section included subsequent
19 to our --

20 MR. HERSEY: Original guidelines.

21 MR. LEVINE: -- original guidelines.

22 MR. PERLE: It does not give any greater right.

23 MR. WEDGEWORTH: What does that mean?

24 MR. PERLE: What it says is it does not give you any
25 greater right to photocopy by inter-library transactions
26 than the right that you would have by intra-library --

1 from materials in any collection.

2 MR. NIMMER: It goes in a situation where you have
3 a subscription and instead of reproducing from your own
4 subscription copy you want to make inter-library loan, you
5 cannot get more copies by way of an inter-library loan
6 than if you just reproduced from your own subscription.

7 MR. PERLE: Or from a copy of a work, a book, that is
8 in your collection. 108 describes in general what can be
9 done and what cannot be done. There is no limitation.

10 MR. WEDGEWORTH: 108 does not tell what you can do
11 within a given institution. That is the reason it is so
12 crazy to me.

13 MR. LACY: There are some things you cannot do.
14 Multiple copies, for example.

15 MR. PERLE: You cannot do multiple or systematic
16 copying.

17 The whole proviso, 108(g)(2) says you can do
18 systematic copying because your system is that there is
19 an arrangement between one library and another to provide
20 copies. That is really what the objective of that is.

21 MR. WEDGEWORTH: I did not have any objection. I
22 just did not understand what it meant.

23 MR. LACY: My impression is that no such practice
24 as this would be intended to object to what is carried on
25 or contemplated but that they just wanted to make it clear
26 that they were not intending, by saying that you could get

1 an unlimited number of copies of material over five years:
2 old from another library; that you could do things like
3 making multiple copies for a class that you could not do
4 from your own subscription.

5 MS. WILCOX: I remember the reason for having some-
6 thing in about having a subscription was to take care of
7 the societal problem of when items were lost, mutilated,
8 or missing. Then I guess I would wonder why I could not
9 address that question rather than spelling what it cannot
10 do because I cannot -- maybe I do not know.

11 MR. LACY: I do not think it is trying to say what
12 you cannot do. It is simply setting copying limits on
13 108. All other limits on their own copying still
14 apply. One of the things we had in mind was: When you
15 subscribe to the journal and you have all the copies from
16 1975 on but what about the copies on 1973 and 1974 issues
17 before you entered the subscription? They have not
18 prevented you from making a copy because you have
19 subscribed, but I think it was just to make sure that that
20 exemption did not justify, say, doing copies for a
21 class. I do not think
22 it changes a thing, actually.

23 MS. WILCOX: That is exactly it. It is as though,
24 when it makes -- I guess what I am uneasy on is that these
25 guidelines were supposedly to recognize some kind of
26 mutual trust and it is as though there is no trust

1 whatsoever from --

2 MR. PERLE: Alice, I honestly -- I have got to say by
3 preface to this that Dan Lacy and Gabriel Perle may be
4 drummed out of the ranks of the publishing corps. The
5 publisher representatives and the author representatives
6 in particular, think that Lacy and Perle are not fully
7 representing their interests.

8
9 MS. WILCOX: What I am responding to is I think that it is with
10 great reluctance that the library community agreed to
11 those guidelines, recognizing that there was tremendous
12 compromise in there. And that --

13 MR. LACY: I think what you are doing is like a group of
14 lawyers advising clients that if you read this
15 literally, this would open up the possibility for that,
16 so if there is no intention to take advantage of it, but
17 it would help in closing the loophole.

18 MR. HERSEY: I think they recognize that you went out
19 on a limb.

20 MR. LACY: I think that is genuinely recognized.

21 MR. HERSEY: In fact, this mark-up falls short of --
22 quite far short of what the AAP and the Authors League
23 negotiated, would have wanted, acknowledging that you also
24 went out on a limb.

25 MR. LEVINE: I guess --

26 MR. WEDGEWORTH: The part that bothers me is that I

1 think I know the people well enough to know that they just
2 do not sit around and dream up innocuous language. When
3 I looked at this and it says "under other provisions of
4 108," what other provisions? What really are you talking
5 about? Because I do not understand why you want to put
6 it in if somebody cannot tell me specifically what it
7 refers to.

8 MR. LACY: It refers to -- that is very clear. One
9 is the multiple provision against multiple copying, class-
10 room copying, 30 copies at a time.

11 The other one is the essential and National
12 Institutes of Health problem when, by deliberate policy,
13 a library subscribes to a one copy of a thing and tells
14 all the employees of the organization involved, "Do not
15 subscribe. Get photocopies here."

16 It is saying that if this Statute prohibits
17 both of those from your own collection, the fact that
18 these guidelines do not put any limit on copies you can get
19 from another library provided you are subscribing to it,
20 you cannot then go to another library and get 30 copies for
21 a classroom under the exemption that you do not have to
22 put -- if the guidelines do not put any limit because you
23 already have a subscription, but there is the thing. I
24 do not think the libraries intend to do that, but I do not
25 see any harm in making it clear if it bothers people on the
26 other side and reassures them.

1 MR. LEVINE: Gabe drafted that originally, I think --

2 MR. LACY: Those are the only two things. There is
3 nothing secretive about that.

4 MR. MILLER: You know, you are not exempted by the
5 First Amendment implications, the way it is drafted. It
6 prohibits the request, which is speech. It does not
7 prohibit the supplying.

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14 MR. NIMMER: I think you have a --

15 MR. PERLE: It says "a library or archive may request
16 a copy."

17 MR. NIMMER: "Only when," and so on.

18 MR. LACY: I am reading a different --

19 MR. PERLE: Will you look at new 3 on Page 2?

20 MR. LACY: I am sorry. I was looking at 4.

21 MR. NIMMER: Good point there, Arthur.

22 MR. HERSEY: Let me try again. What Dan tried on --
23 what I understand to be the point of this -- the guidelines
24 set a limit of five copies for copying until you get a
25 subscription. The guidelines do not set any limit if you
26 have a subscription. This simply says the limit is what

1 you would be permitted to do otherwise. You see? That
2 is all. It is a kind of insurance.

3 MR. PERLE: Furthermore --

4 MS. WILCOX: Am I correct that these guidelines go
5 back to 108(g)(2) and the proviso?

6 MR. HERSEY: Just the proviso.

7 MR. PERLE: That is all.

8 MS. WILCOX: Then they only --

9 MR. LACY: There is another effort, really, to say
10 the same thing, that they are amending the rest of 108.

11 MS. WILCOX: Couldn't we say that they deal with
12 inter-library arrangements, not intra-library arrangements?

13 MR. PERLE: All the way through it says "only." The
14 guidelines say "restricted to inter-library loan."

15 MS. WILCOX: The fear we are talking about is the fear
16 of intra-library --

17 MR. HERSEY: No, Alice. A limit of five copies is
18 set until you get a subscription on inter-library loans.

19 MS. WILCOX: That I understand.

20 MR. HERSEY: Before this paragraph, there was no limit.
21 There is an implicit limit because of law. This simply
22 says explicitly that you cannot borrow more than you
23 would be able to under --

24 MR. LEVINE: If you are on a subscription.

25 MS. WILCOX: The example it then gives deals with
26 intra-library, not inter-library.

1 MR. NIMMER: That sets the --

2 MR. LACY: Suppose you have UCLA and USC -- the
3 example is extreme but it is a precaution against -- USC
4 and UCLA both have a subscription to a journal. A
5 professor wants 50 copies of an article reproduced from
6 one of those in the UCLA library to give to every member
7 of his class. Clearly illegal. If he, however, gets
8 smart and says "Get USC to duplicate 30 copies for us,"
9 it is not under the five-copy guidelines because you have
10 got a subscription. There is no limit on the number I can
11 get from another library, as long as I have got it. All it
12 says is if it would be illegal to do it from your own copy,
13 you cannot do it from another library.

14 I do not think anybody intends doing it, but
15 I do not see that it prohibits any practice the library
16 would feel proper.

17 MR. PERLE: It also does such things as allow a
18 library loan transaction to get a whole work under 108 (e),
19 reproduce a whole work for certain purposes. So it is not
20 in either limitation nor expansion. It is just saying
21 inter-library transactions do not expand the right.

22 MR. NIMMER: You cannot do more by way of inter-library
23 than you could from intra-library.

24 MS. WILCOX: I guess my difficulty is I am not a
25 lawyer.

26 MR. WEDGEWORTH: Let me give you an example that I

1 think is somewhat related to not really understanding all
2 of the implications of this.

3 The language of 108 says in effect that you
4 cannot systematically reproduce materials under copyright,
5 either multiple reproduction or reproductions over time
6 to individuals. What I read here saying is that if you
7 have a number of requests for inter-library arrangements
8 where you may have a subscription, if you consider that,
9 for example, it takes up to three months sometimes to
10 replace a subscription or a lost issue, and, say, three or
11 four people come in and they want a given item from a
12 given volume of a journal, under this provision where it
13 is intended to control something else, how do you relate
14 these two? This section --

15 MR. LACY: Suppose you had not lost a copy; you had
16 it right there. Would what you were doing be okay? It is
17 certainly okay to get it from another library. No problem.

18 MR. LEVINE: May I make a suggestion?

19 MR. HERSEY: It just sets the same limits.

20 MR. LEVINE: It seems to me that making a separately
21 numbered paragraph may be confusing. If, in fact,
22 Paragraph 3 followed on from Paragraph 2 -- what it is
23 intended to set a limitation on -- that it might be clearer
24 that it does not apply to all of the other guidelines as
25 well.

26 MR. WEDGEWORTH: I do not think that really makes that

1 much difference.

2 MR. PERLE: 1(c)?

3 MR. PERLE: What? No. He is saying make it "provided"
4 at the end of 2. Semicolon, "provided that a library may
5 request a copy."

6 Is that what you mean?

7 MR. LEVINE: Yes, because
8 standing out as a separate item, the --

9 JUDGE FULD: Implication.

10 MR. LEVINE: -- implication may be that it applies
11 to all of the other numbered sections where it --

12 MR. PERLE: If it should be held the requesting
13 entity cannot make copies from its own collection, but
14 cannot do more than it can from its own collection. It is
15 very logical.

16 MR. LEVINE: That it should follow after 2?

17 MR. PERLE: Very logical.

18 MR. HERSEY: Does that ease a little bit your concern
19 about it? It is intended as a limitation on the single
20 copy.

21 MR. WEDGEWORTH: I think that the Bill and the guide-
22 lines at present cover all those situations. I think it
23 is unnecessary and that was my only point. The only way
24 it would ease my concern about it would be to drop the
25 whole thing, and there does not seem to be any support for
26 that. But I still would like to go on record as saying it

1 is not appropriate. I do think there are some potential
2 conflicts with it.

3 MR. PERLE: I looked awful long and hard, and so did
4 everybody else that I have spoken with, as to our conflicts
5 and, Bob, I just did not find any. I really did not.

6 MR. NIMMER: Does it help any just to make clear what
7 it is talking about to add at the very end of the sentence
8 "to supply such copy from materials in its own collection
9 rather than by intra-library arrangement"?

10 MR. HERSEY: No.

11 MR. PERLE: No.

12 MR. HERSEY: No. That just --

13 MR. LACY: Could you put it affirmatively, that if
14 the library has a subscription, it can supply any copies
15 by a library loan that it legally could from subscription?

16 MR. PERLE: Or if it has a work which is not available
17 for copying.

18 MR. LACY: I mean, it is intended to be affirmative,
19 not a negative. Even it is more than five. I mean, the
20 five is no longer a limit. Once you subscribe you can do
21 anything by an inter-library loan that you could have done
22 if you had in-house a copy at hand. It is not really a
23 limitation.

24 MR. MILLER: Psychologically, that is easier to
25 accept.

26 MS. WILCOX: Yes, very much so.

1 MR. PERLE: If we can possibly avoid it, let us not
2 go back to that group again, please.

3 (Laughter.)

4 MS. WILCOX: You are over the hump and we just got
5 it started.

6 JUDGE FULD: Wouldn't a semicolon be all right after
7 "collection provided however"? Wouldn't that be a clari-
8 fication?

9 MR. PERLE: Why don't you offer to be their lawyer?

10 MR. MILLER: I have this feeling that I am in the
11 Coliseum watching the Christians and the lions. I am not
12 sure who I am rooting for.

13 (Laughter.)

14 MR. HERSEY: Watch out. Someday you may be eaten.

15 MR. PERLE: Someday you may be christened.

16 MR. LACY: The Christians have copyright of contro-
17 versy, anyhow.

18 MR. NIMMER: Should we have a five-minute break?

19 JUDGE FULD: Yes.

20 You are still troubled that it says "provided
21 however," at the end of "made such copy from its own
22 collection; provided however the library may request"?

23 MR. WEDGEWORTH: I think that probably would be
24 more acceptable to me than this, the way it is stated.
25 But here again --

26 JUDGE FULD: You are afraid of something hidden?

1 MR. WEDGEWORTH: I am not so sure that I would put it
2 that strongly. I just think that ambiguous language is
3 always subject to things down the road that will come up
4 and are not intended.

5 MR. LACY: I think that is exactly the problem and
6 somebody may want to resolve the ambiguity.

7 MR. NIMMER: The problem of changing that language
8 which has the same meaning when we are working under a
9 combined, in order to get it to the Congress in time for
10 it to have any meaning, any change of language, we then
11 have to go back to the other group and we are going to run
12 out of time.

13 MR. WEDGEWORTH: I do not know that we should spend
14 that much more time on it.

15 MR. HERSEY: I would be willing to try the affirmative
16 language on Irwin and Charles Lieb.

17 MR. WEDGEWORTH: It is stated affirmatively.

18 MR. HERSEY: It is stated negatively here.

19 MR. PERLE: No.

20 MR. WEDGEWORTH: No, it is not. It is stated affirma-
21 tively here.

22 JUDGE FULD: "Only" you mean is a negative?

23 MR. HERSEY: I think the notion of an affirmative is
24 to be under any circumstances.

25 MR. PERLE: John, in all due respect, we have a limited
26 time in which to get this and if we get back to Irwin and

1 Charles we are never, ever, ever going to get a guideline
2 in. I think that is a practical answer.

3 MR. WEDGEWORTH: Let me just simplify. As I said
4 before, that I simply wanted to go on record as saying
5 that I think it is unnecessary. Obviously, more of you
6 think that it is necessary, so let us go on to the next
7 point.

8 MR. PERLE: Bob, if you want to, we will sit down
9 later and see if we can dream up any situation where this
10 would have some sort of limitation effect. That was not
11 intended. I honestly could not find one and neither could
12 anyone else, because what Dan and I were trying to go
13 through is not change the substance of this, of what the
14 consensus of the Commission was.

15 MR. LACY: The main effort was to make it clear to
16 the author-publishers that this did not mean anything they
17 feared it meant. I do not think it was any effort to
18 change the substance of the articles.

19 MR. LEVINE: My concern is being able to say to the
20 Commission, to the judge in a letter, to be able to say
21 to Congress, "The parties agree," or "The parties do not
22 agree."

23 MR. LACY: "The parties agree," is going to be
24 their Constitutional process. If you wanted to say
25 formally that "all of these associations agreed," you
26 are talking about some time late in 1978. I think we

1 would have to accept an unratified signature by emissaries
2 rather than --

3 MR. WEDGEWORTH: I think we ought to go on to the next
4 point, frankly.

5 MR. HERSEY: Is that attached to the previous para-
6 graph now?

7 MR. PERLE: Yes.

8 JUDGE FULD: It will be 2, part of 2, with a semicolon
9 or a period "provided however."

10 MR. PERLE: Do you want a "however" or just a "provided"?

11 JUDGE FULD: "Provided."

12 MR. PERLE: Semicolon "provided that."

13 MR. LEVINE: I will have to read it over.

14 MR. PERLE: I do not understand what he is talking
15 about.

16 MR. WEDGEWORTH: In No. 4?

17 MR. PERLE: Yes. That marginal notation.

18 MR. WEDGEWORTH: Now, here, you get into the certifi-
19 cation and I want to ask a question for information. It
20 seems to me that in the transactions that take place under
21 these provisions, the most that the actual certification
22 would say is that "this certifies that this transaction
23 is fully in accordance with the copyright law," or some-
24 thing, rather than going into this. But the guidelines
25 provide the interpretation as to what the copyright law
26 means with respect to those transactions. Am I correct in

1 saying that?

2 MR. HERSEY: Yes. I think it would be sufficient that
3 the people who sign this statement would have the defini-
4 tion, whatever it was, before them. Right?

5 MR. WEDGEWORTH: I think they are responsible for
6 knowing what the definitions are, but it would simply say
7 that "We certify that this transaction is fully in
8 accordance with the" --

9 MR. PERLE: "The guidelines."

10 MR. WEDGEWORTH: -- "with the law."

11 MR. PERLE: It would have to say "the guidelines."
12 The law is interpreted by the guidelines.

13 MS. WILCOX: Couldn't this be done in a symbolic way,
14 in the sense, say, that on a request that came over a
15 TWX that there could be a guideline X so that the certifi-
16 cation is on the copying, that it is maintained in the
17 requesting library?

18 MR. WEDGEWORTH: What we are saying is -- are you
19 saying that every time you want a simple transaction that
20 you are going to have to file a legal brief?

21 MR. PERLE: It is funny. This thing started without
22 any certification and then we said here that there has to
23 be some sort of certification, so the certification seeks
24 to track the guidelines. Just thinking out loud, if the
25 certification simply said that "This request is in
26 accordance with the guidelines 108(g)(2)" why wouldn't that

1 be enough?

2 MR. WELLS: It should be enough.

3 MR. WEDGEWORTH: That is what I am saying. I know
4 it is a very fundamental kind of situation, but when we
5 go out of this room and try to explain this to people,
6 I think that is a very important point. What does this
7 mean? Will they have to record all this information every
8 time they do -- just simply certify this was done in
9 accordance --

10 MR. PERLE: Certifying that the request is --

11 MR. LACY: I do not want to be a spokesman for the
12 publishing industry, as I made clear, but I do not see
13 any problem. This is not a policy. This is just a
14 practical question.

15 What about TWX and telephone requests? What do
16 you do if you get a telephone request for a photocopy, as
17 a practical procedural matter? Do you say, "You have to
18 send us an order," or --

19 MS. WILCOX: No. Absolutely not. That is the order.
20 But I think what Bob is saying this really would require
21 that there is a form that is filled out and if we can go
22 back for a moment, the main reason for putting a certifica-
23 tion in was to assign the responsibility to the requesting
24 library, and not the filling library, the liability.

25 Because that is --

26 MR. LACY: This was on the filling library, that the

1 certification has been made, not that it was true or --

2 MS. WILCOX: If we got TWX requests it would be the
3 end of it and we would not wait for an order or anything
4 else, but it would be very possible on the requesting
5 library that they keep that certification and symbol this
6 with --

7 MR. FRASE: Certification.

8 MR. LACY: Other people are less concerned about
9 keeping the record that you, as the filling library, do not
10 fill it unless they do make the certification. We are
11 willing to leave it.

12 MS. WILCOX: That is what I say about the symbol. It
13 can simply say on the TWX, "The request is certified."

14 MR. WEDGEWORTH: We are not suggesting that this
15 implies some change in the guidelines, but I think it is
16 the kind of discussion that ought to be on record so that
17 we understand what this means.

18 MR. LACY: I do not think there is --

19 MR. PERLE: How about a representation rather than a
20 certification?

21 MR. HERSEY: What they want is the simplest
22 possible procedure.

23 MR. PERLE: A certification means a certificate which
24 has to be signed by the parties. If it is a representation,
25 it can be oral.

26 MR. HERSEY: You say there is oral --

1 MR. WEDGEWORTH: That is when things go through the
2 mail, John. But, you see, there are thousands of trans-
3 actions done via lease telephone line and with no human
4 intervention. These are just teletype machines talking to
5 each other, or computers talking to each other. That kind
6 of thing is money.

7 MR. LEVINE: What Dan has said so many times, certainly,
8 I think, is applicable here. If people are requesting a
9 seventh and eighth and ninth copy, no one in the world is
10 going to know that they are requesting a seventh, eighth,
11 and ninth copy, in violation of the guidelines. What the
12 guidelines are attempting to do is merely set out a standard
13 by which reasonable and honorable men will work.

14 MR. HERSEY: The one requirement would be that the
15 person keeps a record.

16 MR. WEDGEWORTH: No question. That is the requirement.

17 MR. MILLER: It seems to me the word "represented"
18 is better and, when it goes to a TWX, it is by symbol.

19 MR. WEDGEWORTH: The certification assumes a certain
20 type of documentation where there may be many different
21 types of documentation.

22 MS. WILCOX: That is why the original one suggested
23 very much that the responsibility for keeping these records
24 was at the requesting library.

25 MR. LACY: I do not think anybody wanted to make the
26 supplier keep a record, just note that they did so and not

1 that this was true, just that it was said.

2 MR. PERLE: Done.

3 MR. WEDGEWORTH: Okay.

4 JUDGE FULD: What is the change?

5 MR. PERLE: We will have to rewrite the certification
6 provision to say that, "The requesting entity shall
7 represent," or that, "You shall not fulfill unless the
8 requesting entity represents that the request has been
9 made in accordance with the guidelines of 108(g)(2)."

10 MR. HERSEY: That would obviate all the rest of this
11 language.

12 MR. PERLE: Sure simplifies it. Makes more palatable
13 to everybody.

14 MR. LEVINE: So we forget about 3?

15 MR. PERLE: The only question is do we phrase it
16 affirmatively, that it "is in conformity with," or "does
17 not violate"? I think "is in conformity with."

18 MR. WEDGEWORTH: "In conformity with."

19 MR. PERLE: Yes. It is nicer.

20 MR. LACY: That is the spirit of the thing. Let us
21 do it this way.

22 MR. LEVINE: That takes out all of Pages --

23 MR. PERLE: It takes out all of 4, which now is 3.

24 MR. LACY: Doesn't the guidelines have to say what it
25 is that they mean when they say it "is in conformity with"?
26 You are not going to put all that in the certificate?

1 MR. HERSEY: The guidelines do say it elsewhere,
2 don't they?

3 MR. LACY: Yes. I guess you are right.

4 MR. PERLE: Could simply say, "No request for a copy
5 or phono record may be fulfilled unless such request
6 includes a representation," or something of that nature.
7 That the fulfillment --

8 MR. LACY: "Is in conformity with the guidelines."

9 MR. LEVINE: How far off are we in eliminating --

10 MR. PERLE: Let us play with it.

11 MR. WEDGEWORTH: Let us see what is actually necessary.

12 MR. PERLE: We have the drafting measure.

13 MR. LEVINE: Because among the things that appear in
14 the certification, I think, that do not appear in the body
15 of the guidelines, the early portions of the guidelines,
16 is the question of the --

17 MR. PERLE: Availability?

18 MR. LEVINE: No. The entering an order. I think that
19 only appears in the --

20 MR. PERLE: No, no. That is in the -- entering an
21 order for a work? That is coming out.

22 MR. LEVINE: No. Entering an order for a subscription.
23 I think that only appears in the --

24 MR. WEDGEWORTH: It is under 2, isn't it?

25 MR. HERSEY: No.

26 MR. LEVINE: It says, "shall have in force a

1 subscription."

2 MR. PERLE: "Shall have in force or shall have" --

3 MR. LEVINE: "Entered."

4 MR. PERLE: "Or shall have entered an order for."

5 Very good.

6 MR. HERSEY: Where is that now?

7 MR. WEDGEWORTH: It is under 2.

8 MR. LEVINE: On the very first page of the guidelines.

9 MR. WEDGEWORTH: "Enter an order for the purpose of
10 such copyrighted collections" or "such copyrighted work"?

11 MR. PERLE: That has to come out because the publishers
12 felt that it was meaningless; that there are a lot of
13 circumstances where you cannot order. How do you order
14 something that is out of print?

15 MR. WEDGEWORTH: But that is covered under another
16 section.

17 MR. PERLE: Another section of the law.

18 JUDGE FULD: 108?

19 MR. PERLE: So you do not have to worry about it.

20 MR. WEDGEWORTH: I was looking for the language that
21 you wanted.

22 MS. KARPATKIN: On Paragraph 2, there is a different
23 time. There is a difference between having a subscription
24 in force and entering an order. There is a lapse of
25 anywhere from six to ten days.

26 MR. PERLE: I thought we were going to insert "shall

1 have in force," comma "or shall have entered an order for,"
2 comma, "subscription for a periodical."

3 MR. HERSEY: That is at the bottom of Page 1?

4 MR. LEVINE: Yes. I think that is the only substantive
5 point that appears in the certification that is not in the
6 rest of the guidelines.

7 MR. LACY: That is a liberty and not a restriction.

8 MR. PERLE: Right.

9 JUDGE FULD: What does go out?

10 MR. PERLE: What does 5 mean? "A maker of a request
11 orally"? You cannot comply with this, can you?

12 MS. WILCOX: I think, as I understand it, this would
13 mean that even though a request was made orally to the
14 filling library, the requesting library would have to have
15 a copy.

16 MR. LACY: They would, in any event.

17 MS. WILCOX: I know they would.

18 MR. LACY: It just means they keep the copy of the
19 record. They would have to keep it because they have to
20 know that they ordered it in case a person calls up and
21 says, "Where is my copy?"

22 MR. PERLE: This really is enormous progress.

23 MR. WEDGEWORTH: Is that all of the --

24 MR. PERLE: Changes? Yes.

25 MS. WILCOX: We have deleted all of Part 3. Before the
26 newly numbered Part 5 --

1 MR. WEDGEWORTH: I'll accept the introductory material.

2 Let us back up to be sure that we have --

3 We have revised Section 1;

4 Section 2 had the newly numbered Section 3
5 added to it;

6 we have eliminated all of Section 4, except
7 for the preliminary statement with the change of represen-
8 tation as a substitute for certification;

9 and then Sections 5 and 6 remain as they are?

10 MR. LACY: As they have been from the beginning,
11 actually.

12 MR. HERSEY: What about that Subsection 2 on Page 4?
13 Is that some substance that makes a difference to leave
14 out?

15 MR. PERLE: It is right in 2.

16 MR. HERSEY: 2?

17 MR. PERLE: "Materials not reasonably available."

18 MR. HERSEY: Oh, yes. Okay. That is right.

19 MR. LACY: I take it what we are reassuring the
20 Committee is that the principal associations or represen-
21 tatives of the associations involved have agreed with that
22 and are not necessarily going to say that every single
23 library and every --

24 MR. NIMMER: Sure cannot say that.

25 MR. LEVINE: That is what Tom specifically said that
26 he would want is -- well, he said the principal associations

1 agree but obviously --

2 MR. LACY: I have in mind.

3 MR. PERLE: The preamble will still say that, "we
4 believe this to say." I do not believe in our introductory
5 language we should say --

6 MR. LACY: I think he said he would not put it in --
7 I do not think we can say all these associations have
8 formally, as an association, voted. But we can say the
9 representatives.

10 MR. PERLE: In our covering letter, but our intro-
11 ductory material cannot say that.

12 MR. LACY: I do not think the introductory material
13 should say anything about it.

14 MR. WEDGEWORTH: How are you going to handle that,
15 though?

16 MR. LEVINE: The introductory material or getting the
17 agreement?

18 MR. WEDGEWORTH: Well, you discussed the guidelines
19 with representatives of the publishers and authors on the
20 8th, but they, of course, have not seen the results of
21 that discussion.

22 You have had some discussions with the
23 representatives of the library community, but they, of
24 course, have not seen the results of that.

25 I think rather than just state that, you have
26 got to --

1 MR. LACY: We have to go back again.

2 MR. LEVINE: I was saving that for after we get where
3 we go, for after we get through with the introductory
4 material. But I do --

5 JUDGE FULD: Alice?

6 MS. WILCOX: A question, and that is: Were we really
7 trying to define two things: one was, what aggregate
8 quantities in lieu of subscription? That really is what
9 we were trying to --

10 MR. PERLE: In lieu of subscription?

11 MS. WILCOX: Yes. In lieu of purchase or subscription.
12 This Part 3 that was deleted, does that show up anyplace in
13 the Roman numeral under Point 5 or has that been completely
14 deleted?

15 MR. WEDGEWORTH: Under Point 5?

16 MS. WILCOX: Just above Point 5. There are three --

17 MR. WEDGEWORTH: That was under 2.

18 MS. WILCOX: That would come under 2?

19 MR. LEVINE: No.

20 MS. WILCOX: Where under 2?

21 MR. WEDGEWORTH: No. They wanted to delete that
22 altogether.

23 MR. HERSEY: That is all eliminated now.

24 MS. WILCOX: Have we addressed the question at all
25 of trying to cover -- it is not in there, but it would seem
26 one of the good points, it did try to address the problem

1 of suggesting that a substance should be placed --

2 MR. LEVINE: Alice, this is the book. This is not
3 a subscription to a periodical. A subscription to a
4 periodical presumably will be taken care of at the bottom
5 of the first page of the guidelines, the first sentence in
6 the old No. 2, and which will be the new No. 2, I guess:
7 "In the event that a requesting entity shall have in force
8 or shall have entered an order for a subscription to a
9 periodical." The problem is the order for a book and that
10 is what the publishers suggested be eliminated and that is,
11 in fact, what the guidelines have eliminated.

12 MS. WILCOX: I just do not find it. If it is under 2,
13 then that is fine.

14 (Discussion off the record.)

15 MR. PERLE: I think that you should check with Irwin
16 and I think we ought to check with Dan and Charles and
17 Bella.

18 MR. LACY: Bella, does not represent the Association.

19 MR. PERLE: Let Charles check with Bella.

20 MR. HERSEY: Actually, the section that we have
21 eliminated simply repeats the earlier stuff, doesn't it?

22 MR. PERLE: It was intended to.

23 MR. HERSEY: Attaches everything to the certification
24 and if we say, "In accordance with the guidelines," then
25 all that is automatically attached.

26 MR. PERLE: I just want to make sure we all appreciate

1 the elimination of that "placed an order for," is covered
2 by (b). It says that whether or not you have it in your
3 collection you can do up to five, through five. We have
4 nothing that says anything about what happens if you do
5 not have it in your collection. I do not think the
6 elimination of that language that says you placed an order
7 for makes any difference; right?

8 MR. LEVINE: I did not follow that, but I think it
9 makes a substantive difference. I think that putting that
10 language in -- under 1, you assume you do not have a
11 subscription or you have not entered a subscription, under
12 1. On 2, it covers the situation where you have a sub-
13 scription or you are entering a subscription. I think that
14 covers all of the situations that we had contemplated.

15 Do I understand the point you were making?

16 MR. PERLE: No. I do not think that is what the
17 guidelines say. I think what they have really properly
18 renumbered is 1, but I will not argue with that. The
19 first two paragraphs, (a) and (b), and the preliminary language
20 is the overall rule and everything else are terms and
21 conditions applicable to the overall rule. The overall
22 rule is that you can do five articles from a periodical
23 in any given year, if the periodical is published within
24 five years prior to making a request.

25 (b) says that for everything else you can have
26 five articles a year, if it is protected by copyright.

1 All the other provisions are limitations on that.

2 MR. LEVINE: No. Some expansions.

3 MR. PERLE: Or expansions.

4 MR. LACY: The whole point of this is what keeps you
5 from subscribing and once you have subscribed, obviously
6 the copying does not keep you from subscription, so that
7 exempts you from the fact.

8 MR. PERLE: I do not think the elimination of that
9 "placing an order" makes any substantive difference.

10 MS. WILCOX: It does. It makes a very big one. It is
11 what defines in lieu of subscription and it simply is
12 saying is that --

13 MR. PERLE: It is purchase. We have eliminated --

14 MS. WILCOX: What do you do with the period between
15 putting the subscription in now and --

16 MR. PERLE: The subscription is still there. The
17 elimination of that Roman numeral III applies only to the
18 entering of an order for something other than a periodical.

19 MR. LEVINE: I think everybody is in agreement that
20 that is out, though, Gabe.

21 MR. PERLE: I want to make sure that there is not
22 a hooker; that we are not putting a zinger into the library
23 group this way.

24 MR. NIMMER: I do not understand what your concern is.

25 MR. PERLE: I just want to make sure that Bob and
26 Alice are in the position where some day they or the ALA

1 is going to say to them, "Look what you did to us." I do
2 not think we did anything. I am just thinking out loud.

3 MR. LACY: As a practical matter, nothing is a
4 technical matter, I think the point would be if you
5 decided, okay, there are enough orders for photocopies in
6 this particular compendium, not a journal, so we ought to
7 buy it; you go ahead and put your purchase order in and
8 then from then on you could get anything from another
9 library, whether more than five or not, that you could if
10 the book had already arrived and was on your shelf.

11 MR. HERSEY: "Not reasonably available," takes care
12 of it. It really does.

13 MR. PERLE: Yes, it does.

14 MR. WEDGEWORTH: As a matter of fact, I think we had
15 done that with other sections. When in doubt, leave it
16 out.

17 MR. PERLE: That is a good paraphrase.

18 (Laughter.)

19 MR. LACY: Would you carry that to a logical conclusion?

20 MR. WEDGEWORTH: I would not object to that, either.

21 MR. PERLE: You are too silent, Hershel.

22 MR. SARBIN: No. I have not been. I have been just
23 silent enough.

24 (Laughter.)

25 JUDGE FULD: What else is there?

26 MR. LEVINE: There is the introductory material.

1 Again, I am thinking out loud and I have not thought it
2 through, but are we in any way getting confused again
3 between article and other material as to "shall have
4 entered an order for"? I am just not sure and I want to
5 be sure that we have it.

6 MR. HERSEY: Where is that?

7 MR. LEVINE: In 2.

8 MR. HERSEY: You are in the guidelines still?

9 MR. LEVINE: Yes. "In the event that a requesting
10 entity shall have in force or shall have entered an order
11 for a subscription to a periodical or has within its
12 collection a copy or phonorecord of any other copyrighted
13 work," are we getting again into the problem of collective
14 works? Is that again something between --

15 MR. NIMMER: I do not think that is a problem for
16 anybody.

17 MR. PERLE: It is okay. I think it is okay.

18 MR. LEVINE: It is all right with me.

19 Getting to the introductory material, the
20 publishers essentially, I think, originally told me that
21 they wanted to eliminate everything but the first two
22 paragraphs and the last paragraph as amended. Their
23 latest markup comes in with some other paragraphs in,
24 which means that they will be willing to include those.

25 MR. WEDGEWORTH: On Page 3, are we leaving in the
26 final paragraph which begins, "These guidelines"?

1 MR. HERSEY: Yes. I think that is in.

2 MR. LEVINE: Well, they seem to indicate that that
3 would be acceptable to them with the --

4 JUDGE FULD: Changes.

5 MR. LEVINE: -- changes, which do not seem particularly
6 significant.

7 MR. PEPLE: But inserting "inter-library" is terribly
8 important there.

9 MR. LEVINE: No. I am talking about their changes
10 as opposed to your changes.

11 MR. HERSEY: Top of Page 4.

12 MR. WEDGEWORTH: Well, the reason that I ask that is
13 that at the top of Page 4, that is not entirely precise,
14 because the guidelines cover more than just that.

15 MR. FRASE: If you left the original word in "intended
16 only," but "primarily" I think it would be more accurate.

17 MR. WEDGEWORTH: It is certainly more accurate to
18 say "primarily" rather than "only," because "only" is
19 incorrect.

20 MR. LEVINE: Yes. That is your change.

21 MR. PERLE: What would happen if we struck both of
22 them? "Intended to provide guidance in the application."

23 MR. LEVINE: Then I think that, again, means "only."
24 No, it does not.

25 MR. PERLE: I think "primarily" is a better word.

26 MR. WEDGEWORTH: I think that might do it.

1 MR. PERLE: Actually, these guidelines are intended
2 to provide guidance in the most frequently encountered
3 inter-library case.

4 MR. LEVINE: So you could not leave out "primarily."

5 MR. PERLE: The concern is that they be restricted
6 to inter-library, not intra-library.

7 MR. LACY: I think the reason for that is most of
8 them are over five years. If they wanted the "only" in
9 to make sure it would comply with that over five years.
10 I wrote the "primarily," actually, and my impression was
11 that -- I was not at that meeting.

12 MR. PERLE: How do you feel about saying "these
13 guidelines are intended to provide guidance"?

14 MR. LACY: It is all right with me.

15 MR. HERSEY: Among other things.

16 MR. SARBIN: That is a good idea.

17 MR. PERLE: I think I know what you are saying,
18 Hershel. You are saying we are talking too much.

19 MR. SARBIN: No. But that is a good idea.

20 MR. MILLER: You have to eliminate the reference to
21 "certificate" on Page 4.

22 MR. PERLE: And a representation.

23 JUDGE FULD: We leave out specific form.

24 MR. LEVINE: Yes.

25 MR. LACY: Yes. In fact, I think it would be simpler
26 to cut out everything from "year" on because it would involve

1 a lot of rewrite and we do not really have to -- the
2 certificate and all is just a means of implementing follow-
3 up. Refer to it in the introduction.

4 MR. PERLE: You have to leave in from "periodical
5 issue less than five years old."

6 MR. LACY: "From any given periodical in any
7 calendar year." Then I would -- we already have the five.
8 It is already referred to. We are saying two things:
9 one, you cannot do it more than these five copies if they
10 are fewer than five years; and we require you to make a
11 certificate about the things over five years, which we
12 just cut out the reference to the certificate.

13 MR. WEDGEWORTH: Just put a period after "calendar
14 year"?

15 MR. LACY: Yes.

16 MR. LEVINE: That takes us to Page 5 and the first
17 full paragraph there.

18 MR. HERSEY: Wait a minute. I am sorry. Leave out
19 the whole --

20 MR. NIMMER: Yes. Period after "any calendar year."

21 MR. LACY: It does not change the requirement. It
22 just does not bother to say in the introduction because
23 it would be too complicated to explain it twice.

24 I really wonder whether you need that first
25 paragraph on 5 now that we have made the guidelines more
26 explicit. I mean, the whole point of all this elaborate

1 introduction was to try to, without changing the guidelines,
2 to reassure authors and publishers who might have been
3 concerned that the guidelines would not do the things that
4 it does not do. They have preferred to get that reassurance
5 by stating the guidelines, but the guidelines do not say
6 things that they do not say and it is so there is no
7 particular point in saying once more in the guidelines
8 that it does not say something it does not say.

9 MR. WEDGEWORTH: I would say we ought to X that
10 paragraph and just go to the final paragraph.

11 MR. LEVINE: Why not the first two paragraphs and the
12 final paragraph, which is what they had originally sug-
13 gested at the meeting a week ago?

14 MR. PERLE: We are deleting the last part of it?

15 MR. WEDGEWORTH: No. You need that section on Page 3.
16 The paragraph on Page 3: "These guidelines are intended
17 to provide guidance in the application of 108."

18 MR. MILLER: There are a total of four paragraphs.

19 MR. WEDGEWORTH: Yes.

20 MR. LEVINE: Okay.

21 MR. PERLE: Why did they strike the last part of --
22 this is new. We did not discuss this, Dan, the last part
23 of the paragraph on 6.

24 MS. WILCOX: Good question.

25 MR. LACY: I have no idea. They struck a lot of stuff
26 that I drafted for their benefit. But strike it; it is

1 all right with me.

2 I think probably I do know. It refers to a
3 new situation and they wanted to cut up the words "in the
4 future" and "otherwise," and I think that is because of
5 the belief among some people that there now exists
6 institutions that make that --

7 MR. WEDGEWORTH: The intent is adequately covered
8 in Section 108(i), with that new Section 108(i). It
9 clearly covers that.

10 MR. LEVINE: Ends the last sentence in the guidelines,
11 and it also calls for a review and I think that --

12 MR. WEDGEWORTH: Yes.

13 JUDGE FULD: That would seem to conclude it, wouldn't
14 it?

15 MR. LEVINE: Well, it concludes, I think, the dis-
16 cussion of the draft. Now the question is how we get
17 the agreement of the affected parties?

18 MR. PERLE: First, I think we ought to have a clean
19 copy and I think that that should not be hard to do.

20 MR. LEVINE: You and I can sit down and do it.

21 MR. PERLE: And get it typed up.

22 MR. HERSEY: Could it indicate changes?

23 MR. PERLE: Yes.

24 MR. SARBIN: You do have facilities to get it typed?

25 MR. NIMMER: I hope. I will try.

26 MR. LEVINE: Dee Dee is here and she can type it if we

1 have a typewriter she can use.

2 MR. PERLE: The minute the testimony starts, you want
3 to disappear? Then I think that Bob and Alice -- and I
4 do not know who you want to check.

5 MR. LEVINE: Can we do it the way we did it after the
6 last guidelines and, that is, that would Bob and Alice be
7 willing to contact the major library associations?

8 MR. HERSEY: I can do it right from here.

9 MR. WEDGEWORTH: I think Alice can do that since she
10 is a member of the subcommittee that worked with the
11 guidelines and she has contacted the people before that.
12 I say that specifically because I want to try to really
13 separate roles here between functioning as a member of the
14 Commission and where we do other things.

15 MR. FRASE: You might want to use TWX in some cases
16 or our facilities in the University. If there are facili-
17 ties on the other end that some recipient --

18 MS. WILCOX: I am trying to think of the major associa-
19 tions. They may not have TWX, but we probably could send
20 a Mail-O-Gram or something like that, send a copy because
21 it certainly will be easier for them to have a copy rather
22 than just to explain it over the telephone.

23 MR. LACY: I think probably it needs some explanation
24 over the telephone after they have seen the copy.

25 MS. WILCOX: Quite a bit.

26 MR. WEDGEWORTH: Does this mean that following a

1 review of the clean copy that the Commission will approve
2 for transmittal subject to ratification guidelines for the
3 proviso to 108(g)(2)?

4 MR. LEVINE: Certainly.

5 MR. WEDGEWORTH: It seems to me that the Commission
6 should not be sitting around waiting to see what one or
7 the other parties is doing. We have given it our best
8 consideration and we have come up with something and we
9 go say, "Here it is."

10 MR. LEVINE: Yes.

11 MR. NIMMER: That is an important point, notwith-
12 standing what Tom Brennan said about they do not want it
13 unless they have the approval of all the parties. That
14 eventually may or may not be the case. We should go on
15 record as approving it.

16 MR. LEVINE: He said he would not put it in.

17 MR. LACY: That is a responsibility quite apart from
18 the offer as accepted by Kastenmeier, but you can offer
19 to make such recommendation to Congress as we feel appro-
20 priate.

21 MR. HERSEY: I think Brennan will want to avoid a
22 situation where a lot of time is taken reopening this
23 thing and arguing it in the conference committee because
24 they want to get it done as quickly as possible.

25 MR. WEDGEWORTH: That is true. I am trying to address
26 the same point in a different perspective: that we should

1 not go back to the parties with the understanding that
2 this is open for renegotiation. They get a binary choice;
3 it is either "yes" or "no."

4 MR. LEVINE: I really, in that regard, then, urge
5 upon those of you who are going to be contacting the parties
6 that this is really attempted to bring together conflicting
7 points of view and that these are --

8 MR. PERLE: Not conflicting points of view.

9 MR. LACY: Actually, I think phrasing, there is almost
10 total substance.

11 MR. LEVINE: Conflicting is the wrong word.

12 MR. SARBIN: That is the wrong word. It might be
13 worthwhile for you to write out what you consider to be
14 a statement of -- just a paragraph of what we have tried
15 to do and this is our conclusion and that this is really
16 the best we can do and we are in a position in which there
17 cannot really be further discussion on it. That is all.
18 Just a general statement that says "Recognize where we
19 are." I think that that is certainly appropriate and
20 consistent with what you were saying before.

21 MR. LACY: I would think neither one of the sides
22 will want to be in the position to say that CONTU is saying,
23 "Here are the guidelines based on this long discussion
24 which has been approved by side A and not by side B."

25 MR. SARBIN: I think it is important to put something
26 down in a paragraph because I feel concerned that parties



1 involved here may say if we do not put something in
2 writing to this effect this was told to us as "take it or
3 leave it." That it might be like a threat rather than
4 what it is intended to be. That should not be hard. You
5 are good at that.

6 MR. LEVINE: Maybe the thing that we can say in
7 effect is we have been working on these -- the Commission
8 met these two days and there is not going to be another
9 opportunity for the Commission to meet and this is --

10 MR. LACY: And we believe this covers the principal
11 concerns that everyone has expressed.

12 MR. HERSEY: I do not think there would be any
13 problem.

14 MR. LACY: I do not anticipate any problem from AAP.

15 MR. WEDGEWORTH: The point is, these groups are
16 sophisticated enough if they have substantial objection
17 they can always go directly to Congress and they do not
18 have to negotiate with them through the Commission. My
19 intent was we think about it and I think the written
20 statement is important so that all of the people who are
21 representing what has occurred here say exactly the same
22 thing so that there are not different stories coming from
23 different groups and that they understand that we have
24 reached the end of the editorial changes that really do
25 not change the substantive part of the guidelines.

26 JUDGE FULD: Arthur?

1 MR. MILLER: I am just reacting to something Dan had
 2 said. In submitting this to Brennan -- I am speaking only
 3 for myself, maybe for Rhoda -- I personally do not want
 4 this thing submitted as the view of the Commission, as to
 5 what the Commission believes the guidelines would be. At
 6 most, all this is is the Commission discharging its
 7 obligation to use its good offices in conjunction with
 8 representatives of the relevant groups.

9 I did not participate in those discussions and
 10 I have in no way developed my own thoughts as to what the
 11 Commission qua Commission should come up with independent
 12 of those groups.

13 MR. NIMMER: May I speak to that -- or maybe Rhoda
 14 wants to speak to it.

15 MS. KARPATKIN: Go ahead.

16 MR. NIMMER: Obviously we should distinguish between
 17 what we eventually are going to recommend in the photo-
 18 copying area and what has been done here. What we
 19 eventually recommend may or may not be an interpretation
 20 of the existing or the proposed law or it may go beyond
 21 the proposed law. All this purports to do is to interpret
 22 what the proposed law says, not whether or not

23 the proposed law is what we think is the most ideal
 24 set of circumstances. But within accepting the standards
 25 of 108(g), then looking to this only as an interpretation
 26 of that, I understand further what you are saying, Arthur.



1 But I would hope that the Commission could say, "This is,
2 in our view, a good interpretation of 108(g)(2)" or "108(g)(2)
3 proviso." I would hope we could do that simply because I
4 think that will help in effectuating its embodiment in the
5 report, particularly if there is some difficulty with the
6 principal parties or any of them on accepting this.

7 MR. WEDGEWORTH: I think that it does say what you
8 have just said. Do you not think that that paragraph says
9 what you intended? It is not that it is just the Commission.

10 MR. MILLER: It says, "The Commission considers the
11 guidelines which follow to be correct." That is Mel's
12 point. Mel wants me to say, "I think these guidelines are
13 correct." To date, all I know is that the only thing that
14 is correct is that these guidelines, as this draft,
15 represents a major collaborative effort.

16 MR. LACY: You have to miss the meaning of the formal
17 Commission and quickly call a meeting of such Commissioners
18 as those could attend and did develop this. It was not
19 just the two parties. I think the Commission was present.
20 Whether the librarians did not make a good --

21 MR. PERLE: We can all make it the Commission with
22 one Commissioner abstaining.

23 MR. WEDGEWORTH: I do not agree with that, Arthur,
24 because it is not placed in proper context, if you stop
25 with saying that it is correct. Because what it says is
26 that the Commission considers the guidelines which follow

1 to be a correct, workable, and fair interpretation of the
2 intent of the proviso portion of 108(g)(2). I think if
3 you leave out the rest of it, it is not -- it says more.

4 JUDGE FULD: Yes, Rhoda?

5 MS. KARPATKIN: Whether the Commission is structured,
6 that sentence is silent as to whether the Commission
7 believes it is in the public interest. What has happened
8 here is that an attempt has been made to work out a
9 compromise between parties with different views and that
10 is all that was undertaken and that still leaves open
11 whether the resolution of the different views and the
12 ways it was resolved --

13 MR. SARBIN: There is a view at this time that any
14 compromise would be in the public interest.

15 MS. KARPATKIN: It might be in the interest of the
16 report to be next --

17 MR. LACY: I do not think the Commissioners -- at
18 least this Commissioner -- that, granted, 108(g)(2), the
19 question is not how you handle library photocopying but
20 how you interpret 108(g)(2), that this was the best
21 possible interpretation in the public interest that could
22 be arrived at. I think we were genuinely looking at the
23 public interest. There is no particular interest in
24 libraries different than that and there is no particular
25 interest in publishers terribly different than that.
26 What we really were looking at is what realistic stuff is

1 available without imperiling the continued existence
2 and financial liability to be determined. There was
3 genuine public interest criterion in all of our minds.

4 MR. SARBIN: I have a general comment to make. It
5 is in the public interest that this Commission accept
6 this in order to get on with its work.

7 (Laughter.)

8 MS. KARPATKIN: That is what I just said.

9 MR. SARBIN: This is the real public interest.

10 MS. KARPATKIN: I agree. The question is --

11 MR. LACY: Certainly my vote was what I thought was in
12 the interest of the public associations.

13 MS. KARPATKIN: But the question remains now, after
14 all of the times I have asked for staff assistance in
15 identifying the public interest, that has not happened.
16 I do not know how I could cast a vote one way or the
17 other. I do not think it much matters. I think it was
18 Commission resolution on this. One or a couple of
19 abstentions would not make much difference, but I do not
20 know that I would be fulfilling my responsibility by
21 endorsing a compromise between two interested parties,
22 even though it would seem to me as an order that it was
23 a workable compromise, which it certainly seems to be.
24 But there is more involved than casting a vote.

25 JUDGE FULD: We are using our best interests to get
26 together.

1 MR. PERLE: If I may, Dan and I -- and I think Bob and
2 Alice, in their way -- let me put it another way. In one
3 way or another they have made representations as to what
4 they consider to be our constituency: That we have been
5 appointed from among them but we do not represent them.
6 We represent what we think is in the public interest;
7 taking into consideration all of the factors. So that when
8 I vote, I am not voting solely on behalf of the group from
9 which I was appointed. I think that is true of every
10 single one of us here and it is one of the distinguishing
11 factors of this Commission, in that it has developed a
12 unity, a feeling of purpose so that --

13 JUDGE FULD: And an objectivity.

14 MR. PERLE: Subject of objectivity.

15 So that speaking for myself, I do not feel that
16 I have to have assurances that this is best for the public
17 in order to vote in the public interest.

18 MR. LACY: I do not think we have anything really to
19 vote on, to tell you the truth, until we get the clean
20 copy. So why don't we approve this draft of the guidelines --

21 MR. WEDGEWORTH: Let us vote to adjourn for lunch.

22 MR. LEVINE: I just hearken us back to our resolution,
23 original resolution, which was for CONTU to use the good
24 offices to bring the parties together. Just one quick
25 thing, again, procedural question. We have left open
26 Saturday morning for general Commissioner discussion if, in

1 fact, there is a feeling that there is a need for such
2 discussion. I know several of the Commissioners are not
3 going to be here Saturday morning and I wonder whether
4 there is a feeling as to whether we cannot decide now as
5 to whether we want to continue Saturday morning.

6 MR. HERSEY: Before we decide that, did I understand
7 you to say that Mr. Parker is not coming tomorrow afternoon?

8 MR. LEVINE: No. Mr. Parker is coming. We have a
9 revised agenda. Because Quadra is not coming in the
10 morning, Peter Weiner will be moved to the evening. Donn
11 Parker will be at 2:00 o'clock tomorrow afternoon.

12 MR. HERSEY: Could we set the hour from 3:00 to 4:00
13 to resolve this issue so far as possible, and that will
14 assume that I have checked with Karp and you with Lieb
15 before --

16 JUDGE FULD: 3:00 to 4:00 when?

17 MR. HERSEY: Tomorrow afternoon, so that we could get
18 this thing --

19 MR. LEVINE: Fine.

20 MR. LACY: I assume most people do not plan to leave
21 until Saturday morning. I would feel we would have some
22 time Friday evening. I made a midday lane reservation
23 just in case we needed it, but I would welcome being able
24 to take a, say, 9:00 o'clock.

25 JUDGE FULD: Friday evening would be a little dif-
26 ficult for me. I understand we were not to meet Friday

1 evening, but Saturday morning.

2 You will not be here Saturday?

3 MR. LEVINE: If necessary.

4 MR. LACY: No. I will be here Saturday as presently
5 planned. If we could note that we were not going to meet,
6 I would take a 9:00 o'clock or whatever flight.

7 MR. LEVINE: I think Mrs. Karpatkin is not going to
8 be able to be here; Mr. Hersey is not going to be able to
9 be here; I think Hershel Sarbin will not be here.

10 MR. WEDGEWORTH: What is the purpose of Saturday
11 morning?

12 MR. LEVINE: In case there are matters -- at the
13 last Commission meeting it was suggested that the
14 Commissioners would gain some benefit from sitting and
15 discussing the issues and that there be time left avail-
16 able for general discussion of issues. That is why that
17 time is --

18 MR. LACY: I think if we go from 3:00 o'clock, that
19 should be all right.

20 JUDGE FULD: I would think so.

21 MR. WEDGEWORTH: I thought that was the intent at
22 the last meeting, that we do provide discussion time.

23 MR. LEVINE: Yes. We did do that, also, but just
24 in case, we left Saturday morning open, also.

25 MR. NIMMER: Starting at 3:00 should be ample.

26 MR. LEVINE: Fine.

1 MR. NIMMER: All right. Adjourn?

2 JUDGE FULD: Nothing else, is there? We will return,
3 then, at 1:30.

4 (Lunch recess.)

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1 LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 1:50 PM

2

3

4 FULD: Our first speaker is Dr. Herbert R. J.
5 Grosch has an extensive background in computer
6 technology. His work experience has been managing com-
7 puter and space projects for General Electric and IBM as
8 well as serving European consultants for such firms as
9 Remington Rand, Univac, and Control Data.

10 Dr. Grosch worked with the United States
11 Department of Commerce for six years with responsibility
12 for establishing automatic data processing standards for
13 both the Federal government and then offering the United
14 States' point of view in an effort to establish national
15 and international ADP standards.

16 Currently, Dr. Grosch is a consulting editor
17 for Computer World and President of the Association for
18 Computing Machinery.

19 My fellow Commissioners and I are delighted
20 that such an eminent guest is appearing before us.

21

22

23 DR. GROSCH: Thank you very much. That is kind of
24 you.

25

26 I must say I was very much impressed in turn
to see the research plan that I got in the mail and to see

1 how thoroughly you had already begun to go into the problems
2 that the technology poses and its interactions with the
3 public domain, as well as the ordinary legislative, legal,
4 and economic matters.

5 In the little thing I handed out to you, I
6 stated my interests modeled in some way after the way the
7 British directors are supposed to say that they really
8 have part ownership of the real estate outfit and th
9 Board of Directors of this other company is voting on
10 today.

11 I do have to tell you that I am very much
12 concerned that your recommendations reflect an acceptance
13 of continuing rapid technological change in this field
14 and the fields adjacent to it. One of the things I want
15 to say today: I do not see any prospect whatsoever for
16 this change slowing up. We are not running out of new
17 physical phenomena; there are handbooks after handbooks
18 of new materials, new physical phenomena, newly discovered
19 nuclear particles, and what have you, all of which I am
20 sure somebody will turn into business machines. For that
21 reason, anything which, no matter how cleverly you bring
22 it up to current speed, anything which is then fixed,
23 I think is doomed to becoming obsolete within just
24 literally a fraction of a decade.

25 A generation of computer time, historically
26 since the introduction of electronics, has only been six

1 years. That is, in six years a completely new family of
2 machines, usually built out of completely new components,
3 is announced; initial installations are made; the programs
4 are written for it. They do not work very well, but, then,
5 we have learned to live with that. The machines come
6 widely spread and a successor system is announced. All in
7 six years.

8 There is some indication that as patterns of
9 use change and as the investment in the software and in
10 the big data banks increases that that time may lengthen;
11 that it may take seven or eight years . . . generation
12 to evolve in the near future and, possibly, ten years,
13 twenty years from now. But it certainly is not going to
14 cease to evolve and many of the things that are a direct
15 concern to you -- for instance the representation of
16 data within the machine, the ways in which it would be
17 presented to the outside world, either in hard copy form
18 or in some novel form, which, nevertheless, contains the
19 same information -- these things are all going to continue
20 to change rapidly.

21 The important thing, probably, is the inter-
22 action of that technology and the economy. Specifically,
23 for instance, if you look at the research plan, one of
24 the items that is mentioned is memory technology. That is
25 Item 3B on the technological page. We see very clearly
26 in the sense that it is virtually guaranteed, both by the

1 remarks of the manufacturers and by the publication of
2 advanced research in the technological journals, that the
3 cost of storing one piece of information will drop by a
4 factor of between ten and a hundred in the next decade.
5 I would guess the hundred myself, rather than the ten.
6 Moreover, the cost of processing data will continue to
7 drop as the speeds of the machines increase; so that it is
8 not just a question of being able to hold it incommunicado,
9 as it were. You will not only be able to do that very
10 much more cheaply but you will be able to work it over,
11 to transform it from one fashion to another, to interact
12 with other data banks, to introduce more complicated
13 programs at a cheaper and cheaper cost.

14 Now, before we met this afternoon, I was
15 remarking to a couple of old friends that this does not
16 mean that you can do anything for nothing because we have
17 one limiting factor that you should all know about; and
18 that has a great deal to do with the legal remedies or
19 precautions that you may wish to recommend in this data
20 bank area as a result of your deliberations. That is that
21 the start-up costs are enormous and are likely to increase,
22 where the running costs are already very small and are
23 likely to decrease. This means that either, under the
24 pressures of social judgment, the privacy and security
25 issues, for instance; or under the property concerns that
26 the copyright and patent laws embody, under either of those

1 pressures, you decide to advocate massive record-keeping
2 systems, logs of utilization, and so on -- which you will
3 see on the last page of my remarks I do indeed advocate --
4 the cost of doing this is really a negligible part of
5 the cost of doing business, but that is as a running cost,
6 ladies and gentlemen. It might cost a small fortune to
7 get it going and, in fact, as I say, I think the cost of
8 getting it going will increase as time goes on where the
9 cost of running it after you get it going will continue
10 to decrease, which I suppose if you are going to do it
11 at all, the sooner the better.

12 Also, the rate of increase of start-up costs
13 are not as spectacular as the rate of decrease of running
14 costs. I think you can figure that the cost of keeping
15 and outputting a log of utilization, for instance, just
16 using that term vaguely, is probably going to drop by a
17 factor of ten in the next ten years. The cost of putting
18 such a system into being is going to double; it is not
19 going to go up by ten, and even then it is mostly because
20 programmers are getting more and more salaries all the time,
21 not because they are getting less efficient. In fact,
22 there is some question in my mind if they could be less
23 efficient.

24 (Laughter.)

25 DR. GROSS: It verges on zero at the present time.
26 It cannot really be negative unless they went in there and

1 started chopping off programs that already worked.

2 Specifically, the thing that is making this
3 big revolution in memory cost and processing fees is
4 what, in the Santa Clara Valley, we call chip technology.
5 I live where the term Santa Clara Valley is often renamed
6 Semiconductor Gulch. There is the world's center of
7 manufacture, and, to a considerable extent, the world
8 center of research and development in large field and
9 integrated circuitry.

10 As an example, for those of you who are not
11 up on this stuff, this tieclip was given to me two years
12 ago in Japan and it has in the center of this little
13 decoration -- I will pass it around the table -- I thought
14 the fact that I was wearing it was a little more impressive
15 than if I had a box full of goodies to pass around.

16 In the center of this is a little chip about
17 a fifth of an inch square which stores 1,000 bits of data,
18 1,000 yeses and noes, or another embodiment could be a
19 thousand switches for a processing system. This was given
20 to me a couple of years ago as an example of how great
21 the Fujitsu Company was in Japan. I went back last year
22 and they almost abandoned the manufacture of this class
23 of chip and were in full force trying on 4,000-bit chips
24 and we are now delivering in Sunnyvale and Santa Clara
25 a 16,000-bit chip, same physical size and approximately
26 the same cost. So in two years, from the Japanese

1 embodiment to the American embodiment, in an additional
2 year -- you might say maybe in three years, we have got
3 a sixteenfold increase at no increase in cost and, if
4 anything, greater reliability. The reliability is almost
5 perfect already. It is going further.

6 This thing really requires about -- even a
7 thousand K-level really requires about a 30-power micro-
8 scope to really see any detail, so you ought to take my
9 word for it that it is there and is not just a smear on
10 the face of the chip.

11 The Japanese are embodying the efforts of other
12 countries and other technologies to catch up. They are
13 probably the most successful competitor of the American
14 expertise, but so far they have not closed the gap; they
15 have stopped the opening. It is no longer widening. But
16 they are still a year to two years behind us in spite of
17 very, very heavy support from their government and a much
18 higher degree of cooperation within their major industries.

19 I think, though, that you can figure that both
20 the Americans and the Japanese will have million-bit chips
21 commercially available by the end of the decade, by 1980,
22 1981. The Japanese have embarked on a hundred million
23 dollar project and a hundred million dollars government
24 support and \$50 million of industrial funds to the develop-
25 ment of two million bit-chip capability. I am persuaded
26 that IBM in this country already has something pretty close

1 to this capability, although not in manufacturing form,
2 and will undoubtedly exceed it in the Eighties.

3 The next stage of the game is to go beyond
4 photographic techniques. These things are made by
5 photographic processes, extremely high resolution photo-
6 graphic work is done using masks which are also made
7 photographically. We are already at work in the United
8 States making the masks which are carving them by electronic
9 beams from opaque material. But we will use those masks
10 in mass production still with photography and that gets
11 you down to the level of tens of thousands, or hundreds
12 of thousands of bits per chip, but at that stage of the
13 game you reach the limit of what you can do with light
14 waves. The structures that you try to make are then
15 so fine that they cannot be seen with a microscope no
16 matter how powerful the microscope is because of the
17 finite nature of light and it will be necessary to go to
18 other kinds of manufacturing techniques to go into greater
19 detail. This will undoubtedly be electron beam.

20 At present, they are also exploring X-rays, but
21 it will undoubtedly be electron beam technology. With
22 that, it should be possible to store a billion yeses or
23 noes on a little chip the size of that tieclip.

24 MR. KEPLINGER: In terms of characters or words of
25 information, what are we talking about?

26 DR. GROSCH: Ten bits to a character; 50 bits to an

1 English word, roughly speaking. More if you are uncertain
2 of the reliability of your medium and you put in a lot of
3 extra check bits to make sure that everything is all right.

4 For instance, it has been propose that a
5 universal identifier replacing a Social Security number
6 should have additional digits and decimals, and not be
7 binary, of course, should have additional digits so you
8 could tell by adding up the digits or having a check
9 circuit in the credit card accepting device at the hotel
10 desk or what have you whether it was a valid number. This
11 kind of thing might expand your 50 bits to 75 or something
12 like that.

13 When I say a billion digits, you are talking
14 about a volume of the encyclopedia on one little chip.

15 That does not mean, however, any fundamental
16 change in the nature of the information. I think this is
17 important for your deliberations. This is primarily
18 character by character, word by word, phrase by phrase,
19 paragraph by paragraph information, stored in a way that
20 is sort of uncongenial to computers. They really had
21 nice binary numbers that just, you know, are nonredundant,
22 unique, compact, and so forth. But alphabetical informa-
23 tion, graphic information, all of the kinds of information
24 that you are concerned with, including digitized music
25 and things of that sort, can still be stored in this
26 relatively uncondensational 011001 binary way. Because it

1 becomes so cheap to do this and so easy to retrieve it,
2 so rapidly possible to retrieve it, the economics of what
3 you are watching changes although the basic nature of the
4 information does not.

5 We are getting, for instance, to the point
6 where the whole central activity in a newspaper editing
7 operation is going to disappear across the entire world
8 in a few years. Already in the very larger newspapers it
9 has pretty well disappeared, at least on the experimental
10 basis. This means that the reporter, sitting at his
11 poor little battered Underwood, is replaced by an
12 equally low-paid reporter sitting at a much shinier
13 computer terminal and he types out his story with all the
14 bad spellings and all the interlineations and all the
15 second thoughts that he currently does on his yellow paper
16 and it appears on the face of the capitalization. By
17 fiddling around with it a little bit, he can clean it up.
18 The computer itself will adjust the right-hand margin;
19 will make sure that all of his hyphenations are correct;
20 will check any misspellings that he has missed and, in fact,
21 will do most of the job of the copy reader and the proof
22 reader at present. A senior person can quite readily
23 impose on that material either further editing or the
24 typographical kind of stuff; can choose what size type it
25 should be; narrow or widen the columns in case they
3 decide to make up the front page seven columns wide instead

1 of six. And still further computerized operations will
2 enable you to put in the headlines; to insert cuts and
3 photographs, and so forth. All of this will then go down
4 and appear as photographic output ready to be turned into
5 printing plates without the intermediate stages of copy-
6 reading, proofreading, Linotyping, hot lead castings,
7 stereotyping, and all the other stuff that goes on. I
8 am not a publisher and I do not know -- not a printer --
9 and I do not know all the steps that are being replaced,
10 but you are getting a removal of several normal old-
11 fashioned interfaces and replacement by high speed,
12 economical, non-unionized mechanical processes.

13 To that extent, the way in which information
14 will be total is changing, but the basic value of the
15 stuff inside has probably not change. If anything, it
16 may well be increased by the fact that greater output is
17 possible; that a creative person can turn out more and better
18 material using these techniques than they could with the
19 yellow seconds and the battered Underwoods.

20 I still find it necessary to write, when I am
21 write creatively, to do it longhand, but then I am sure
22 I am unemployable in the publishing industry, too.

23 Let me say one or two other things about
24 devices that I think will interest you. Under 7, Input
25 Devices, I do not believe that we will have voice input
26 to printed material or, let us say, recorded material in

1 the near future. There are a lot of people working on
2 this. I do not think there is any question that we will
3 have voice, practical voice recognition, in special
4 situations. In fact, in very special situations we have
5 it now. The Post Office Department, our poor maligned
6 postal service, is trying very hard to get a reliable,
7 ultra-reliable accent independent system where it will
8 recognize just the digits of the zip code so that a
9 postal worker or a very poor one with a bad ethnic accent
10 and a cold besides can nevertheless read the zip code
11 aloud as he picks up a big awkward package, throws it into
12 a single hopper and then it is sorted by the machine, a
13 mechanical handling device, a thing it had before, besides
14 the one to reduce the bulk, and will reduce it to the
15 proper stack and out into the outside world. They already
16 have the pounding device worked out. That is available
17 now, but not economical. Places like Stanford have amply
18 good voice recognition things for this, but they are
19 expensive.

20 Now, with your chip technology sort of thing,
21 you can have many, many more logical decisions for a penny.
22 You can listen to all sorts of different characters of the
23 voice thing. You are not going to reduce the cost of the
24 transducer, the thing that listens to the human voice and
25 turns it into bits because it is going to continue to be
26 relatively expensive. It is going to have to have

1 microphones, but then the rest of the things, the digitizing
2 of it and the discrimination of that digit message down
3 to the state, that is absolutely certain to be zero and
4 not six. That will get cheaper and cheaper so that it
5 will undoubtedly come; but I repeat, I think the chances
6 of going from that to replacing the human stenographer or
7 secretary so you can dictate and one typewriter turns out
8 good English with archaic spelling is zero for the fore-
9 seeable future. If you could do it, you would not want
10 to and I do not believe it can be possible to do it.

11 The thing that gets you is that you may, of
12 course, find it possible to do this by transferring part
13 of the intellectual load to the senior person. I can
14 conceive of a system 10 or 20 years down the road where
15 voice input would turn out a lousy letter which would
16 then appear, you know, on your cathode ray tube at your
17 executive's desk and then he has to plunk away at the
18 keyboard and correct it. It is not, I think, verbal, but
19 at a keyboard. If you were willing to spend some time
20 typing up his letter you might manage to eliminate the
21 human being that produced that first draft. I kind of
22 doubt it myself. But to go beyond that, to the perfectly --
23 the perfectly turned-out literary quality thing is, I
24 think, beyond our capability for the foreseeable future.

25 By the same token, we will not have automatic
26 translation from one language to another or other similar

1 things that depend on the intimate knowledge of human
2 language.

3 Now, the network thing is mentioned here and
4 I think it is very important to point out that networks
5 are indeed spreading. What you really have at the present
6 time and will have for the next five or ten years, at
7 least, is a divergence away from the present old-fashioned
8 moderate use of computers. You will have on the one hand
9 smaller specialized machines referred to here at the
10 bottom as minicomputers and microcomputers, which will be
11 capable of being put into very simple situations. A shift
12 in the handset of your telephone to record and transfer
13 calls and things of this sort that should be in your
14 typewriter to do elementary memorizing and photographing
15 and frequently dictated letters and so forth. All of
16 those things are easy. But they are valuable because you
17 can have it inexpensively all to yourself. You can put
18 one of these things in your typewriter and at night put
19 the cover on the typewriter and go home. You do not feel
20 any impulse to keep it used three shifts, seven days a
21 week, as you do with a major computer program.

22 But in the other direction, to come back to the
23 networking, in another direction we also see a growth of
24 interconnection of big computer systems and big data banks
25 and, of course, terminals for human access. So that large
26 credit operations, large banking operations, large retail

1 establishment operations, and so forth will all be knit
2 together by these networks and from your point of view
3 the problem there is that the input can be put in any
4 point in the network, the output can be at any point in
5 the network, and unless there are, you know, legally
6 enforced logging operations, you will never know that it
7 has happened.

8 Of course, I am also concerned about the
9 social issue that the inputs, outputs, and interactions
10 within the system may be undesirable from other points
11 of view. Violations of copyright, that we may put together
12 down inside without the civil libertarians knowing
13 about it, we may put together two data banks and draw
14 unauthorized conclusions therefrom and I have mentioned
15 that very briskly in my submission to you.

16 I think at both ends it becomes difficult to
17 control. I am more familiar with the problems at the
18 upper end, the big network sort of thing. They are
19 referred to more in that submission. But there is also
20 the question if everyone has a little minicomputer, if
21 you can have one in your home for less than the cost of
22 an automobile, maybe ultimately about for the cost of a
23 television set, especially if you use the television set
24 as one of the output devices, that there is also going to
25 be, because of incorporation, this small and controllable
26 machine. It is a difficult question of improper use of

1 copyrighting material. The very center which is the big
2 push at the moment where the IBM and the Univac and Burroughs
3 have done so well already, that is still growing also. But
4 it is growing at a less rapid rate and less intellectual
5 challenge. Little machines, very cheap, that you can use
6 for anything, and a great big interconnected network which
7 is enormously powerful, perhaps unauthorized, that I think
8 you should direct your attention to.

9 Before I ask you for questions and stuff, I
10 would like to go back to my submission and go down very
11 quickly through it just so I make sure that all of you do
12 not -- that none of you missed one or two of the things
13 suggested here.

14 On Item 9, for example, on translation, let me
15 amplify that a little bit. One of the things that we are
16 always hearing about is computer conquests and this is one
17 of the valuable things that are stored in computers,
18 operating institutions, and often extraordinarily expensive
19 programs that make the machines do particular valuable
20 tasks. We're often told that these are written in a
21 certain language or that they are stored away in such a
22 way that they can only be accessed through, for example,
23 the IBM operating system, or something like that. To make
24 a change from one of these to another is often very, very
25 expensive and very slow and very difficult and is regarded
26 as a great intellectual or commercial achievement when it

1 is accomplished. But, in my view, the basic information
2 contained in that has not been changed any more than
3 translating a literary work from English to French; as I
4 put it here, phrase by phrase. That is without major
5 deletions or additions. And I would hope that nothing that
6 you do will change that situation and I think it is very
7 important to say that when you go from ASCII to implement
8 there are two ways of representing the task, in bits.
9 When you go from FORTRAN to PL-1, as an engineering
10 language, when you imbed what you have done in a data
11 base which is contained in an IBM, a UNIVAC, an independent
12 software house system -- I am thinking, for instance, here
13 in the Los Angeles area of the Informatics Mark IV, data
14 management system, that the translation of the fundamental
15 stuff from one of these character codes or languages or
16 overall operating systems to another should not be
17 regarded as changing the fundamental information inside.

18 I have mentioned Item 10, about how I believe
19 that if you decide that logs should be kept of where data
20 is output from the system that the cost of operating that
21 should not be excessive in the future; but, I repeat, the
22 cost of starting it off will be a whopper. And I am sure
23 that when you talk to people that have large data banks
24 already in existence, credit bureau type of operations,
25 they say, "We can't possibly do all those controls you
26 want us to put in. It will cost us a fortune." In one

1 way they are right; in another way, not true.

2 If I may ask you to make one small change at
3 the bottom of Page 2, Data Output for Control. My
4 secretary made a small mistake. Third line from the
5 bottom, "Check the correctness of entry," comma, "processing
6 or output." That is three things. "Entry," "internal
7 processing," and, "output." Otherwise it is all right.

8 I will mention just in closing, my second thing
9 in Item 3. Although I am not appearing before you as a
10 representative of my association, I might mention that
11 people in the computing -- I prefer to call it trade but
12 they like to call it profession -- have both the duty and
13 an interest in this sort of thing. We are the people who,
14 to a very considerable extent, will be creating and
15 manipulating the systems, the data base and processing
16 systems that you are concerned with in these meetings,
17 and we would like to be sure that we know what is right
18 and what isn't right. Many of us -- you have heard me --
19 feel that we have some ideas to offer in the matter and
20 are anxious to make sure that all our small inputs are of
21 value to you. We are going to hope, through our committees
22 on professional matters and our activities with respect
23 to data base management, business data processing, program-
24 ming, languages, and so forth, to incorporate in the works
25 that you give us and keep abreast of the legal situation
26 and the legislation that comes out of this activity.

1 With that, I would like to see if I can get
2 some questions and discussion.

3 MR. SARBIN: Thank you very much. That was very
4 good for me.

5 DR. GROSCH: Thank you.

6 MR. SARBIN: I may not express my question as well
7 as I would like to, but thinking about your comments on
8 the way in which the technology will expand our capability,
9 dealing with that, it is so enormous. Would you comment
10 on how pervasive in the society the use of this particular
11 technology may be in business communities and our private
12 lives?

13 DR. GROSCH: I think you can figure that it will be
14 the most important single technical input to our ordinary
15 everyday life in the very near future. It already pervades
16 virtually everything we do, but it usually is a second-order
17 effect. Let me see if I can illustrate this with banking.

18 At the present time, what you do at a bank is
19 still pretty much what you have always done, but down
20 underneath, second order, the amount of record-keeping,
21 the fanciness with which your statement is presented to
22 you, the promptness and error-freeness of the system,
23 depends on very extensive use of computers. Now what
24 happens next is these guys are now tempted by certain
25 things. They are tempted by the desire to do things more
26 economically, to get rid of some of those tellers; to get

1 rid of some of the data processing people in the back room;
2 and also they are tempted by the float, all that money
3 running around loose that nobody is getting any interest
4 on, from the time you write that check until the time it
5 actually gets back to you and the money disappears from
6 your account. So for one reason or another, whether you
7 believe it, you might say it's economical and all that,
8 or perhaps something a little closer to greed. The banks
9 would like to tie themselves all together and have what I
10 used to call -- I used to call it my electronic money.
11 You push a button and, boom, it's gone. Now that is a
12 first-order change; it is not a great big one. We can
13 live without accounting or checks, although I would find
14 it difficult, but one can. But it, nevertheless, is a
15 real social change.

16 By the same token, for instance, in an entirely
17 and very much more pressing sort of matter, we have always
18 had the possibility of a FBI or CIA or other police agency
19 in other countries poking down into our private lives and
20 searching through what we do in great detail and really
21 stringing us up by the thumbs if they want to do it, but
22 it has always been a very expensive and very specialized
23 thing, a lot of tracing; you have to go around and talk
24 to the neighbors and your neighbors tell on you, and this
25 sort of thing.

26 Now, when you get everything all knitted

1 together and you get these banking networks, retail
2 purchasing networks, the credit card sort of thing, when
3 you begin to buy all your transportation credit cards or
4 automatic terminals on the outside of the airport like the
5 easy money terminals and the supermarket in Seattle and so
6 forth, as you begin to do this, the possibility of
7 incursions on personal liberty become very much more, and
8 Arthur is an expert on this sort of thing. Once more, it
9 becomes not only economical to do it but you can do it
10 very quietly. Some little old guy there reading all about
11 what you did yesterday and he can get it printed out for
12 him, boom, at his terminal in Washington while you're
13 sneaking around taking that blonde out in Seattle. Real
14 time. Before the check comes -- no, not before the check
15 comes. Right after the check comes. Well, you can get
16 the bar bill first. So those are, again, first-order
17 things.

18 Education: there is no more conservative field,
19 as the professors around the table will admit, no more
20 conservative field in our culture than education.
21 Professors are very starchy, teachers are even starchier,
22 superintendents of education and principals are somewhat
23 more starchy than bricks, I would say. But regardless of
24 that, there is such an enormous possibility for change
25 in these new technologies, not just the possibility of
26 hope studies and things like that. That is obvious.

1 But the possibility, again, a first-order sort of thing --
2 a possibility of fairly straightforward interaction between
3 a data bank containing ultimate paths of instruction and
4 a slow, lazy, remote but perhaps, nevertheless, ambitious
5 human being.

6 We have seen in such elementary forms as the
7 talking typewriter, that you can take to ghetto kids who are
8 normally almost destructive towards a human teacher
9 because they feel the teacher has contempt, they do not
10 want to be in the school, they feel put upon; but they
11 will play with a machine. This does not always happen.
12 Some play with a machine by hitting it with a rock. But
13 a lot of them will play with the machine, interact with a
14 machine; the machine does not exhibit prejudice and it
15 does not make ugly remarks and it does not get tired. You
16 can get the same answer back 18 times and it will poke at
17 you each time with an improvement. In sophisticated
18 systems it may give you 18 different improvements until
19 one finally strikes hold.

20 So the possible way in which you might educate
21 people, either in an adult mold or even in the school
22 mold, becomes possible. I think you can say that this
23 will be --

24 Now, to get back to economic terms, I have been
25 saying for some years that I believe that by the end of
26 the century -- not the end of the decade, but by the end of

1 the century -- you will see knit together, economically
2 knit together, and probably regulated in the unified
3 sort of way, all of the information industries of the
4 United States, that you will have not only the data
5 processing and the data communication industries which
6 are already moving together -- they are both under Anti-
7 Trust at the moment. If both get off, they can hook
8 together and so forth. But all of the ancillary activities
9 that you are concerned with: publishing, television and
10 radio, the entertainment business, audio recordings, tapes,
11 records, and so forth, all of those things are characterized
12 as having information as distinguished from, say, heavy
13 power, like nuclear energy or transportation or mining or
14 agriculture, which deal with big gobs of things. I see
15 that the knitting together of that as being an absolute
16 consequence of technology, the same little old chips, the
17 same microwave links or the satellites will knit the
18 whole business together. The same satellite that is making
19 sure you see all these dumb TV shows from coast to coast
20 will also be carrying data communication, will be carrying
21 digitized forms of entertainment and so forth, along with
22 the audio forms or the video forms you are accustomed to
23 and the natural thing is, okay, let us put it all together;
24 let us regulate it; let us work with it.

25 MR. WEDGEWORTH: You made a statement earlier I found
26 fascinating in terms of how we actually approach the

1 problem of controlling the use of copyrighted works that
2 get into large computer banks. I understood you to say
3 that we need to be concerned about what happens, say, in
4 a very large computer data bank, how that material is
5 output; and also that we need to be concerned about, say,
6 the home all-purpose receiver for video, audio, as well as
7 digital information.

8 I am not sure that I understand the latter part
9 of that. Are you saying that we really ought to be logging
10 what comes into each of those home units or maybe like the
11 Nielsen, you might want to have a sample log of a number of
12 units simply to double check the logs that are being kept
13 in the major computer data bank?

14 DR. GROSCH: Let me give you an example of one thing
15 that has happened right now that, I think, without much
16 effort you can expand to a parallel with art, phonograph
17 records, and things like that. There is an enormous growth
18 in the last couple of years with what is known as the
19 hobby movement in computers because these chips have made
20 it possible for the basic data processing that used to be
21 done in almost a roomful of machinery to be done in one
22 little thing the size of a postage stamp. One of these
23 chips imbedded in a plastic container with some leads
24 running out of it, it is now possible for hobbyists to
25 build their own microcomputer for substantially less than
26 a thousand bucks. The basic chip, the thing that is

1 actually doing add, subtract, multiply, and divide is,
2 at the present time, around 95 bucks in the retail store;
3 cheaper if you buy a thousand at a time. There are stores
4 springing up in all the large communities across the
5 United States called Byte Shops, byte spelled b-y-t-e,
6 which means eight bits in a IBM machine; called Byte Shops
7 and similar names. People flock to them the way they
8 flock to the Radio Shack for audio equipment.

9 These people are hungry for things to do with
10 these machines after they put them together for two
11 hundred, five hundred, or a thousand dollars and they want
12 to do something with them. At present what they are doing
13 largely is to trade games around between themselves and so
14 forth. Most of these are not protected. They are written
15 by enthusiasts and the more they are used, the more
16 enthusiasts prowl. But some of these software packages,
17 as we call them, are to be protected in some way. They
18 have been made commercially and what is happening is that
19 these are being ripped off in enormous quantities. The
20 minute one copy is sold, duplicates of it on paper tape,
21 or what have you, are given away by the person who buys
22 them to all his friends, just as rapidly as he can.

23 Now, if you assume that there is a big market,
24 if you assume that all the middle-class and upper-class
25 homes in the United States are going to have something
26 like this, maybe if only attached to their TV sets so the

1 kids can play Ping-Pong, then you are going to have an
2 awful lot of encouragement on the commercial and an awful
3 lot of desire to make commercial profit out of this and an
4 awful lot of almost uncontrollable incursions on it, very
5 similar to the way in which people trade tapes and record-
6 ings around in the audio entertainment area.

7 MR. KEPLINGER: If I may make a remark, I think both
8 Fairchild and RCA are planning on bringing out a game
9 played with microcomputer systems that will attach to your
10 TV set at home which you will have plug-in modules to
11 transmit this very kind of program.

12 DR. GROSCH: We are talking about something sub-
13 stantially larger than the juke box industry.

14 MR. WEDGEWORTH: I think we understand that and you
15 can overplay the remarks that really impress people about
16 technology. But how different is that from saying that
17 anybody can go out to any shop and buy all kinds of audio
18 equipment and listen in to conversations that may have all
19 kinds of strategic and economic value? It is still
20 illegal. How do you prevent that? Do you make the sales
21 of that kind of equipment illegal? I think what we are
22 going to have to come to grips with once we get over being
23 impressed with the enormity of the problem is what, if
24 anything, can be done to control it? That is really the
25 crux of my question, because we had assumed that -- at
26 least I had assumed that in looking at this problem it was

1 extremely difficult to control this activity beyond the
2 broadcast stage and I thought I heard you say something
3 else and if there is something specific that you had
4 behind that remark, I would like to hear it because it
5 certainly defies my imagination at present.

6 DR. GROSCH: I do not think it is impossible to
7 control it, but I think it is probably socially difficult
8 to get that control accepted. It would not at all be
9 impossible to control 80 or 90 percent of this sort of
10 thing by technological intervention, if people would
11 accept it.

12 You were going to say something, I think. Why
13 don't you break in?

14 MS. WILCOX: I was going to ask, with this control,
15 some people have suggested that you can, with information,
16 put them all together, you could have a meter on your
17 own TV --

18 DR. GROSCH: That is the sort of thing I had in mind.

19 MS. WILCOX: So every month you get a bill like you
20 get a bill for water, gas, electricity. What implications
21 would this have for copyrighters? Are you saying that
22 the plug-in cost of installing that would be difficult?

23 DR. GROSCH: My personal advocacy to you people is
24 that wherever it is possible to log this kind of thing,
25 that you advocate it. I recognize that you may not feel
26 this way, and I repeat, I think that there will be a lot

1 of social pressure against it from hobbyists.

2 I write editorials and send letters off to
3 hobbyists' magazines and so forth. I just wrote one
4 yesterday to computerists in the Massachusetts area telling
5 them, "Steal it, goddamit." But the fact remains that
6 even if you come to a social thing, the question is, do
7 you really want to get into anything that is complicated?
8 I have a letter here from a young lady at Burroughs in
9 Pasadena. She wants to put an invisible code on every
10 page of copyrighted information which would be read by
11 a chip in a Xerox machine. Every time it is copied,
12 three-hundredths of a cent gets sent off to an author.
13 That is technologically feasible; you could do it.
14 Terribly dumb idea, but you could do it.

15 MR. NIMMER: Would you expand on why it is dumb?
16 What are the problems?

17 DR. GROSCH: I guess my first objection is aesthetic.
18 I do not like to feel that every time I leaf a page --
19 even if I can barely see the thing -- every time I leaf
20 over a page in a fine edition that there is a bar code at
21 the bottom of the page.

22 MR. HERSEY: Surely the technology could bury it
23 in the print on the page.

24 MR. GROSCH: I suppose they could. I sort of have a
25 feeling of crossing Shakespeare with a Cheerios box. It
26 kind of bothers me -- not that I'm all that keen on

1 Shakespeare. But let's say Arthur Clark. You could do it,
2 though. Most of this could be done. Mind you, you always
3 have pirates. Don't get me wrong. There will be always be
4 some guy that will put a piece of paper over it before
5 copying, but most people won't object to this, you see.

6 You take your commercial Xerox machine in a
7 supermarket and you are charging ten cents, one-tenth of
8 a cent is sent off to the author through some kind of a
9 logging mechanism. That will not shut you down.

10 MR. LACY: I certainly applaud one thing you said and
11 that is that we ought to recognize that rapid rate of
12 change that exists for the indefinite future in this area
13 and try to confine what we do to setting forth general
14 principles in the whole enactment of the copyright law
15 that seems about to pass now, the actual history is being
16 of a bill that the author had in mind has been subjected
17 to pressures from both sides with people who are uncom-
18 fortable with the ambiguity and effort to define everything
19 and it has gotten to be that thick. It is already obsolete
20 and it has not even been passed yet. I think it is
21 terribly important that we try to resist those pressures
22 and stick to principle.

23 But turning to the actual content, one comment
24 of yours troubles me a little and that is the suggestion
25 that so far as we are dealing with the issue of the input
26 of material already existing and already under copyright on

1 a computer that your belief would be that the input itself
2 would not be considered a use subject to copyright and
3 neither would the manipulation of the data within the
4 computer, nor the output from the computer if it were
5 small portions of material, such as might be considered
6 to be fair use of a copyright. This bothers me for two
7 or three reasons.

8 Now, one is that some of the uses of materials
9 that are clearly proprietary and where clearly advantage
10 is being taken of somebody else's investment may not
11 involve printout at all.

12 Let us set up a purely hypothetical case that
13 there is a firm that publishes the text of public domain
14 statutes and court decisions and, hypothetically, this
15 firm has worked out rather an elaborate system and has
16 indexing and this material was numbered, and if another
17 firm puts the same material into its computer, including both
18 the public domain texts and the copyrighted hierarchy of
19 material, using that as one of the descriptors with which
20 a person could elicit material, there might be no output
21 of this material and, yet, somebody would have taken
22 advantage of somebody else's substantial work. Purely a
23 hypothetical case.

24 But the second kind of thing, there is a
25 tradition established in credit reproductions that the
26 quotation of a small excerpt is fair use and all of us

1 have seen speeches about some topic that start out saying,
2 "Webster defines the word about which I am speaking in
3 this way:" And it clearly is a fair use. This is not
4 competitively Webster and nobody can use that speech to
5 look up words. But when you incorporate -- and this
6 again is a genuine hypothetical question because it
7 would not be economical to do it -- but if you incorporated
8 all of Webster on a data base, from computer data base,
9 from which one could extract not merely the one definition
10 that was quoted but any definition, you have replaced the
11 dictionary even though no excerpt comes up more than small.
12 So I think that really points to a different test of fair
13 use.

14 In the third place, if you consider that there
15 are inputs that would need the permission of the proprietor
16 of fairly extended text, what do you do when the computer
17 starts to output a fairly extensive text? By definition,
18 this is unforeseeable. You do not know it is going to do
19 it until you ask the question and this gives this as the
20 answer formally.

21 Does one assume that there is going to be a
22 compulsory license so that nobody can object to this and
23 one has got to permit it and accept a stipulated payment?

24 It seems to me that there is really no real
25 reason for saying that input, if the input may result in
26 an output for one reason or another, is as should require

1 permission; permission should not be gained at the point
2 of input. It seems to me logical and convenient that you
3 have one permission govern everything else and everything
4 else is wrong focus.

5 I would like to turn to one other thing --

6 DR. GROSCH: May I answer that for a moment because
7 it is a very important philosophical point. If, as you
8 say, you are going to produce broad recommendations rather
9 than three inches of detailed stuff, this sort of thing
10 is exactly what you'd be concerned with and I thought
11 very hard about that entry thing. This information that
12 I have given you here essentially came from the time when
13 I was with the Bureau of Standards and was assigned to
14 interact with McClellan's Committee, five years ago, I guess
15 it was, roughly. And I thought very hard about that input
16 thing and it was my conclusion to make this recommendation
17 because I am assuming that the data from which you made
18 the original input was something you had already paid for.
19 In other words, you had a copy of something that was worth
20 a lot of money and you had bought it. Now, the question
21 was, do you put it into your machine to process it without
22 violating the copyright; would that be fair use?

23 Let me give you an example: The publisher of
24 Computer World, for which I write articles, puts out a
25 great, big thick compendium twice a year of all the
26 computer installations in the United States that he knows

1 about. It is a great big thing like this (indicating).
2 The computer printout is almost a foot thick and he sells
3 that for fifteen thousand bucks a year subscription for
4 this, not printed, and each page has, you know, copyright
5 stuff all over it and a statement, "If you print" -- "If
6 you use even one line of this, you are in violation of
7 the copyright," and blah, blah, blah. I do not know the
8 whole legal terminology of it. But there is a case where
9 he doesn't want an unauthorized person to see even one
10 line of that. But, on the other hand, you can't put that
11 into your computer without having paid the fifteen
12 thousand bucks in the first place.

13 MR. NIMMER: Are you saying, in a comparable situation,
14 if a library buys the Encyclopedia Britannica they should
15 have to pay something like \$15,000 for one set of the
16 encyclopedias?

17 DR. GROSCH: No. I would be prepared to let the
18 Encyclopedia Britannica sell for its present five hundred
19 bucks and then if the library wants to go ahead and key
20 it into the system, perhaps then -- of course, that is
21 also going to be obsolete -- data entry costs are going
22 to come down because you are going to have character
23 reading devices that will do for a tenth of present costs,
24 not a thousandth but a tenth, at any rate. If they want
25 to put it into their system, I think that five hundred
26 bucks authorizes them to do so. But having got it into

1 their system, they can't put it out again without paying.

2 MR. LACY: Can they put it out if the output is
3 saying, "When was Charlemagne born?" Because the one copy
4 in the central computer could supply all --

5 MR. WEDGEWORTH: You could be saying in effect that
6 there would be nothing wrong with what Dr. Grosch is
7 suggesting provided that whatever internal manipulation of
8 that data would not substitute for the purchase of a
9 particular work in question and if they are doing what
10 you are suggesting that they are doing; that is, in fact,
11 substituting --

12 MR. LACY: The whole point, I think, is the simplest
13 thing; if there is any possibility of getting permission
14 to get it at the point of input and be done with it.

15 MR. GROSCH: I only wanted to tell you that I had
16 thought about that. I do not see that my opinion on this
17 is as valuable as yours since you have been exposed to this
18 much longer than I and you certainly know a great deal
19 more about it than the man in the street because it is
20 essentially a moral judgment, not a technological one.
21 But I did think about it.

22 MR. LACY: There is another question on which I
23 would certainly welcome your views. I have had the feeling
24 for some time that we have obviated ourselves in debating
25 what is the question about computer data bases, that
26 within a little bit in that condition printers might have

1 been -- and proprietors of scriptoria that put out manu-
2 script versions of books -- might have been about 1460 and
3 the printers would all say that there would be no copyright
4 on these manuscript books; we ought to be able to incorporate
5 them into new technology and scriptorials were to buy
6 copyright and then after half a century the printers
7 realize they have all the books in print and they shift
8 over. That has happened here.

9 I was fascinated to hear the testimony of the
10 representative of Educom requesting some very high pro-
11 tection for computer programs because of the fact that the
12 universities that make up Educom have developed so many
13 programs where ten years ago their distinguished represen-
14 tatives were taking a low protection position for computer
15 programs.

16 DR. GROSCH: Don't you listen to that guy. He did
17 all those programs --

18 MR. MILLER: Which guy?

19 DR. GROSCH: Educom.

20 MR. MILLER: The current one?

21 DR. GROSCH: He and his buddies, with public funds,
22 by golly, and now they want to go out and make some
23 private --

24 MR. LACY: I think the situation is within the --

25 DR. GROSCH: Before, Arthur, they didn't have the
26 funds yet. They said, "Give us some of that money and

1 we'll give it away to everybody," and we made the mistake
2 of giving it to them.

3 MR. LACY: The main weight of proprietary right in
4 this field now exists not in people who have written
5 something in print and copyrighted it, that might be put
6 into a computer; but it exists in people who have
7 accumulated within a computer enormous data bases at
8 great expense, maybe every data of which is the public
9 domain, which is --

10 DR. GROSCH: The organization is very valuable.

11 MR. LACY: The question that has concerned me, at
12 least, and I think others, is what is the social and most
13 useful way of protecting whatever value investment is
14 there providing incentive for continuing that without
15 being restricted. Right now these proprietors protect
16 their rights by keeping them secret and by permitting
17 access only on stipulated contractual conditions and many
18 of them do not want copyright protection, as a matter of
19 fact, at all because of the feel that under Section 301
20 of the new bill it is a copyrightable right; it cannot be
21 protected in any other way. They would rather rely on
22 trade secrets. That probably works now. I just have an
23 innate feeling that any mode of protecting intellectual
24 property requires you to protect it by restricting access
25 to it; is inherently not assigned.

26 DR. GROSCH: Socially undesirable unless you have to

1 absolutely do it.

2 MR. LACY: But over 50 years ahead, we might want to
3 be in an environment in which the data bases embodied in
4 some very cheap form would be not at least, but so, as
5 these programs --

6 DR. GROSCH: Obvious programs.

7 MR. LACY: Whatever counsel you have got. Now, not
8 the question of putting copyrighted stuff into a computer
9 but, what sort of copyright provisions with respect to the
10 rights that may have been accumulated by the proprietor
11 by the data base and organizing, that kind of makes us
12 wise on that.

13 DR. GROSCH: I doubt if I can make you wise.

14 JUDGE FULD: I think it is more knowledgeable.

15 DR. GROSCH: I am not sure I can speculate effectively
16 because I think that the basic problem is that you have to
17 have a set with respect to social trends. My set is
18 somewhat described here, although only in three lines. I
19 guess what I am looking for in the world of the distant
20 future, if we survive which is dubious at the moment, is
21 a very much more open world than the present time. There
22 are many people, I think who feel that we are going into
23 another direction. For instance, in the privacy issue:
24 one solution to the privacy issue is to go -- you might
25 say -- in the Scandinavian rather than the Swiss direction
26 instead of keeping all of your information about yourself;

1 your bank accounts, your medical records, and so forth,
2 very tightly held. You know, just spread them out on the
3 table and say, "I don't mind if my neighbor knows I have
4 venereal disease. It's just another disease."

5 If you go in that direction, then the need for
6 copyright begins to recede because the value of compilations
7 and so forth, compilations will be considered to be sort
8 of in the public domain, it seems to me. My boss, Pat
9 McGovern, will no longer be able to object for some one
10 person, for one line in his huge data base, being excerpted
11 on the grounds that he got that one line free of charge
12 from somebody down the road and his value was only in
13 having them all in one big heap.

14 I do not think you should ever get into a
15 situation where you will eliminate the artistical value --
16 I am not talking now about compilations, but about a
17 beautiful poem, a magnificent play, even a very cleverly
18 written textbook. There, I think, is an element of
19 unreproducible skill in the thing. You cannot just say
20 anybody could go out and do it if he wanted to. And that,
21 I think, copyright ought to protect, as long as we can see
22 in the future 50 or 200 years.

23 MR. MILLER: Can you draw that line?

24 DR. GRCSCH: Very difficult, but then there is the
25 problem of the law, isn't there? When is it all right to
26 shoot a guy and when isn't it? The answer is, if you are

1 an authorized soldier and he is an authorized enemy, go
2 ahead and shoot him. If it is your wife, don't do it.

3 JUDGE FULD: Of course, you have our very deep thanks
4 for a very interesting and very illuminating address.

5 DR. GROSCH: Thank you. I enjoyed doing it.

6 I would like to stay and listen for a while,
7 if I may.

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1 LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 2:50PM

2
3
4 JUDGE FULD: Our next guest is Dr. M. Thomas Risner.
5 Since 1966 he has been involved in the systems design,
6 implementation of the world's largest data base of non-
7 print educational materials, compiled in conjunction with
8 the Library of Congress and the National Information
9 Center for Educational Media at the University of Southern
10 California.

11 The accomplishments of his career is the
12 publishing of 20 volumes of indices on nonprint media in
13 book form, as well as microfiche. He worked earlier in the
14 area of communication management, research, and teaching.
15 He is published widely in these latter areas.

16 Dr. Risner, the Commission is happy to hear from
17 you.

18 DR. RISNER: Thank you. There is only thing more
19 traumatic than parking at UCLA and that is attempting to
20 park at USC and I am happy I left an hour earlier or I
21 would not have made it.

22 Today, to this very prestigious Commission, I
23 want to direct my comments particularly to the background
24 of this information storage and retrieval system; the
25 general make-up of the information system, defining the
26 input and the output; and then an interpretation of how

1 the system relates to the proposed copyright changes as
2 we interpret it; and then, finally, I want to present a
3 summary, based on the questions that Mr. Levine presented
4 in a letter dated August 17.

5 Now, once I have completed the presentation,
6 I do have a handout of the general summary of the presenta-
7 tion that I am about to make and I will give that to you
8 afterwards.

9 Approximately 14 years ago the Office of
10 Education provided a \$115,000 grant to the University of
11 Southern California Division of Cinema to study the
12 feasibility of computer application to the handling of
13 information on films. At that time, USC had one of the
14 largest film libraries in higher education, as well as
15 the only what was called then Division of Cinema. So this
16 seemed logical and natural that it start there.

17 The only thing that happened out of this
18 \$115,000 grant was that eventually it grew into probably
19 the world's largest data base of what librarians call non-
20 print educational media. Today we are right now in the
21 process, as a matter of fact, of publishing approximately
22 25,000 pages of index material which we sell to all parts
23 of the educational and library communities, including the
24 international community. 12 percent of our sales and
25 indexes, whether it be on microfiche or in hard copy, it is
26 sold as far away as Malaysia, the Middle East, Israel;

1 a great quantity of these materials are sold in Canada,
2 as well as Western Europe and throughout the United Kingdom.

3 As a result of this project, it was determined
4 that it was feasible and, as I jumped ahead here and
5 stated to you the basic results of the project, to this
6 date, the University has spent approximately \$4 million
7 developing this system and expanding it. Now, remember,
8 the \$115,000 was the seed money provided by the Office of
9 Education. To this date, there have been no other funds
10 other than what the University has plowed into it. Of
11 course, at USC, it being a private school, there is only
12 one reason you stay there and that is if you can raise
13 the money, and that is, in a sense, literally true. You
14 have to pay your way, whether it be in the classroom;
15 whether it be in research; whether it be in development.
16 As a result, we, in a sense, with this type of development
17 to a computer data base, are in the marketplace and we are
18 in the marketplace to a large degree because we found,
19 through publishing contracts with such prestigious
20 publishers as McGraw-Hill and R. R. Bowker and Xerox, that
21 it was not a profit-making type situation and, again --

22
23 DR. RISNER: I know that your ears are full and your
24 minds are full of knowledge and maybe you can relate
25 something to me because it was very interesting sitting
26 in on his extrapolations.

1 Again, the University felt, as all good uni-
2 versities should feel, that they are there to serve the
3 national and international needs and, as a result, some-
4 thing good has come of this data base.

5 Today you are particularly interested in our
6 opinions on the new proposed laws and amendments to the
7 copyright bill as it is stated in S22 and how it relates
8 to this particular information system, and this is why I
9 am giving you the background and going through the develop-
10 mental part of the system itself.

11 Now, just briefly extend yourself to the front
12 of the room here. Can all of you see, by the way? Can
13 you gentlemen see through me? I doubt it.

14 MR. HERSEY: Step around it once in a while.

15 DR. RISNER: Okay. Input, your editorial research,
16 your data base, and this can include all the systems
17 development, all the programming, all the designs right
18 here. This is the raw input, so to speak. The acquisition.
19 This is the actual manipulation storage and the integrity
20 building of a file, we might call it.

21 This down here -- can you read this? Is this
22 clear enough? This is what we would call output. Where
23 does the National Information Center for Educational Media
24 receive its input? Producers and distributors, people who
25 produce and distribute it. Remember, we are a national
26 center. We have to publish in our indexes things that are

1 available to people, they can actually get their hands on
2 them at one point in time. The Library of Congress, back
3 in '67, the University and LC entered into a mutual agree-
4 ment that they would set up an input form to collect all
5 data in a uniform manner from producers and distributors.
6 If producers and distributors want to get their information
7 into the LC Mark system, which is also computerized,
8 highly computerized, if they want to get it into 3 by 5
9 cards, if they want to get it into the NICEM Data Bank,
10 which is also an output system, they are very motivated
11 to send their input forms into LC.

12 We deal directly with schools at all levels and
13 most of them have what they call media centers, either
14 separately or as part of their library system, and we deal
15 with public and private libraries. In dealing with these
16 two, we do contractual work for them so we, in a sense,
17 receive input from both of these, which we call unverified
18 input. It has to go back through a research process to
19 make sure we do not get some local production that is not
20 available nationally. If we do get that local production,
21 we can flag it in the data base and it never goes out other
22 than if it is for, say, Boston Public Library. But in a
23 sense we carry every nonprint item that Boston Public
24 Library or Chicago Public Library, both could not contract
25 for, on nonprint media catalogues in our data base. If it
26 is mutually available it is for everybody; if it just for

1 those two libraries, it stays in the data base and it is
2 flagged as such.

3 In our editorial research division, we have
4 followed the Anglo-American rule which basically is
5 written by librarians in the Library of Congress and is
6 approved by the American Library Association and they are
7 the publishers -- ALA is.

8 Also, we follow some guidelines put out by the
9 American Association of Educational Communicators and
10 Technologists. Between these two publications, it gives
11 us the guidelines by which we editorialize and we research
12 these matters out to make sure they are valid entries and
13 they go into the data bank and they are stored.

14 The output -- and here is where we start getting
15 into what we came here to talk about in a sense -- machine-
16 readable tapes, indices, book copy, and microfiche copy,
17 what we call custom book catalogues, which are rather
18 common throughout the library world today -- search service
19 and, by the way, the search service is primarily done for
20 large companies like Eastman Kodak, that want to know the
21 average length that the color ~~film~~ produces between 1956
22 and 1976. Obviously, they are getting this data for
23 marketing purposes.

24 Then we have just signed a contract with
25 Lockheed Information System in Palo Alto using their
26 DIALOG system to place the entire data base on line for

1 their customers, so in a sense you get an overall picture,
2 I think, of what a national information system grew to from
3 a measly \$115,000. It was nurtured primarily in a
4 university environment.

5 To give you some idea of what the data base
6 consists of, here are the different media that we encode
7 into the data bank and out here are the numbers of main
8 entries that were in there as of March. Now, each entry
9 contains approximately a thousand characters. There are
10 21 descriptive elements and I want to talk a little bit
11 about the descriptive elements because that is one area
12 where we think there has been some creativity in the data
13 base, even though as one gentleman said, a lot of this
14 information that goes into these general nationalized
15 data bases is in public domain; it goes into the system,
16 but what happens to it after it is out and into the system
17 and how does it come out of the system?

18 Our '76-'78 description, which we sell, again,
19 to the educational library community, consists of 20
20 volumes with the 14 titles. We update these just like an
21 encyclopedia. We do these custom jobs, contractual jobs,
22 which also involve information in data banks.

23
24 DR. RISNER: We were currently at that time negotiating
25 this ongoing access and then we do special searches and
26 analyses for different individuals and companies who want

1 to come to us.

2 Presently our user base -- we have on our
3 computer files 9,653 institutions or individuals who use
4 our information. These are educational industries,
5 government, libraries. 12 percent of the total are over-
6 seas users.

7 Now, some of the elements that are in the data
8 base are the 21 elements that we talked about. You have
9 basically the same type of information as you have, say,
10 on an LC 3 by 5 card. In this case, it is in a special
11 data bank. You have a title, with a subtitle, the size
12 and physical description, the length, all of these things
13 we have no control over. We just record them as we
14 verify them. You have a stock, in the case of motion
15 pictures and video tape. In the case of tapes and records,
16 you have to designate whether it is monaural or stereo.

17 Now we get into No. 5, the description of the
18 contents. This is where we have designed the parameters
19 for writing what is in that particular title in order that
20 the user may read the description and make an educationally
21 sound decision, whether it is worth getting ahold of for
22 his purposes. The series, titles, reference, whether
23 applicable, the audience or grade level, again, we do
24 some assignment of grade levels or audience level,
25 producer-distributor codes attached to the information.
26 These are codes that are developed by us. The year of

1 release is something we have no control over. The Library
2 of Congress members, broadcast quality, these things are
3 in a sense in public domain. The thing that we think that
4 takes creativity is: One, the description of the item in
5 the data bank relative to its contents. We think the
6 search strategy, how we catalogue it, is something that is
7 creative in a sense. As far as the formatting and the
8 output, it is our belief that this likewise is part of
9 the total system and is part of the creativity of develop-
10 ing the total system. Again, our output, these are the
11 types of books that we publish from the data base currently.
12 There are many other possibilities. It is simply a matter
13 of economics of what we do publish. We can publish them
14 by media or we can go in and publish them by curriculum
15 or subject areas. For example, the index of Health and
16 Safety Education, the index of Vocational and Technical
17 Education, Environmental Studies and indexes to free
18 materials. All of this is easily done with a computer.

19 Currently we are negotiating with the National
20 Library on Medicine to do an index on medicine which, in
21 a sense, will supplement the abline, except that the abline
22 is an on-line system which takes into account only those
23 titles which have been approved or evaluated by the
24 medical profession. The index we would produce would be
25 a comprehensive, universal index taking in all facets.

26 A typical page in our index would look something

1 like this (indicating). This would be in the alphabetical
2 file section. These indexes are set up pretty much like
3 a card catalogue file in the library and this would be
4 a sample of the -- here would be the producer and the
5 distributor codes, the title, the biodata film strip of
6 records and a brief annotation of what is on the data
7 bank itself.

8 We can turn the lights back on.

9
10 DR. RISNER: Now, the implication is, from our point
11 of view, relative to -- particularly Sections 107 and 108
12 and this data bases, National Information Center, through
13 our interpretations of Section 107 and 108 of the S22,
14 and there was a Senate report which discussed it entitled --
15 "Numbered 94 dash 473." It is our opinion that the
16 limitations on exclusive rights contained in those parti-
17 cular sections will have little or no impact on the NICEM
18 operation. As we read it, 107 permits fair use of the
19 copyrighted work for purposes such as criticism, comment,
20 news reporting, teaching, scholarships, or research. If
21 I may quote from that discussion paper, the 94 -- the
22 section, it states, "Is intended to not necessarily change
23 the judicial or legal parameters of fair use, nor to
24 narrow or to particularly enlarge it." So we feel that
25 there is really no threat to this data bank system as it
26 exists today and I can extrapolate on that a little more a

1 little bit later.

2 The section set up for criteria, for determining
3 this and, that is, that the purpose and character of use,
4 the nature of the copyrighted work, the amount and substance
5 of the portion used in relation to the copyrighted work as
6 a whole and the effect of the use upon the potential market
7 for value of the copyrighted work. In view of the nature
8 of the NICEM output, as we have displayed it here, it
9 appears fairly remote that the indexes themselves would be
10 used for teaching, but certainly they would be used for
11 scholarship and research. In this regard, we would
12 expect that citations of small portions in research reports
13 would be permitted as fair use. That is our interpretation.

14 However, in view of the criteria 3 and 4, we
15 would expect that any citation in excess of a very minor
16 portion of an index would be considered an infringement.
17 We would not want somebody to copy it in whole and distri-
18 bute it, particularly if it were available at a price.

19 I put together a very simplified -- the real
20 cost of copying -- and let me throw this in briefly --
21 these figures are based on 1974 Information Almanac. But
22 the school districts in the United States, there were
23 17,000; elementary school units or buildings, there were
24 65,800; high school units, 25,352; higher education
25 institutions, 1428. Believe it or not, Federal government
26 and military training commands, there are a tremendous

1 number of those -- and we sell to them quite regularly --
2 1800. But there are 52,000 libraries and branches in the
3 United States, too; 111,380 units here. We published 23
4 volumes at \$605.50 and this seems ridiculously high but
5 at the time time when you carry it back through the costs,
6 we find it is almost a nonprofit type of situation. I
7 think this is one of the reasons that it was not commercially
8 feasible with McGraw-Hill or Bowker. Times 111,000 equals
9 67 million. Now, that would be the ultimate, if you sold
10 everybody a set. Obviously we cannot and we could not.

11 If we took the 16,000 just in those 23 volumes,
12 666 pages times the cost of copying, five cents apiece,
13 \$833 times 111,000, you would see it would be substantially
14 more to copy and the only problem is that there is, we
15 find, a syndrome that exists in educational institutions
16 that -- or I guess it exists in just about every department
17 that human beings are involved in -- if the copying machine
18 is there and the paper is there, it does not cost anything
19 to copy it. I know that the copying machines in our
20 institution have to be controlled very carefully with keys
21 and so forth because there is a lot of unauthorized use.

22 In our opinion the Section 108 permits repro-
23 duction by libraries and archives but only under
24 circumstances which are sufficiently limited as to
25 preclude any significant impact, say, on a NICEM-type
26 operation.

1 Section 108(a) permits a single copy to be
2 reproduced but only subject to the conditions of the other
3 sections. In this regard, and, again, we are interpreting
4 it from our standpoint, Sections 108(c) and (e) which
5 permit reproduction of an entire work require that a
6 reasonable effort be made to determine that a copy of the
7 work cannot be contained or obtained at a fair price.

8 Section 108(d) permits reproduction of only a
9 small part of the book.

10 Section 108(b) refers only to some published
11 works, so it would not, in a sense, interfere with us.

12 In the report discussion, it is explained that
13 any determination of availability at a fair price will
14 always require recourse from commonly known trade sources
15 or even from the publisher, so we feel in that sense some --
16 for example, the L.A. public school system could not buy
17 one set of our indexes and then immediately reproduce it
18 for all of their individual buildings; we feel this would
19 be an infringement.

20 In our opinion, the libraries and educational
21 institutions could reproduce one copy of indexes only if
22 the copies were not otherwise available at a fair price.

23 One other section -- or the section in 108(f)(1),
24 it is our opinion that no relief from the liability is
25 provided for an institution relative to its employees for
26 mass duplication of copyrighted matter. In Section 108(f)(1)

1 it exempts the institution or its employees only from
2 unsupervised use of reproducing equipment located on its
3 premises, and then only if the equipment displays a notice
4 that the making of a copy may be subject to the copyright
5 law.

6 Section 108(f)(2) makes it clear that even this
7 exemption does not extend to the user if the user exceeds
8 fair use and, again, fair use is defined.

9 The recommendations and interpretation is based
10 on the questions that were presented in the letter. First
11 of all, what constitutes a copying? Again, it is very
12 difficult to discuss this without becoming philosophical
13 and, in a sense, taking all social and economic factors
14 that enter into this type of a question. When we say the
15 transformation of a work in a machine-readable form such
16 as punch cards, mag tape, or disk or any other type of
17 device is a prerequisite to the retrieval of information
18 with universal and format possibilities existing based
19 upon the sophistication of the system. I guess in a sense
20 we are saying copying is copying regardless of how it is
21 done or how it is achieved. There has to be, in any
22 system, initially a formatted procedure for entrance. We
23 talk of character recognition, but at the same time there
24 has to be a form developed. There has to be some para-
25 meters and rules and regulations for getting the data on
26 there to be scanned and it cannot be just scanned in a

1 random manner, particularly.

2 These modern technological means of capturing
3 data are simply techniques which allow the rapid and
4 massive storage of data fielded in such a way as to allow
5 the user quick access to large amounts of information.
6 The copying is the same whether by handwriting, keyboarding,
7 scanning, it is copying; the latter requiring more definitive
8 parameters since the very nature of such copying with
9 technological devices makes it mandatory for initial and
10 precise definitions of input. Copying is copying whether
11 by ancient or modern means.

12 Data bases just do not happen. The use of,
13 say, cathode ray tubes, devices in the interrogation of
14 machine-readable files, is copying simply by the nature
15 of the required organization of the files prerequisite
16 to the ability to retrieve and display information on a
17 CRT for printed card copy.

18 In presenting some of the historical background
19 information in this particular system, the point to
20 recognize is that a data base and the supporting systems
21 for the base is a process. The output is dependent on
22 this process and the process, as well as the final output,
23 must be protected since, in this particular case, the
24 system and the data base is dependent on the revenues
25 from the output. The doctrine of fair use applies only
26 as we interpret the meaning and, as we presented it earlier,

1 relative to our output which is primarily the indexes and,
2 believe it or not, we can talk and we can read about the
3 technological advances in information handling; we can
4 belong to ASIS ; we can go to the conventions, but in the
5 final analysis, the human being, in a sense, returns to
6 the printed book. We have figures to prove it because
7 we offer ourselves on microfiche, machine-readable tape,
8 and in book form, and, believe it or not, they have
9 knocked down the doors for the book form and they continue
10 to, year after year. Some of the more sophisticated
11 institutions and, I think the MARC -- the MARC system in
12 the Library of Congress found this out. MARC was developed
13 to take care of the information needs of the small libraries
14 all over America and in Canada. In the final analysis,
15 when MARC was up and running, they probably had maybe
16 six to seven institutions that could effectively take those
17 tapes and the documentation and do anything with them.
18 Those were the very sophisticated institutions. One of
19 them was not an institution. I think it was, at that time,
20 nonprofit. It was System Development Corporation; another
21 one was Rice Institute. But the vast majority of the
22 libraries had no use for MARC and now they are getting some
23 use out of MARC because MARC is generating a 3 by 5 card
24 which they continue to place in their card files.

25 One of the attributes of a computerized data
26 base information system is its ability to make mass changes

1 internally, hence there should be a distinguishment
2 relative to proprietary rights and the ability of the
3 system to change data -- excuse me. There should not be
4 a distinguishment relative to the proprietary rights and
5 the ability of the system to change data, to make cor-
6 rections and deletions. The proprietary right, under the
7 doctrine of fair use, should be protected even though
8 data items may be subject to constant fluctuations and
9 subject to change. In a sense, you cannot separate the
10 system; they are both dependent on each other: the data
11 base and the system. The data base on tape or on a disk
12 or any other device, storage device, is totally useless
13 without a system and a well-documented system.

14 Proprietary rights should extend to the
15 equivalent of performance rights as defined under the
16 doctrine of fair use. We now, for example, if somebody is
17 going to publish something with our material in it and they
18 are very good about it, they do come to us, obtain per-
19 mission and pay for the use of the information. Output
20 requires special talents for success of any modern
21 information system and we would like to think that this
22 would be true of the information system that we have
23 presented here to you today.

24 That terminates what I have to say. I have it
25 written down and I will give each of you a copy.

26 JUDGE FULD: Are there any questions to ask our guest?

1 Thank you very much.

2 DR. RISNER: You bet.

3 JUDGE FULD: We can recess for a short period.

4 (Recess.)

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1 LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 3:48 PM

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JUDGE FULD: While we are waiting for the copies of
5 the guidelines, Arthur will address us.

6

7

8

MR. LEVINE: We have just passed out a draft of
7 the preliminary report. I would ask you to please look it
8 over and get comments to me by --

9

JUDGE FULD: By tomorrow?

10

11

12

13

MR. LEVINE: Well, that would be nice, but how about
11 September 29th? That is two weeks from yesterday. Of
12 course, if you want to get them to us earlier, we would be
13 very pleased to --

14

15

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19

This is a draft that errs on the side of too
14 much, I suspect, and we have, for your convenience, made
15 out some large envelopes. If there is anything that you
16 can send back to yourself in the mail rather than carrying
17 back in the plane, the envelopes will be passed out. They
18 are not large enough, but they are large.

20

21

22

Dr. Grosch, I know is only going to be here
21 until 4:30 and I understand that there be additional
22 questions that some of the Commissioners have for him.

23

24

25

26

DR. GROSCH: I will be glad to do anything I could.
24 I have to fly to Denver, unfortunately. If there is
25 anything, I would be glad to leave, if you want to be
26 private.

1 MR. LACY: It is illegal for us to be private.

2 Occasionally a cloud.

3 MR. SARBIN: We are waiting for some papers to come.

4 Is that it?

5 MR. LEVINE: We are getting some copies of the re-
6 drafted guidelines that Gabe and I just did.

7 MR. PERLE: Let us talk with Dr. Grosch and then I
8 can do that later.

9 MR. LEVINE: I think we can do that.

10 DR. GROSCH: Let me come up here again, in case I can
11 do anything.

12 MR. HERSEY: At the end of our conversation before I
13 thought I heard you saying or moving in the direction of
14 saying that perhaps copyrights should be reserved for
15 works of literature and art and some other form of protec-
16 tion should be devised for these other areas. Is that
17 true? If so, what are the other forms of protection?

18 DR. GROSCH: It is sort of a moral feeling that I have
19 that there is a difference -- it is not something I have
20 thought about a great deal or that I have any expertise to
21 offer you in; it is just that I sort of feel there is a
22 difference between something that no one else could do,
23 the artistic, the creative sort of thing. It does not
24 have to be a work of art. In that sense, it could be a
25 beautifully written textbook, as I said, or something like
26 that and not something that could be ground out by an

1 organization or by a committee, or a Commission, if I may
2 say so. Or, you know, just requires enough effort.

3 Now, whether this would be a different phase of
4 a copyright or whether it be an entirely different kind
5 of protection as provided by the copyright, I do not
6 know. We have had this argument. The only reason I have
7 thought about it at all, aside from just being a social
8 human being, is that fact that we have this argument. In
9 the software field there has been a lot of discussion
10 as to whether computer programs are truly
11 creative and, I must say, in most cases I tend to feel
12 that they aren't. You occasionally get one that is just
13 great, some of the original work on computer graphics where
14 you see something thrown up on a screen -- all digitized,
15 you understand, but not appearing that way to a spectator.
16 And the object would rotate and the lines that went around
17 behind would be hidden and the object would get larger and
18 smaller and it would be shown in perspective and color. In
19 a sense, that was artistic, it seems to me. Once he has
20 seen that he goes home and says, "I could do better than
21 that." He writes up a better one. Okay, I can see the
22 element of creativity in the second one, but not nearly
23 as much as the first and then after a while he's selling
24 packages, you know. And they do that by just putting
25 enough people in a room and saying, "Okay. I am going to
26 pay you \$8.00 an hour; start writing," in the same way that

1 manuals, operating manuals for gadgets are written.

2 Yes, please?

3 MR. NIMMER: You related it in an interesting way
4 before about perhaps going to different views of privacy.
5 It does go to the existing distinction that has long
6 existed -- before new technology between copyright -- in compila-
7 tions and copyright in literary and artistic works. Many
8 people have questioned whether there should be a copyright
9 in compilations as such; it does not have any authorship
10 or creative aspect. You suggested, as I understood it,
11 insofar as the compilation is a sweat-of-the-brow kind
12 of activity that we are rewarding and with new attitudes
13 on privacy it is that much easier to make the collection
14 or compilation because people are very open about the data
15 being collected and, hence, it perhaps should deserve less
16 of a reward. But then when you get to compilations that
17 may be the combination or collections, not simply the sweat
18 of the brow involved, but itself involves some creative
19 efforts of collection and arrangement. Still, one could
20 argue that does not rise to the same level of creativity
21 as a literary work and, yet, is something more than merely
22 the sweat of the brow. There is some kind of creativity
23 involved. So it is maybe somewhere in between.

24 DR. GROSCH: I think that is a tough one. I do not
25 have anything to offer on that. I do not think there is
26 any question, from the very, very creative thing, that no

1 one else could do, the epic poem down to the crudest kind
2 of compilation where you just list everybody's license
3 number that you have gotten from the Motor Vehicle Bureau.
4 Somewhere in between is the handsome, well-indexed,
5 conveniently arranged compilation where there still is
6 a very useful element contributed by the compiler and I
7 guess you are simply up against the age-old question of
8 where does the value reside? That is a tough one.

9 MR. LACY: In general, copyright has avoided the
10 patent law feeling that something had to be original and
11 distinctive. One man's dogma is accessible to another
12 man's epic poem; one man's cigarette ad is another man's
13 painting.

14 MR. GROSCH: I think I am only justified in pushing
15 any of my ideas on you to the extent that there is a
16 technological element and there is not really much in --

17 MR. LACY: I would --

18 DR. GROSCH: Copyright organizations of the Government
19 decided that these goods are original and that they
20 deserve protection and that these are uncreative and
21 unoriginal, unimportant works.

22 One of the interesting things, it seems to me,
23 is the question of the initial statement. I wonder if it
24 is not possible for a group like this to make recommenda-
25 tions about different qualifications that could be imposed
26 by the copyright holder. In other words, take again the

1 example of this valuable compilation. The compilation
2 where each line has potentially rather high value to
3 somebody. Would it be possible, for instance, to have a
4 restriction which says that in this case no unpaid use
5 whatsoever of the material may be made? I have seen, for
6 instance, a literary work where the thing is red hot; the
7 author has just escaped from Russia or something where you
8 say you cannot quote anything from this; it is really
9 precious.

10 On the other hand, the copyright notice on the
11 publication says specifically that, you know, other than
12 for the crassest kind of commercial use, go ahead and use
13 it. I wonder if an extension of this isn't possible, not
14 only in the data base case but in the more general case
15 of copyright revision; that the person holding the copy-
16 right might specify in more detail how much, what is fair
17 use to him. In producing it, that would be a way of
18 protecting this compilation sort of thing.

19 MR. NIMMER: Certainly --

20 DR. GROSCH: Your handsomely compiled thing, for
21 instance, might say it is all right to put this into the
22 data base and use the information in it but do not copy
23 the handsome, esthetic features of it.

24 MR. NIMMER: One way to approach this input versus
25 printout might be to change the line of fair use for
26 output. Input is not prohibited or not protected, but the

1 output, what is fair use, is a much more limited kind of
2 thing than would originally be under copyright as we have
3 noted up to now. At some point you might run into
4 constitutional objections. Are you then not really, if
5 you are saying you cannot copy one word or two words, you
6 are not really protecting the works of authorship and the
7 means and the running-into-First-Amendment kinds of
8 questions. You are trying to give a monopoly on a fact
9 that someone wants to be able to repeat.

10 DR. GROSCH: Yes. You can see at least commercial
11 versions of a Watergate sort of thing in that that credit
12 information would be so thoroughly protected that you could
13 not get at it and that would be an unhealthy thing, I am
14 sure.

15 I think the important thing that I want to come
16 back to about the technology, though, is that if you really
17 do decide you would like to track information through
18 complex technical machinery that at least in the near
19 future and in most cases right now the mechanism for doing
20 so could be available to you. You could tack something
21 on every reel of tape at the beginning that, "You are not
22 supposed to use this without," and you can have in every
23 use of that tape a log which would be added on at the end
24 of the tape, so to speak, listing the uses that have been
25 made, by whom, to what extent, under what authorization,
26 and so forth, all rather inexpensively, if you chose to so

1 recommend.

2 MS. WILCOX: I think you made reference to a letter
3 you received --

4 JUDGE FULD: Talk a little louder, Alice.

5 MS. WILCOX: The letter you made reference to.
6 Would you like to expand?

7 DR. GROSCH: That was a very interesting little one.
8 I will give you her name. The young lady is authorized
9 to mention this. She offered it to Burroughs, her
10 employer, and they said, "Yes, not for use. Go ahead
11 and tell everything you want."

12 I will look it up here.

13 MR. NIMMER: She called me, as a matter of fact.

14 DR. GROSCH: Is that right? She has an idea that
15 could be put in that goes into a Xerox copier and the
16 Xerox thing is certainly true that the Xerox copier, even
17 a real cheap one, could have that -- would log the use of
18 this and, you know, once a month a meter reader would
19 come around and everyone whose page was copied would get
20 a hundredth of a cent or three-tenths of a cent use out
21 of it. Interesting.

22 Atkinson, it seems to me to be the name but I
23 will get it to you shortly.

24 MR. NIMMER: Yes.

25 DR. GROSCH: Judy Atkinson, Burroughs, Pasadena,
26 Technical Librarian. She thought she might come today,

1 but obviously did not.

2 I think it may be possible, but I think it is
3 one of those things that may be beyond the limits of
4 reality.

5 MR. NIMMER: Why? We want to know specifically why,
6 if it is beyond --

7 DR. GROSCH: I am just thinking of the resistance,
8 the resent. Maybe I am wrong.

9 MR. NIMMER: You objected aesthetically before.

10 DR. GROSCH: That, I think, could be licked. You
11 could have infrared. So it makes the cost of the logging
12 device a little more, but not impossible.

13 MR. LACY: Obviously, it would be no great problem to
14 have the meter show 11,412 copies were done last week or
15 whatever. But there might be a hundred thousand different
16 copyright products. Would this be able to print out the
17 log from that or least to log the copyright proprietary
18 interest at 104 pages?

19 DR. GROSCH: Yes. What Judy is obviously relying
20 on, we will be able to do this inexpensively and quite
21 quickly. The chip technology would make it possible to
22 keep a hundred thousand records on it on a very small
23 piece of magnetic material or something like that. You
24 are speaking about a gadget that would undoubtedly cost
25 fifty or a hundred bucks. It would not be ten cents, you
26 know, but it would not be ten thousand or twenty thousand.

1 It would be a fraction of the cost of the entire -- perhaps
2 ten percent, but not 500 percent or anything like that.

3 As I mentioned in my prepared material there,
4 the cost of further processing will have that capability
5 of sending it off to "ASCAP" and having it erased or recorded
6 and bills issued would not be trivial but they wouldn't be
7 prohibitive. I think the resistance would come primarily
8 from the copier manufacturers and the people that had
9 these installed and that would have to permit access or
10 take their postage meter down to a certain place once a
11 day and that is the type of social resistance. The user
12 would not resist because he would not know anything about
13 it. He gets the copy. Presumably that copy in turn has
14 to have the device on it or otherwise you could just copy
15 it once and then copy the unmarked one.

16 MR. WEDGEWORTH: But it is not free to the user.

17 DR. GROSCH: No, it is not.

18 MR. HERSEY: It is built into his cost of copying.

19 DR. GROSCH: He will find himself spending five cents
20 a copy instead of four cents and will not know the dif-
21 ference.

22 MR. LACY: Somebody is going to make a fortune out of
23 that ninety-nine and one-hundredths cent.

24 DR. GROSCH: It is the old business of scraping a
25 little bit, a tiny bit, off the gold coin every time it
26 goes by and after a while you have gold dust as big as

1 your head.

2 MR. WEDGEWORTH: We went through this elaborately a
3 year or so ago in a major study that was sponsored by the
4 Society of Research Libraries which was to keep track of
5 all the loan transactions through libraries across the
6 country and it resulted from right here in Los Angeles.
7 Bob Hayes did the study and it is very consistent with
8 what you said. It is technically feasible to do all of
9 that but what gets lost in that conclusion that it is
10 technically feasible is that only a small portion of the
11 costs of collecting, assembling, transmitting the data
12 that you have made technologically possible to collect.
13 That is where your costs are and when we looked at the
14 study, they had to conclude that nobody could afford to
15 do it because the purpose of the study was to assess the
16 feasibility of that national system, accounting for those.

17 DR. GROSCH: I think it is the old question, again,
18 of looking at the total picture, including the social
19 and personal resistances and the best example of this
20 and one that may be entertaining to you is this business
21 of marking the universal grocery card or whatever they
22 call the bars on the side of the packages. That thing
23 is just not going ahead and they did the hard part of the
24 job, as most people thought very easily, which was to
25 persuade all of the manufacturers to put those codes --
26 to adopt a code and to have everybody accept it and to

1 print it on the packages. All of that was supposed to be
2 terribly difficult. They did that very easily. Now it
3 turns out the material for the checkout counter is
4 difficult because people are not willing to have individual
5 rubber stamp marks on the tin cans.

6 MS. KARPATKIN: But those aren't inconsistent. You
7 could also put the prices on the packages.

8 DR. GROSCH: You can, but then possibly the prices
9 disappear. There is some controversy in the trade.

10 Let me, however, state as editor of Computer
11 World, that we are having trouble handling this beyond
12 the first few installations.

13 MR. LEVINE: You might be interested in knowing that
14 one of the major photocopying manufacturers is, in fact,
15 almost at the point of starting an experiment exactly
16 like that.

17 DR. GROSCH: Is that right? Interesting. I did not
18 know that.

19 MR. LEVINE: With a bar coding. They have some
20 patent disclosure problems so I am being somewhat vague in
21 my description, but they have a photocopying machine
22 connected to a computer and each transaction would be
23 recorded on computer tape and the computer tape could be
24 removed and sent off, as you suggest, to a clearing house
25 where copyright owners could go through which copyright
26 could be compensated. They expect to experiment with this

1 within the next month or two so it is --

2 JUDGE FULD: Imminent.

3 MR. LEVINE: -- very imminent and very feasible and
4 the resistance, at least, is not at this stage with the
5 manufacturer of the equipment. But there are all sorts
6 of problems down the line because the cheap photocopier
7 will probably go away because the machine will have to
8 have something, because every machine, in order to do it
9 feasibly, every machine would undoubtedly have to have
10 one.

11 DR. GROSCH: Think of the problem that you get now
12 if you want to talk about a systems problem. I am putting
13 aside moral issues and the high technology. Here you have
14 a sheet of paper that is copyrighted. I stick this in
15 the copier and it has the bar code or something on it
16 so the author can get his cash or there just doesn't even
17 have to be a complete breakdown yet. Maybe a class break-
18 down or something. Stick this in the copier and you get
19 a copy which presumably has the same bar code on it.
20 Otherwise you run into proliferation problems.

21 On the other hand, here is a letter I wrote
22 today -- or here is an agenda. I put that in. Does the
23 machine lock up because there isn't a bar code on it?

24 MR. HERSEY: That machine does.

25 MR. LEVINE: The machine we are familiar with, it
26 would.

1 DR. GROSCH: You are going to have to copy it.

2 MR. HERSEY: Not necessarily.

3 DR. GROSCH: Why didn't I cut my bar code off my
4 first one or place a paper over it and put it in the free
5 machine and go ahead and copy it anyway?

6 MS. MORRISEY: You can.

7 DR. GROSCH: You know darn well a lot of people will.

8 MR. HERSEY: But we have the technology that can
9 devise this sort of thing, so can the technology devise
10 protections against it.

11 DR. GROSCH: Well said.

12 MR. WEDGEWORTH: It is not true because the technology
13 is not the problem. It is not the problem at all. Anybody
14 around this table could devise a machine to take care of
15 those kinds of problems, but that is not where the resist-
16 ance is. We started this discussion several years ago
17 with representatives of publishers and author communities.
18 We said, "Fine. You can design any system that you wish;
19 just do not make us responsible for collecting and transmit-
20 ting the information."

21 MR. HERSEY: That is a different question.

22 MR. WEDGEWORTH: But that is the heart of the
23 dilemma because that is the most difficult part of it.
24 The technology part of the question is the easier part
25 of it.

26 DR. GROSCH: Let me entertain you again. There is a

1 big flap going on about coding for security, not just for
2 privacy, but for commercial value, for military security,
3 and what have you. There is a suspicion afloat in the
4 trade that the security that has been selected, the level
5 of security that has been selected is just such a whirl
6 that no one except a very large and powerful organization
7 or the National Security Agency or the Internal Revenue
8 Service could break the code. In other words, technology
9 is indeed capable of unlocking any lock the technology
10 locks, but only at great expense. The CIA could afford to,
11 but you and I could not.

12 MS. WILCOX: It seems to me, too, that if you are
13 trying to catch the violators, what you really need to do
14 is attach a lie detector or something to the individual
15 when he goes to the machine and uses it, because then you
16 could really catch him and until you do that --

17 MS. KARPATKIN: Sweaty palms lights the machine.

18 DR. GROSCH: That is possible, too.

19 (Laughter.)

20 DR. GROSCH: We are going to have probable finger-
21 print identification reading devices working pretty well
22 within a few years. SRI and the National Laboratory in
23 England have you sign your name on a goody four or five
24 times and a green light goes on and says your average
25 signature is recorded; and the next time you sign it it
26 says, "Okay, that is him." Fingerprinters are going to

1 look at the little tiny details of the fingerprint and
2 classify them, and when they do that, then a single print
3 will not be enough. You always must have a full hand
4 rather than a single print. You can prove it if you leave
5 a print on the murder weapon and then you catch a guy and
6 you compare his thumb with the clue and tell that it is
7 him, but you cannot go down to the FBI with one thumbprint
8 and say, "Who is this?" It takes all ten.

9 MS. KARPATKIN: I did not know that.

10 MR. MILLER: You have been watching too much television.

11 MR. LEVINE: I have been so careful.

12 DR. GROSCH: Times ten, it is enough. And they have
13 a classification scheme worked out to search through the
14 files. Now what we are going to try to do is look at
15 each little bifurcation and loop in a numerical code and
16 search that in very much more complex computing schemes
17 and they ought to be able to identify single prints, so
18 you might watch it on the Xerox machine before using it
19 first. I hope that does not happen.

20 MR. LACY: It is all right to use the machine, but
21 what about the traffic warrant?

22 (Laughter.)

23 DR. GROSCH: That is exactly what we are all afraid
24 of.

25 MR. NIMMER: Aren't there methods of avoiding self-
26 incrimination and fingerprinting and all the rest? Doesn't

1 it perhaps turn on the motivation to cheat? If we are
2 talking about libraries or supervised machines and if the
3 consumer is going to pay the copyright royalty, the
4 librarian has no motivation to cheat. At least there is
5 nonprofit. Then it seems to me you do not need a lock
6 on the machine. That is, you trust the librarians to not
7 cover up the insignia if it is copyrighted and if it is
8 not, the machine will register "No fee due."

9 On the other hand, the problem arises where you
10 have unsupervised machines, it seems to me, but then the
11 answer might be, I ask tentatively, a copyright fee, a
12 fraction of a cent, or whatever it is, on all reproductions
13 whether copyrighted or not. But then the fund only pays
14 for the copyrighted work.

15 DR. GROSCH: Yes. That thought did occur to me, that
16 we might simply have an overall fund that all copying gets
17 dumped into and then chop it up among them.

18 MR. NIMMER: For the person who does not want to pay
19 a copying fee for his uncopyrighted reproduction, then he
20 goes to a supervised machine and there is a variation.

21 DR. GROSCH: Suppose that the supervised machine is
22 used to produce statistics and indications of how much
23 each author or each copyright holder is copied and then
24 you have a gross amount collected from unsupervised
25 machines? It gets dumped into the same pot -- and I am
26 just thinking out loud, you understand.

1 MR. MILLER: It is an interesting discussion, but
2 obviously our function in talking to Congress is not to
3 build them a better mousetrap, whether it is a technolo-
4 gical mousetrap or it is a spring-gun. It is perfectly
5 clear that no system is going to be perfect; perfectly
6 clear. So what we really should be asking ourselves is
7 is there a police mechanism, an enforcement mechanism
8 that has reasonable accuracy in the 90 to 95 percent
9 range of picking up all -- let us call them compensable
10 uses for the time being. Is that system sufficiently
11 foolproof so that violations of it would not reduce the
12 90 to 95 percent pickup to something like two percent
13 enforcement, because the gap will be replaced. Now I
14 would think that when you are talking about the copyright
15 fee that would be charged for Xeroxing this one sheet of
16 paper given the billions of pages that are Xeroxed, the
17 copyright fee will be so infinitesimal that there will be
18 zero incentive even to go to get out a pair of scissors
19 to cut off the bar. And the ramifications of violation
20 for installation users will be so significant, both in
21 a moral, ethical, and in a legal sense, that your major
22 institutions are not going to engage in it. Your slug on
23 the street will not even know how to do it and for your
24 hobby group who may attempt to, one-tenth of one-tenth of
25 one percent of the population, they have enough sense to
26 know it is not cost-effective to block out the bar.

1 DR. GROSCH: They may do it anyhow.

2 MR. MILLER: It will not make a bit of difference,
3 really. The next question is, even if you can devise a
4 technological system that is 90 percent effective, that
5 is not vulnerable to fail-safe to any degree, is whether
6 the system will have such heavy transaction costs so that
7 you are paying a buck to pick up the penny, at which
8 point you have got to think about bar coding, that it is
9 cost-effective. Translation costs or illustrative costs
10 on a machine, as you have just been talking about, is so
11 significantly cheaper in a transaction cost sense so that
12 even though it is less precise it is still socially more
13 desirable. No one sits around and writes down how many
14 copyrighted pieces of music that are played. There is a
15 probabilistic analysis of what is going on and that is
16 good enough. As long as the overall revenue makes the
17 troops happy. Once you have gone through that sort of
18 a discussion in your own head you have to go back to some-
19 thing that Dan Lacy was talking about during your initial
20 presentation. That is, if you have got that sort of a
21 back-up capacity that is going to make certain uses or
22 all uses inside a computer system compensable, have you
23 not now defeated the argument that says the copyrightable
24 point is input into the system? It seems to me that is
25 one of the major philosophical questions that this
26 Commission really must address itself to; looking at

1 several strategies, one of which says you have got
2 technological backup in terms of making uses compensable
3 at the output side. What now is left to the argument with
4 regard to input and the implication that making input a
5 copyrightable event has, on a wide variety of uses, we
6 would all agree a fair use.

7 Now, you go back into putting Encyclopedia
8 Brittanica into a library. You pay 500 bucks; you put
9 it up on the shelves and over a time, a theoretically
10 infinite number of people can go to the Encyclopedia and
11 say, "Charlemagne was born in the year" -- I forget the
12 year -- as opposed to putting it into the Los Angeles
13 Public Library computer or UCLA's computer and making it
14 available on that system, to again an infinite number of
15 people, the concern being that fewer people will go to
16 the higher level than will go to the computer system; or
17 if it is a library system they will buy 30 \$500 books
18 rather than one Brittanica and input it, make it available
19 through access terminals and 30 branches of the library.
20 If you have got this backup system and you shift your
21 concept of compensable event from major hard copy printout,
22 that is the classic notion of infringement of a book, the
23 compensable use of the data base; namely, the Brittanica
24 in machine-readable form and say, "If you want to know
25 when Charlemagne died through this terminal, it is going
26 to cost you one one-hundredths of a penny," then you have

1 got no argument, or reduced significance to the argument
2 that it is input that caused the copyright toll.

3 MR. LACY: I do not agree with that. The agreement
4 at the point of input might well be that it would be
5 one-hundredth of a cent use or 50 cents a use or \$1.00
6 a use, or a quarter a use, depending on the value.

7 But let us suppose there was a company, for
8 example, that put out a citator that listed all decisions
9 subsequent to a case and this is a very valuable com-
10 modity and people pay a great deal for this information
11 and somebody wanted to put that in a data base so it
12 could be accessed on line and they have no right to do
13 this and you say, "You cannot do that." Who determines,
14 then, what the output charge is? The agreement that was
15 made at the point of output might be that the tollable
16 thing was going to be output and as technology would
17 measure it, but somewhere the right to agree or disagree --

18 DR. GROSCH: Surely this is just the equivalent of
19 setting the price of a printed copyrighted work; that you
20 have the right to say that the encyclopedia sells for
21 500 bucks a copy because you remember how much it cost
22 you to build it.

23 On the other hand, you can sell a cruder
24 child's encyclopedia for a great deal less; each of them
25 protected by --

26 MR. NIMMER: In your case, Dan, the laws could say,

1 "Upon the printout of one citation there is nothing due
2 for feeding this Shepard's citation into" --

3 MR. LACY: I did not say anything about Shepard.

4 MR. NIMMER: Or whatever. But any printout of one
5 citation is an infringement unless it has been consented
6 to which in turn means unless the price --

7 MR. LACY: Nobody sends X-hundred dollars unless they
8 have made the agreement.

9 DR. GROSCH: Which you are going to see, you will be
10 able to buy a tape also or some kind of machine and it
11 will undoubtedly cost a lot more than a printed set.

12 MR. MILLER: But it will probably cost a lot less than
13 for an individual library to punch it in themselves.

14 DR. GROSCH: Exactly so. That will be a marketing
15 device.

16 MR. MILLER: Let me back up and articulate the
17 philosophical point that Bob has made. Dan knows what
18 it is; we went through this in 1967. The philosophical
19 point Bob was making with making input an infringeable
20 event, two concerns:

21 First, if you say you cannot input without
22 consent, then you are potentially creating a barrier to
23 the utilization by a new technology. I am just stating
24 it. This is a dire conclusion.

25 Second, if you are making input an event that
26 requires compensation, then you are requiring everybody

1 to pay money when some subset of those inputtings will
2 be inputting for a use that has historically been thought
3 to be non-infringing for use, non-compensable.

4 MR. PERLE: You made some statements there.

5 MR. MILLER: I know. I understand, Gabe. I trust
6 people understand what I am doing. I am trying to focus
7 some discussion on some issues that we have.

8 MR. PERLE: I think you made one false assumption.
9 Traditionally, you buy a book and, here you get your
10 book for nothing if you have free input.

11 MR. MILLER: Do I buy the book to input it just as I
12 bought the book to put it on the library shelf?

13 MR. PERLE: Then you are buying the tape. That is
14 equivalent to payment for input.

15 MR. MILLER: I buy a book; I can either sit and read
16 it and memorize it or I can put it into my machine.

17 MR. PERLE: You have not bought the tape; you bought
18 the book.

19 MR. MILLER: I bought the book in both cases.

20 MR. PERLE: I do not know that --

21 MR. LACY: What keeps you from borrowing it from the
22 library? I do not see the ownership on which print evolves
23 has any right to input it into a machine.

24 MR. MILLER: Before you were playing with a very
25 sympathetic hypothetical from your proprietary, from the
26 proprietary; namely, you slipped the Britannica in there

1 and, my God, the entire population can research it for
2 one lousy \$500 purchase.

3 Let us play with my hypothetical. You are an
4 academic, God help you. You want to close your ears,
5 John? You are not going to like this.

6 You want to know, unfortunately, what a lot of
7 academics do, syntactically or quantitation. They plug
8 one of John's novels -- let us make it all his novels in,
9 and they want to do sentence structure analysis. They want
10 to do key therapy.

11 DR. GROSCH: Which would prove he did not really write
12 it, in fact.

13 MR. MILLER: Whatever. Classically, that academician
14 could go to the library, pull down the book, and read the
15 book and do all the syntactical analyses manually and we
16 know that is fair use. No one would say you are infringing.

17 Now, the university has a big computer so he
18 plugs the book in and through some software package he
19 does the same syntactical analysis by computer. Should
20 that be affected by the Copyright Laws?

21 MR. LACY: If he erases it when he gets through with
22 the tape, there is --

23 MR. MILLER: But if the machine could control the
24 possibility of any subsequent use, not within the ambit
25 of the initial fair use, then the security problem is
26 solved.

1 MR. LACY: I mean, the point is, I would agree the
2 input has been made a fair use because it was a fair use
3 of the work, but that does not mean that, absent the fair-
4 ness, the input would not have been an infringement.

5 MR. MILLER: So we are talking about one --

6 MR. LACY: Input is certainly subject to fair use.
7 But to input it, leave the tape on the library shelf, is
8 certainly an infringement. I agree the agreement would be
9 greatly fortified if you did not say that little bits and
10 pieces of output are also protected, but when you say
11 input of the total work is protected and output of the
12 bits and pieces is protected, it is a disingenuous argu-
13 ment.

14 MR. NIMMER: You are saying you cannot have both or
15 it is not justified to have both, but suppose they do have
16 the protection of the printout; you still even have a
17 minimal kind of printout, the year Charlemagne was born,
18 et cetera.

19 MR. LACY: Then the question becomes academic because
20 nobody in his right mind would make an input. Isn't it
21 conceivable if somebody sends me a work I could go
22 ahead and set the whole thing in type without his permis-
23 sion as long as I did not print a single copy of it, but
24 it just does not go --

25 MR. NIMMER: We are really talking about in making
26 a contract between the owner of the Encyclopedia Britannica

1 and the computer user, should that contract be geared to
2 the act of input or should it be geared to the act of
3 printout? It is just a question of which one makes more
4 sense in terms of a useful way to pay for it.

5 MR. MILLER: Dan does sort of do the Solomonic thing
6 by saying that -- I think he has backed off an inch or so.
7 I think what he is now saying is he would recognize that
8 certain inputs are for fair use.

9 MR. LACY: In point of fact, I was just about to
10 make the same example that you did before only I was going
11 to --

12 MR. MILLER: That makes the decision as to whether
13 the input is compensable or not the intent of the inputter
14 with regard to the expectation as to the output.

15 MR. LACY: I think it gives them a defense. I think
16 the law would be presumed infringement. If I sued him,
17 he could offer as a defense that he used it only for this
18 one purpose and had erased it.

19 MR. MILLER: Whether the regime of distinguishing
20 between and among different inputs with regard to the
21 nature of the utilization of the work, whether that is
22 not too difficult to administer --

23 MR. LACY: Isn't it far more difficult to put the
24 burden upon the proprietor?

25 MR. MILLER: I do not think that is. I could, for
26 example, see that every input is compensable as long as

1 you developed a rate structure.

2 MR. LACY: But just with permission.

3 MR. MILLER: Well, the permission is both because of
4 the access difficulty. You have to worry about the
5 viscosity of the system; your ability to plug them in
6 when you need them, not when an exchange of correspondence
7 happens to get handled.

8 MR. LACY: Plus a certain amount of fair use. Nobody
9 figures that he has got to sit down and write for all the
10 permissions that he does on things that are printed, we
11 know.

12 MR. PERLE: You also presuppose there that the social
13 value of access is more important than the need to compen-
14 sate the author, if you will.

15 MR. MILLER: I presupposed that, Gabe? Me?

16 MR. WEDGEWORTH: Is there any question about that?

17 MR. MILLER: It is a debatable point, I will admit.
18 Lurking under that is the compulsory license.

19
20
21 DR. GROSCH: You are going to have technological
22 aids, however. One is, of course, the fact that most
23 books and journal articles are going to be produced in
24 machine-readable form very soon. There will be a mag tape
25 or something in the system ready for chief input. Another
26 one is the reasonable introduction of optical character

1 reading and other keypunch elimination things. We were
2 thinking seriously at the Bureau of Standards even
3 as far back as six or eight years ago, about particularly
4 reading all the chemical patents, for instance, because
5 we got to the patent literature-type phase and they did
6 not have a lot of diagrams. Most of their stuff was just
7 fiddle-faddle and we were very seriously thinking that we
8 could put the patent into a machine six or eight years
9 ago. They have not done it yet, but that is the Government.

10 MR. LACY: Practically a great bulk of publishing
11 very soon will be, I am --

12 MR. MILLER: Isn't it possible that the input question
13 is a transitory question to the extent that all books --

14 MR. LACY: I have never heard of anybody who really
15 had a problem with that.

16 MR. MILLER: If they are right, as we all know that
17 Linotypes are going to be driven by machine-readable tape
18 so that it is commercially possible to vend the tapes at a
19 price lower than input costs for a third person, no one
20 has the incentive to input without permission.

21 MR. LACY: I do not think --

22 DR. GROSCH: I like to think of the good side of the
23 future; mind you, there are also bad sides. I like to
24 think of the good side of the future that is very much
25 like science-fiction-games machines in which essentially
26 all the information in the society is linked together in

1 a network. Hopefully, there would also be an automatic
2 safeguard so only appropriate people could get authorized
3 information out of it, but if that were so, you really
4 would have access to virtually every fact in society,
5 entire data bases through mechanical means. The alterna-
6 tives would still exist. You would still have handsomely
7 printed books; you would still have things you could read
8 on airplanes or take to bed at night, but in addition you
9 would have the machine way to every fact in the society.
10 I am inclined to think this will come, also. It will not
11 come in this century, though, certainly. So what you are
12 really talking about is a way of short term that revolves
13 around print and involves different ways of recording
14 things, but looking far down the road to a time in which
15 everything will be machine-available, inexpensively
16 machine-available. And that, I think, you might very well
17 think of what you do in the future in such a way as not
18 to require an overturn when you go into the more distant
19 future and I think I would say, you know, without trying
20 to force it on you, that the control of output is a more
21 practical way of doing that. Ultimately have to have
22 control output.

23 Listen, I do have to go.

24 JUDGE FULD: Thank you and if I could say, as we get
25 further advanced, we would like to feel free to ask you
26 to attend again.

1 DR. GROSCH: It is cheap to come to Los Angeles; if
2 you want me to come to Washington, you have to buy me an
3 airplane ticket.

4 JUDGE FULD: We will do that.

5 MS. KARPATKIN: Did we ask him?

6 MR. LEVINE: We asked him.

7 MS. KARPATKIN: Shouldn't we pay for his plane fare?

8 MR. LEVINE: If it is something --

9 MR. WEDGEWORTH: What was your intent when you
10 invited him?

11 MR. LEVINE: Our intent was, I guess, educational.
12 I am not sure. I have to talk to Mike. I assume from
13 his last comment that we were not compensating him for this.

14 JUDGE FULD: Are we going to take this up now?

15 MR. HERSEY: It does not show changes.

16 MR. LEVINE: No, it does not because it was just not
17 feasible. We can, perhaps --

18 MR. NIMMER: Because you could dictate.

19 JUDGE FULD: Read it out loud as we go along.

20 MR. LEVINE: I can tell you, I think, precisely
21 where the changes are. The first paragraph is the same
22 as the first paragraph in the introduction.

23 The second paragraph we have eliminated the
24 word "correct" in the last sentence so that the Commission
25 merely considers the guidelines to be a workable and fair
26 interpretation.

1 The third paragraph represents fairly sub-
2 stantial change. It begins originally on the bottom of
3 Page 3; it continues to the first line on Page 4 and then
4 the rest of that paragraph is new, beginning with the
5 words "those published."

6 MR. HERSEY: I am lost there. Would you repeat that,
7 please?

8 MR. LEVINE: I am sorry. On the bottom of Page 3
9 of the old draft.

10 MR. HERSEY: The adverb is left out of that first
11 line; right?

12 MR. LEVINE: Yes. The adverb is left out.

13 MR. HERSEY: Then?

14 MR. LEVINE: Then the first line on Page 4 is
15 included to the end and the rest of Page 4 is not included;
16 it is eliminated.

17 JUDGE FULD: After the --

18 MR. LEVINE: After the dash in the third paragraph is
19 all new "those published within five years prior to the
20 date of the request," through the end of that paragraph.

21 We then go to the --

22 MR. HERSEY: Wait a minute, now. This is all new
23 material we did not discuss this morning.

24 MR. NIMMER: It is putting in language that we did
25 discuss.

26 MR. LEVINE: I will just try to point out the

1 differences and then we can come back to the differences.

2 The last paragraph in the new draft is the
3 same as the changes that we made to the last paragraph in
4 the old draft.

5 MR. NIMMER: In the last paragraph are you talking
6 about, on Point 2?

7 MR. LEVINE: Yes. "The point has been made that the
8 present system," and that conforms with what we discussed
9 this morning and which there was, I think, complete agree-
10 ment.

11 We felt that if we were leaving in anything that
12 talked about what copying could be done within five years,
13 that we had to say what the position was as to copies after
14 five years. In fact, we used short language. We have
15 said, "The guidelines do not specify what aggregate
16 quantity of copies of an article or articles published
17 in periodicals, the issue date of which is more than five
18 years prior to the date when the request for the copy
19 thereof is made, constitutes a substitute for a subscription
20 to such periodical. The meaning of the proviso to Section
21 108(g)(2) in such case is left to further interpretation
22 by future guidelines, legislative action, or judicial
23 decision."

24 MR. NIMMER: Good, I think.

25 MR. FRASE: What do you mean by "future guidelines"?

26 MR. WEDGEWORTH: That was the part I thought we

1 discussed at length and we had agreed that we were not
2 going to telegraph decisions of that type.

3 MR. PERLE: This is in the introduction. When you
4 get to the guidelines, you will not see it in the guide-
5 lines itself. This is by way of explanation of the
6 guidelines.

7 MR. FRASE: My question is, what are the guidelines?

8 MR. PERLE: Wait until you get to the guidelines and
9 I think we can discuss it as a whole. What the guidelines
10 are are an attempt -- and we hope a successful attempt --
11 to deal with a problem that has been a terrible obstruction.

12 MR. FRASE: Given some life and meaning by being put,
13 say, at that -- "enacted by the Congress but after the
14 revision bill is over," then what does the term "guidelines"
15 mean?

16 MR. LEVINE: There could always be guidelines and
17 agreement.

18 MR. FRASE: Private agreement between parties?

19 MR. LEVINE: There was something back in the Thirties
20 called the Gentlemen's Agreement on photocopying.

21 MR. PERLE: What are the guidelines of classroom
22 using?

23 MR. FRASE: Those are endorsed by the Congress.

24 MR. PERLE: This will be, too.

25 MR. FRASE: But future ones?

26 MS. WILCOX: Future?

1
2
3 MR. PERLE: Further interpretation, whether by guide-
4 lines or legislative agency or judicial decision.

5 MR. NIMMER: Whether by informally agreed upon
6 guidelines --

7 MR. PERLE: Or otherwise. "Left to further inter-
8 pretation." Make it "future interpretation." "To future
9 interpretation," comma, "whether by formal or informal
10 guidelines, legislative agency, judicial decision, or
11 otherwise."

12 MR. HERSEY: What is the value of "formal or informal"?

13 MR. NIMMER: What we mean is nongovernmental agreed
14 upon --

15 MR. PERLE: We will talk about the Gentlemen's
16 Agreement as opposed to classroom photocopying.

17 MR. WEDGEWORTH: It has no status in this case unless
18 it is accepted by Congress, so what you are really talking
19 about is additional guidelines rather than "formal or
20 informal." It is something other than what is presented
21 here.

22 MR. LEVINE: Excuse me --

23 MR. PERLE: I was under the impression that it was
24 necessary in order to make sure that after five years
25 these guidelines do not apply.

26 MR. WEDGEWORTH: I thought that is what the previous

1 sentence said.

2 MR. HERSEY: What is the meaning with ending the
3 sentence at "interpretation"?

4 MR. LEVINE: Fine. Let me just suggest that the
5 guidelines themselves anticipate some further reviewing
6 and revision in the last paragraph, paragraph No. 5 in the
7 guidelines. All the parties agree that there should be
8 review and presumably if there is review there is some
9 action that will be taken as a result of that review, and
10 I would think that might be future guidelines.

11 MR. PERLE: I guess we will leave it "in such case
12 is left to future interpretation," period. Okay?

13 MR. WEDGEWORTH: That would be fine with me.

14 MR. PERLE: Sure it is okay?

15 MR. WEDGEWORTH: You are changing the word now from
16 "further" to "future interpretation"?

17 MR. PERLE: Yes. We are doing nothing about it right
18 now.

19 MR. LACY: You are not interpreting it either now or
20 in the future; it is left to interpretation.

21 MR. PERLE: I cannot look in the minds of people who
22 are going to be carping, if you will excuse the expression.

23 MR. WEDGEWORTH: I do not want to belabor this point,
24 but I thought that the point that I made this morning was
25 that we could simply say that they do not cover those
26 other cases and point back to the language itself, rather

1 than trying to tell people. Maybe when we get over to
2 the guidelines themselves we can come back to this.

3 MR. LEVINE: Why don't I read 1(a) of the guidelines
4 and you can compare it as I read it slowly with what went
5 before, because I think it is too difficult to explain
6 how it has been changed.

7 "As used in the proviso of Subsection
8 108(g)(2), the words 'such aggregate quantities
9 as to substitute for a subscription to or
10 purchase of such work'" shall mean:

11 "(a) With respect to any given periodical
12 (as opposed to any given issue of a periodical),
13 filled requests of a library or archives (a
14 'requesting entity') within any calendar year
15 for a total of six or more copies of an article
16 or articles published" --

17 MR. PERLE: Something has been left out.

18 MR. LEVINE: No. "Published in such periodical
19 within five years prior to the date of the request. These
20 guidelines specifically shall not apply, directly or
21 indirectly, to any request of a requesting entity for a
22 copy or copies in any issue of the periodical, the
23 publication date of which is more than five years prior
24 to the date when the request is made."

25 MR. PERLE: That is wrong. That is wrong.

26 MS. DOUGHERTY: "These guidelines specifically shall

1 not apply, directly or indirectly, to any request of a
2 requesting entity for a copy or copies of an article or
3 articles published in any issue of a periodical."

4 MR. PERLE: "Copy or copies of an article or articles."

5 MR. WEDGEWORTH: Where are we?

6 MR. PERLE: On the twelfth line.

7 MR. LACY: Here you are, John.

8 MR. HERSEY: Thank you.

9 MR. PERLE: You must insert after "copy or copies,"
10 the words, "of an article or articles published."

11 MS. DOUGHERTY: "In any issue of a periodical, the
12 publication date of which is more than five years prior
13 to the date when the request is made. These guidelines
14 do not define the meaning, with respect to such a request
15 of '...such aggregate quantities as to substitute for
16 subscription to [such periodical].'"

17 MS. WILCOX: What words do we add in there?

18 MR. PERLE: "Of an article or articles published."
19 And the word " " is to come before "subscription."

20 MR. LEVINE: "For a subscription."

21 MR. PERLE: It is redundant but it clears up any am-
22 biguity.

23 MR. LEVINE: If you have taken any post-graduate
24 law degree, the whole thing is prolix, that is for sure.

25 This is (b):

26 "With respect to any other material

1 described in Subsection 108(d), (including fiction
2 and poetry), filled requests of a requesting
3 entity within any calendar year for a total of
4 six or more copies or phonorecords of or from
5 any given work (including a collective work)
6 during the entire period when such material
7 shall be protected by copyright, subject to
8 the following terms and conditions:

9 "2. In the event that a requesting
10 entity shall have in force, or shall have
11 entered an order for" --

12 MR. PERLE: That is new, "or shall have entered an
13 order for."

14 MR. LEVINE: -- "a subscription to a periodical
15 or has within its collection a copy or phono-
16 record of any other copyrighted work, a copy of
17 which it desires to obtain from another library
18 or archives (the 'supplying entity') and the
19 material to be copied is not reasonably avail-
20 able for copying by the requesting entity itself,
21 the fulfillment of such request shall be treated
22 as though the requesting entity made such copy
23 from its own collection; provided that a library
24 or archives may request a copy or phonorecord
25 from a supplying entity only under those
26 circumstances where the requesting entity would

1 have been able, under the other provisions of
2 Section 108, to supply such copy from materials
3 in its own collection."

4 MR. LACY: We really should strike "is not reasonably
5 available for copying by the requesting entity itself,"
6 because what I think was originally meant was it was
7 reasonably available for copying by the requesting entity.
8 The way I read it now, if the thing is reasonably available
9 for copying, then these restrictions no longer apply. You
10 can copy even if it is illegal under 108, if you have got
11 it reasonably available for copying. It is a reversal
12 of what you really mean. That ought to be left out.

13 MR. PERLE: You are going to invoke the wrath of the
14 publishers, Dan.

15 MR. LACY: The publishers would be wrathed if it was
16 in there. Read it. What it says is that if the material
17 is reasonably available for copying then the subsequent
18 limitations do not apply.

19 MR. PERLE: It was intended that if the material is
20 reasonably available from your own collection, do not get
21 it from somebody else.

22 MR. LACY: Two different ideas got involved in there.
23 One idea was that if it was reasonably available for
24 copying you did not get any copy from anybody else at all;
25 you copied your own copy. But if it was not reasonably
26 available, then you could go ahead and get it from anybody

1 else, something you could not have done if it had been
2 reasonably available.

3 MR. NIMMER: Isn't that what it says?

4 MR. LACY: No. What it says, if it is reasonably
5 available, you can get no more than you could have done if
6 it was your own; but presumably if it is reasonably
7 available then you can get anything you want from the
8 other library, which is not what you mean. That is this
9 limitation.

10 MR. NIMMER: That is all before the semicolon, Dan.
11 Before the semicolon is not the reasonably available part.
12 It indicates to the circumstances under which you can get
13 it from somebody else, even though you have a copy yourself.
14 That is only when your copy is not reasonably available.

15 MR. LACY: The material to be copied is reasonably
16 available; then you do not have to treat it as a fulfillment
17 of a request from your own collection. The rest of 108
18 is not available.

19 MR. PERLE: I do not follow you.

20 JUDGE FULD: What would you insert?

21 MR. WEDGEWORTH: I think I understand. You have got
22 two ideas mixed up here and the source of it is the last
23 line under 2, "or has within its collection a copy or
24 phonorecord of any other copyrighted work, a copy of which
25 it desires." You start out talking about something that
26 you presumably do not have, but you have subscribed to or

1 entered a subscription --

2 MR. LACY: What you are trying to say, I think, is
3 what Irwin was trying to say.

4 MR. HERSEY: That was not his idea.

5 MR. LACY: Whose?

6 MR. HERSEY: It was in our original guidelines.

7 MR. LACY: If you have it and it is reasonably
8 available for copying, you do not make any copy from any
9 other library at all. If you own a copy or subscribe to
10 it and it is not reasonably available, then you can get
11 it from other libraries, but only to the extent you could
12 have if you had --

13 MR. HERSEY: That is the intent of this language.

14 MR. LACY: Right. But that is not what this language
15 is.

16 MR. HERSEY: If you put a comma after "periodical"
17 in the last line of the first page, then there is a new
18 category. That is, you have a copy but the copy is not
19 reasonably available.

20 MR. LACY: Suppose it is reasonably available? Then
21 what is the situation?

22 MR. HERSEY: Then you are not allowed to copy it.

23 MR. LACY: It does not say you cannot copy it if it
24 is reasonably available. All it says is if it is not
25 reasonably available --

26 MR. HERSEY: Both conditions have to be.

1 MR. WEDGEWORTH: Why shouldn't you be allowed to copy
2 it if it is available?

3 MR. HERSEY: You can copy in-house, but you cannot
4 borrow from another library.

5 MR. LEVINE: You can borrow from another library and
6 make only as many copies as you could if you were doing it
7 in-house.

8 MR. WEDGEWORTH: I do not think that makes any
9 difference and I am sure we never intended to imply that.
10 If an employer owns a copy, suppose it does not have a
11 copying machine and sends it off across town to get a
12 copy from somebody else; what difference does it make?

13 MR. HERSEY: I believe this condition was put in for
14 the librarians because the argument was made you may have
15 a subscription but you cannot -- you may have a copy of the
16 book with pages missing.

17 MR. LACY: The librarians mentioned this as one of the
18 kinds of explanations of why they would need the copy in
19 another library, even though they owned the book, whether
20 it was lost or damaged or got out of circulation or the
21 copying machine was broken down. But I do not think that
22 was meant to be a condition.

23 MR. HERSEY: This is not new. This was in the guide-
24 lines that Gabe drew up after our June meeting and it has
25 never been a question up to this point by anybody.

26 MR. WEDGEWORTH: I think it says what we generally

1 thought it said and we have never really talked about
2 the alternative explanation that you have given.

3 MR. LACY: I am saying the fulfillment of such a
4 request being treated as though the requesting entity
5 made such a copy from its own collection, which inputs
6 all the restrictions of 108 into this, only becomes
7 operative if the copy is not reasonably available.

8 MR. WEDGEWORTH: That is right.

9 MR. LACY: What I am trying to say, it seems to me
10 that the fulfillment of the request ought to be treated
11 as though it were from its own collection, whether you
12 have a copy or not, and ought to be subject to the same
13 restrictions. Why wouldn't the restrictions on copying
14 from your own collection be applicable to a copy you get
15 from somebody else, even though your copy was available
16 for copying?

17 MR. LEVINE: It seems you could eliminate the line
18 and the material to be copied is not reasonably available
19 for copying by the requesting entity itself." Or supposing,
20 does it help it if we put a period after "a collection,"
21 and eliminate "provided that," and start a new sentence
22 with "library or archives may request such a copy or
23 phonorecord"?

24 MR. LACY: If you are meaning to say that a library
25 that has subscribed to a periodical can get a copy from
26 another library only if its copy is not reasonably

available; is that what you mean?

JUDGE FULD: That is how I read it.

3 MR. HERSEY: Dan, what did you substitute for before
4 "and the material"? If you have your earlier guidelines
5 in front of you, in the material that we have eliminated
6 on Page 4, there is a restatement of this thing, which
7 uses the --

8 MR. WEDGEWORTH: Page 4 in the guidelines?

9 MR. HERSEY: Yes. Subsection 2, at the top of that
10 page. There is a restatement of this.

11 MR. LACY: What is intended to be the case if the
12 library has a copy which is conveniently available for
13 copying? Are you intending to say it may not require or
14 ask for a copy from another library?

15 MR. PERLE: No.

16 MR. LACY: What do you mean to say, assuming it is
17 available?

18 MR. PERLE: Only to the extent and the same way that
19 you can do it yourself.

20 MR. LACY: Isn't that exactly what you are saying,
21 if it is not available for copying? You are setting up
22 two different situations: one is, you have got a copy
23 for copying; and another is, if it is not available.

24 MS. WILCOX: I think it is further confused because
25 you have added in there "or shall have entered an order
26 for," because that does not cover -- that is another

1 condition. That is added into this because what you are
2 talking about, obviously, you cannot have something lost
3 that you just placed an order for or missing or not
4 reasonably available.

5 MR. LEVINE: That is right.

6 MR. PERLE: If the truth be known, I suppose then
7 2 could start with the semicolon.

8 MR. LACY: It does not help the librarians. It is
9 quite the other way around. It says all these limitations
10 we are trying to put --

11 MR. PERLE: You could strike the whole thing and
12 start the whole thing with the "provided that." Strike
13 "provide that," and say "a library or archives may
14 request a copy." Right?

15 Start Paragraph 2 with the fifth line from the
16 bottom on Page 2 of Paragraph 2 with the words "a library
17 or archives."

18 MR. LACY: I am sorry. Where?

19 MR. PERLE: If you forget everything that goes before
20 it. All you have to say --

21 MR. LACY: Where are you now?

22 MR. PERLE: On Page 2. Forget everything that goes
23 before that and start the whole paragraph with "a library
24 or archives may request a copy or phonorecord from a
25 supplying entity only under those circumstances," and
26 forget everything that goes before it. Strike everything

1 else.

2 MR. LACY: Good.

3 MR. LEVINE: What do you mean by "everything else"?

4 MR. PERLE: All of 2.

5 MR. LEVINE: What is the point of (a) then? Why the
6 five-copy restriction?

7 MR. NIMMER: Isn't the beginning of 2 removing the
8 five-copy restriction?

9 MR. LACY: No. You cannot.

10 MS. WILCOX: Yes it is.

11 MR. NIMMER: Where you have the subscription and now
12 you are eliminating the removal.

13 MR. LACY: Up to then you have two different -- what
14 I thought we were trying to get, two different cases. It
15 does not have; has not owned; has not ordered anything.
16 Under that condition it can order up to five copies, but
17 no more.

18 Clause 2 applies when it owns or has ordered the publica-
19 tion in which case it can order whatever it could have if
20 it were reproducing it from its own copy. Now, whether
21 or not a copy is conveniently available seems to me to
22 have no relevancy.

23 MR. PERLE: Taking it back, the reason we have it
24 phrased this way is because we are interpreting the
25 meaning of the words "substitute for a subscription or
26 copy." So what happens if you happen to have it in your

1 collection? The inter-library loan transaction applies
2 only to inter-library loans. You cannot have an inter-
3 library loan for a copy which is substituted for a
4 purchase or a subscription. "But, fellows, I already
5 have one. So what do I do now?" What I do now is I
6 say, "Okay. I can do the same thing on an intra-library
7 basis that I could have done myself."

8 MR. LACY: I am saying the conveniently available --

9 MR. PERLE: Should not be affected.

10 MR. LACY: Reasonably available could have got in
11 before we said this business. You cannot do anything with
12 an intra-library loan that you could not do if it were
13 in the collection before. Before that was introduced
14 there was a concept you could not, if you had the
15 publication. But the way it is drafted now, it sets up
16 three situations: A, you do not own the book and have not
17 subscribed, five copies; B, you own it but it is not
18 conveniently available, in which case Section 108 governs;
19 and you have a Class C, you own it and it is conveniently
20 available and nobody says what the limitation is.

21 MR. NIMMER: Then it is back to the five copies.

22 MR. PERLE: If your copy was reasonably available.

23 MS. WILCOX: I cannot imagine anybody wanting to do
24 this because the economics of it do not make sense.

25 MR. NIMMER: But the structure is 2 replaces 1(a).
26 1(a) has the five-copy restriction. 2 is a substitute for

1 the five-copy restriction only if you have a subscription
2 and it is not reasonably available.

3 MR. LACY: This whole thing you are trying to put in
4 saying you have to comply with 108, you have triggered
5 only with the unavailability. It is exactly the opposite.

6 MR. HERSEY: I think if we leave out about the
7 material phrase, as Dan is urging, it is still all right.
8 That really describes the borrowing libraries motive for
9 wanting a copy.

10 MR. PERLE: You want to take out "and the material"?

11 MR. HERSEY: What happens then? Is that all right,
12 then?

13

14

15

16 MR. PERLE: Irwin and Charles said it has got to go
17 back in.

18 MR. LACY: Has no copies available from anywhere else
19 and you have not said that either, if that is what you mean.

20 MR. PERLE: I am perfectly willing to take it out.

21 MR. LACY: What you are saying now is none of these
22 other limitations that you are putting in operate.

23 MR. PERLE: I think it is meaningless.

24 MR. LACY: I agree with you.

25 MR. LE... One point that Gabe has been making
26 that becomes more apparent now is that the numbering is

1 wrong. The top of the page should not be No. 1. There
2 should be an A and 1 should be where 2 is because that is
3 a --

4 MR. PERLE: Modification.

5 MR. LEVINE: -- modification. Thank you.

6 MR. PERLE: 1(a) and (b), the overall guidelines
7 say everything in it. This is a dangling participle.

8 MS. WILCOX: Are you saying that if you have a
9 subscription it also is counted in the five copies?

10 MR. PERLE: No.

11 MS. WILCOX: Then does this become (c) or are you
12 saying this is not 2 any more?

13 MR. PERLE: 1 should not be 1. The guidelines are
14 all (a) and (b). The following terms and conditions are
15 all modifications on it, so that 2 would go back to 1;
16 there would not be a 1 where 1 is now.

17 MR. NIMMER: Wait a minute. Isn't 2 a situation
18 where the guideline of five does not apply? It is an
19 alternative.

20 MR. PERLE: No, it is not. Five still applies.

21 MR. NIMMER: The five does not apply if you make your
22 own copying right from your -- if you do not go inter-
23 library. Now 2 is saying an inter-library loan, where
24 you have your own subscription, will be treated as if it
25 were not, so the five does not apply to whatever you could
26 do for yourself.

1 MR. LEVINE: That is right.

2 MR. PERLE: That is right.

3 MR. NIMMER: So 2 is an alternative to (a) and it
4 is separate.

5 Furthermore, in answer to Dan's point, what
6 happens if it is reasonably available is that the
7 alternative does not apply, which means you are back to
8 the five limitation. Maybe you want that; maybe you do
9 not. But it does not leave it hanging; there is an
10 alternative. There is either the five limitation or
11 inter-library, if it is not reasonably available.

12 MR. PERLE: So we have to strike "any material that
13 is not available."

14 MR. LEVINE: Not necessarily.

15 JUDGE FULD: I think it belongs in.

16 MR. NIMMER: If that is the deal.

17 MR. WEDGEWORTH: It does not make sense if you
18 do it. Then it is not an alternative to what you
19 presented before.

20 MR. LEVINE: So we leave it in.

21 JUDGE FULD: This is what we intended, the way it
22 is written.

23 MR. LEVINE: I am going to do an in-depth study on
24 syntax.

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1
2 MR. HERSEY: Where are we?

3 MR. LEVINE: Now we are on 3. 3 now reads simply --
4 if I may use that word --

5 "No request for a copy or phonorecord of
6 any material to which these guidelines apply
7 may be fulfilled by the supplying entity unless
8 such request is accompanied by representation
9 by the requesting entity that the request was
10 made in conformity with these guidelines."

11 Okay?

12 4 and 5 remain exactly the same as they are
13 in the original draft.

14 MR. WELGEWORTH: So the only --

15 JUDGE FULD: Dan, I read 2 as reflecting what we
16 intended. Do you still feel it is incorrect?

17 MR. LACY: You mean as it was without change?

18 JUDGE FULD: 2.

19 MR. LACY: I think it is muddy draftmanship, but I
20 do not think it will do any great harm as long as people
21 do not think that that phrase about "not reasonably
22 available," as long as it is meaningless, it is all right.
23 If you think it means something, then I do not think we
24 know what it means and it could mean --

25 JUDGE FULD: I think it applies only if it is not
26 available. And we go back, as we said.

1 MR. LACY: You should suggest two alternatives:
2 one, set a criteria if it is reasonably available for
3 copying; another set of criteria applies if it is not
4 available. If you say what applies if it is not; if you
5 do not say what applies if it is available, then you just
6 leave --

7 JUDGE FULD: Then one comes permissible.

8 MR. NIMMER: 1(a) applies unless 2 stops 1 from
9 applying. If 2 is not met then 1 necessarily applies.

10 JUDGE FULD: 1 applies unless 2 is met.

11 MR. LACY: No. Because we will --

12 MR. WEDGEWORTH: Would it be helpful if instead of
13 just straight numbering, if you indicated in the margin,
14 because 2 cannot apply at the same time.

15 JUDGE FULD: I do not follow what you mean. I do not
16 understand.

17 MR. WEDGEWORTH: You have got the guideline which is
18 given in 1, but you have got another situation, which you
19 are trying to describe in 2.

20 MR. HERSEY: So you have another guideline.

21 MR. WEDGEWORTH: The cannot apply at the same time,
22 so if you had "or, 2, in the event that a requesting
23 entity shall have in force a subscription of or have
24 entered an order for or has within its collection," et
25 cetera.

26 JUDGE FULD: That seems clearer to you?

1 MS. WILCOX: That is what we had in the other one,
2 where it said that one of these items has to apply. But
3 we have left this out and this does not make sense.
4

5 MR. NIMMER: It does make sense in the sense that 1
6 starts with a reference of the proviso of 108(g)(2); now
7 you get to 2 and you are saying in those circumstances of
8 2 it is not going to be created as interplay; it is going
9 to be treated --

10 MR. WEDGEWORTH: Then no --

11 MR. NIMMER: Even though it is inter-library; right?

12 MR. HERSEY: I think these are two guidelines. I do
13 not see why they cannot be "1" and "2." In fact, I
14 would be in favor of "subject to the following terms and
15 conditions."

16 MR. WEDGEWORTH: I think that is misleading. That is
17 misleading, the last line in 1.

18 JUDGE FULD: I think that can come out.

19 MR. PERLE: All right. What would happen if you
20 eliminated all numbers?

21 MR. HERSEY: All what?

22 MR. PERLE: All numbers. Start a paragraph with (a)
23 and (b) under it.

24 JUDGE FULD: I think you want to keep numbers.

25 MR. PERLE: I do, too.

26 MR. NIMMER: But "subject to the following terms and
conditions" should come out.

1 MR. MILLER: I do, too. I think this document should
2 be input into a computer and the computer be instructed to
3 randomly spray the words on a piece of paper and the
4 result would be better than this.

5 MR. PERLE: Thank you.

6 JUDGE FULD: I think it reads --

7 MR. LEVINE: That is exactly how we did it.

8 MR. MILLER: I am treating myself as the average
9 lay person coming to this document fresh and it gives me
10 a headache. It really does.

11 MS. KARPATKIN: It is not public interest that keeps
12 us from doing it.

13 MR. LEVINE: Is it workable and fair?

14 JUDGE FULD: It seems clear to me.

15 MR. FRASE: How about this: Subheadings at the
16 committee when the library holds the work and then,
17 secondly, where the library does not hold the work.

18 MR. WEDGEWORTH: I think anything else would make
19 it worse.

20 JUDGE FULD: Take out the "subject to the following
21 terms and conditions."

22 MR. MILLER: Can I ask someone to tell me what
23 situation 2 is covering? I think I am going back to Dan's
24 point. Is it describing two different situations or
25 three different situations? It says in the event that a
26 requesting entity, 1, "shall have in force a subscription,"

1 or 2, "shall have entered an order for." Are those the
2 two situations?

3 MR. HERSEY: No.

4 MR. MILLER: Or are the two situations, 1, "shall
5 have in force a subscription but the material to be
6 copied is not reasonably available," and, 2, "shall have
7 entered an order for"?

8 MR. HERSEY: No. The two situations are, as I
9 understand it, the library has a single subscription of
10 a periodical or the library has a single copy of a book,
11 but in neither of those cases the material is reasonably
12 available, so it wants to borrow from another library.
13 Then it is only permitted to copy to the extent that
14 it could if it were copying from its own collection.

15 MR. MILLER: So one situation is shall have in force
16 a subscription or has within its collection a copy or
17 phonorecord or it desires to obtain from another library,
18 but the material to be copied is not reasonably available
19 for copying, or shall have entered an order for such a --

20 MR. HERSEY: No.

21 MR. MILLER: With all due respect, if I cannot re
22 it out sitting here after a half-hour there is a problem.

23 MR. HERSEY: That is true.

24 MS. WILCOX: I cannot imagine any librarian being able
25 to figure this out.

26 JUDGE FULD: Really?

1 MS. WILCOX: I really do, because I cannot figure it
2 out, either.

3 MR. MILLER: Excuse me, John. Could you describe it?

4 MR. HERSEY: Let me try. As I understand what the
5 clause is intended to cover is this: A library has a
6 single subscription for a magazine, to a periodical, or,
7 secondly, it has a single copy of a book but it does not
8 have either the copy of the magazine or the book reasonably
9 available. In those circumstances, it is only allowed to
10 copy as much as it could if it were copying from its
11 own collection.

12 MR. LACY: How much is that?

13 MR. NIMMER: In those circumstances, the five number
14 does not apply but instead it is as if they were not making
15 an inter-library loan; it is as if they were doing it from
16 their own collection.

17 MR. MILLER: Okay.

18 MR. FRASE: So they can make --

19 MR. NIMMER: Whatever they can make. It is not an
20 unlimited number, but the five rule --

21 MR. FRASE: If it is one each, they could make an
22 unlimited amount --

23 MR. HERSEY: No. They cannot do that.

24 MS. KARPATKIN: Wouldn't it help if (a) and (b) --

25 MR. MILLER: There is a different discussion that is
26 going on right now. But they just decided they did not

1 mean what they meant.

2 JUDGE FULD: I think it means what it says.

3 MR. LEVINE: I think it is time for fresh insight,
4 please.

5 MS. KARPATKIN: Let me try it with (a) and (b):
6 "In the event that a requesting entity (a) shall have in
7 force or shall have entered an order for a subscription,
8 or (b) has within its collection." Maybe you can even put
9 them indented. "Or (b) has within its collection a copy
10 or phono record of any other copyrighted work."

11 Now, I would take the word "and" in the third
12 line and put it both places: "and the material is not
13 reasonably available," because --

14 MR. PERLE: Indent (a) and (b) and bring this out to
15 the margin.

16 MR. MILLER: One problem with that is you have
17 eliminated "or shall have entered an order for a periodical,"
18 and I think that should apply.

19 MR. NIMMER: So it does not apply to the book.

20 MR. MILLER: You mean --

21 MR. NIMMER: If you have only ordered it but do not
22 have it, you cannot treat it as if you have --

23 MS. KARPATKIN: Why would you distinguish between
24 books and periodicals?

25 MR. PERLE: Frequently there is no way of ordering
26 a book: if it is out of print and where the publisher

1 does not know who has got it; it may still be in print
2 but the publisher says --

3 MR. MILLER: Rhoda, all I want to know is what they
4 intended. I think it should be (a) and (b).

5 MS. KARPATKIN: (a) and (b) are indented and (a) is
6 left flush.

7 MR. WEDGEWORTH: I still raise the question that I
8 think that all of this is unnecessary. It is confusing and
9 the more I read it the more I tend to agree with Gabe
10 that I would like to strike the whole thing except the
11 last part of the last sentence in the paragraph and that
12 is that "the library or archives may request a copy or
13 phonorecord from a supplying entity only under those
14 circumstances."

15 MR. LACY: I think you have to have the first part,
16 that this is where it is ordered or entered a subscription
17 for because that is what is distinguishing it from 1.

18 MR. NIMMER: That is important for the librarians.
19 Then they are held to the five rule.

20 MR. WEDGEWORTH: I am saying that all of this other
21 business in here is just very confusing and does not mean
22 anything.

23 MR. PERLE: It has changed so much I do not know what
24 it means.

25 MR. NIMMER: Maybe we need a fresh start tomorrow.

26 MS. KARPATKIN: I would put the word "then" in here

1 to clarify.

2 MR. MILLER: "In the event that (a) or (b), then"?

3 MS. KARPATKIN: Yes. Okay?

4 MR. LACY: While some of us try to rewrite that more
5 clearly overnight --

6 MR. HERSEY: Try on Irwin Karp's provision of leaving
7 out the first half of this paragraph and just --

8 MR. NIMMER: Irwin might go for it.

9 MS. WILCOX: Irwin is not the only one that counts.

10 MR. HERSEY: You were urging leaving that out?

11 MS. WILCOX: No, I would not, on the condition they
12 have a subscription because otherwise it is meaningless.

13 MR. LACY: I think you have to have that. While we
14 are redrafting that, I think everybody has probably agreed
15 to 3 and 4, haven't they? But 5 is not a question of use
16 agreement; it is question of drafting. The statute itself,
17 assuming it is enacted in its present form, then 108(i),
18 if I can find it, 108(i) says:

19 "Five years from the effective date of this
20 act, and at five-year intervals thereafter, the
21 Register of Copyrights, after consulting with
22 representatives of authors, book and periodical
23 publishers, and other owners of copyrighted
24 materials, and with representatives of library
25 users and librarians, shall submit to the Congress
26 a report setting forth the extent to which this

1 section has achieved the intended statutory
2 balancing of the rights of creators and the
3 needs of users. The report should also
4 describe any problems that may have arisen
5 and present legislative or other recommenda-
6 tions, if warranted."

7 I think we ought to not attach the five-year
8 review to that provision in the Statute. We do not have
9 to bring it in as a guideline. We can refer to the
10 fact that these guidelines will, of course --

11 JUDGE FULD: Be reviewed.

12 MR. LACY: -- be reviewed as required by 108(i). We
13 do not have to urge it as a guideline; it is mandatory.

14 JUDGE FULD: I do not think you need the last two
15 sentences.

16 MR. HERSEY: Let us do as little change as possible.

17 JUDGE FULD: Do you need the last sentence, though?

18 MR. HERSEY: No, I do not feel we need that.

19 MR. LACY: When you have got a legislative mandated
20 review by the Register of Copyrights, it means a little --

21 MR. PERLE: The Register of Copyrights may say 108(c)
22 (2) is perfect. Leave it alone.

23 MR. LACY: These guidelines presumably will become
24 a part of the legislative history of 108. They have to.

25 MR. PERLE: Well, the words of the Statute may be the
26 guidelines if the Commission -- I do not care.

1 MR. LACY: Also, I think it is presumptive of us to
2 say that we should review something five years from now
3 when the Statute requires that we expire in another year.

4 JUDGE FULD: I think it is wrong.

5 MR. WEDGEWORTH: So the only serious question we
6 have relates to the --

7 MR. LEVINE: This was a specific suggestion, as I
8 recall, of the Library Association.

9 MR. WEDGEWORTH: The only serious question is No. 2
10 and we are going to review this.

11 JUDGE FULD: I think we will recess now and resume
12 tomorrow at 9:30.

13 (The proceedings concluded at 5:25 P.M.)
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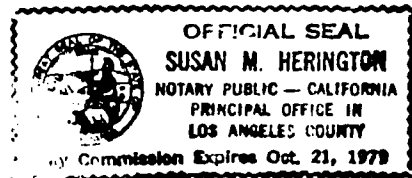
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That the foregoing comprises a true and correct copy of the proceedings had and reported by me.

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VOLUME II

REPORTER'S TRANSCRIPT, taken at 9:50
A.M., Friday, September 17, 1976, at
the Law School Building, Room 2435,
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NATIONAL COMMISSION ON NEW TECHNOLOGICAL
USES OF COPYRIGHTED WORKS

Law School Building, Room 2425, UCLA
Los Angeles, California

Friday, September 17, 1976
9:50 A.M.

COMMISSIONERS:

JUDGE STANLEY H. FULD, Chairman
MELVILLE NIMMER, Vice Chairman
RHODA H. KARPATKIN
HERSHEL SARBIN
E. GABRIEL PERLE
JOHN HERSEY
DAN LACY
ROBERT WEDGEWORTH
ALICE WILCOX
ARTHUR MILLER

ALSO PRESENT:

ARTHUR LEVINE
ROBERT FRASE
MICHAEL KEPLINGER
DOLORES DOUGHERTY
MARLENE MORRISEY

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A G F D A

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9:50 A.M.	Ms. Patricia Ferguson and Donna Chamberlain, Esq., Documentation Associates Information Services, Inc.	3
11:00 A.M.	Dr. Peter Weiner, Rand Corporation	50
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6 JUDGE FULD: Our next speakers are Patricia Ferguson
7 and Donna Chamberlain. Ms. Ferguson is president and
8 co-founder of Documentation Associates, a broad-based
9 information services firm created in 1971. Prior to
10 organizing her own company Ms. Ferguson did extensive
11 work in the field of library research. She has a Masters
12 in library science from the Graduate School of Library and
13 Information Science, UCLA, and has co-authored many
14 reports, including one which investigated and evaluated
15 effectiveness criteria for medical library services.

16 She has also studied library environmental
17 designs and, when working as reference
18 book editor, she helped solve reference problems through
19 development of plans for useful information tools.

20 Ms. Ferguson is joined by her general counsel,
21 Donna Chamberlain. Ms. Chamberlain returns to familiar
22 ground when she joins us today for she received her law
23 degree from UCLA.

24 In addition to her legal experience and general
25 practice Ms. Chamberlain set up an in-house resource
26 information file on computer retrievable legal systems.

1 She also conducted a pilot survey of nonlegal information
2 needs of lawyers in the California area. In addition, she
3 has had five years of experience operating a library:
4 cataloging, inventory, acquisition, maintenance, and also
5 concomitant responsibilities.

6 The Commission welcomes both of these ladies
7 to our eighth meeting and looks forward to their presen-
8 tation on the copyright implications of the data base
9 industry from the viewpoint of information sources.

10 You are to talk first?

11 MS. FERGUSON: Yes. Thank you very much. I am
12 Patricia Ferguson and I am going to give the presentation
13 and Donna is going to be available to answer questions
14 that you might have, especially if they are on legal
15 matters.

16 MS. CHAMBERLAIN: Which I will refer to Mr. Nimmer.

17 JUDGE FULD: Everything is legal here.

18 MS. FERGUSON: We very much appreciate the opportunity
19 to come here and talk to you. I handed out a brochure
20 which clearly states our position in the world of infor-
21 mation as a for-profit firm.

22 JUDGE FULD: Could you talk a little louder?

23 MS. FERGUSON: Yes. I handed out some literature
24 which clearly states our position in the world of infor-
25 mation, which is as a for-profit firm. We view ourselves
26 as an extension and a complimentary service to what is

1 offered in libraries and most of us at the company are
2 librarians or information scientists, so that is the
3 world that we come from.

4 The brown list, which you might refer to later,
5 is a list of the computerized data bases that we are
6 currently searching.

7 Within the information industry, our kind of
8 company is called an information broker or an information-
9 on-demand company, or an information-on-request firm,
10 both meaning that we provide a connecting way between
11 the information and the user. We feel that we are
12 representative of a rather new and unique business that
13 has emerged in the seventies, this connecting business.
14 In fact, there is one new company called Link; there is
15 also one called Seek; and there is also one called Find,
16 so four-letter acronyms are emerging.

17 Some researchers are predicting that our kind
18 of intermediary firm will become a dominant force in the
19 information industry in the years to come, comparing
20 it to supermarket industries in the food industry. We
21 have had a very encouraging growth in the last five years
22 and we are hopeful that these researchers are right
23 because we would like to become a broad-based large
24 general purpose information distribution firm.

25 We try to provide a very complete range of
26 information services and, specifically, these include

1 the computerized data base searching, library searching,
 2 document retrieval, indexing, abstracting -- we have
 3 constructed the thesaurus -- preparation of literature
 4 review and state-of-the-art reports, information system
 5 design, consulting, and so on. We deal with information
 6 in all subject areas and we have focused in the last few
 7 years on -- because of the nature of the jobs we have
 8 obtained -- on drug abuse among humans, gerontology,
 9 oceanography, career education, subjects like this. We
 10 tend to use subject consultants as experts and we provide
 11 the information expertise when we are carrying out projects
 12 like this.

13 Our services are used by both Government agencies
 14 and organizations, corporations, and individuals. And
 15 they can range from a long-term multi-year project to a
 16 one-day literature search.

17 As an example of a long-term project, we have
 18 an ongoing contract with the National Institute on Drug
 19 Abuse which requires us to search out research on selected
 20 topics. For instance, we have done drugs and crime, drugs
 21 and pregnancy, drugs and sex, drugs and employment, and
 22 having identified a range of research reports we will
 23 select a balanced collection of studies and reports and
 24 abstract them in rather long summaries, organizing them
 25 into books, put an index in the back, and then the
 26 Government Printing Office publishes them, so it is an



1 example of a large project.

2 As an example of a short one, the computer-
3 ized literature search is a good example.

4 Our practices in the data base searching and
5 photocopying, I will try to summarize. We view
6 commercially viable data bases as a very crucial part of
7 our operation and we use them every day. We have two
8 in-house computer terminals; one is a printer only and
9 one is a CRT with a side printer. We have contractual
10 agreements with six commercial vendors -- I guess you'd
11 call them commercial -- six vendors of data bases,
12 including Lockheed, System Development Corporation,
13 National Library of Medicine -- that is what I stopped on
14 commercial -- Battelle, Informatics, and the New York
15 Times. So we regularly research all data bases offered
16 by those vendors. Totally, something over 40 at this
17 point, but the number changes frequently.

18 Our information specialists receive training
19 in all of the systems offered by the vendors and the data
20 bases and this training runs from beginning through
21 intermediate and then up through advanced and they also
22 have researcher courses that are frequently offered. This
23 is very necessary to keep up-to-date with what is in these
24 data bases. We maintain a full library of researching
25 aids, such as thesauri and word frequency lists, special-
26 ized dictionaries, and so on.

1 The print-out from the computer search is the
2 product that we sell to a customer, in the case of
3 computerized data bases, and we provide one copy of the
4 bibliography and we do not keep a copy; we pass it on to
5 the customer. Our charge is for our time and our exper-
6 tise, computer connect time, and the citations and any
7 consultants who may have been called in to help with
8 that particular search.

9 We have been considering the market for multiple
10 copies of computerized bibliographies and, at the same
11 time, we have to consider the implications of that because
12 there will be some copyright concerns. We aren't doing
13 that at this point.

14 Each customer is interviewed at some length,
15 it averages a half an hour, either in person or by phone
16 to determine the kind of question. Then we select the
17 data bases we are going to search from our list and we
18 supplement this with library resources frequently and
19 supply a cost estimate -- a not to exceed estimate.
20 Customer okays that and then we proceed, so each search
21 is individually priced at this point.

22 We also provide document retrieval services.
23 We will locate and photocopy a document requested by a
24 customer who will purchase it, get it on microfiche or
25 intra-library or whatever method we can use to obtain it.
26 Again, we are charging for our time, expertise, and the

1 direct cost of the document. And, again, we provide only
2 one copy. It could be a journal article or a Government
3 report, a book, a monograph, an unpublished paper, a
4 newspaper article, anything that is in print. We have no
5 collection of documents ourselves. We access all available
6 libraries as we access all available data bases. And we
7 have too deposit accounts with NTIS, the Government
8 Printing Office, the ERIC and the British Lending Library,
9 and any other large sources of documents.

10 We employ several retrievers, we call them,
11 who are placed in local libraries and they will make
12 photocopies of journal articles and other items.

13 We wanted to point out that without this photo-
14 copying capability, copies of most retrospective journal
15 literature and out-of-print publications would not be
16 available to our customers, and this is the service that
17 we feel that we are providing to them. We also request
18 many times directly from the authors, either by telephone
19 or mail. We have a large mail acquisition service.

20 I did gather up some statistics, as you
21 requested, on our customers and this statistical breakdown
22 that I am going to give you is based on our commercial
23 customers, not our Government customers. We have, in the
24 last several years, performed some large contracts for
25 six Government agencies and we have also served several
26 hundred individual customers. These are the individual

1 customers. In computer searches the types of customers
2 are as follows:

3 41 percent of them have come from R and D
4 firms, mostly in the local areas. These are the aero-
5 space corporations and the manufacturing firms in
6 Southern California. 32 percent come from the academic
7 community, professors, graduate students, not very often
8 undergraduate. 14 percent from what I call business
9 persons. That would be company presidents, marketing
10 executives, accountants, sometimes even attorneys, but
11 not very often. Seven percent from social science firms,
12 generally consulting firms. And six percent from
13 individuals with individual interests.

14 In the area of document retrieval, our sources
15 are as follows: Over half of the items that we have
16 retrieved have come from local libraries, 52 percent; 14
17 percent from these large sources like NTIS, DDC, and GPO.
18 In fact, those three. DDC is the Defense Documentation
19 Center. 0.3 percent from inter-library loan, mainly
20 because it is so slow. It takes us so long to get it
21 back that our customers cannot -- it was ordered by the
22 time it has arrived. 0.5 percent come by the U. S. Patent
23 Office; 3.4 percent from ERIC, the Education data base;
24 and almost 29 percent from letter requests where we will
25 write letters to an author or other institution.

26 Now, the second breakdown on document retrieval

1 is types of materials. Almost half are journal articles
2 in our case; 14.6 percent, Government reports; 1.7 percent,
3 books; 32.2 percent other reports. These would be from
4 institutions, organizations, corporations, that kind of
5 report. 1.8 percent, hearings and proceedings; a half
6 a percent, patents; and 2.2 percent dissertations. It
7 is kind of a detailed breakdown. This probably represents
8 about 5,000 documents. I think. That is an estimate; we
9 have not counted them.

10 At this point in time, we do not feel that we
11 are violating any provisions of the copyright act,
12 copyright law. But we also would like to point out that
13 we don't feel we fully understand the provisions of the
14 act. We don't know anyone who does, and we have consulted
15 various experts who have different opinions. Maybe I
16 should take that back.

17 MS. CHAMBERLAIN: That is fine.

18 MS. FERGUSON: At any point we have consulted people
19 at the Information Industry Association, at the Copyright
20 Office, and so on, trying to find out if what we
21 were doing is, indeed, a violation. Again and again we
22 can't find out whether it is truly a violation, so we,
23 at this point, believe that it isn't, but we want to go
24 on record as saying we are perfectly willing to pay
25 royalties and we don't have any objection to it. What
26 we need is a mechanism to allow us to do this.

12

1 In terms of the proprietary concerns of data
2 base producers, those are affecting us a great deal at
3 this point and we believe they are issues; the concerns
4 that they have are very valid. We don't at this time
5 produce a data base ourselves but we have the capability
6 to do that and the interest and we might at some point
7 become a data base producer, at which point their concerns
8 would become our concerns.

9 Right now what is happening with us is as
10 follows: When a data base producer imposes an access fee
11 on a broker that is excessive on top of the computer
12 connect fees and the citation charges, then the cost
13 becomes prohibitive for us to access that data base unless
14 we have a steady volume of use, and non-use of a data base
15 by a broker results in a lower -- in lowered revenue for
16 both the data base vendors and the data base producers,
17 which, of course, they realize as much as we do.

18 For example, Predicasts data base, which is
19 coming off our list at this point, has a \$500 annual
20 subscription fee per data base and they make several
21 regardless of how much you use it and we can't afford
22 to pay that at this point. Excerpta Medica, which is
23 an excellent collection for medical search, requires a
24 \$350 initiation fee. We hope to be able to pay that soon,
25 but we cannot yet. MEDLINE, on the other hand, has a
26 monthly minimum of \$15 which we can afford to pay because

1 we have some customer usage in that data base and it is
2 a low fee.

3 There are other restrictions on brokers that
4 are discriminatory in certain senses. For example,
5 Chemical Abstracts recently announced that searchers of
6 that data base are not to be distributed outside the
7 geographical site of the users. When this statement was
8 prepared, this had not been clarified. I met with the
9 marketing director of Chemical Abstracts last week and
10 found out that a university is defined as a geographical
11 site, so that would mean that any number -- that a library
12 at UCLA could conduct a search of Chemical Abstracts and
13 distribute it to the entire campus if they wanted to,
14 whereas our firm, which is located in a suite of offices
15 down here on Pico Boulevard, cannot distribute any
16 searches that we conduct because our users are not at
17 our geographical location.

18 However, Mr. MacDonald also clarified what
19 the restrictions are going to be and they amount to a
20 \$50 annual fee for most of us who don't have geographical
21 users and two cents per reference, which we will have to
22 pass on to our user, so that is the situation with
23 Chemical Abstracts.

24 The Defense Documentation Center is an example
25 of a bureaucratically impossible situation where the user
26 of the DDC data base must have a Government contract and

1 need to know and be able to fill out countless forms and
2 10 to 15 copies very frequently in order to use their data
3 base. We do go through this because a lot of our clients
4 need it.

5 The Department of Justice data base, JURIS,
6 is also only available to other Government agencies. We
7 would like to be able to search that.

8 We really feel that information, whether it
9 is owned by the public or a private sector, whether it
10 is contained in computer data base or in a library, ought
11 to be reasonably accessible and not prohibitively expen-
12 sive and not surrounded with bureaucratic difficulties.

13 We are primarily a service business and we
14 are trying to provide a service to people who are willing
15 to pay us to find it and we want to make it very clear
16 that we are prepared to pay copyright holders for the use
17 of their materials and we are prepared to honor the
18 proprietary concerns of data base producers for the use
19 of their data base. Obviously, we would not be in business
20 without both of those people, so they are very important
21 to us.

22 In terms of the proposed provisions to
23 copyright law, we cannot really see that the propo-
24 sitions of Senate Bill 22 speak to what we are concerned
25 about. We think that we will still be operating under
26 fair use provisions once that bill is passed. And we

1 feel, also, that in a certain given situation we might
2 be subject to criminal sanctions, depending on the
3 circumstances. We know that there is still continued
4 debate over the claim in the Wilkins case on whether that
5 was infringement or fair use, and we cannot see, also,
6 any explicit discussion of the problems associated with
7 computer uses of copyrighted works, in the computer sense.

8 So we would like to support a change in the
9 general attitude of the public concerning the basic rights
10 of the copyright holder. What we would like to see is a
11 system that would permit copying with the advanced approval
12 of the copyright holder provided provisions were made for
13 compensation to the author.

14 In Section 118, which addresses public broad-
15 casting, there is a policy that we would like to see
16 extended to photocopying and data base copyright issues;
17 that is, to seek to encourage broad access to copyrighted
18 materials at reasonable royalties without protracted
19 delays in obtaining permissions from copyright owners.
20 But it was specifically for public broadcasting.

21 You must have addressed this issue before.

22 MR. PERLE: Yes. You hit a nerve.

23 MR. LEVINE: Not as part of this Commission but some
24 of the Commissioners had very great interest.

25 MR. PERLE: You better get to your next point.

26 (Laughter.)

1 MS. FERGUSON: We support limitations -- well, in
2 Section 108, our primary concern is that we are left out
3 of Section 108 and it appears to address only libraries,
4 nonprofit groups, archives, and so on, and by the process
5 of elimination it appears that we do not fall into Section
6 108 and, therefore, cannot do that; cannot make copies as
7 they can. We are already seeing cases where libraries
8 are becoming very inhibited in the practice of sending
9 copies to us when we request them. We get form letters
10 that say "You sign this to let us off the hook" -- that
11 is not what it says in the letter, but that is the impli-
12 cation of the letter. And so an officially signed state-
13 ment is sent back to the library, at which point they will
14 photocopy: more delay and more paper work is what is
15 happening.

16 Well, I think to conclude, I just would like
17 to say that we would rather not rely on a case by case
18 resolution of our problems if possible and we would hope
19 that the Commission could make recommendations for new
20 legislation which will address the issues we are concerned
21 with and, of course, we would like that to be in the best
22 interest to the public and in our interest and in yours
23 and in all parties concerned.

24 JUDGE FULD: Are there many others who compete with
25 you in the same field?

26 MS. FERGUSON: There are at this point in time about

1 40 information brokers ranging from one-person operations
2 up to companies with about 35 or 40 people.

3 MR. LACY: Do you have employees and major libraries
4 who themselves make photocopies using the dime-in-the-
5 slot photocopying machines?

6 MS. FERGUSON: Would you clarify what you mean
7 "employees"? Are they our employees or the libraries
8 employees?

9 MR. LACY: Your employees.

10 MS. FERGUSON: They are our employees and we send
11 them to local libraries to use the machines.

12 MR. LACY: One of your competitors in another area
13 apparently had enough business to keep most of the students
14 pretty much on a several-hours-a-day retainer in the
15 library doing that.

16 MS. CHAMBERLAIN: Just standing at the machines
17 copying? Is that what you mean?

18 MR. LACY: Well, several hours may be an exaggeration.
19 It would be by the library every day with a list of
20 requests and it might take a half an hour one day and two
21 or three hours another day.

22 MS. FERGUSON: That is approximately our situation.
23 In this drug contract that I was describing, we will do
24 large searches identified by perhaps 500 or a thousand
25 possible articles that might be selected and we will send
26 someone up with a list to photocopy so that we can review

1 the article and determine whether it's appropriate for
2 our selection.

3 MR. WEDGEWORTH: That is not an unusual situation.
4 Research assistants, in fact, in departments do this
5 routinely.

6 MR. LACY: Did you ever use an organization like ISI
7 as a source instead of a university library, as a source
8 for photocopies?

9 MS. FERGUSON: Yes, we do. And we have begun on-line
10 ordering of it now that it's available. ISI and NTIS. The
11 problem sometimes is the mail. It is so slow and that is
12 all on the East Coast, so -- especially NTIS. It is a
13 problem so we will choose --

14 MR. LACY: You have got the Government and a Government
15 service both operating against you in NTIS.

16 MS. FERGUSON: That is right. We make the decision
17 depending on how fast we need the item.

18 MR. LEVINE: You have the microfilms. Do you use
19 them at all?

20 MS. FERGUSON: Uh-huh. Any place where there's a
21 document we are bound to access it at some point.

22 MR. LACY: If you had a comparable institution to ISI
23 here where you were not facing the mail problem, how would
24 you find your service compared with getting it from the
25 university library in terms of time and efficiency and so
26 on? Putting aside the postal delay.

1 MS. FERGUSON: We would probably be more efficient.
2 We would have to avoid hiring people and supervising and
3 the time that is spent running around to the libraries
4 finding out that it is in the bindery or that the pages
5 have been ripped out, especially in the case of drug
6 articles. We probably would be more efficient. We don't --
7 this is hard work we have to do to get these documents and
8 if there were an easier way to do it, I think we would opt
9 for it.

10 MS. WILCOX: Do you have a feeling about what years
11 that journal concentration of either journal titles or
12 year spans that you are covering?

13 MS. FERGUSON: No. Because we do so many different
14 kinds of jobs.

15 MS. WILCOX: I was wondering, when you search some
16 of your data bases, the length of parameters would deter-
17 mine pretty much your citations.

18 MS. FERGUSON: Yeah. If we are just --

19 MS. WILCOX: So probably most of them --

20 MS. FERGUSON: We are researching a computerized data
21 base probably from 1965 and no farther back, but we do so
22 much combination searches where we'll do Chemical Abstracts
23 and go back -- search it back to 1869 or something. But
24 you are right, in that context.

25 MS. WILCOX: Do you have any feeling at all what
26 percentage would be less than five years or more than

1 five years? Do you have any feeling?

2 MS. FERGUSON: Well, if it were not -- obviously,
3 the past decade, there is a heavy concentration for us,
4 but we just happen to be doing an oceanography project
5 now which requires us to go back to the Challenger expedi-
6 tions of 1860 or something, but that is a rarity. I think
7 the recent decade would be the --

8 MS. WILCOX: Would you have any --

9 MS. FERGUSON: A percentage within that?

10 MS. WILCOX: Yes.

11 MS. FERGUSON: Yes.

12 MS. CHAMBERLAIN: In a five-year period.

13 JUDGE FULD: Could you talk a little louder?

14 MS. FERGUSON: If we are just talking about computer-
15 ized searches, then I would say that the big emphasis is
16 on the previous year -- not even the previous quarter, but
17 the previous year. But when we are talking about
18 Government contracts, most often the previous ten years
19 or 15 years is required, so in terms of volume of all
20 business, we do more Government contracting than computer-
21 ized searching, so the emphasis would be on the decade.
22 But if you took this little microcosm here, it would be
23 on the last year.

24 MS. WILCOX: You can determine really your searches
25 by asking for the most recent going back, or either way.

26 MS. FERGUSON: Yes, you can limit by date; date scope

1 or something they call it.

2 MR. WEDGEWORTH: You touched on the data bases
3 problem in an area that is of less concern to us; namely,
4 the initiation or access fees, which is not really a
5 copyright problem. But I would really like to have you
6 comment in more detail about the requests of some data
7 base firms that their data base have copyright protection,
8 which would restrict the terms and conditions under which
9 you could provide that information to your customers.
10 Would you like to comment upon that? Have you had any
11 experience in dealing with that situation?

12 MS. FERGUSON: Well, we have -- I found out last
13 week that we are, apparently, in a position where we know
14 what all the data base producers are saying and they do
15 not know what they are saying. In other words, data base
16 producers do not talk to each other because they do not
17 want to be -- they do not want to get into any kind of
18 price fixing or discussion of things. So at a meeting
19 last week of the Association of Information Dissemination
20 Centers in Louisville I brought up this very issue and
21 discovered that other data base producers do not -- let's
22 see. How can I explain this? I think I started something
23 is what happened because I pointed out that one data base
24 producer would not permit us to distribute searches at all
25 and this sparked another data base producer who hadn't
26 been concerned at all; so my comments are we would -- from

1 our point of view, we would like to be able to conduct a
2 search and sell that search to a customer and we would even
3 like to sell it in more than one copy to many customers,
4 the same search; and we would like to be able to pay the
5 copyright owner for that privilege. This situation does
6 not exist yet, as far as I know.

7 Well, all the data bases on this list, with
8 the exception of the Predicasts, which are up at the top --
9 they are not called Predicasts any more. They are called
10 Domestic Statistics, EIS Industrial Plants Statistics,
11 and so on, which have to come off our lists -- all of them
12 allow us to sell one copy -- I told you about Chemical
13 Abstracts -- if we pay certain things in some cases and
14 that is what we would like to keep on doing.

15 Are you getting at something even broader than
16 that?

17 MR. WEDGEWORTH: Follow my question, then: What, in
18 your opinion, are you contributing to this process?

19 MS. FERGUSON: Expertise.

20 MR. WEDGEWORTH: What expertise?

21 MS. CHAMBERLAIN: On the information or the data base?

22 MR. WEDGEWORTH: Whatever it is that you are passing
23 on to your customers. The argument of the data base
24 manufacturer or disseminary may be that we have put an
25 enormous amount of money and expertise into the development
26 of this data base and then you are in a position to simply

1 take that and give it to someone or some ones at a profit
2 to yourself. What are you contributing to the process, I
3 think is my question?

4 MS. FERGUSON: I think I can describe that. I believe
5 what we are contributing is analogous to a very large
6 reference library which provides storage and interpreta-
7 tion -- storage space and interpretation of a large
8 collection of documents. We are doing precisely the same
9 thing by allowing people to call one place for access to
10 many, many subjects which requires training to search.
11 Certainly a reference librarian's mode of operation is
12 used in searching these data bases, and I can tell you
13 that it takes us approximately five person days per month
14 simply to maintain the new materials that come from each
15 data base. For instance, there are new methods of
16 searching; frequently there are new user aids coming out;
17 there are updates coming into these things; there are new
18 data bases appearing all the time, and that is just the
19 maintenance. So we are providing that. Then there is
20 another five days of supervision of this kind of thing
21 because we have now several searchers who are specializing
22 in different subject areas. So, to me, the value that we
23 are contributing to the world of data bases is the value
24 of one-stop expert help with gaining information that is
25 contained in these very valuable -- I agree with them --
26 data bases. We are the interpreters, although I do not

1 like to use that word because we are not interpreting
2 except in the sense we are conducting a search and, in
3 that sense, we are the intermediaries.

4 MR. MILLER: Could I have some clarification on your
5 concerns? One of the concerns I heard was that there is
6 some ambiguity as to the legality under the copyright law
7 of what you are doing. I take it that concern is primarily
8 addressed to those instances in which you made copies of
9 what you search. It is the old problem of reprography
10 and duplication. Another concern I heard was the access
11 concern and that, I take it, is a concern addressed
12 primarily to the data base is our ability to gain access
13 to nonpublicly located data bases like the six services
14 that you described.

15 Now, on that side of the ledger, your access
16 problem, as I hear it -- and I am just seeking clarifi-
17 cation -- is some of them have very high fees which you
18 just defined prohibitive; you cannot pay. Others with
19 lower fees have variegated conditions and terms on what
20 you can do with that data base in terms of secondary
21 dissemination.

22 Now, I assume you have got contractual relation-
23 ships with each of the data bases that you actually have
24 in your services.

25 MS. FERGUSON: No, we don't. We have contractual
26 relationships with the vendors.

1 MR. MILLER: What is your relationship with, say,
2 Lockheed?

3 MS. FERGUSON: We have a contract.

4 MR. MILLER: With?

5 MS. FERGUSON: Lockheed.

6 MR. MILLER: Which tells you what you can do --

7 MS. FERGUSON: With the Lockheed data base.

8 MR. MILLER: -- with the Lockheed data base.

9 MS. FERGUSON: Yes.

10 MR. LACY: Not only with Lockheed but the data base
11 proprietors whom Lockheed makes available.

12 MR. PERLE: She said, "No."

13 MR. LEVINE: Is that right?

14 MS. FERGUSON: No. We have written contracts with
15 Lockheed and in that contract is specified the kinds of
16 restrictions and nonrestrictions that apply to Lockheed's
17 supplied data base.

18 MR. LACY: I assume that those are conditions that
19 Lockheed suppliers require Lockheed to put in the contract.

20 MR. MILLER: At the moment, that is irrelevant.

21 You must live, I gather, under extremely
22 different contractual arrangements with your different
23 data base sources who, in turn, may have different arrange-
24 ments with the sub-suppliers.

25 MS. FERGUSON: Right.

26 MR. MILLER: Okay. Are you asking this Commission

1 to think about the establishment of relatively uniform
2 access rules for companies in your position in terms of
3 the pricing structure and in terms of the utilization you
4 want to make of those data bases?

5 MS. FERGUSON: No.

6 MR. MILLER: It is a free market economy and
7 freedom of contract and all that.

8 MS. CHAMBERLAIN: One of the concerns, I think, so
9 far -- has not really been, I take it, your investigation --
10 it is whether or not these data base material, the infor-
11 mation in the data bases, is copyrightable; if they have
12 proprietary rights to that.

13 MR. MILLER: Let us say we do not. Let us say there
14 is no copyright in what they have got. What more do you
15 want from us? What more should we think about? I do not
16 want to suggest that we are here with your -- like Oliver
17 Twist.

18 MS. FERGUSON: You mean if all the information in the
19 data bases is not copyrighted?

20 MR. MILLER: That is right.

21 MS. FERGUSON: What would we want? Nothing, as far
22 as I can see.

23 MR. LACY: I do not think the situation would be any
24 easier.

25 MR. MILLER: That is right.

26 MS. FERGUSON: No, it might not be any easier.

1 MR. MILLER: What I am trying to drive at is, at
2 least in terms of your concerns about access to data
3 bases, either in terms of dollar pricing or in terms of
4 terms and conditions of use, I am trying to figure out
5 whether a copyright has anything to do with that or whether
6 it is a pure contract problem that you are faced with.

7 MS. FERGUSON: That is a contract problem, but the
8 copyright problem, as I see it, is when we wish to make
9 more than one copy of a data base material.

10 MR. MILLER: Why can't that be part of your contract
11 structure? You have, no doubt --

12 MS. FERGUSON: It is not at this point. I do not
13 know.

14 MR. MILLER: You talked about ambiguity as to the
15 law. If you have a contract with Lockheed and it allows
16 you to do certain things, if you pull some material off
17 Lockheed's base and off Battelle's base, and off the New
18 York Times' base, and you package them
19 into a new data base, you have just created a new data base
20 from compiling things from existing data, and you try to
21 sell that either as a new computerized data base or in
22 hard copy form to a multiple number of users, you are an
23 infringer.

24 MS. FERGUSON: Yes. I understand that.

25 MR. MILLER: What do you think this Commission should
26 think about when my response to you is if you want that

1 right you sit down and contract with those people for
2 that right?

3 MS. FERGUSON: Then, if that is your response, then,
4 okay. You are not going to address that issue.

5 MR. MILLER: I want to know what you think the issue
6 is.

7 MR. PERLE: What relief do you want?

8 MS. FERGUSON: Pardon?

9 MR. PERLE: What relief do you want?

10 MS. FERGUSON: We would like to be able to do what
11 you just described and perhaps I have not ably thought
12 that that was a concern of the Commission. If it isn't
13 and it is a contractual thing, then it is due to our lack
14 of business expertise.

15 MR. MILLER: Do not let me push you off the point.
16 What I am asking you is why you think in the Federal
17 copyright statute there should be a provision that gives
18 you an automatic right to do that, subject to either a
19 negotiated or a Federally set fee for doing what I have
20 described. In other words, do you want the United States
21 Congress to destroy the right of freedom of contract?

22 (Laughter.)

23 MR. MILLER: In an absolutely neutral way.

24 MS. CHAMBERLAIN: Oh, I think that is too large of
25 a question to address to two juniors in the law.

26 MR. MILLER: You are a conduit from Mel.

1 MR. LEVINE: Do your contracts now specify that these
2 data bases are, in fact, under copyright? Is there
3 anything in the contracts that suggest that --

4 MS. CHAMBERLAIN: No. Do you recollect?

5 MS. FERGUSON: No.

6 MS. CHAMBERLAIN: We anticipate --

7 MR. LEVINE: So the only restriction there is is a
8 contractual restriction; there is no copyright restriction,
9 and the question, I suppose, in part, is whether the
10 contract can extend that far. Is there a basis for the
11 data base owner to say you can make one copy, but you
12 cannot make multiple copies without claiming copyright
13 in the data base portion?

14 MS. FERGUSON: Some of the contracts, I think, between
15 the, for instance, Lockheed and the producer company
16 specify that the material is copyrighted. We do not see
17 those contracts. What we get is a contract from Lockheed
18 which will simply say, "You may distribute this"; "You
19 may not distribute this"; "You have to buy the printed
20 index in order to distribute this one." There are all
21 sorts of different rules and regulations.

22 MR. PERLE: Does your contract with Lockheed require
23 you to put any given notice on that which you distribute,
24 whether in type or hard copy form?

25 MS. FERGUSON: The one instance of that is now
26 Chemical Abstracts will require us to inform each one of

1 our users that they are not to distribute it beyond their
2 geographical site either.

3 MR. LACY: Did they require you to put a copyright
4 notice in the American Chemical Society's manual or --

5 MS. FERGUSON: I do not know. I do not have the
6 contract yet. I have just had this verbal interchange
7 so far.

8 MR. MILLER: Could I ask you to try to address that
9 point that Gabe put correctly: What relief do you want?

10 MS. CHAMBERLAIN: In terms of the access question?

11 MR. MILLER: In terms of the access question from
12 this Commission or Congress.

13 MS. FERGUSON: Well, I do not think the access -- I
14 don't know whether I should even try to answer it. But
15 I don't think -- I believe that the information that I
16 was providing you on pricing is simply information that
17 I wanted to tell you because it does affect us.

18 In terms of access, what we are really concerned
19 about from CONTU's point of view is not the prices,
20 obviously, or the right to contract, but whatever kinds
21 of copyrighting violations we might be incurring with our
22 practices.

23 MS. CHAMBERLAIN: They think --

24 MS. FERGUSON: I already told you I do not understand
25 the whole situation.

26 MS. CHAMBERLAIN: Some of the concerns we have had

1 have to do with the chilling effect this legislation may
2 have on the activities of libraries, which you can tell
3 from our statistics, we have a lot of dependency on. 50
4 percent of our copying business comes from there.

5 So getting back to it, I think the primary
6 concerns of CONTU, those are some concerns we have about
7 how these are going to affect libraries and archives in
8 terms of their interpretation. The problem with this kind
9 of law being legal and librarians not being able to
10 interpret it. We have been concerned about there being
11 clear guidelines for the people who will be frequently
12 affected.

13 MR. NIMMER: Are you now speaking with respect to
14 photocopying activities?

15 MS. CHAMBERLAIN: Photocopying. Because I think the
16 access issue is not really an issue. I think it was
17 informational.

18 MR. NIMMER: On the photocopying, am I correct that
19 your concern is that your access to be able to continue
20 to photocopy exists, you are not -- you made it clear, I
21 think, that you are not concerned with having to pay a
22 copyright royalty on photocopying; you just want to be
23 able to do it and not have to get consent in advance.

24 MR. MILLER: You will have to help me out because now
25 you say it is a straw person issue.

26 MS. FERGUSON: The pricing part is whatever you called

1 it, the straw issue. But what I am concerned about --
2 let me deal with realities here. There is a company, one
3 company that is a competitor of ours that is -- maybe you
4 have already heard from them, Editec. Have they talked to
5 you?

6 MR. LEVINE: You are the first information brokers
7 we have had.

8 MS. FERGUSON: Okay. They are searching these data
9 bases and recording -- printing on-line instead of
10 requesting it printed off-line and recording the informa-
11 tion onto a minicomputer cassette and then reorganizing,
12 rearranging, eliminating, changing in various ways the
13 search results, and reprinting out from their own computer
14 the results. Well now -- and distributing many copies,
15 more than one copy to -- of the same search. Okay. Now,
16 whether or not that is a violation is of concern to me
17 because we might like to do it, too, and the reason I
18 thought it was a violation was because all the data base
19 producers are really screaming about it; they are very
20 upset about it.

21 Now, does that more specifically tell you what
22 kind of relief we might like? I do not know if we need
23 relief.

24 MR. MILLER: What is the relief you want? It can
25 come in one of two ways -- it can come in a number of ways.
26 We could suggest the enactment of a statute that simply

1 gave you the right to do that; which simply said, the
2 copyright ends here and you can do anything you want
3 beyond that. We could recommend the passage of a statute
4 that said exactly the reverse; that said no, that is part
5 of the monopoly, and they control that and you have to
6 contract with them for that right. Or we could recommend
7 the enactment of a statute that says it is part of the
8 copyright, but as a matter of national policy they must
9 give you access and that right at a negotiated or
10 arbitrated fee. Do you have any sense into where on that
11 spectrum you would like to go?

12 Talking about the compulsory license. For
13 example, when the people from that data base come and say
14 you have to use on-site; you have to have on-site users,
15 that is an access limitation. It cannot be a straw person
16 problem. It has got to be a real problem.

17 MS. FERGUSON: Compulsory licensing?

18 MS. CHAMBERLAIN: Right. You can give --

19 MS. FERGUSON: Tell him.

20 MS. CHAMBERLAIN: I should have Professor Nimmer tell.
21 It would permit access without giving -- or are you saying
22 beyond fee?

23 MR. MILLER: It could be either one.

24 MS. CHAMBERLAIN: Negotiated.

25 MR. LEVINE: Because you would pass those costs on
26 to your --

1 MS. CHAMBERLAIN: Yes. That is compulsory licensing.

2 MR. LACY: The permission that Lockheed or whoever
3 gives you to have access to their data base on whatever
4 terms does not really rest on the claim on his part that
5 he has a copyright in the data base; he certainly has a
6 copyright because of it and it rests on the fact that
7 unless he says you can, you cannot do it.

8 MS. CHAMBERLAIN: Right.

9 MR. LACY: The door is locked and you have to pay
10 him to get the key.

11 MS. CHAMBERLAIN: Right.

12 MR. LACY: It would seem that Editec, the question
13 with Editech is not whether or not it is a copyright
14 infringement. It is a question of whether they drafted
15 their contract adequately and many data base producers
16 are now believing they have done a sloppy job of contracting.

17 MR. MILLER: You have to watch out yourself, you know,
18 because you fully understand, just by using that Editec
19 hypothetical, that at some day down the pike you may be a
20 bigger data base supplier than a researcher and you will
21 change your stripes and maybe not be happy with that.

22 MR. LACY: Editec might well want, in fact, to
23 copyright and control access to their revised data base.

24 JUDGE FULD: Are there any other questions or do you
25 want to say anything?

26 MS. CHAMBERLAIN: I would like to ask the question

1 in terms of description of our operations and whether or
2 not that constitutes fair use of copyrighted material.

3 MR. MILLER: I am not licensed to practice in
4 California.

5 MS. CHAMBERLAIN: I think that is one of our specific
6 concerns.

7 MR. PERLE: There are some problems.

8 MS. CHAMBERLAIN: There are some problems?

9 MR. PERLE: Yes.

10 MR. LEVINE: Let me ask a question or two that goes
11 to precisely what you are doing. If you have five or six
12 or seven requests in the same day for the same journal
13 article, although coming from different people, I take it
14 you would feel you are not infringing a copyright by
15 making those six or seven copies?

16 MS. CHAMBERLAIN: I do not think that has happened.

17 MS. FERGUSON: You mean by coincidence?

18 MR. LEVINE: Yes.

19 MS. CHAMBERLAIN: We are offering a service and we
20 would be servicing five or six individual requests.
21 Maybe different retrievers would be duplicating efforts.

22 MR. LEVINE: The question is, whether the same
23 retriever might be sitting at the same photocopying
24 machine and making the six or seven copies.

25 MS. FERGUSON: It would be efficient to do it that
26 way; right.

1 MS. CHAMBERLAIN: The cost effective concerns would
2 be an item, but that would have to be our position.

3 MR. LACY: I am a publisher, not a lawyer, so I am
4 free to give you advice. I have worked with McGraw-Hill
5 and if you send a paid employee into a library to make a
6 copy from a reprint from one of our journals and sell it
7 to somebody else, particularly if they are for sale, a,
8 I think you have infringed and, b, I have no intention
9 of suing you.

10
11
12
13
14 MR. PERLE: The point is that McGraw-Hill and the
15 rest of us who are data base proprietors are not going
16 to sue you today. At the point where you start hurting
17 us then, yes, indeed. At the point where your activities
18 have economic impact upon his activity, then there is a
19 problem.

20 What you are doing now -- I am not giving
21 advice --

22 MR. MILLER: But you are threatening.

23 MR. PERLE: No, I am not. It is that sort of copy-
24 right infringement which I do not think anybody is going
25 to do anything about at this stage in time.

26 MS. CHAMBERLAIN: Because it does not have that much

1 affect.

2 MR. PERLE: But it is something this Commission has
3 to deal with, is the need of people like this, in order
4 to deal with information as it develops and the broker is
5 not merely pointing people in the direction of material
6 but supplying it, then we have to deal with it.

7 MR. LACY: I think there is another problem too,
8 and, as was mentioned here, blind people who do not know
9 about an organization that supplies photocopies on the
10 basis of a license from the publisher and it has been
11 suggested -- not only here but in many other places --
12 there is a much more efficient service than ordering it
13 from a library; you get almost overnight service, instead
14 of two or three week service and you do not have to
15 maintain your own person to go do it as you do at libraries
16 because of the slowness in the library's response.

17 Why you do not use IBEX is because it is only
18 in Philadelphia. Why isn't ISI in Los Angeles? Because
19 all of this is being done. If you could not do it and
20 you had to go to somebody that was licensed that would
21 almost certainly --

22 MS. FERGUSON: Not only that, but ISI does not have
23 anything. We go to a lot of libraries.

24 MR. LACY: No. But what I mean is what ISI has and
25 ISI would have a lot more, but I am no great brief for ISI;
26 I have no quarrel with them. But I mean that type of

1 institution.

2 MS. FERGUSON: We have used it. We are not boycotting
3 it.

4 MR. LACY: There would be a lot more of that if one
5 were compelled -- and I am not suggesting, Alice, that a
6 library not be able to do it, I am saying if somebody is
7 going in commercially into a library and on the library's
8 site running a commercial photocopying service, using the
9 library's machine -- I am not putting any restriction on
10 the library, now -- I am talking about if you could not
11 do it, if you had to either order from a library or order
12 from a licensed photocopying service, commercial one, you
13 would be very anxious to have that commercial photocopying
14 service even if they charged you a little more because it
15 would give you faster service.

16 MS. CHAMBERLAIN: Yes.

17 MS. FERGUSON: We would probably set one up.

18 MR. LACY: And you would be better off and your
19 customers would be better off and the publishers would be
20 better off and the libraries would be better off because
21 they would not have your people cluttering up the library
22 using the machine and drawing the stuff off the stacks.
23 But there is a real social need to be served by having
24 commercial licensed authorized photocopying services, and
25 I think that the copyright law could be an incentive to
26 that, if it is placed in a way it does not mess up the

1 machinery first, before you get the new machine.

2 JUDGE FULD: Arthur?

3 MR. MILLER: Could you follow up on Gabe's point?
4 Without telling tales out of school, there are, you said,
5 about 40 or 60 companies --

6 MS. FERGUSON: 40 is the latest, the highest that I
7 have heard.

8 MR. MILLER: -- like yours. You have described what
9 Editec does, which I will just simply redescribe as
10 bleeding off pieces of various data bases, compiling them,
11 repackaging them, and vending them.

12 MS. FERGUSON: Right.

13 MR. MILLER: How prevalent is that kind of practice
14 and what other kinds of practices are there that might,
15 in the legal sense, hurt the data base proprietor?

16 MS. FERGUSON: I know of three companies that do that,
17 what you just described. I do not know that it is none of
18 their business.

19 Other practices that would hurt the data base
20 proprietor?

21 You will say this is irrelevant, but one that
22 concerns us is a lot of poor searching. I was talking
23 about this last night and, that is, the need to establish
24 some kind of a standard -- this has nothing to do -- but
25 it hurts data base proprietors because we are marketing
26 their product. That is the primary function, I think, of

1 the broker and when we market or when we produce a poor
2 product, which is a combination of this data base, that
3 one, and that one, then it hurts the data base proprietor
4 in the end, so there is a concern.

5
6 I cannot think of any more right at
7 this point, but there are lots of other practices going
8 on. I can't think of any that hurt.

9 JUDGE FULD: Bob?

10 MR. WEDGEWORTH: Fundamentally, there is no reason
11 why the restrictions that you have pointed out with regard
12 to data bases should not apply to other kinds of products.
13 A data base via a terminal is essentially no different in
14 content than that as a printed source. If we assume that
15 in a new copyright bill that libraries are going to have
16 to assume greater liabilities with respect to works under
17 copyright, do you believe that firms such as yours should
18 continue to be treated simply as another user in going
19 into these agencies, using their services to provide
20 services in terms of your customers?

21 MS. CHAMBERLAIN: Yes. I would think, yes, as opposed
22 to somehow having to check in your commercial users, and
23 you are treating different --

24 MR. WEDGEWORTH: The point that I am trying to get
25 at is that somehow in this discussion you have always
26 assumed that there is only the user out here and the

1 proprietor, be it a data base proprietor or publisher of
2 some large compilation, and this institution where you
3 are getting 52 percent of your sources does not have any
4 stake in the matter.

5 Suppose this institution would say, "Fine, you
6 can come in provided there is an access fee that you pay
7 to this institution? Otherwise we can start our own
8 information brokerage business inside under the same terms
9 and conditions that are extended to you by the proprietors."
10 Now, the relationship is that in talking about the
11 restrictions of copyright or the restrictions of the
12 contractual arrangement, you have to consider all of
13 the agencies that are involved.

14 MS. FERGUSON: We want to do what your button says --
15 I just noticed it -- "Documents to the People."

16 (Laughter.)

17 MR. WEDGEWORTH: I do not think there is any violation
18 of that. There is no violation; there is nothing that you
19 are doing that did not emerge out of traditional practices
20 that these institutions teach people how to do every day.
21 I am simply saying it is more complex than simply changing
22 your contractual arrangement because the agencies where
23 you are getting most of your information are still liable
24 for whatever infringements take place on their premises.

25 MS. FERGUSON: Are you going to be hearing from
26 Information Unlimited?

1 MR. LEVINE: No. We may at some point, but there is
2 no plan at the moment.

3 MS. FERGUSON: Apropos of this issue, they are in
4 Berkeley and the Berkeley Library has taken away all of
5 their library cards -- they had a lot of them -- because
6 their primary business was photocopying and their primary
7 customers are special libraries. Okay? Located around --
8 all over Arizona, New Mexico.

9 MR. WEDGEWORTH: That is exactly what I am talking
10 about.

11 MS. FERGUSON: So they are in great trouble at this
12 point and they are in need of help.

13 MS. WILCOX: This issue gets further complicated
14 because of some legislation supporting major research
15 libraries saying they have to provide access to everybody.

16 MS. FERGUSON: What legislation?

17 MS. WILCOX: There is some proposed legislation.

18 MR. LACY: Why did the library at Berkeley do this;
19 because they were getting to be a nuisance and over-using
20 material or because they were afraid that they were
21 becoming liable for infringements if they permitted it on
22 that scale?

23 MS. FERGUSON: Well, if I can speak for the owners,
24 they started out their business with an open policy of
25 going directly to the head of the library and saying:
26 "This is our business; this is what we intend to do;

1 MR. LEVINE: No. We may at some
2 no plan at the moment.

3 MS. FERGUSON: Apropos of this
4 Berkeley and the Berkeley Library has
5 their library cards -- they had a lot
6 their primary business was photocopying
7 customers are special libraries. Okay
8 all over Arizona, New Mexico.

9 MR. WEDGEWORTH: That is exactly
10 about.

11 MS. FERGUSON: So they are in great
12 point and they are in need of help.

13 MS. WILCOX: This issue gets further
14 because of some legislation supporting
15 libraries and information services.

1 company and a hundred special libraries that they serve
2 that are in for-profit companies and he is saying, "Those
3 special libraries can come here and check out anything they
4 want and photocopy it; you cannot do it for them." That
5 does not make any sense to me at all.

6 MR. WEDGEWORTH: Isn't there any reciprocal arrange-
7 ment between the institutions?

8 MS. FERGUSON: Which institutions?

9 JUDGE FULD: The specialized --

10 MS. FERGUSON: Them and UC Berkeley?

11 MR. WEDGEWORTH: Yes.

12 MS. FERGUSON: I do not know what kind of reciprocal --
13 oh, you mean inter-library loan-type thing? Yeah, but they
14 don't want that. You know why? Because that takes six
15 weeks. They all use Information Unlimited, every one of
16 them.

17 MR. WEDGEWORTH: That is the oldest type of cooperative
18 arrangement existing in this country and it is a primary
19 basis for those arrangements.

20 MS. FERGUSON: Then why does this company exist?

21 MR. WEDGEWORTH: Which company?

22 MS. FERGUSON: Information Unlimited.

23 MR. WEDGEWORTH: I am not arguing. I think they are
24 providing a very fine service, but I am saying you cannot
25 distort --

26 MS. FERGUSON: But that is the difference.

1 MR. WEDGEWORTH: -- a traditional relationship and
2 say there is no difference; there is a difference.

3 MS. FERGUSON: What is different is that Information
4 Unlimited has nothing to give.

5 MR. WEDGEWORTH: There is a service that is being
6 shared.

7 MR. NIMMER: You have asked for a distinction, what
8 is the distinction between the for-profit corporation and
9 the for-profit libraries which it serves and maybe there
10 is no meaningful distinction, but the latest version of 108
11 in the House Report suggest just that kind of a distinction.
12 I wondered whether you think it makes sense. They say
13 that one who photocopies -- the 108 library exemption goes
14 to nonprofit operations, but they define, as included
15 under nonprofit, a for-profit enterprise as long as there
16 is no profit to be realized directly from the making of
17 the photocopies. That is, if Shell Company has their own
18 library and they make photocopies of material that will
19 indirectly help them make more money, but they are not
20 making money from the making of the photocopies per se,
21 then that is not for profit. That is just where your
22 distinction comes in.

23 The operation that goes to the library is making
24 a profit directly from making the photocopies by giving it
25 to the Shell library; whereas the Shell library is not
26 making a profit directly from the photocopies but they

1 MR. WEDGEWORTH: -- a trad
2 say there is no difference; then

3 MS. FERGUSON: What is diff
4 Unlimited has nothing to give.

5 MR. WEDGEWORTH: There is a
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7 MR. NIMMER: You have asked
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12 I wondered whether you think it
13 that one who photocopies -- the
14 to nonprofit operations, but they
15 under nonprofit, a for-profit ent

1 MR. LACY: But you have got seven percent of what
2 you paid out to copy the 400 copies that you did not use;
3 you include that in the price. You make just as much
4 money copying one that you do not use that you do make
5 copying the ones that you do use.

6 MS. FERGUSON: Right. I think the other business of
7 actually photocopying a document and selling it to a
8 customer, that is the other side.

9 Is the U.S. Government violating --

10 MR. LEVINE: Can I ask just one quick question?

11 MS. FERGUSON: I wanted to bring up an issue -- maybe
12 there isn't time -- that we didn't want to put in print.

13 MR. LEVINE: That sounds far more intriguing than
14 my question.

15 MS. FERGUSON: Are we taping this?

16 MR. NIMMER: It is all public.

17 MR. LEVINE: There is a stenographer present.

18 MS. CHAMBERLAIN: There is a stenographer taking it
19 down.

20 MR. LEVINE: Yes, this is a public meeting.

21 MS. FERGUSON: I guess I will not do it, then.

22 MR. SARBIN: You can tell Mr. Perle outside.

23 MR. PERLE: Talk to me later.

24

25 MS. FERGUSON: It is only that I wanted to do it for
26 the good of the public interest, but there is no sense

1 punishing us.

2 MR. PERLE: Can you paraphrase it?

3 MS. KARPATKIN: Could we go off the record or into
4 executive session or something?

5 MR. MILLER: There is no reason why we cannot go
6 off the record.

7 MR. LEVINE: Let us briefly go off the record.

8 (Discussion off the record.)

9 MR. LEVINE: May I ask one quick question -- the
10 answer to which I am sure I know. Fiction, poetry, is
11 that any percentage at all of the type of work that you
12 do or is it all in the scientific and technical --

13 MS. FERGUSON: That we photocopy?

14 MR. LEVINE: Yes.

15 MS. FERGUSON: Yeah. It's a smaller -- small, minute
16 portion, but we've been known to do it.

17 MR. LEVINE: Minute?

18 MR. PERLE: For what?

19 MS. FERGUSON: For a customer who requests -- we do
20 get searches in humanities areas and we do a search in the
21 library since there are no humanity data bases and then
22 sometimes photocopy.

23 MR. LACY: What kind of questions do you get in
24 humanities?

25 MS. FERGUSON: An example would be a student's
26 dissertation on the life and works of George Byron. I

1 don't know. Something like that. We will do a literature
2 search in support of that student's dissertation.

3 JUDGE FULD: Thank you very much for a thought-
4 provoking discussion.

5 MS. FERGUSON: You are very welcome and we appreciate
6 it, too. It was also fun.

7 MR. MILLER: Mr. Chairman, could I ask if our staff
8 could try to assemble for the Commission copies of the
9 contracts that data base suppliers use so that we can get
10 some sense of the terms and conditions that might limit
11 access?

12 MR. LACY: That would be very interesting.

13 MR. LEVINE: We already do have the contracts that
14 SDC and Lockheed enter into with people like Ms. Ferguson's
15 organization, but we will try to get the other contracts.
16 Perhaps we may even have them.

17 MR. MILLER: Maybe you can get a compilation of the
18 relevant cases.

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1 Los Angeles, California, Friday, September 17, 1976, 11:00 AM

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4 JUDGE FULD: Our next speaker is Dr. Peter E. Weiner.
5 He is the head of Information Science Department for the
6 Rand Corporation. He received his Ph.D. in 1966 from
7 Brooklyn Polytechnic Institute. He worked first as an
8 assistant professor at Princeton University and then as
9 associate professor at Yale where he has created a new
10 computer science department and served as its first
11 chairman.

12 His recent research at the Rand Corporation
13 has been involved with the interface of humans and machines.
14 In this context, he helped design an implement system that
15 allows convenient entry in manipulation of tapes by
16 computer editing programs.

17 Among Dr. Weiner's many professional affiliations,
18 he serves on the Editor Advisory Board of the International
19 Journal of Computers and Data Bases.

20 Dr. Weiner will be the first speaker CONTU will
21 hear concerning the new topic: New Works Created by
22 Computers.

23 We are happy to welcome you, Dr. Weiner, to
24 our session.

25 DR. WEINER: It is great to be here. I would like
26 to state that what I am about to say is not necessarily

1 the views of the Rand Corporation or its sponsors.

2 THE REPORTER: Could you speak up a little, please?

3 DR. WEINER: Although I do want to thank --

4 MR. SARBIN: Excuse me.

5 Would you rather have him up here?

6 You speak softly, so let us change places.

7 DR. WEINER: I do also want to mention that two of
8 my colleagues, Dr. Rein Turn and Norman Shapiro, have
9 spent some time discussing issues with me and thinking
10 through of the substance that I have to say, and I want
11 to get my thanks on the record for their help.

12 I will talk about new works issues, but I have
13 actually come to talk about some broader concerns. I want
14 to try to stretch the Commission's thinking in the direc-
15 tion of flexibility from having a body of law that will
16 respond to the changes in technology over the long term;
17 and I have taken it upon myself to decide that this means
18 to think about the technology as it will evolve over a
19 25- to 50-year period. Now, I do not think that I can
20 responsibly predict with any real accuracy what the
21 technology is going to be in that time frame, but I would
22 like to offer some speculation anyway because I think it
23 will be relevant.

24 Essentially, I am looking towards a world which
25 will be essentially computer based. By that, I mean that
26 terminals and computers in homes and offices will be

1 commonplace. We will have systems of computerized commerce
2 that, for example, include the notions of electronic fund
3 transfers; this will be commonplace. There will be much
4 less dependency on paper than we have today. For example,
5 I expect that systems of electronic mail will be used
6 quite -- by quite many people.

7 Perhaps most relevant to the concerns of this
8 group is, I envision, individuals, say, in their homes
9 accessing ordinary literary works through computer
10 terminals; that is, the words will be stored in data bases
11 and people will read these works, not in hard copy form
12 through a book, but rather through use of the new
13 technology.

14 Now, what I wanted to do is offer some general
15 comments about the significance of all this as I see it;
16 then talk specifically about the role that computers will
17 play in producing some of the works in the new works issue;
18 and, lastly, at the end, discuss perhaps some of the
19 technological developments that I see that will make --
20 leads me to this speculation, why I think this may, in
21 fact, be the case.

22 Copyright laws, of course, deal with many,
23 many different areas. I am going to try to limit my
24 discussion to some books, things -- when I go to a book
25 store and I buy something. I don't want to get into areas
26 of phonorecords or movies or the other types of issues.

1 I would like to make some very basic types of
2 comments and it relates to the original goals of copyright
3 and the mechanisms that have been used over time and the
4 question as to whether those mechanisms are really appro-
5 priate for the future. The fundamental goal of copyright,
6 I guess, is simply to promote the arts. That is, to
7 encourage the recreation and distribution of works of
8 authorship. The basic mechanism, as I see it, is to
9 essentially control the making of a copy, the creation
10 of a fixation. What the basic mechanism does not try to
11 do is in any way limit the way this copy is used. That
12 is, if I go into a book store and buy a book, I am
13 certainly allowed to pass this among all my friends and
14 allow them to read it as well.

15 I guess what I am trying to suggest is there
16 doesn't seem to me to be anything fundamental or signi-
17 ficant about this mechanism other than it works. It sort
18 of reasonably encourages works of authorship to be
19 produced and it does provide for rather wide distribution
20 of these works to the public. Certainly it worked quite
21 well in 1909 and even today it still largely holds as a
22 good mechanism. But I want to suggest that it is not
23 necessarily the mechanism that should be at all followed
24 in the computer based world when the information that is
25 now in books are instead contained in information systems.

26 I guess I am suggesting that of the alternatives

1 that I have seen in the research plan that I suggest you
2 might consider that you indeed seriously consider the idea
3 of examining new concepts of intellectual property laws;
4 those not limited to the traditional copyright framework.
5 I recognize this is not an easy task at all, but I think
6 it is an important one and I will try to give some specific
7 reasons for it.

8 What is needed, of course, in some general
9 terms, is simply basic understanding of what is really
10 allowed to happen with information systems and, also,
11 how, in essence, returns to authors and investigators are
12 managed. Rather than trying to control the basic notion
13 of the creation of a fixation, instead, it seems to me,
14 other notions like more directly trying to control, if
15 you will, the use of a work. That is, in particular,
16 perhaps arranging for mechanisms where return is generated
17 to an author if merely a single page of his work is read
18 by a person in that person's home, using a computer
19 terminal. I think the technology in the long run can
20 support this and that this is an interesting way to
21 consider.

22 MR. NIMMER: Isn't there a kind of fixation if it
23 appears on a screen; it is ephemeral, but --

24 DR. WEINER: Yes. It is completely true that one
25 can take the present copyright framework and try to bend
26 it to the new technologies and say, "What we had before

1 is a fixation on paper is now a fixation on a screen."
2 We can say that the running of a computer program is a
3 performance in the computer because the --

4 MR. NIMMER: Performance is also not a fixation but
5 it is recognized in the present law.

6 DR. WEINER: Yes, of course. But if we change the
7 mechanism to which we try to promote the arts in this
8 fundamental way we may arrive at a fairer and more
9 efficient system; one that, in fact, does a better job of
10 achieving the overall goal of what copyright is
11 supposed to do.

12 I guess even though this becomes conceivable
13 and more relevant in a time frame which is quite far out,
14 I think one of the fundamental points I want to make is
15 that every issue that is arising today with respect to
16 data bases and software will essentially arise in the
17 future when we get to this computer based world where
18 conventional literary works are accessible as well.
19 that what I am suggesting is that one not try to bend the
20 present copyright laws today to handle the data bases and
21 software issues; that is, not try to simply say that running
22 a computer program is performance and, therefore, it is
23 covered under the present framework, but rather develop
24 new frameworks today to handle the present problems that
25 are really here today and that will lay the way and the
26 groundwork for eventually handling this entire new way

1 of life that will be around in 50 years.

2 Perhaps I can make that point clearer by
3 showing some issues that arise now within data bases and
4 software and drawing the analogy to how those issues will
5 arise with respect to conventional works. Of course, there
6 is a problem: Conventional works in 50 years -- that is,
7 the things that are now essentially obtained by going to
8 a book store will not be quite the same any more; they
9 won't be so conventional, but I think the distinction
10 should be clearer.

11 For example, within the software issue we
12 worry about the different forms that an object might have.
13 It can be as a source program in binary code; it might
14 have various representations within the computer. Essen-
15 tially, this is going to be true for works when they are
16 stored as well. Certainly in a trivial sense I might
17 store them in different computer systems using different
18 codes. I also might have them stored in computer systems
19 including formatting information that allows it to be
20 displayed in different devices more easily; I might find
21 that it is necessary to compact information, compress it,
22 so it can be more efficient for storage and, therefore,
23 might be in a somewhat unrecognizable form, but clearly
24 equivalent; it might be cryptic for some reason; or,
25 again stretching to what the future might really be, it
26 might be in the form of a computer program itself. I

1 certainly can go to a book store today and buy a handbook
2 of physics and chemistry. If I wanted to put that hand-
3 book in a computer system it might be the case that I
4 would really store the equations in which a lot of the
5 tables are generated and when a person wanted to access
6 that work, instead of opening up the book and turning
7 the page, he issues commands which would display the
8 results for him in a way that he can perceive them but,
9 in fact, what was in the computer system was not off that
10 table but rather the program.

11 That already shows, in a way, my second example,
12 which is that the -- it may take the execution of a
13 computer program itself in order to be able to perceive
14 the work. But I think this also will be true for other
15 works other than this specialized example. For example,
16 it may be found convenient to store in a computer a form
17 of a work and to allow a computer program to produce a
18 derived work from it rather than store the work and the
19 derived work as well. If I want to access the derived
20 work, perhaps I will access it by running the computer
21 program. I suspect that as authors become more acquainted
22 with the computer as a tool, a creative tool, we will find
23 computer programs embodied into literary works themselves
24 in a much more -- in a way that is dramatically different
25 from what we do today; but still, I see this as conceivable
26 in the long term.

1 Now, the literary works stored in computer
2 systems may themselves be perceived by other computer
3 programs in the same way that a numeric data bases and
4 scientific data bases are perceived by programs today;
5 that is, I might not want to read through some historical
6 work but I might like to see a few pages relevant to some
7 events of a certain time and relating to certain circum-
8 stances, and I might ask the computer program to read
9 through that work for me and simply produce on my screen
10 the relevant portions of that work. Well, here again, is
11 a case where perhaps the author of that work ought to get
12 some return based on my examination of his work and perhaps
13 even a different kind of return because it was examined
14 largely by a computer program and only small parts of it
15 were examined by the actual human. But what I am trying
16 to show is that whereas in the data base problem today
17 we have to worry about machine access of data base and
18 extraction of information from that, so we will have to
19 with respect to conventional works in the future.

20 As one more example: We look at a data base
21 that changes every day and we wonder whether it can be
22 copyrighted; does it have to be copyrighted every five
23 seconds because it has changed, or do you somehow copy
24 the dynamic data bases as it is changing in some way?
25 I just feel sure that authors, once they are provided
26 with the possibility, will also produce works of

1 authorship that will be dynamic in somewhat the same
2 sense. An almanac, for example, that is kept current.
3 Or I could even -- stretching my imagination -- think
4 of a novel that changes from day to day as current events
5 change.

6 MR. NIMMER: That is really no different except in
7 the present situation where a different edition of a book
8 or a play -- changes are made in a play during the run of
9 its performance and --

10 MR. MILLER: That is known as a soap opera.

11 MR. HERSEY: Because the programs intervene along
12 with the author in a way that it does not happen when you
13 have different editions of a work.

14 MR. NIMMER: I do not know what you mean by the
15 "program."

16 MR. HERSEY: He is talking about a situation in which
17 the computer may be a participant in the changes in the
18 novel.

19 MR. NIMMER: Doesn't that simply facilitate the
20 change, but it does not change the problem?

21 MR. HERSEY: It is a corroboration. It is different.

22 MR. NIMMER: You are getting to the other part about
23 copyrighted works created by a machine?

24 MR. HERSEY: That is right.

25 DR. WEINER: Well, again, the question is, do you
26 want to take the current copyright framework and adapt

1 it so that when copyrighted works every five seconds can
2 come by some automatic means without having to refile in
3 some way?

4 MR. NIMMER: You do not have to file to get a copy-
5 right.

6 DR. WEINER: I understand. I am still leading to
7 the notion that new frameworks are needed. They seem
8 appropriate to me for software and data bases and I think
9 in the long run will be appropriate for conventional works
10 as well.

11 MR. LEVINE: But the ephemeral nature problem still
12 remains, if, in fact, there is a change every five seconds
13 and I capture the change that occurs at 11:20 and 35
14 seconds and copy that, but it is gone forever to the copy-
15 right owner to prove that at 11:20.35 this was his version
16 of the work; then the question is proof, that type of
17 thing.

18 DR. WEINER: Well, the point that you raised brings
19 me to the main area of discussion which is the new works
20 and the role that the computer plays in producing these
21 works. I see that the Commission is interested in at least
22 three questions in this area: First, can a computer
23 program be thought to generate a copyrightable work in
24 any sense direction; and if so, when is a particular work
25 copyrightable; and then, assuming that we have a copy-
26 rightable work, who owns the copyright interest?

1 Well, this is one set of questions where, at
2 least to me, I see a path that can be followed to an analogy
3 that can be said that will help make these issues, in fact,
4 rather easy to deal with. The analogy is to consider what
5 a program produces to be equivalent to what is produced
6 as a work for hire. That is, consider the program to
7 play the role of an employee, if you will. Now, what this
8 means is that if you want to decide whether a work is
9 copyrightable or not, I suggest that you use criteria that
10 applies to the work and its relationship to other works
11 and not at all to the nature of the author, as I see no
12 reason to distinguish between a machine or a person. I
13 only want to look at what has been produced because in
14 principle, I can ask a person or, if necessary, an army
15 of people, I can hire them to do essentially what any
16 machine can do.

17 Now, when it comes time to answer a specific
18 question of who has the right to a particular work, then
19 what one has to do is look at the relationship of what
20 the hypothetical employee has done and what contractual
21 relationship has been set up to define who owns his
22 product. That is, if I am given a computer program by
23 someone and I am allowed to use it with no constraints,
24 then I can think of that program as being my employee
25 and if I use it in some way I have produced a work that
26 is essentially mine for -- and I have the copyright

1 interest.

2 On the other hand, if you write a computer
3 program, think of that program as your employee, if I
4 want to use your program to help me create a work then
5 I have to negotiate with you and ask you to allow me to
6 use your employee in pursuit of my activity.

7 MR. NIMMER: Do we have time for me to ask a question?

8 JUDGE FULD: Sure.

9 MR. NIMMER: That is an interesting analogy. Let me
10 pose this hypothetical: Suppose in the middle of the
11 Arizona desert there are rock formations and the rocks
12 fall in such a way that they rub against other rocks and
13 create interesting designs. Suppose I buy all of the land
14 surrounding certain rocks so that those rocks belong to me.
15 Now, can I claim copyright in the design that the rocks
16 make because I own the rocks? Is it a work of authorship?

17 DR. WEINER: Well, I am not sure I have the legal
18 background to answer that. I suspect not.

19 (Laughter.)

20 DR. WEINER: But the point is that all the interesting
21 subtle questions that can be raised can be reduced to
22 interesting subtle questions that do not have a computer
23 any more. You have replaced the computer with a person.
24 You still have an interesting set of questions that still
25 may be difficult to decide --

26 MR. NIMMER: As I understand it, as long you are

1 saying a human being is giving instructions to a computer,
2 what to do, and then the computer does it, that indirectly
3 is the human being that is doing it. I am wondering --
4 and I do not know -- whether the analogy is more like that
5 or whether that is the fact or whether it is just an
6 analogy like my rock one where the inanimate object
7 completely on its own does this. But you are saying just
8 because I own the computer, therefore, I should have a
9 copyright interest?

10 MR. LACY: Could you give us a hypothetical example
11 of something a computer does without somebody having told
12 it to do something?

13 MR. NIMMER: Well, it may be that -- you are right,
14 Dan, but in that case, then, the employment for hire
15 relationship is not the analogy because in the employment
16 for hire, unless it is under supervision where the employer
17 is saying, "Now, do it this way," or, "Do it that way,"
18 but it is a real kind of independent contract, like motion
19 picture writers, et cetera, who are, because they are doing
20 it on their own, then it is not one human being telling the
21 other or one human being telling the computer, but it is
22 the computer doing it on its own.

23 MR. PERLE: Maybe it will develop with his exposition.

24 DR. WEINER: Let me try to stretch this example,
25 although I feel on somewhat weak grounds to deal with this
26 particular case. If I train a person to go out and

1 rearrange rocks in the desert, then what he produces might
2 be of different nature than if it is just rocks falling
3 by themselves. If I write a computer program which then
4 controls a machine for going out and doing it, this, in
5 my mind, is no different from training the person to do it.

6 MR. NIMMER: I agree. Then there is no problem.
7 Then you have a human being doing it. Then it is not the
8 computer who is your employee; it is the man who does
9 something with the computer, that is your employee.

10 DR. WEINER: I guess I draw the analogy of the
11 program to having trained a person to do a certain job. In
12 writing that computer program he has created a hypothetical
13 employee and he has trained him to do it and he has endowed
14 him with certain skills and abilities. Now I want to use
15 that employee for my purposes. I go to the creator --
16 presumably that employee in some sense is proprietary
17 property as a program is proprietary property which, I
18 imagine, is protected under some body of law, whether it
19 is the copyright law or not -- it is owned originally by
20 the person that made it. And now I want to use that
21 program in some way to produce a work for myself. Perhaps
22 what should be necessary is that I will have to write a
23 contract with the creator of that program that agrees
24 that we share the copyright interests in what is produced.

25 Now, what I tried to do in thinking about this
26 is, in fact, think of a number of subtle and strained

1 circumstances where the computer is involved and, in the
2 end, I finally came to the point of view that the computer
3 can be taken out as a computer issue. You are still left
4 with difficult and subtle issues, but think of the computer
5 as an employee, and it seems to address almost all
6 reasonable cases.

7 (Discussion off the record.)

8 MR. PERLE: Is it the program that does the job?
9 Isn't the program a set of instructions?

10 DR. WEINER: Uh-huh.

11 MR. PERLE: I think you may be close. But I am
12 having a little trouble with the concept of somebody
13 writing a program which is a series of instructions
14 which someone can then manipulate and select from and
15 tell that programing to work on a data base, an infor-
16 mation, and come up with a result so that it is not the
17 program that is the person. The program is a machine;
18 is it not?

19 DR. WEINER: Yes.

20 MR. HERSEY: What Peter is saying is the point at
21 which you make it go to work it becomes a person. That
22 is the analogue for a person, when it does the work.

23 MR. PERLE: Is it the program that is doing the work
24 or the machine that is doing the work? See, I am a
25 little --

26 MR. MILLER: It is the programmed machine.

1 MR. PERLE: The program is a combination of the two.

2 DR. WEINER: Of course. Well, let us see. Let me
3 branch off in another direction, in other types of examples:
4 Suppose I buy a machine which sprays paint on a canvas
5 and I can control the levers that make that machine spray
6 the paint various ways; then I presume that work of art
7 would be copyrightable if I put enough of myself into it.

8 MR. PERLE: Unquestionably.

9 DR. WEINER: I could have had a person stand there
10 and hold a nozzle and do somewhat the same thing, assuming
11 he had all the dexterity to keep up with the machine, and
12 the analogy holds there, also. When you get to the point
13 where the machine does it by itself, the paint spraying-
14 thing, and the person stands there and does nothing, it
15 is not at all clear any more whether the person who bought
16 that has a right to copyright that work. All he did was
17 buy a piece of machinery and let it do its thing.

18 MR. SARBIN: Didn't somebody have to give him a set
19 of instructions?

20 DR. WEINER: The instructions sometimes are built
21 into the mechanism of the machine. He just turns a
22 switch and out comes the paint and it sprays on to the
23 canvas.

24 MR. PERLE: You are talking about a printing press;
25 that is what you are really talking about. The stamping
26 impressions. But instead of stamping them it is --

1 MR. LACY: It seems to me this whole thing was
2 actually a nonissue from the beginning. If it had ever
3 come up around a half or three-quarters of a century ago
4 and somebody had said, "Is a photograph written by the
5 camera or is it written by the photographer? That no
6 human being has painted this picture; therefore, it is
7 not a work of authorship," the analogy with the camera
8 is really very close. I do not think anybody is suggesting
9 that a computer ever writes anything that somebody has not
10 told it to write, just as a typewriter never writes
11 anything nobody ever told it to write and an adding
12 machine never calculates anything that somebody never
13 told it to calculate. I think that the action is of a
14 copyright examiner getting cute once and raising the issue
15 with one registration that got this dropped into the moor
16 of all of our concerns. It really just is not much of a
17 problem. I agree with Mr. Weiner. I take it he is stating
18 it is not much of a problem.

19 MR. LEVINE: There are a couple of things that I have
20 heard of that I think are coming along: artificial
21 intelligence and heuristics. Again, are we in the same
22 area? In other words, does the computer only operate
23 based upon what the human tells it to do?

24 DR. WEINER: That is a very good point. People view
25 computer programs and the computers running the programs
26 in different ways. Let me take the two examples:

1 On one extreme you think of a computer as just
2 carrying out the simplest type of recipes doing the simplest
3 kind of operation and moving something from here to there,
4 adding to numbers, very simple type of information trans-
5 formation operations but it effects something useful by
6 doing them at a very, very interesting repetitive way.

7 Other researchers in the field go right to
8 the other extreme. They feel that you can build in such
9 sophistication in programs that the effect of running the
10 program is very hard to distinguish from what a highly
11 intelligent person would do and such programs are, in
12 fact, called "artificial intelligence programs." For
13 example, there is a program which I can converse with
14 and answer questions about, the sample of moon rocks
15 that was brought back and I can answer very general
16 questions of how many rocks of a certain color came back
17 and what was their specific density and talk in a very
18 natural language way. And an awful lot of computer
19 processing goes into carrying out the operation which is
20 very easy for a person, but it is beginning to approach
21 the kind of things that people do.

22 Again, I think this is largely irrelevant to
23 the issue; I am agreeing it is a nonissue. When you hire
24 someone to do the job for you it doesn't much matter if
25 it is a clerk you hire or whether it is an intelligent
26 person. Highly intelligent people can be asked to do

1 things which do not produce copyrightable work; clerks
2 can be asked to do things which produce copyrightable
3 works. It does not really matter if we think about the
4 programs as having intelligence or not. Think of the
5 program as being an assistant which has been made available
6 to you, hopefully through contractual arrangements which
7 keep the bodies happy as to what is going on and reducing
8 the issue to one of a nonissue.

9 MR. LACY: The camera analogy really appears there.
10 You can get a camera that does not just give you the same
11 image that the human eye sees but does what an artist
12 does: Accentuates, contrasts, emphasizes the reds, blurs
13 and mists the picture if you want it to, abstracts from
14 the scene a particular element you want seen that does not
15 make the operation of the camera or the work any less a
16 copyrightable product.

17 MR. NIMMER: It is still the effectiveness of the
18 human entity that triggers this, but I guess you are not
19 saying anything to the contrary.

20 MR. LACY: Let us say the first time a copyright
21 computer, which no human being has ever given any
22 instruction to, whatever it produces, the work will raise
23 the issue, but we will postpone it until that happens.

24 DR. WEINER: Let us go in that direction for a moment.
25 Suppose I train clerks to carry out certain operations
26 which result in their reading of meters that are on the

1 wall, carrying out some computations on these meters, and
2 producing a weather report. These people that I hire to
3 do that.

4 MR. NIMMER: But you have told them what to do.

5 DR. WEINER: I have told them what to do. Now, what
6 they produce might be copyrightable. Again, I do not want
7 to offer legal opinions in this area, but let me assume
8 that it is copyrightable. If a computer program is
9 engendered to do this routinely, day after day, it is the
10 same things that those people were doing, then what they
11 produce should be as copyrightable as before.

12 MR. NIMMER: Absolutely. But because you were there
13 in the first place to tell them what to do or to tell the
14 machine what to do. I do not want to beat this -- I think
15 it may be a dead horse because there always is some kind
16 of human source to it. I just pause because it seems to
17 me sometimes I hear you saying it really does not matter,
18 intelligence does not matter as long as it is done; the
19 result is all that counts. I come back to, there has to
20 be some --

21 DR. WEINER: I think what you are saying is quite
22 pertinent to my point, too, that it was -- the program
23 essentially was put together by a person who gave it
24 certain abilities, if you will, trained it to do certain
25 things and that is equivalent to having trained another
26 person to do it. From there, the conclusion follows.

1 MR. PERLE: If I read you correctly, what you were
2 saying is that if I want to end up with a product -- let
3 us say I want to end up with a piece of music which has a
4 melody and chords and orchestration, and I want it to be
5 based on Chopin and let us assume that Chopin is a living
6 person and it is all of the things that Chopin wrote,
7 which has triplets in it, all three notes put together,
8 and I ask somebody to design a program which will scan
9 all of or somehow store and manipulate all of Chopin's
10 works so that I can put them together in a rhythmic way.
11 And then in turn orchestrate, record it so I can play it
12 on the piano, and with accompaniment, and maybe play it
13 for me and then add the string section and the base and
14 all the rest of them. There are a whole series of
15 different operations, different people doing it. There
16 is me, who wants it; there is the guy who is developing
17 the data base, I guess, he is supplying all of Chopin's
18 material -- we are getting it from somewhere -- and there
19 is the guy who is developing the program. Each of those
20 people have some sort of stake, whether it is a work stake
21 or an economic stake. How do you divide up in that
22 division in terms of copyright? I guess what you are
23 saying is that dividing up the pot is a contractual
24 relationship.

25 DR. WEINER: Exactly.

26 MR. JACY: The computer is no different from putting

1 out an encyclopedia. Hundreds of people participate in
2 various ways in doing that and you are still --

3 MR. PERLE: I am a little bothered by the program
4 because by traditional terms the man creating the program
5 and the analogue of the program itself, the program becomes
6 a joint author. If you are going to carry the analogy
7 through then I, by contract, have to deal with that joint
8 authorship, I think is what Mr. Weiner is saying.

9 MR. LACY: Or you hire a guy to do it so you become
10 the author that worked behind it.

11 MR. PERLE: And then I own the program. But where
12 it is a preexisting program, I have to deal with it so
13 that the product of what it does --

14 MR. LACY: I do not see that this is any different
15 from any complicated editorial product. I think the
16 computer --

17 MR. WEDGEWORTH: The only case where that might be
18 true is where you have an inadvertent product and it seems
19 to me that that, too, would resolve itself the same way
20 you do under other circumstances; if you have a contractual
21 relationship where the employee or the agent says that
22 everything they do belongs to the company, then it is
23 already answered. If you do not, then that is still
24 negotiated.

25 MR. LACY: If the computer does something inadvertently
26 without anybody telling it to -- that happens to human

1 beings, too.

2 I have a manuscript in front of me the woman
3 produced by automatic writing. It is a biography of
4 Jesus and she does not know what spirit told her to write
5 it.

6 MR. WEDGEWORTH: The point, though, is that it does
7 not really make any difference and it is possible to have
8 something done which is not precisely the result of direct
9 instructions. I mean, you cannot really say that. And
10 the analogues of programs that are being developed where
11 you provide general instructions to a computer that tells
12 it how to play chess, you cannot really say that the human
13 told it to move the rook to queen eight; it just does not
14 happen. There are other things that are going to develop
15 in the future, but, still, the problem is I do not think
16 it makes any difference.

17 MR. NIMMER: Here maybe it does. Jerome Frank, for
18 example, in one opinion, said that if an artist's arm
19 moves inadvertently because lightning is striking at
20 the time, still that movement is protected. But there
21 is a further component and that is, under the Constitution,
22 Congress can enact copyright laws only for the protection
23 of authors. So that you have to have a human entity, an
24 inadvertent human act is protectable. An inadvertent act
25 by a machine that is not directed by a human arguably is
26 not the act of an author within the Constitutional sense.

1 MR. LEVINE: Another question that Gabe posed, he
2 used Chopin and that is borrowing somewhat an analogy
3 that Arthur Miller used last week in another context.
4 But instead of Chopin, it was Burt Bacharach. Let us
5 say one of his compositions was put in and they wanted
6 a new work by Bacharach. Is the author the person who
7 programed it or is the author Burt Bacharach?

8 MR. LACY: Gabe stipulated that Chopin as alive.

9 MR. PERLE: One of the things the Commission
10 should note here is that this analogy breaks down in
11 work made for hire because it does not fit in under the
12 definition of 101 right now. But that is just an
13 individual.

14 MR. HERSEY: I would like to hear the rest of what
15 Peter was going to present.

16 You spoke of some other --

17 DR. WEINER: I did not want to suggest, by the way,
18 that new works issues would not be -- will always be easy
19 to resolve in practice.

20 I want to say at least that in computers, of
21 course, things can happen a lot faster and short of time
22 frames and involving more complicated situations than
23 perhaps ever in the past; that is, we can certainly think
24 of complex multiple party interactions sometimes involving
25 little human intervention along the way and this certainly
26 will produce problems.

1 Also, I think in the area of the use of
2 computers to produce derived works, we have potential
3 problems. It may be very difficult to decide or even
4 to detect when a derived work has been produced. That
5 is, the principle I enunciated before still holds true:
6 Think of the program as a person but in practice it may
7 get very, very difficult to keep track of all that is
8 going on.

9 I think also the issue of integrity of work
10 comes up, something of which I suspect is of concern to
11 authors. For example, a novel is written and someone
12 comes along and writes a program which allows me to read
13 that novel but allows me to read it in a form that has
14 been personalized to me -- in fact, that is even no
15 different from a service which is commercially available
16 today, except it does not take a standard work and modify
17 it; it derives personalized work. Should there be of
18 concern to authors that their work is modified by this
19 way before they are presented to users?

20 If I take a photograph and it is in computerized
21 form, someone could write a program which will shake around
22 the bits that make up that photograph and come up with one
23 that is different in some way, enhanced or modified.
24 Perhaps as the person who took that photograph I do not
25 want that to happen. What this raises is an interesting
26 question which I am not really sure in my own mind what

1 the answer is. But the question is: Should there be a new
2 framework, should one have some control over how the work
3 is done? That certainly is a departure, as I see it, in
4 many ways from what the case is today, but it may become
5 important to think about that in the future. I am not sure.

6 In any case, the last thing I wanted to get to
7 was a brief discussion of some of the technological
8 developments that I am familiar with that make me think
9 that the computer based world that I spoke of at the
10 beginning is, in fact, a conceivable conjecture for the
11 25- to 50-year period. Let me do that by talking about
12 a few things that I see being developed today. Some of
13 these things are used in my daily work as a researcher
14 and that I think will be undergoing advanced development
15 and serious testing in the next five to ten years, if not
16 sooner, and perhaps will be commercially available 10 to
17 20 years from now, although maybe only to specialized
18 markets on a small scale.

19 First, I want to mention the developments which
20 are leading more and more people to become on-line with
21 computers in getting their works directly into machine
22 readable form. That is, I do not want to talk so much
23 about optical scanners and digitizers which can tape the
24 work, but rather the developments which are putting people
25 directly into contact with computers, to bring their works
26 into machine readable form in a direct way. I am referring

1 to machines and programs which basically do typewriter-
2 like operations except that the key strokes are captured
3 and are manipulable. Essentially, I see the business
4 world moving in this direction and we will find word
5 processing and office automation systems become more and
6 more heavily used simply because of the efficiency that
7 this will entail for business operations. I think also
8 it is interesting to view these devices as devices which
9 might play some role in helping an author in his creative
10 work; but I guess from the point of view of the copyright
11 laws, that is not of prime concern, although it will just
12 have a further effect of bringing more and more individuals
13 into contact with computers.

14 In the storage area, I know of today places
15 that are using devices that store a trillion bits. There
16 is, up at Illiac 4 Project at AFSA Ames, there is one
17 such device on-line now and there is one company, Computer
18 Corporation of America, which is attaching a device to a
19 particular computer a PDP-10 and is actually selling today
20 a commercial service in a store of this size; so the
21 problem of coming up with storage devices to store large
22 amounts of information, library source information, is
23 certainly already at hand and conceivable in the near
24 future as an economic reality.

25 Once information gets into the machine and is
26 stored, we will need mechanisms for communicating it

1 around both from center to center and also into the home.

2 Here I wanted to discuss briefly my experience
3 with the Arpanet which is an experimental computer network
4 work produced by the Advanced Research Project Agency in
5 the late 1960's and one that is getting extensive testing
6 today. This network has over 200 computers attached to
7 it right now and utilizes a technique of communication
8 which is called package switch digital communication. It
9 originally was put together as a network to facilitate
10 resource sharing among computers. That is, if I want to
11 run a computation in my computer but it is overloaded, I
12 will have a mechanism for running that program on someone
13 else's computer at some other location. But what was
14 found to be true is that perhaps the more important resource
15 to be shared was the file system. In practice today, we
16 find people going out over the network, retrieving documents
17 that are stored on other computers because it is more
18 convenient or less expensive to keep the information in
19 the file systems of that computer.

What has turned out to be an interesting development in use in the Arpanet is that its main role as a resource-sharing device has been supplanted in some way as its role as a message system. This was not really the notion that was behind the development to the Arpanet but, interestingly enough, it has turned out that one of its main applications has been simply as a way to generate

1 messages on a local computer and transmit them over the
2 network to storage locations in other computers.

3 MR. PERLE: What do you mean by "a message"?

4 DR. WEINER: Oh, a memo; a short set of paragraphs
5 that I just composed that -- any collection of texts that
6 might be on my local computer.

7 MR. PERLE: Who is calling for the message?

8 DR. WEINER: Basically, I want to send a note to
9 someone telling them that I will arrive in Washington
10 next week at 11:00 o'clock. I sit at the computer --

11 MR. PERLE: That sort of communication?

12 DR. WEINER: Yes. I sit at the computer terminal
13 and I compose, using existing programs, something that
14 says just that and I essentially run a little program
15 which asks me, "Who do I want to send it to?" "Who should
16 get copies?" "What is the subject of the memo?" And,
17 then, the body of the text.

18 MR. PERLE: So it is person-to-person communication?

19 DR. WEINER: Person-to-person communication. Which
20 today on the Arpanet connects over 1400 people. I can
21 sit down at a terminal and address little messages to
22 any one of 1400 people and have the message arrive in a
23 matter of seconds.

I do exchange in my daily work messages with
24 people on the East Coast. Three to four messages a day,
25 back and forth, if there is some issue that we need to

1 discuss without using the telephone system.

2 The point of all this is that it is highly
3 suggestive of electronic mail systems that will extend
4 into your homes in the foreseeable future. In fact, I
5 understand the Postal Service has let about a \$2,000,000
6 contract to a division of RCA to study the feasibility of
7 the electronic mail system as it applies to our nation's
8 mail service.

9 I guess what I am really trying to say is that
10 there are a lot of developments which are pushing us in
11 the direction of a computer based system. That does not
12 directly relate to the kinds of applications that have to
13 do with things of concern to this Commission, but they are
14 happening independently and they are going to provide the
15 technology and they are going to provide the familiarity
16 with computers to bring about situations that will be of
17 concern to this group.

18 Lastly, I wanted to talk about the output
19 devices and the displays. Here the question, I guess, is,
20 will people really give up hard copy books and allow
21 themselves to use some of these other forms of examination
22 of works? The devices that I see in the laboratories
23 today have quite high resolution. They produce on screens
24 images which are very hard to distinguish from terms of
25 the resolution from that on a printed page. There is
1 serious thought being given to shrinking the size and

1 weight of these devices so that they may, in fact, even
2 feel and look like a book in terms of physical size. This
3 is perhaps the furthest out thing in terms of being able
4 to say when this may actually be but I know that it is
5 seriously considered the notion that one carries around
6 in a person's hand something the size of a book which has
7 enormous amounts of computing and storage capability.

8 MR. PERLE: And viewing.

9 DR. WEINER: And viewing capability. I guess people
10 generally think of memory and computing as going down by
11 a factor of two a year in either cost or expansion in
12 two-year capability. Even if that two years means three
13 years or four years, it does not take very long. Let us
14 say, 50 years for three orders of magnitude for improvement
15 to have taken place and people do believe that in this
16 business there are at least three orders of magnitude of
17 improvements that can be made to support that.

18 In fact, I want to direct you particularly to
19 some research being done at the Xerox Palo Alto Research
20 Center under the direction of Allen Kay. He is looking
21 at his concept in the future which he calls the "Dynabook."
22 A Dynabook is exactly the notion of a small object the
23 size of a book yet carry around that is your personal
24 computer and your personal connection to other computers.
25 They are today prototyping this device, although certainly
26 not in that size or weight, but they are developing the

1 applications that will make this device a useful tool in
2 the future.

3 Finally, I wanted to comment on the question
4 of whether people will really change their habits and
5 start using devices if they become available. There, I
6 really wanted to refer to newspaper industries which, in
7 what I regard as a remarkably short period of time, we
8 find the places where reporters work and editors work
9 completely changed in their way of doing business.
10 Reporters put their stories now on computer terminals;
11 they are routed around to editors for examination, and
12 then they are shipped directly to the presses, and the
13 ways that people used to use, which were basically type-
14 writers -- the typewriter technology has completely changed
15 in a dramatic fashion. And so to think about changes of
16 the types that I described at the beginning over a 50-year
17 period of time, seems quite reasonable to me.

18 MR. PERLE: Can you tell us a little more about the
19 Dynabook?

20 JUDGE FULD: About what?

21 MR. PERLE: The Dynabook.

22 DR. WEINER: The Dynabook? Well, I did, in fact,
23 bring with me a report that this group has issued.
24 Perhaps it might be worth it to just show their conception
25 of what this Dynabook will be. I do not know if it should
26 be passed around or shown, but essentially their notion is

1 something of this size and with a screen of this nature
2 that will be, in the long term, economically viable for
3 the ordinary person to own. The computing power that will
4 be required in such a device is probably 100 to a thousand
5 times the computing power which is economically purchasable
6 by a person today, but that, too, is viewed as coming in
7 the future. Their view is that the people interact with
8 these devices through keyboards and also through a voice
9 that comes from mechanical transducers in the Dynabook and
10 perhaps through styli which are used to mark right
11 on the surfaces, display surfaces themselves; that is,
12 the notion that one might look at a displayed text and
13 decide to delete something from it by just drawing an
14 arrow around it and say, "Take this away."

15 MR. PERLE: This is not a mere viewing device. It
16 is not a lieu of a book: this is a whole system?

17 DR. WEINER: No. Their concept of the Dynabook is
18 an interactive personal computer that allows input and
19 output.

20 MR. PERLE: Is it in any way dumpable into somebody
else's book or system?

21 DR. WEINER: Certainly. I mean, the exchange of
22 information between Dynabooks would be the easiest of
23 things to accomplish.

24 MS. FARPSTEIN: What would the inputs be? Where
25 would they come from?
26

1 DR. WEINER: Well, in the world that I have been
2 referring to where conventional works are stored in large
3 data banks, connection to a network would allow the
4 transfer of a work from that data bank into the storage
5 of the Dynabook.

6 MS. KARPATKIN: So you would have a contract with
7 Lockheed?

8 MR. HERSEY: You would have a contract with Alfred
9 Knopf.

10 MR. LEVINE: Or no contract.

11 MR. MILLER: There is a notion of the tummy-sized
12 computer terminal which you would read from in bed. Here
13 you can sit at a desk --

14 MS. KARPATKIN: A practicing lawyer could do research
15 that way.

16 MR. HERSEY: But you could also get up some of this
17 data and manipulate the data yourself just by writing on
18 the thing and then the machine would make the corrections
19 and return it to you?

20 DR. WEINER: Yes. That certainly is conceivable.

21 MR. MILLER: The machine could take every third word
22 from one of your books, from Albee's books, and from Taylor
23 Caldwell's books and write a new book for you.

24 MR. HERSEY: Thanks. I mean that.

25 MR. WEDGEWORTH: What about the Book-Of-The-Month
26 Club service where this month you can plug in overnight

1 and get John Hersey's latest work to carry around with
2 you in your briefcase and read a few pages every few days,
3 if you like?

4 DR. WEINER: Yes.

5 MR. HERSEY: More than that, you can get the machine
6 to change it and give it a more interesting plot, as I
7 understand what you have been saying.

8 MR. LACY: Substitute one's own name for the name
9 of the hero.

10 MS. KARPATKIN: Give it a happy ending.

11 MR. LEVINE: Everyone will go to the seashore at the
12 end of every novel.

13 DR. WEINER: There is one other --

14 MS. KARPATKIN: Could this print out also the Dynabook?

15 DR. WEINER: Yes. In fact, I just wanted to get to
16 one other technological development which I think, as a
17 matter of fact, is just really right around the corner.
18 That is, the connection between the copying technology
19 and the computing technology. Devices are being tested
20 today, I know, that can output on a piece of paper infor-
21 mation stored in computer readable form in a way that you
22 cannot distinguish that it's a photographic resource process
23 today. So, in fact, taking the work stored in the computer
24 system today and printing it out in different thoughts on
25 the computer control, is quite easy.

26

1 DR. WEINER: Which suggests to me that in the long
2 run the copying problem and the computer problem are going
3 to become one.

4 MS. KARPATKIN: What was the process by which you
5 produced this?

6 DR. WEINER: Very crude. This was just an ordinary
7 computer line printer. Unfortunately, at Rand I do not
8 have sophisticated devices.

9 MR. LEVINE: Was this typed at 6:58 P.M.? Is that
10 what 1858 means?

11 DR. WEINER: It was actually printed at that time.

12 MS. KARPATKIN: It was not typed. It was produced.

13 MR. LEVINE: Yes. I am rooted in the old technologies.

14 JUDGE FULD: Any questions? Alice?

15 MS. WILCOX: Do you have any feeling about how this
16 might be controlled in the sense of paid for on that, or
17 anything like that?

18 DR. WEINER: Yes. If we think into the long term,
19 then it certainly seems conceivable to me that mechanisms
20 can be built into every computer that keep track of minute
21 exchanges of information and, in fact, runs on a basis
22 that is just quantitatively quite different than it is
23 today. It seems to me that legislation, in fact, can
24 encourage the development of this. After all, we do have
25 legislation which insists that every TV set that is sold
26 today have both the UHF and VHF device. In the same way,

1 we can have information systems in the computers, that
2 even those in the home contain within them the mechanisms
3 for recording back to the information about what has
4 transpired within the system in a way that will result in
5 a fair return.

6 MR. HERSEY: It seems to me that from what you have
7 been saying it is terribly important that this process be
8 started now so we do not face the situation with these
9 devices that we do with copying machines where the policing
10 and return system has not been built into the machines and
11 we are now going to be faced with a great problem of
12 reversing that.

13 DR. WEINER: Yes, exactly.

14 MR. HERSEY: You were talking about setting up a new
15 body of law to deal with copyright for data bases and
16 programs. Can you elaborate on that at all? Have you
17 thought about the nature of that?

18 DR. WEINER: Essentially, I was trying to suggest the
19 simple thought that the basis of return be on the use of a
20 work. As an example: If I have a computer program, I
21 really do not care how many times it is copied or where
22 the copies go; if I have a data base, I do not really care
23 if somebody copies into their machine. What I really care
24 about is once it is copied into their machine, what are
25 they going to do with it? Are they going to search it in
26 some way? Essentially, a framework is developed so that

1 the return to me is derived from their using my product.

2 MR. MILLER: Your analogy to the legislation that
3 requires a TV set to give me access to UHF and VHF is
4 interesting. Can you perceive the development of this
5 kind of a device and the legal structure that requires
6 the holders of data to give me access? In other words,
7 if I own one of those things, by legislation, it would
8 be appropriate or inappropriate that I automatically have
9 access, say, both to Lockheed and Battelle or to Knopf
10 and Doubleday or to CBS and NBC, whatever the information
11 units are.

12 DR. WEINER: I feel the technologies in that time
13 frame I referred to would support that. That is certainly
14 possible and one that --

15 MR. MILLER: Do you think it is socially desirable?

16 DR. WEINER: That is what I was going to say next.
17 There is certainly an area of once you get considerable
18 examination, the next step, obviously, is for information
19 of various kinds being reported back to central sources
20 and it leads to serious questions of privacy and personal
21 rights.

22 MR. MILLER: What about the resultant monolithic
23 character of information and its centralization and control
24 over it, perhaps by Governmental agencies?

25 DR. WEINER: Well, if we get to the point where
26 information is stored in a single place and under one

1 body's control, that would be a concern. But I do not
2 see that as a necessary consequence of technological
3 developments.

4 MR. MILLER: Under your view of the world, which
5 seems quite appropriate to me, it is no longer a question
6 of centralizing one place. The information itself can be
7 distributed nationally, but it is the control over the
8 links that becomes the key question.

9 Is there any research being done on that ques-
10 tion at this point?

11 DR. WEINER: I am not aware of research that deals
12 with the issues. I think you are most concerned with the
13 social and legal implications of that, but I do not mean
14 to pass this on, necessarily.

15 JUDGE FULD: Are there any other questions?

16 MR. PERLE: Is there anything else that is going on
17 at the Rand Corporation that this Commission can benefit
18 from? You are in the business, really, of looking into
19 all the things that are happening down the line. I just
20 wanted to tell you the reason for my question. Some of
21 us here have realized the extent of trying to get away
22 from any conventional thought and just say, "What is going
23 on and what is the picture going to be a hundred years or
24 50 years from now?" Then we can develop a philosophy of
25 balance of respect and rights of the participants. Trying
26 to get into what is really going to be the shape of the

1 future is very difficult. Is there anything else that
2 your --

3 DR. WEINER: There is work going on that is relevant
4 to this, but it is not really -- knowing the details of
5 this work are not going to be of central concern to this
6 group.

7 We are, ourselves, participating in the
8 development of software which will run in personal
9 computers that will help people deal with the complexities
10 of a network that they will have to connect into. That is,
11 if I need to pull some information from someplace out of
12 some computer that is attached to a series of networks,
13 the way the world is today, I have to ask for that infor-
14 mation in very, very complicated ways. Perhaps some of
15 the ways that have been -- some of the things are necessary
16 to get into the New York Times' data base may have been
17 described here. Today they require a real specialist to
18 be able to access information to the New York Times. The
19 software we are working on allows a person to specify in
20 a much more natural way what he wants and then this soft-
21 ware, which we call intelligent agents, goes off and
22 carries out the transaction with the network and facilitates
23 the search of -- in this case -- the New York Times data
24 base. So we are, ourselves, contributing towards what
25 will have to be a whole series of small steps that will
26 eventually take us down this small path. But eventually

1 I am suggesting that the average person will be able to
2 deal with this complexity of networks in a way that will
3 be comfortable and reasonable to have.

4 MR. MILLER: It sounds to me as if you are automating
5 Documentation Associates, eliminating the broker by making
6 it possible for the average person to do what the broker
7 now does.

8 DR. WEINER: That is not the objective of our research.

9 MR. MILLER: But isn't it a by-product?

10 DR. WEINER: It may be a by-product.

11 MR. MILLER: It is amazing how short the life cycle
12 is of the various brokers --

13

14 MR. MILLER: You wake up this morning --

15 MS. KARPATKIN: This morning they were here and by
16 lunchtime they are obsolete.

17 MR. MILLER: By the time they solve their legal
18 problems they will be gone.

19 JUDGE FULD: Thank you very much, Dr. Weiner. It has
20 been a delight having you.

21 DR. WEINER: I enjoyed being here.

22 JUDGE FULD: Do we have any other business, Arthur?

23 MR. LEVINE: Just lunch.

24 JUDGE FULD: That is not business.

25 (Lunch recess.)

26

1 Los Angeles, California, Friday, September 17, 1976, 2:00 PM

2
3
4 JUDGE FULD: Our next speaker, Donn Parker, is
5 senior information processing analyst of the Information
6 Science Laboratory of the Information Science and
7 Engineering Division of the Stanford Research Institute.
8 Mr. Parker is published widely on the subject of computer
9 abuse. In addition, he has taught computer programing and
10 security and several related topics at universities around
11 the country, including San Jose State University and the
12 University of Michigan.

13 He has also worked in private industry for such
14 giants in the computer industry as General Dynamics and
15 Control Data. He has served as a chairman of the
16 Professional Standards and Practices Committee of both the
17 Association for Computing Machinery and the American
18 Federation on Information Processing Society.

19 CONTU welcomes you, Mr. Parker. Tell us about
20 the computer abuse studies made by the Stanford Rsearch
21 Institute.

22 MR. PARKER: Thank you very much, ladies and gentlemen.
23 First of all, my remarks are my own and not of my employer,
24 Stanford Research Institute, nor the supporter of most of
25 my research, the National Science Foundation.

26 Susan Mycum testified before you last May, I

1 think it was, on the same subject and she and I are
2 co-investigators of computer abuse research.

3 So you can better understand what I have to
4 say, my background is in computer programming and manage-
5 ment of computer systems and of software development
6 organizations. Five years ago I started with a concern
7 for the safe use of computers and found that there was
8 very little information on the subject; and in the mid-
9 1960's even started collecting various cases that have
10 occurred involving computers. Here I defined computer
11 abuse, as Mrs. Nycum did, as any incident in which a
12 victim suffered or could have suffered a loss; perpetrator
13 made or could have made gain; and involves an intentional
14 act in computer environment -- and I will explain what I
15 mean by "computer environment."

16 This covers a broad spectrum of crimes that put
17 people into jail on one end of the spectrum, to disputes
18 that might cause an employee to be reprimanded or to
19 lose his job; and all kinds of activities in between:
20 Business disputes that result in civil cases are the broad
21 definition. The reason for it is that we are looking for
22 ways in which we can make computers safer to use, both
23 through the law and through the performance of people in
24 the computer field and those that use computers. So we have
25 a double purpose in the investigation; it is an empirical
26 study with the idea that we should learn from experience

1 and apply this to potential victims: The organizations
2 that use computers and people that are served by computers.

3 The problem has grown significantly over the
4 past 15 years but still represents a relatively small
5 problem, considering the general problem of white-collar
6 crime. We have 420 cases in our files today and we are
7 continuing to gather them, a few per week. Just last week,
8 for example, there were three major computer-related
9 crimes. One was a \$14,000,000 gasoline theft in San Juan,
10 Puerto Rico; another was the prisoners at Leavenworth
11 Prison who are writing computer programs and have computer
12 time-sharing terminals for Government agencies, and one of
13 them apparently found the secret algorithms or rules that
14 determine when a tax return is to be audited and used that
15 information to get -- at least he is being tried right
16 now -- for getting \$20,000 falsely from the IRS. The
17 third case --

18 MR. PERLE: How did he do that?

19 MR. PARKER: Well, it is not clear yet, but the most
20 secretly held information IRS has are these rules and
21 limitations that make them decide when to audit a tax
22 return and when not to look at it and let it pass through.
23 They have been doing contract programing for the IRS, the
24 Department of Agriculture, and so on.

25 MR. LEVINE: They best not computerize their cell-
26 block locking system.

1 MR. PARKER: I think that is another computer than
2 the one they use.

3 The third case was here in Los Angeles where a
4 gang was indicted last week on criminal charges where they
5 had been charging up to \$1500 to change someone's credit
6 information from negative to positive in credit reporting
7 systems by having an insider get into the TRW Credit Data
8 Reporting System. So these things are just churning along
9 and we are trying to keep up with them. The growth seems
10 to be expansional but I have a very small sample of what
11 is probably going on, so it is difficult to tell. All we
12 know is we have a lower bound of what is going on and it
13 looks like it is going up significantly. But 420 cases
14 is not very many compared to the 10,000 cases per year
15 of just bank fraud and embezzlement reported by the FBI,
16 for example. Losses in the hundred and fifty cases in
17 which we have been able to determine losses seems to be
18 running around 10 to \$15,000,000 per year. Again, only
19 amounts that we can actually prove are losses and that
20 does not include the Equity Funding Insurance fraud which
21 is the largest fraud in the United States, \$2,000,000,000.
22 That throws my curves all off, so I just leave it out.
23 The \$14,000,000 fraud last week is going to blow the
24 budget for my whole year, so there are many peaks.

25
26 MR. PARKER: An important thing, however, we find

1 is that when computers are associated with a particular
2 business or white-collar crime, the losses tend to be far
3 higher than they are in ordinary or manual white-collar
4 crime. The average bank fraud and embezzlement was
5 \$19,000 in 1975. The average bank fraud and embezzlement
6 involving computers in a study of 54 cases was \$450,000
7 per case. We suspect the reason for that is that as
8 businesses automate, as the environment in which white-
9 collar crime, business crime, taking place automate, that
10 the crime itself will automate along with it and you might
11 just as well run a crime for another half a second and
12 take \$2,000,000 as \$2,000. You go to jail a shorter time,
13 anyway.

14 (Laughter.)

15 MR. PARKER: In any case, they are the same old
16 crimes: fraud, larceny, theft, embezzlement, sabotage,
17 espionage, and so on. But once you name the crime, we
18 find everything else about it is new: The occupations
19 of the people that are doing it are new; the environments
20 in which they are doing it are new; the methods that they
21 use are new; the forms of the assets are all new. That
22 makes a new problem and it is a problem that is confounding
23 prosecutors, law enforcement agencies, and victims of
24 these problems.

25 The nature of the problem could best maybe
26 better be illustrated by some cases and describe the roles

1 that computers play. We have identified four specific
2 roles -- and Susan Nyeum mentioned these before so I
3 will only briefly mention them. One is the computer --
4 is the object of the incident, or the software or the
5 data is the object of an attack: vandalism, bombing of
6 computers, this type of thing. I have four cases where
7 computers have been shot with guns, for example. In a
8 couple of cases they were a tax processing computer and
9 a job placement computer. Presumably, people just so
10 frustrated and outraged taking their vengeance out on
11 computers.

12 The second is where the computer is the tool
13 to perpetrate the act. An accountant used the computer
14 to simulate his company. Embezzlement, by the way, is
15 very hard work and it can be very complex. You not only
16 have to run your normal job but you have all this
17 complexity of stealing and it is a very great challenge,
18 except when you have a computer.

19 A teller in New York City didn't have a computer;
20 he had only a transaction access to a computer and he said
21 after his first million that he was going to get caught
22 because he couldn't keep track of it any more. He had it
23 on little pieces of paper stuffed in his pocket, sitting
24 in his desk, and at home, and he was running out of brains
25 to keep track of it.

26 In another case, an accountant modeled his

1 company on his own computer, unknown to his company. And
2 he would run simulations with the correct data and then
3 the changed data that he was making to regulate his
4 embezzlement. He also wrote a program where he could
5 introduce the bottom line of a set of accounts and the
6 program would statistically distribute that among the
7 accounts so it would be less noticeable. He was very
8 successful; he got a million and a half over six years
9 until he finally decided that he would like to end it
10 and could not figure out how to do it. He finally went
11 to an attorney, explained his embezzlement, and the
12 attorney said, "I can get you off for \$50,000," and the
13 guy said, "Fine. Let us go." The idea was that he was
14 to get caught, but caught in such a way that he would get
15 a suspended sentence. It goes on from there; it is a long
16 story. But it turned out he had trouble getting caught
17 because he was going to overdraw these accounts in his
18 bank so the bank would discover the fraud rather than his
19 boss, who he knew would kill him if he found out what he
20 was doing. And so he overdrew his accounts in these
21 dummy vendor companies and nobody paid any attention to
22 him. Anyway, things backed up on him and he served five
23 and a half years in San Quentin for his million dollar
24 crime.

25 MR. MILLER: How much did the lawyer get?

26 MR. PARKER: He got \$25,000 because he dropped the

1 lawyer as soon as he found out the lawyer was a personal
2 friend of his boss and there was a \$50,000 check written
3 from his boss to his lawyer. As I say, it goes on from
4 there.

5 Let me get into the third role: where the
6 computer is a symbol -- and we are not very interested in
7 that from, at least, a legal point of view. But dating
8 services that claim they match people for dates and they
9 have a card sorter in the back room, this kind of thing.
10 It is a symbol for intimidation or deception, a giant
11 electronic brain.

12 The fourth way is probably the most important
13 here. That is where the computer presents a unique
14 environment or a unique form of assets. Just as an example,
15 historically we have moved from bartering goods and services
16 to precious metals for negotiable assets, liquid assets to
17 paper representing precious metal, to paper alone, and now
18 we have plastic money and we have electronic money.
19 Electronic money means money that is actually represented
20 electronically and magnetically inside a computer and
21 squirted through telephone lines. An electronic fund
22 transfer is an example of where we are moving rapidly
23 into the new form of electronic money where the money is
24 not represented anyplace else except in the computer
25 system and crime goes where the money is and if the assets,
26 the monies, are in the computer, that is where it goes.

1 Some examples of cases that have involved data
2 and computer programs, a rather innocuous one was where
3 programmers were found using the computer in an unauthorized
4 fashion to produce Snoopy calendars. This takes a
5 tremendous amount of printing to print out pictures in
6 the form of solid patterns of characters and so large
7 amounts, like tens of thousands of dollars, was being
8 spent in running off one after another of these Snoopy
9 calendars. So there is this kind of malicious mischief-
10 kind of activity.

11 Something close to that is McDonald Hamburgers
12 that had here in Southern California, the Southwest States,
13 I guess it was, a major contest -- it was a drawing-type
14 of contest -- that required you, on any kind of a piece
15 of paper, to write your name and address and stick it in
16 a box at any McDonald's and then there was a drawing. So
17 some students at Cal Tech here in Pasadena used the
18 computer to create 1.2 million of these little pieces of
19 paper and stuffed them into the boxes, and it represented
20 a little less than half of the 3.3 million that were
21 collected for the contest. They wound up collecting
22 \$40,000 worth of prizes. Burger King gave the man who
23 discovered the idea a scholarship to Cal Tech.

24 (Laughter.)

25 MR. PARKER: But that created quite a bit of concern;
26 if not legal, at least ethically.

1 Then there is Professor and Mrs. Pennypacker
2 of the University of Florida. Theirs is a case that they --
3 well, actually, as far as I know, they haven't filed a
4 civil suit on it yet. But Professor and Mrs. Pennypacker
5 developed a personalized learning system involving the use
6 of computers, software, and a large body of data that was
7 being developed that you could compare the progress of
8 students against. They did this in their own private
9 company; they then went to the University of Florida, the
10 Professor at a teaching position and his wife as director
11 of the personalized learning center for a two-year contract,
12 she thought. She was fired and in the hearing on her
13 firing, the issue came out that the University of Florida --
14 it was claimed by Professor and Mrs. Pennypacker -- had
15 stolen all of their software and their data stored in the
16 university's computer system. The president of the
17 university heard about this and returned at least a copy
18 of all this material to the Pennypackers and said it was
19 an unfortunate incident. Professor Pennypacker is not
20 satisfied with that since he is not sure that the original
21 was returned to him and that he still is the sole custodian
22 of his programs and data. So he is filing a suit against
23 the University of Florida and the University of Florida's
24 position was that a great amount of computer time and
25 personnel time paid for by the university went into
26 advancing the state of the software and the data. So I

1 think there will be a pretty interesting civil case in
2 this situation and one that we are starting to see and
3 starting to face increasingly, and that is in trade secret
4 theft at least, but all kinds of theft of information;
5 what constitutes conversion and when is it the original
6 and when is it not?

7 The data and the programs were kept in the
8 system under a security password, but the university that
9 runs the system was able to gain access to the
10 system without having to go through the security process
11 so they were able to remove copies of the whole set of
12 programs and data.

13 In a slightly different direction, we are
14 starting to find extortion. The organizations that use
15 software, that have software developed for them, often
16 feel that the software is of value only to them; it was
17 custom-designed for their use; anyone else would have to
18 go to such great lengths to modify it for their use that
19 they feel it does not need protection and really would not
20 be of use to anyone else. It turns out that it is of use
21 to other people in some situations.

22 Here in Los Angeles, a small accounting firm,
23 a medical clinic accounting firm, had their whole business
24 dependent upon a set of accounting programs that they had
25 hired a programmer to develop for them. After he developed
26 the programs he took all copies of them, all the instructions,

1 all the documentation, went off and hid in the San
2 Bernardino mountains and called his employer, said he had
3 all his programs and would not give them back unless he
4 paid him \$100,000. So programs, even though they are
5 custom built for an organization, are of importance from
6 the point of view of the use of the programs and far more
7 important as to their use rather than who has a copy of
8 the program.

9 They caught this young man after three days,
10 but they impounded the programs in the sheriff's office
11 for evidence and they did not understand what the program
12 was; all they had was a bunch of punch cards. This little
13 company could not function without the programs and so one
14 night they burglarized the sheriff's office, stole the
15 programs, made copies of them, and returned them to the
16 sheriff's office without their knowing it.

17 The district attorney, by the way, decided not
18 to file charges because he could not figure out how he
19 could explain to a court the importance of these and the
20 value of these programs and felt that he really did not
21 have enough evidence to go ahead with a criminal indictment.

22 In two cases we have had people who collect
23 programs from other organizations, that belong to other
24 organizations, and then use them commercially. One was
25 a professor from a French university that toured the
26 United States going to various universities and large

1 organizations and collecting software. He just asked
2 everybody for all the software that they were willing
3 to give him and he collected a large amount of it; went
4 back to France; packaged the better software that he
5 found and brought back with him; and went into business
6 selling this software. He was indicted and I don't have,
7 I am afraid, any more information other than the fact that
8 he was indicted for fraud in that case in France.

9 In the other case, a blind man here in Los
10 Angeles and his business manager went into business
11 advertising openly for programmers to submit to him copies
12 of programs from their employers and the willingness of
13 the programmer along with it to modify and maintain the
14 programs that he would then go sell on the open market.
15 He had a fairly extensive business going getting programmers
16 to take software from their employers' facilities and give
17 it to this man and then provide their services to maintain
18 the software. So there are two examples where there is
19 commercial value in unauthorized acquisition of software.

20 You may have read recently of the Sideletz
21 case, the programmer who worked for Optimum Systems
22 Incorporated, OSI, that had the contract to provide
23 exclusively all the computing for the Federal Energy
24 Agency in Maryland. This man, by mutual agreement, left
25 the employment of OSI, started up his own computer
26 consulting and services business and got on his terminal --

1 and he knew the passwords and he knew the access to the
2 OSI, FEA system, and proceeded to steal a piece at a time
3 the entire operating system called "WYLBUR," for the
4 computer system. Now, WYLBUR is considered a trade secret
5 system by OSI. At the same time, it was developed at
6 Stanford University and there are a number of copies of
7 Wilbur that are available and in use in various places.
8 At least there are versions that are in the public domain.

9 Put this man, Sideletz, was convicted and is
10 now serving a term in jail. He claimed his purpose in
11 taking the software through his terminal in his garage
12 at home was to demonstrate to his former employer and the
13 FEA the vulnerability of that system so that they would
14 hire him as a consultant to help them increase the security
15 of the system. The prosecutor contended that it was his
16 intent to steal the Wilbur program to cause a loss to OSI
17 and possibly to market the system that he took -- or at
18 the very least to use it for his own purposes in running
19 his own computer.

20 Another case, again here in Los Angeles, a
21 man named Mackie, a former employee of a milling machine
22 company in Michigan, went to work for a machine tool
23 company here in Los Angeles. He used a commercial time-
24 sharing computer terminal and, knowing the method by which
25 his former employer chose passwords, with a little
26 experimentation he found the passwords used by that

1 company in London over a telephone line to this country
2 and he used these passwords to use \$15,000 worth of time-
3 sharing time. In the process of using this time, he
4 claimed he was helping his former customers, customers
5 of his former employer, who kept calling him for advice
6 since they could not get any of the correct advice they
7 needed from anyone that was left in the company in Michigan.

8 He also used a program experimentally, a highly
9 confidential new, very expensive program developed by his
10 former employer, but not yet put on the market for use by
11 customers. He experimented with this program and used
12 great amounts of machine time doing that. He told me the
13 reason why he did that was that he was intent on purchasing
14 the use of that program in a legitimate fashion as soon as
15 he figured out how the program worked and whether it would
16 be of benefit to his new employer.

17 The implication there was that it was very
18 possible that what he was doing was testing this highly
19 confidential program for the purpose of determining how
20 it functioned simply by feeding input in and determining
21 the results that came out from its use, and thereby
22 gaining a significant competitive advantage from writing
23 a program of his own.

24 He was indicted and, in fact, just recently
25 convicted and got a suspended sentence. He pleaded guilty,
26 but the prosecuting attorney -- one of the charges against

1 him was forgery for obtaining goods and services. The
2 assistant district attorney was going to attempt to prove
3 that the typing of a password into a computer terminal
4 constitutes a legal signature.

5 We are very unhappy about that case in that
6 that issue was not tested, because, as I say, the man
7 pleaded guilty. But that remains to be determined, the
8 value of a password and legal signatures.

9 I could go on for hours and hours telling you
10 about these cases. There is another one that is a civil
11 case that is in litigation at the present time that is so
12 complex that it would take me hours to tell you about it.
13 It is the Select-A-Seat Company of Arizona that offers
14 computer services of providing a reservation to entertain-
15 ment events and this is a new service that has sprung up
16 all over the country. The Select-A-Seat of Arizona is
17 suing BASS, the Bay Area Selective Seating Company, and
18 several other companies and several other people. It seems
19 that the company that wrote the software that makes this
20 service work, licensed the software to Select-A-Seat Company
21 in Arizona and that people from the BASS Company in San
22 Francisco, through an employee of Select-A-Seat, stole a
23 copy of the software; removed the security provisions and
24 secret identification provisions inside the program; and
25 then used it for their own commercial use; and in turn
26 licensed it to a half a dozen other companies. That forms

1 the basis for this suit.

2 Along the line, BASS did hire a programmer for
3 the purpose of developing the software for them to go into
4 business. In the meantime, they got this program that is
5 alleged to be stolen from Select-A-Seat and they gave that
6 software to the programmer who then proceeded to develop
7 the software for BASS and it was concluded that it would
8 take at least two-man years to develop that software from
9 scratch and he developed it in a matter of a few weeks.
10 So the suit contends that although it was reprogramed, it
11 used their program extensively in the reprograming process.

12 Just to conclude rapidly here, I would like to
13 talk a little bit about the people that are doing these
14 kinds of things, the situation in ethics in handling
15 information.

16 JUDGE FULD: Mr. Parker, I understand you wrote a
17 book, "Crime by Computer"?

18 MR. PARKER: Yes.

19 JUDGE FULD: It has been published?

20 MR. PARKER: Yes, it has. By Scribner's. A number
21 of these cases are described in there in depth.

22 JUDGE FULD: How much does it cost?

23 MR. PARKER: Ten ninety-five.

24 MR. PERLE: How much to Commission members?

25 (Laughter.)

26 MR. PARKER: Unless you are a member of a professional

1 society that is offering it for about eight seventy-five,
2 or something like that.

3 In any case, let me just describe the perpetrators
4 a little bit. I think there are some important insights
5 there. This is based on extensive interviews with 19 --
6 well, 20, including Captain Crunch. He was one of the
7 more recent people. Captain Crunch, John Draper, is the
8 hero of the telephone freaks, the blue box heroes. He is
9 typical of the kind of subset of people that I am going to
10 talk about.

11 The perpetrators are generally the people who
12 have the skills, the knowledge, and the access to do these
13 things. They are very young, intelligent, highly motivated;
14 they are exactly the kind of people that a data processing
15 manager would want to hire. They exhibit the Robin Hood
16 syndrome very strongly and this comes from criminological
17 studies of white collar crime. Well, it is a variation of
18 the Robin Hood. It is stealing from the rich and keeping
19 it.

20 (Laughter.)

21 MR. PARKER: But it is the idea that these people
22 differentiate very strongly in doing harm to people which
23 is highly immoral to them and doing harm to organizations
24 that they can often rationalize. Not only that, but they
25 put the computer in front of the organization and it is
26 the computer they are doing bad things to; the computer

1 cannot cry or get mad or hit back and there is a great
2 satisfaction and challenge in ripping off the computer
3 system; so it makes it very easy, in computer environments,
4 to rationalize their acts; primarily because it has never
5 been done before so who says it is wrong?

6 One programmer said, "You know, I only changed
7 two numbers in that whole system for two ten thousandths
8 of a second. Now surely doing something for so short a
9 time cannot really be very wrong." He was actually inflating
10 two savings accounts to get passbook loans.

11 They exhibit the differential association
12 syndrome; that is, the acts that these people perform often
13 differentiate in only small ways from the accepted practices
14 of their associates. It is the old game of a group of
15 people working together and taking pads of paper today,
16 pencils tomorrow, and pocket calculators the next day;
17 each person reinforcing the other one, thinking it is very
18 funny and there is nothing really wrong with it and every-
19 body is doing it.

20 The young man that Susan Nycum described to
21 you, Jeff Ward, who stole a program from the memory of his
22 competitor's computer was caught in that trap. It came
23 out in a civil case that programmers routinely were dialing
24 into one another's employer's computers and that it was an
25 accepted practice to dial into your competitor's computer
26 and fish around to see what you can find; try to crash the

1 other guy's computer and get customer lists, copies of
2 programs, and so on. It is generally thought that that
3 is a fair game among programmers who work for computer
4 time-sharing services. Now, it is hard for me to say that
5 it is extensive and that it is common practice, but I have
6 interviewed enough programmers to know that it does happen
7 and it seems to be happening fairly frequently. It is
8 claimed that this is reverse engineering; this is Ford
9 buying a Chevrolet to see how it works. We claim that it
10 is far more than that and much more serious.

11 But in any case, the perpetrators are able to
12 justify their acts; they do not see themselves as thieves.
13 They see themselves as borrowers and they see themselves
14 as technologists who are deserving of all of the free
15 computer time and software that they wish to have.

16 The computer field has developed --- and I have
17 been in it 26 years now -- on the basis of a benign
18 environment; that everybody is a good guy; we are all
19 working for the same thing. They do not understand today
20 that they are working in a hostile environment and that
21 there are bad people around.

22 It has been common practice from the beginning
23 of computer time that programs belong to the programmers
24 who wrote them. It was part of my value system when I was
25 a programmer in the fifties and sixties. The Share
26 organization, the largest user group of IBM computers

1 would not have developed the way it has and the technology
2 would not have developed as fast as it had if their concept
3 had not been very strong in the computer field. We also
4 exchange programs, even programs worth hundreds of
5 thousands of dollars, casually, personally, among
6 programmers.

7 Five years ago I fired a programmer; he went
8 to work for another organization; the other organization
9 called me and said, "Hey, we have all of your wonderful
10 programs here. Would you please send us the documentation
11 so we can use them?" And feeling perfectly justified; it
12 was a reasonable thing. When a programmer leaves his
13 present employer he packs up all his materials, including
14 his personal things in his desk, and all of his programs.
15 They belong to him.

16 I did a survey -- the statistics of this are
17 in my book -- of 50 programmers who are, I would say, very
18 strongly professionally oriented; they are part of a
19 professional society. I had a questionnaire that they
20 filled out and I asked them questions about the ownership
21 of software and the authorization to use computer time,
22 and I got answers that essentially -- there was no pattern
23 to the answers of whether they thought a particular act
24 was ethical, unethical, illegal, okay, or, "I have done it."
25 Most of them had done most of the things that I had asked.
26 So in my experience what I have seen is this development

1 of a concept that software is somehow free and is available
2 for distribution.

3 A new hobby is developing like wildfire today,
4 the development of computer hobby. You can buy a computer
5 kit, a full-blown computer for about \$600 today; a terminal
6 will add quite a bit more; but for \$1500 you can have quite
7 a powerful system with a printer, a terminal, and so on,
8 about the equivalent of what it took a full room to house
9 in the late 1950's.

10 There is a great amount of software movement
11 among the hobbyists. These people are often referred to
12 as "systems hackers." This is a term best described by
13 Joe Weizenbaum in his book, "Computers and Human Reason,"
14 a recently published book. Systems hackers are people
15 whose total lives are dedicated to computer technology.
16 They live, eat, sleep, and die computer technology. They
17 are the kind of people that I have had to chase out of
18 computer rooms because they go without sleep, without
19 food, without going to the restrooms, beating away at
20 their programs, through brute force getting their programs
21 to run on the computers. They become addicted like a
22 person who is addicted to gambling. System hackers believe
23 that the computer world is theirs; it belongs to them.
24 They have, in my estimation, at the very least, a very
25 distorted sense of ethics about what belongs to whom.

26 We do a lot of work for a number of clients

1 in computer security. We almost invariably will walk into
2 a large company and find that the tables, the chairs, the
3 filing cabinets all have little labels on them and numbers
4 identifying that this is property of that company, but on a
5 table like this, we will walk into the programing area and
6 find decks of punch cards where the only identity is a
7 felt pen scribbling of the programmer's name across the
8 top. It turns out it is a program that costs something
9 between seven or \$800,000 to program and it is sitting
10 entirely unmarked on a table in an area that, in some
11 cases, we have proven, has had general public access. So
12 large organizations that produce very expensive software,
13 many of them have not recognized the fact that this repre-
14 sents extremely valuable assets to their organizations.
15 The systems hackers perpetuate this concept of "software
16 is free."

17 There is a thing that was developed, an ethic,
18 called "The Peninsula Ethic," that came out of the Ward
19 versus California case in the San Francisco Peninsula Area.
20 The Peninsula Ethic -- well, it came out of expert testi-
21 mony in the criminal case, a very well-known consultant
22 and computer programmer in the field said on the witness
23 stand that it was his belief that anything you can extract,
24 any information, programs, or data, that you can extract
25 out of commercial time-sharing systems is automatically in
26 the public domain. He felt that that was a generally held

1 value among he and his fellow consultants and widely held
2 value in the computer field.

3 It is my contention, after seeing all of this
4 and the computer abuse study that we are doing, that there
5 are no formal ethical standards in the computer field, at
6 least none that cover anything that is unique in the
7 computer field.

8 I just received a grant from the National
9 Science Foundation to conduct the first national workshop
10 on professional ethics in the computer field. It will be
11 held in January or February at Stanford Research Institute
12 and half of the people attending will be people from the
13 computer field, leaders in the computer field; and the
14 other half will be philosophers from various law schools
15 throughout the country who are identified and associated
16 with ethical issues. The purpose is to determine if there
17 really are issues of ethics that are new, are totally new,
18 as a result of the advancing technology. I feel very
19 strongly that as the results of the work and our goals in
20 this area of the safe use of computer technology by
21 society, that it is extremely important that we advance
22 the concepts of professional ethics in the field and I am
23 trying to do this through our professional societies.

24 Susan Nycum is working very hard trying to
25 determine the inadequacy of the law relative to advancing
26 computer technology and I believe that we have got to start

1 with the day to day ethical practices of our own people
2 in the computer field if we are going to make headway in
3 developing adequate and appropriate concepts of software
4 and computer-stored data ownership.

5 Maybe I better stop and let people ask some
6 questions, or elaborate on any issues.

7 JUDGE FULD: Is there no way technologically of
8 protecting the program itself?

9 MR. PARKER: No, there is not. Commercially available
10 computer systems today are not protectable in any practical
11 sense on a technical basis. We are doing research on the
12 provably secure computer systems. They are computer
13 systems that will be designed and implemented so that you
14 could mathematically prove that they are secure, given a
15 definition of a secure computer multi-access computer
16 system.

17 JUDGE FULD: Can you isolate the programmer from the
18 material he programmed?

19 MR. PARKER: No. This is the concept of building
20 electronic fences inside a computer system to separate
21 programs and data. It can be done to the degree that the
22 average computer applications programmer would have great
23 difficulty in compromising the system, but the system
24 would not be safe from a systems programmer who would have
25 knowledge of the operating system of the computer.

26 Now, there are computers that are deemed to be

1 relatively more secure than others. The Honeywell Multics
2 System is generally conceded that the design of that very
3 large multi-access system is secure. Among all the
4 researchers in the computer security field, no one has
5 been able to violate the system based on the design of
6 the system. However, there is an Air Force team that has
7 been weekly for three years compromising the Multics
8 system. They do it by finding errors and shortcuts
9 introduced into the implementation and in the maintenance
10 of these large systems.

11 The serious aspects of the problem is that we
12 do not know how to prove the integrity of a system over
13 time on any practical basis. Therefore, we do not know
14 how to determine what is in a computer system and the
15 degree of integrity or correctness of what is in a computer
16 system at a point in time.

17 MR. PERLE: Is that what "integrity" means? Correct-
18 ness?

19 MR. PARKER: In this case, now, it means that the
20 information in the computer system corresponds exactly
21 to an agreed upon set of specifications and performs no
22 more than the specifications call for.

23 We did a study on the feasibility of the certi-
24 fication of software at SRI. We did it on an NSF grant
25 and concluded -- this was about a year ago; we finished
26 this study since -- we concluded that there is no

1 possibility of developing the concept of certification
2 of software like Underwriters Laboratory would certify
3 a lamp or some such thing because of the state of the
4 art of software development. Programing is still a
5 cottage draft and programs are works of art. However,
6 we do see something on the horizon. We anticipate that
7 we will have provably secure computer systems within
8 eight to ten years. The next generation of computers
9 will not provide it, but the generation after that it
10 will be possible.

11 MR. PERLE: When you say "secure," what do you mean?

12 MR. PARKER: I mean that the system cannot be
13 compromised by expending any less effort or resources than
14 the value of the assets you store in the system. In other
15 words, if you have \$10,000,000 of assets stored in the
16 computer system, one rule of thumb says that the system
17 would be secure if it would cost you more than \$10,000,000
18 to access this system --

19 MR. PERLE: Steal it.

20 MR. PARKER: -- than steal it.

21 MR. SARBIN: By \$10,000,000, stored, you mean \$10,000,000
22 worth of time, energy, whatever, is the cost that went
23 into it?

24 MR. PARKER: That the system could suffer \$10,000,000
25 in losses, I will put it that way.

26 MR. SARBIN: Not that it cost anything like that for --

1 MR. HERSEY: I am sorry. Are you finished with this?

2 MR. PARKER: Yes.

3 MR. HERSEY: In reading your report I saw that under
4 the section "Possible New Legal Approaches," you referred
5 to an advocacy by a number of people of a computer abuse
6 act that would be --

7 JUDGE FULD: Usable.

8 MR. HERSEY: -- a feasible way of using this. Could
9 you describe what that would be?

10 MR. PARKER: Well, only if you allow me the freedom
11 of talking outside of my area of expertise since I am not
12 a lawyer. I can quote Susan Nycum on this, my collaborator.
13 We concluded that the commercial law is not adequate for
14 advancing technology, especially as it is implemented in
15 the 11 jurisdictions that we did our study in, and
16 concluded one of two things: Either the law should be
17 amended significantly, or a new commercial code should
18 be written, ideally, to free the law from dependence on
19 technology, so that as the technology changes and advances
20 the law is unaffected by that; it is invisible to advancing
21 technology. I think that there is an attempt to do that.
22 For example, in new proposed surveillance legislation to
23 control eavesdropping electronic equipment, there are
24 attempts to try to make the law independent of the
25 technological capability to eavesdrop and that, ideally,
seems to be the goal of this kind of thing. But at least

1 me, as a layman, sitting in court listening to these
2 trials involving computers, both civil and criminal, it
3 is a very frustrating experience seeing the great effort
4 of trying to explain the technology in such a way that it
5 is addressable by an existing law.

6 MR. HERSEY: Have you had any cases in which a copy-
7 right law was directly involved?

8 MR. PARKER: None that I recall. I have 420 cases
9 and I was just reviewing them briefly yesterday to find
10 one like that and I have not found any. The ones that
11 involved issues of the ownership of writings were
12 predominately trade secret; there were several patent cases.

13 MR. NIMMER: Were there any on what is called a
14 conversion theory?

15 MR. PARKER: I saw the word used in some of the hearing
16 information and I do not really understand it, what you
17 mean by "conversion theory."

18 JUDGE FULD: Are there others doing this work besides
19 you: abuse?

20 MR. PARKER: No -- well, not very many. Brant Allen
21 at the University of Virginia Business School, professor
22 of accounting, is doing a similar study but not to the
23 extent. It is a limited amount of study. So far, Susan
24 and I really are the only ones. There is a professor at
25 the University of Freiburg in Southern Germany that is
26 doing a study in Germany on the subject. We are the only

1 ones here.

2 MR. LEVINE: We were contacted just this last week
3 by a man at the FBI who is in their data processing area
4 and they have recruits or field agents that were coming
5 to the school at Quantico and they normally give them a
6 course in criminal copyright infringements relating
7 primarily to record piracy in motion pictures, but he
8 thought we might be able to give him some insight into
9 a discussion that he might hold with them on criminal
10 copyrighters as it relates to computer programs. He had
11 been involved in the Sideletz case, he said.

12 MR. KEPLINGER: If I may add to that, I also talked
13 to him, and he mentioned that allegedly the copies of
14 Wylbur that were taken bore a copyright notice. The prosecutors
15 discussed bringing an action for criminal copyright
16 infringement, but because of the uncertainty surrounding
17 the whole matter, it was not seriously considered. They felt they
18 had a much better case on the fraud by wire theory.

19 MR. PARKER: I did not see that in the court documents
20 that I read, the copyright part of it. I have not seen
21 them all yet.

22 MR. LEVINE: They chose not to go to copyright.

23 MR. PARKER: I have lectured at the FBI Academy on
24 computer crime and the FBI is developing a significant
25 training program to include computer technology. They
26 have a computer there now and they are using it in

1 developing courses around it so that their agents,
2 especially their accountant agents -- and there are more
3 accountant agents than there are agent agents in the FBI,
4 police-type agents -- and so that the FBI is moving
5 vigorously, although the FBI generally claims that they
6 only know of half a dozen computer crimes. They define
7 computer crimes very differently than I do. In fact, in
8 speaking very carefully, I really should not even use the
9 word "crimes," because crimes represent only a small part
10 of what we are looking at.

11 MR. MILLER: Some of the things we heard this morning
12 have a larger definition of computer abuse or might even
13 constitute a copyright misdemeanor.

14 JUDGE FULD: Are there any other questions?

15 Thank you very much, Mr. Parker. We will have
16 to read your book now.

17 MR. LEVINE: The Commission has a copy, by the way,
18 if anyone wishes to borrow it on intra-library loan.

19 (Laughter.)

20 JUDGE FULD: We are going to go to the --

21 MR. NIMMER: Can we take a three-minute break?

22 JUDGE FULD: Sure.

23 (Recess.)
24
25
26

1 Los Angeles, California, Friday, September 17, 1976, 3:08 PM

2
3 JUDGE FULD: Let us go to the guidelines again. Do
4 you want to talk, John?

5 MR. HERSEY: I think I penetrated the mystery of the
6 horror. May I try it on you and see whether this sounds
7 right?

8 MR. WEDGEWORTH: Is that the one on page --

9 MR. HERSEY: On page --

10 MR. WEDGEWORTH: -- two of the guidelines?

11 MR. HERSEY: Page 1 of the guidelines themselves, but
12 Paragraph 2 at the foot of the page.

13 "In the event that," paragraph indented,
14 "(a) a requesting entity shall have in force
15 or shall have entered an order for a subscrip-
16 tion to a periodical or," paragraph indented,
17 "(b) has within its collection a copy or
18 phonorecord of any other copyrighted work,"
19 then back to the left-hand margin, "material
20 from either category of which it desires to
21 obtain by copy from other library or archives" --
22 I will just read this off -- "another library
23 or archives because the material to be copied
24 is not reasonably available for use by the
25 requesting entity itself," comma "then the
26 fulfillment of such request."

1 MR. NIMMER: Could you read that part again? After
2 the words, "copyrighted work."

3 JUDGE FULD: That sounds good.

4 MR. PERLE: I just wanted to make sure the librarians
5 understand. They do not want to do it by interlibrary
6 loan, that they may not be able to do it by interlibrary
7 loan if it is available. That is what it says.

8 MS. WILCOX: If I may, that is what the ALA Code says,
9 what the interlibrary loan has been doing for years, so
10 the Commission is not saying anything moot.

11 JUDGE FULD: Do you want to read it again, John?

12 MR. HERSEY: Does that sound as if it makes sense?

13 MR. WEDGEWORTH: It makes more sense than the present
14 version.

15 MR. HERSEY: I will do it again.

16 MR. PERLE: You have the (a) in the wrong place.

17 MR. LEVINE: Let me make sure that DeeDee is writing
18 this down.

19 MR. HERSEY: "A requesting entity" --

20 JUDGE FULD: Do you want to start all over again?

21 MR. HERSEY: All right. Paragraph 2:

22 "In the event that a requesting entity,"
23 paragraph "(a) shall have in force or shall
24 have entered an order for a subscription to
25 a periodical or" --

26 MR. LEVINE: Wait.

1 JUDGE FULD: Go ahead.

2 MR. HERSEY: "Or," paragraph indented, "(b)" -- both
3 (a) and (b) are indented -- "has within its collection a
4 copy or phonorecord of any other copyrighted work" --
5
6

7 MR. HERSEY: "Or (b) has within its collection a
8 copy or phonorecord of any other copyrighted work." Then
9 return to the left margin: "Material from either category
10 of which it desires to obtain by copy from another library
11 or archives." I guess we need the parentheses, "(The
12 supplying entity)", end parentheses, "because the material
13 to be copied is not reasonably available for use by the
14 requesting entity itself," comma "then the fulfillment of
15 such requests shall be treated as though the requesting
16 entity made such copy from its own collection."

17 Then I believe that the "provided that" that
18 we put in yesterday does not make sense. I think it
19 should be a new sentence with "another material." It is
20 simply an elaboration of what we have just said, a clarifi-
21 cation of it. It is not a proviso.

22 JUDGE FULD: It will start with "A library"?

23 MR. HERSEY: End sentence at "collection" and a new
24 sentence, "A library."

25 JUDGE FULD: The rest is as it is?

26 MR. HERSEY: Yes.

1 MS. DOUGHERTY: Could I read it back to make sure I
2 got it, Mr. Hersey?

3 "2. In the event that a requesting entity (a)
4 shall have in force or shall have entered an order for
5 subscription" --

6 MR. FRASE: pardon me. It is "a subscription."

7 MS. DOUGHERTY: " subscription for a periodical or
8 (b) has within its collection a copy or phonorecord of
9 any other copyrighted work," and then back to the margin,
10 "material from either category of which it desires to
11 obtain by copy from another library or archives," did you
12 say?

13 parentheses, "(the "supplying entity")", close
14 parentheses, "because the material to be copied is not
15 reasonably available for use by the requesting entity
16 itself," comma "then the fulfillment of such requests
17 shall be treated as though the requesting entity made
18 such copies from its own collection."

19 MR. PERLE: Would you go back out to the margin again?
20 "Any other copyrighted work," out to the margin.

21 MS. DOUGHERTY: "Material from either category of
22 which it desires."

23 MR. PERLE: "It desires to obtain"?

24 MS. DOUGHERTY: "To obtain by copy from" --

25 MR. PERLE: "By copy"?

26 MR. LEVINE: Yes.

1 JUDGE FULD: Do you need that? Is that redundant?
2 The extra word "copy"?

3 MR. PERLE: No. Otherwise it is a straight inter-
4 library loan.

5 MS. DOUGHERTY: Would you like me to go on?

6 MR. LEVINE: No. I think that is good.

7 MR. HERSEY: There was one other thing. At the first
8 line on Page 2 of the Introduction, I think it should be
9 "in a periodical," instead of "in periodicals."

10 JUDGE FULD: First page?

11 MR. HERSEY: First line of Page 2 of the Introduction.

12 MR. PERLE: Correct. As a matter of draftsmanship,
13 in the guidelines themselves, should "guideline" have a
14 capital "G"?

15 JUDGE FULD: You mean in the title?

16 MR. PERLE: No. In the guidelines themselves, should
17 the word "guidelines" be a capital "G" each time? Do not
18 kill me, Hershel.

19

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1 has ordered a copy of such work and wishes to have copies
2 and portions of that work supplied to it on an interlibrary
3 loan?

4 MR. PERLE: They do not own it until it is in their
5 possession. The title has not passed yet. Nobody is
6 going to worry about it.

7 MR. WEDGEWORTH: What I am trying to get at is that
8 it seems to be another part of No. 2 which has been
9 deliberately left out.

10 MR. PERLE: We deliberately omitted the ordering of
11 a book, or a collective work or anything other than a
12 periodical because frequently it is not practicable to
13 enter an order for that sort of thing.

14 MR. WEDGEWORTH: That is no more true of a book than
15 it is of a periodical.

16 MR. LACY: I agree with Bob on that.

17 MR. WEDGEWORTH: It is less than true.

18 MR. PERLE: How can I enter an order for a book which
19 you no longer have in inventory but it is out in the store?

20 MR. LACY: But assuming a copy of the book --

21 MR. PERLE: You write back and say, "McGraw-Hill
22 regrets that it does not have it available; however, you
23 can go to Doubleday and you can get one"?

24 MR. LACY: No. We write back, "It is momentarily
25 out of stock but we will supply it on such and such a date."
26 If it is a magazine, we say, "We will enter your

1 subscription and you will get your first one in six weeks,"
2 or we would say, "It is out of print."

3 MR. WEDGEWORTH: How do you order a subscription for
4 a journal that ceased publication last month?

5 MR. PERLE: You do not.

6 MR. WEDGEWORTH: Right. And that is a purchase under
7 the second category and what I am saying is that has been
8 left out and it seems to me a significant omission.

9 MR. PERLE: I think you are better off. The
10 librarians are better off if they do not have that because
11 if you do not have that business of entering an order you
12 go ahead and make five copies. No matter what you can
13 make up the five copies. You have a guideline for that.
14 You do have and it is thrown back into 108, generally.

15 MR. WEDGEWORTH: Why do you have that in there for
16 the other categories, then?

17 MR. PERLE: Because the guidelines are supposed to
18 define what is a substitute for a subscription or a
19 purchase. But once again -- we went over all this before,
20 Bob.

21 MR. WEDGEWORTH: No, we never went over this point.

22 MR. NIMMER: We did briefly yesterday. The publishers
23 made that point at our meeting last week.

24 MR. WEDGEWORTH: I never went over it, is what I am
25 trying to say. You may have discussed it with others,
26 but never with me.

1 MR. NIMMER: Briefly yesterday, but only in passing.

2 MR. PERLE: The publishers said it simply was not
3 practicable.

4 JUDGE FULD: Do you think it is critical, Bob?

5 MR. WEDGEWORTH: But I spend my life ordering books,
6 which I think is, to me, a very significant omission.
7 What we are talking about is, in this section, as it
8 presently stands, as providing the opportunity to obtain
9 copies of works where you have entered a subscription or
10 have ordered it under the same circumstances as you would
11 if you actually physically had it in your possession.
12 This can happen just as easily with other kinds of works
13 because, as you said yourself, you cannot order a defunct
14 journal. It really becomes, in a sense, a collected work
15 because you are buying a back issue under special circum-
16 stances.

17 If you originally subscribed and the firm went
18 out of business or ceased to publish that, and for some
19 reason that copy is not available to you, what protection
20 do you have to --

21 MR. HERSEY: There is one difference, Bob. If you
22 were ordering a current periodical, though there may be
23 a delay, you eventually get it. But if you order a book,
24 you may or may not get it. You must know that.

25 MR. WEDGEWORTH: There is no difference.

26 MR. HERSEY: Yes, there is.

1 MR. WEDGEWORTH: No, there is not. In fact, I would
2 demonstrate to you clearly that your chances of getting
3 the book are a lot better than getting the back issue.

4 JUDGE FULD: What harm is there in putting this in?

5 MR. LACY: 108(g)(2) is copying that substitutes the
6 purchasing of the book and if the purchasing of the book
7 is impossible for photocopies -- I really do not -- I
8 think this would be a most rare and exceptional case that --

9 MR. WEDGEWORTH: It is most frequent. It is most
10 frequent. It is probably the single-most frequent case
11 for replacement that ever happens.

12 MR. LACY: You are saying a different thing is
13 frequent from what I was saying was rare. I was saying
14 it is rare that you weren't to get a book that you ordered.

15 MR. PERLE: Do you want to put it back in? It is
16 all right with me.

17 MR. NIMMER: I do not care at all. But one difference
18 is maybe that on periodicals we are only talking about in
19 the last five years and hence they are not likely to be
20 defunct; whereas books --

21 JUDGE FULD: What harm is there in having it in?

22 MS. WILCOX: I think there are two areas. It is
23 hard to explain the problems. That is, the amount of
24 claiming that is required -- maybe this is the postal
25 system -- of the number of journal issues that are not
26 received, it is horrendous.

1 JUDGE FULD: What harm would there be, I repeat, in
2 having it in?

3 MR. NIMMER: We have to go back to the publishers,
4 I guess.

5 MR. WEDGEWORTH: I raised the question because either
6 I would like to see it in there or see some logical
7 explanation for leaving it out.

8 MR. PERLE: The only explanation was that the publishers,
9 guys like Alex Hoffman, have said it was not practicable
10 and everyone said, "All right."

11 MR. WEDGEWORTH: Why isn't it practical? I have not
12 heard anything that relates to my experience in terms of
13 frequency.

14 MR. NIMMER: Bob should know more about ordering than
15 Alex, I guess.

16 MR. LEVINE: They said -- and I am not sure that I
17 understood -- that you do not place an order for a book.
18 I am not sure I understood them, but that it was they said.

19 MS. WILCOX: You do not place an order for a book?
20 What do you do? How do you get books?

21 MR. LEVINE: Isn't that what they said?

22 MR. NIMMER: Yes. I did not understand that, either.

23 MR. LEVINE: I am glad you were there, too.

24 MR. PERLE: Then after the words, "copyrighted work,"
25 on Page 2 --

26 MR. HERSEY: Wait a minute. Let us see what the

1 language should be.

2 Let me say one thing: I would hope we can
3 settle this this afternoon as far as possible because
4 we are not going to be convening again before a week
5 from Monday when this has to be ready for the conference
6 committee and we have done a lot of work on this and I
7 am willing to call Irwin in ten minutes now and check out --

8 MR. NIMMER: This was not a point that Irwin made.
9 It was a point, I think, that Charles made.

10 MR. PERLE: Irwin did not care.

11 MR. WEDGEWORTH: This one question that I have had
12 even before I got out here, questioning why there was not
13 a complete parallel here. I do not understand it.

14 JUDGE FULD: Why should the publishers object?

15 MR. PERLE: I have no idea.

16 MR. LACY: I have no --

17 MR. LEVINE: The only possible situation in which
18 they would object -- and I do not know how you distinguish
19 it from periodicals -- is if, in fact, they know -- I use
20 this as a hypothetical; I do not think the librarians
21 would do this -- but if the article is out of print,
22 merely writing to the publisher and ordering it, then --

23 MR. LACY: Out of print you have another whole
24 category.

25 MR. LEVINE: Or that the publisher is defunct.

26 MR. LACY: You have got all of that on periodicals.

1 MR. LEVINE: That is right. I understand.

2 MR. FRASE: More definitely in periodicals that it
3 is defunct.

4 MR. LEVINE: I cannot believe that the publishers
5 association is going to --

6 MR. WEDGEWORTH: That is not even the most frequent
7 category. You see, if you have a defunct journal -- which
8 is extremely frequent -- new journals go out of business
9 almost immediately, then there is no way you can enter a
10 subscription for it. If you subscribe from the beginning
11 and somehow misplaced or lost your copy, I am saying that
12 would not fall under the first category where you are
13 talking about entering a subscription; it would fall under
14 the second category where you are simply buying a collected
15 work because it is no longer a subscription.

16 MR. PERLE: The language, if it goes in, would be
17 "or (b) has within its collection," comma "or shall have
18 entered an order for," comma.

19 Arthur, the language, if it goes in, would be:
20 "or (b) has within its collection," comma "or shall have
21 entered an order for," comma. Arthur, you make sure that
22 DeeDee gets all the commas.

23 MS. DOUGHERTY: "Has within its collection" --

24 MR. WEDGEWORTH: Comma.

25 MR. LEVINE: "Or shall have entered an order for,"
26 comma.

1 MS. MORRISEY: "Or shall have entered an order for."

2 MR. LACY: I can see no problem from the publishers
3 but I can see there might be out of --

4 MR. HERSEY: I think we have to check it back with
5 them.

6 MR. LEVINE: I think --

7 MR. LACY: Incidentally, on the time, let us get one
8 thing straight. Brennan had said he will accept anything
9 that all the parties have agreed. I think we could have
10 a situation in which the Commission here said that any of
11 the variations in this that all the parties agree to is
12 all right with the Commission and the authors could say
13 if we did leave any unfulfilled minor points.
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18 MR. LACY: Anyway, we do not have to
19 vote on it again if anything in this satisfies us and the
20 parties all agree.

21 JUDGE FULD: Do you want to listen to a draft that
22 Arthur has drawn?

23 MR. LEVINE: According to Hershel's suggestion, I
24 simply scribbled this down: The following guidelines were
25 adopted by CONTU as its meeting on September 16 and 17.
26 They represent the result of a series of discussions by

1 the Commission based upon written and oral presentations
2 given by the major interested parties. We believe that
3 these guidelines are fair and workable and represent a
4 compromise position that the parties can subscribe to.

5 Because CONTU will not be meeting again before
6 Congress is expected to enact the new copyright law, this
7 draft must, of necessity, be the final draft of CONTU of
8 these guidelines.

9 We hope that the parties agree that the adoption
10 by Congress of reasonable guidelines for inter-library
11 photocopying is desirable for both the author-publisher
12 and library communities. We therefore ask for your final
13 approval of these guidelines before they are transmitted
14 to Congress.

15 MR. HERSEY: Send it to the parties?

16 MR. LEVINE: Yes. Maybe just read over the phone
17 by you all.

18 MR. PERLE: The word "compromise" bothers me. It
19 is a draft which mutually accommodates all the parties.

20 MR. LEVINE: Fine.

21 MR. MILLER: Congress is not adopting.

22 MR. HERSEY: Irwin did have one other point and we
23 had a discussion here briefly that --

24 MR. MILLER: Congress does not adopt.

25 MR. FRASE: The conference committee puts it into a
26 conference committee report to --

1 MR. NIMMER: It depends on what they say when they
2 put it into the conference committee report, but notice
3 what they said on the 107 guidelines.

4 MR. HERSEY: Mr. Chairman?

5 JUDGE FULD: Yes.

6 MR. HERSEY: There is one point that I have undertaken
7 to talk to Irwin Karp about this and he is active and he
8 had one point that he wanted to make. Paragraph 3, "No
9 request," and so on. He accepted the language up to the
10 end but wants to add "And whether it is making the request
11 under Paragraph 1 or Paragraph 2 above."

12 MR. PERLE: Why, John?

13 MR. HERSEY: The reason for that is for the record
14 keeping of the borrowing library that it is essential that
15 it be clearly indicated whether they are borrowing under
16 the five-copy limit or under (b) which is where they have a
17 copy and copy under in-house rules.

18 MR. LEVINE: That is one and two.

19 MR. HERSEY: One and two. I am sorry. One and two.
20 Not (a) and (b).

21 MR. PERLE: John, I respectfully submit that if that
22 provision should be in at all it ought to be in Paragraph
23 4. It is not the business of the lending entity or the
24 concern of the lending entity.

25 MR. HERSEY: I will try that on Irwin. I think that
26 he feels very strongly it should go in the request.

1 MR. WEDGEWORTH: Let me first respond to that
2 practically.

3 MR. HERSEY: Let me ask you how the request is made.
4 How does that go?

5 MR. WEDGEWORTH: That is what I was trying to get at.
6 Normally, when this kind of transaction takes place, you
7 fill out this form. Let us assume the form completely
8 identifies the item. Now, addressing the question as to
9 whether it is Category 1 or Category 2, let us also assume
10 that their file is kept in some order, otherwise you would
11 never be able to tell how many copies you got from any
12 given item during a given year. It really does not make
13 any difference whether you say Category 1 or Category 2
14 because if you have got all the slips together and if you
15 have exceeded five, then they are going to have to demon-
16 strate that they have a copy of the item in order to
17 justify their having eight copies from a given work or a
18 given journal during that given year; correct?

19 MR. HERSEY: But isn't it true that if they --

20 MR. WEDGEWORTH: What I am saying is, marking it on
21 the form does no more because you can count them and see
22 that. Even if they mark it on the form, they are still
23 going to have to demonstrate if an audit takes places that
24 they own the copy; correct? So that additional marking
25 does not really help you that much.

26 MR. HERSEY: So they would have to be able to demonstrate

1 the dates which they had entered the order for the copy.

2 MR. WEDGEWORTH: Possibly.

3 MR. HERSEY: See whether that corresponds with --

4 MR. LACY: They would be able to do that. The
5 ordinary acquisition records would show that.

6 MS. WILCOX: It relates to one other thing, too, and
7 that is how the requests are transmitted. If the requests
8 went by telephone or if they went by TWX, that is your
9 record. It seems to me it is appropriate in the requesting
10 library; that is where the burden ought to be because that
11 is the only place where the record is meaningful. But in
12 order to put all this other additional information on; it
13 is redundant.

14 MR. HERSEY: Alice, when a request is made by telephone
15 or Telex, is that not followed by a form?

16 MS. WILCOX: No. The Telex or the TWX is not the
17 only order that is appropriate.

18 MR. HERSEY: A telephone call is sufficient to --

19 MS. WILCOX: For many libraries, that is sufficient.

20 MR. PERLE: May I suggest --

21 MS. WILCOX: I think it is the appropriate place for
22 these records to be kept and the only place where they can
23 appropriately be kept in lieu of subscription is with the
24 borrowing library, not with the lending library.

25 MR. HERSEY: Are you saying that there are many cases
26 where the only transaction is the telephone call from the

1 borrowing library to the lending library saying, "We want
2 such and such a copy of such and such"? Is that not
3 followed by a form?

4 MS. WILCOX: There are many libraries -- I cannot
5 respond to how many -- but, yes, there are libraries where
6 the entire thing is by a telephone call; but there are
7 many, many more where the entire message is on a TWX.
8 Now, the appropriate place to keep those records is in the
9 file and the reason I am saying this is just a logistic
10 thing. If you try to file TWX requests, it just is not
11 appropriate anyway because it is appropriate that the file
12 that you want to keep for the records, the records that the
13 person has filled out at the time of request --

14 MR. WEDGEWORTH: That is not impossible. I think we
15 are getting away from the question and the question is that
16 it seems to me that it is unnecessarily redundant because
17 it does not give you any more information than you can get
18 from looking at the file.

19 MR. PERLE: May I suggest that inasmuch as it has
20 become evident that many of these requests are oral
21 communications, that if we say in Paragraph 4, "The
22 requesting entity shall maintain records," instead of
23 "retain copies," of all requests. Then --

24 MR. FRASE: Yes.

25 MR. PERLE: Then you have the whole thing, John.
26 Because the record necessarily reflects the basis upon

1 which the request was made.

2 MR. LACY: You are already required to maintain records
3 until the fulfillment of a request, which is all you need,
4 because an unfulfilled request is irrelevant anyway. So
5 you could --

6 MR. SARBIN: I think you should accept this because
7 it is in part my contribution. When he asked me I said,
8 "Okay."

9 (Laughter.)

10 MR. PERLE: "Maintain records of all requests made
11 by it."

12 MR. WEDGEWORTH: "Filled requests" or "all requests"?

13 MR. PERLE: And then it goes on to say, "And shall
14 maintain records until the fulfillment of such requests."
15 That word "request" should be "requests" in the fourth
16 line.

17 Dee, got it, kid? "The requesting entity."
18 Substitute the words "maintain records," instead of
19 "retain copies."

20 In the fourth line, the word "request" should
21 be "requests."

22 MR. LEVINE: Excuse me. I forgot a --

23 MR. LACY: Are they really in need of a record of
24 unfulfilled requests and not just the fulfillment of the
25 requests? It is only the fulfillment that you need a
26 record of.

1 MR. WEDGEWORTH: It has to be done anyway. If you
2 ask someone for something you have to be able to identify
3 it when it arrives.

4 MR. LACY: If you are willing to do it, I am certainly
5 not going to --

6 MR. WEDGEWORTH: It has to be done; it is not an
7 option. If you get the item and you do not know who it
8 goes to --

9 MR. PERLE: You have to be neat in draftsmanship.
10 After "requests" you can say "which records." Strike
11 "copies of requests," then.

12

13 MR. PERLE: "Which records shall be maintained."

14 MR. LEVINE: May I make another suggestion for a
15 minor, very minor change in the introduction? This was
16 suggested by John Lorenz. I am sorry I did not call it
17 to your attention yesterday. But he asked that in the
18 first line of the last paragraph of the introduction that
19 the word "system" be changed to "practice"; "system" being
20 a bit of a buzz word.

21 MR. PERLE: First word of what?

2 MR. LEVINE: The first line in the last paragraph of
3 the introduction. "The point has been made that the
4 present system of interlibrary loan." Can we change that
5 to "practice"? Does that offend anybody?

6 JUDGE FULD: Third line, too.

1 MR. LEVINE: No. "System" is correct there.

2 MR. SARBIN: If you do that, you have to say "inter-
3 library loans," not "loan."

4 MR. LEVINE: Thank you.

5 MR. LACY: I wrote that paragraph so let us not
6 tinker too much.

7 (Laughter.)

8 MR. LEVINE: On the second line, "use of photocopies,"
9 instead of merely "photocopies."

10 MR. WEDGEWORTH: Second line?

11 MR. LEVINE: Yes. Okay?

12 JUDGE FULD: What about No. 5? Do we leave out the
13 last sentence? Have you omitted that?

14 MR. LEVINE: I think we decided we would leave it in.

15 MR. HERSEY: What is that?

16 MR. WEDGEWORTH: Five of the guidelines.

17 MS. MORRISEY: It says CONTU won't be alive.

18 JUDGE FULD: I thought we ought to take it out.

19

20 MR. LEVINE: Are we through with the guidelines?

21 JUDGE FULD: No. I want to know about the last
22 sentence.

23 MR. LEVINE: I thought we had decided yesterday that
24 the last sentence --

25 MR. WEDGEWORTH: What last sentence?

26 MS. MORRISEY: Page 2 of the No. 5.

1 JUDGE FULD: No. 5.

2 MR. WEDGEWORTH: I thought we had decided that we
3 would revise that to reflect 108(i).

4 MR. LEVINE: I thought we had decided to not change
5 it at all simply because there was no point in changing it.

6 MR. LACY: I do not agree with it.

7 JUDGE FULD: I do not like it at all.

8 MR. LACY: I think it is presumptuous and arrogant
9 of the Commission to tell Congress that we may review it
10 five years from now. I have some revised language which
11 would say: "Five. As proposed in Section 108(i), these
12 guidelines shall be reviewed not later than five years from
13 the effective date of the enactment of" -- since it is
14 going to be in a report on this bill, you could say, "of
15 this bill," or "the general copyright provisions."

16 MR. FRASE: "This bill for the general revision."

17 MR. PERLE: Well, we are down to the wire.

18 MR. LACY: 108(i) requires exactly what we are saying;
19 it is not even optional. It specifically requires it.

20 MR. WEDGEWORTH: I agree with you, Dan. I think it
21 is very presumptuous.

22 MR. LEVINE: Drop the last sentence? Fine.

23 MR. LACY: Particularly when you have no statutory --

24 MR. PERLE: I move we unanimously --

25 MR. HERSEY: How is the first sentence on Page 5?

26 MR. FRASE: Starting with "as provided in Section

1 108(i) these guidelines shall be reviewed not later than
2 five years" --

3 MR. LEVINE: "From the enactment of this bill."

4 MR. FRASE: -- "after the effective" --

5 MR. LEVINE: "From the enactment of this bill."

6 MR. PERLE: Not "after"?

7 MR. NIMMER: Of course, (i) does not call for a
8 review of the guidelines; it calls for review of the
9 Statute.

10 MR. LACY: It requires a review of everything referring
11 to interlibrary loans and the Statute actually has meaning
12 as interpreted by the guidelines.

13 MR. NIMMER: I agree it is logical to do this but
14 when you say "as provided in 108(i)" it is not, strictly
15 speaking, correct.

16 MR. LACY: Except that these guidelines are only
17 relevant to the legislative gloss on the Statute. It is
18 an integral part of the Statute as required by the courts.

19 MR. HERSEY: I think you are going to get a howl from
20 Irwin on that. Why not leave it the way it is?

21 MR. LACY: I really think that is wild. That is
22 nonsense.

23 MR. HERSEY: It is nonsense to you, Dan, but it is
24 not nonsense to him.

25 MR. LACY: It is nonsense.

26 MR. HERSEY: It is not nonsense to Mel.

1 MR. NIMMER: It does not bother me, I must say, but
2 strictly speaking it --

3 MR. LACY: I have no objection to the guidelines but
4 one thing I object to is to say that -- I would be glad
5 to say "As a part of the review provided in 108(i) these
6 guidelines will be reviewed."

7 MR. HERSEY: That is all right.

8 MR. WEDGEWORTH: Won't you recommend that these guide-
9 lines be reviewed if you construed that it is not a part
10 of your 108(i)? Remember that this has been included in
11 the review mandated by 108(i).

12 MR. LACY: This is the Congress saying this now; not
13 us saying it.

14 MR. WEDGEWORTH: But I am saying CONTU is saying
15 what is in 5.

16 MR. LACY: Well, CONTU is suggesting the conference
17 reports should say it.

18 MR. WEDGEWORTH: Yes.

19 MR. LACY: This is language we are providing --

20 MR. WEDGEWORTH: I see. How would that go?

21 MR. LACY: "As a part of" --

22 MR. FRASE: "Review provided in section" --

23 MR. LACY: "Of the review provided in Section 108(i),
24 these guidelines shall be reviewed not later than five years
25 after."

26 MR. FRASE: The Congress is saying this. Shouldn't

1 you say "will be"? They have already provided it.

2 MR. HERSEY: How does the sentence end now?

3 MR. LACY: "Five years after the enactment of the
4 general revision of the copyright law." What it leaves out
5 is saying that it may be done by us or by the Register of
6 Copyrights, since the last specifically requires the
7 Register of Copyrights to make such a review.

8 MR. WEDGEWORTH: So you dropped that last sentence?

9 MR. PERLE: How does it read now?

10 MR. LACY: "As a part of the review provided in
11 Section 108(i), these guidelines shall be reviewed not
12 later than five years after the effective date of the
13 enactment of this bill."

14 MR. PERLE: Then you should say, "should be reviewed,"
15 instead of "shall be."

16 MR. FRASE: Or "will be."

17 MR. NIMMER: Are we speaking for ourselves or for
18 the committee?

19 MR. LACY: We said "shall" and "will" throughout the
20 rest of it.

21 MR. PERLE: You are talking about a review by some-
22 body else.

23 MR. LACY: This is Congress speaking now.

24 MR. PERLE: You are right.

25 MR. NIMMER: It is not really Congress; it is the
26 committee.

1 MR. LACY: The committee does not feel any embarrass-
2 ment about that. If they do, they will change it.

3
4
5
6 MR. PERLE: I move the adoption of the guidelines in
7 the form in which we all understand them.

8 MR. LACY: Whatever that may be.

9 JUDGE FULD: I do not think anyone disagreed. The
10 motion is carried.

11 MR. LACY: Are you going to call Irwin now with this
12 change?

13 MR. HERSEY: I do not know. How do we leave this?

14 MR. LEVINE: I think it can wait until Monday because
15 I do not think that Alice and Bob want --

16 MR. PERLE: You will have to get a statement.

17 MR. HERSEY: The issue is, we do not reconvene; there
18 is not going to be a convenient time to get us all together.

19 MR. LACY: I think we could adopt these with the
20 provision that the staff can insert amendments that may
21 be jointly agreed to by all the parties.

22 MR. HERSEY: Supposing that there is some sticky
23 point for one of your group or a sticky point on this
24 side, then how do we resolve that?

25 MR. LACY: I think you have a couple of things: One,
26 if it is a trivial kind of easily resolved point, you get

1 on the phone with that if you anticipate the other side
2 will accept. Either you get on the phone or Arthur does.
3 If it is a substantive disagreement, I think we simply
4 report to Brennan we have adopted these recommendations
5 but they have not been agreed to by whichever side did
6 not agree to them so we cannot --

7 MR. FRASE: Should we specify it is agreed to except
8 for this point?

9 MR. PERLE: No.

10 MR. LACY: No. I think we should say it is agreed
11 to except by this organization.

12 MS. WILCOX: The introductory statement that Arthur
13 read covers that.

14 MR. HERSEY: That is a letter to the parties.

15 MR. SARBIN: You are going to get into a discussion
16 about what is trivia and what is substance.

17 MR. LEVINE: Absolutely. What is going to happen is
18 Dee is going to be sitting at the typewriter at 8:30 a
19 week from Monday morning and we are waiting for the last
20 word to come in. I think we have to --

21 MR. SARBIN: I am in favor of saying, "We have had
22 it." I really am. You have done it; you have considered
23 it. If they want to change more and play around with it,
24 let them talk to somebody else.

25 MR. PERLE: Arthur's statement, as said, this is
26 necessarily the last draft. I suggest that you add one

1 last sentence to that which says that, "If you take
2 exception, feel free to write the Congress" or "the
3 committee."

4 MR. LEVINE: That is gratuitous. They can do that
5 without our permission.

6 MR. SARBIN: Let us not add anything.

7 MR. PERLE: As far as I am concerned, I am with
8 Hershel, I am through with this.

9 MR. WEDGEWORTH: I think we have reached the point
10 where we have to decide whether we think we have done as
11 well as we possibly can and it is quite likely that some
12 of our people will say that they do not like this. I also
13 think that they are sophisticated enough to know who to
14 write to in case they do not like it. But I think in
15 conveying that impression to me, my response is, "Well,
16 you know that it is easier to kill a provision than it is
17 to get one adopted." If you want to assume the responsi-
18 bility for not having any guidelines, that is a possibility.
19 But we have done the best that we thought we could do in
20 coming to this conclusion.

21 MR. LEVINE: This is very important for my purposes
22 and for what Judge Fuld, in a letter to the House and Senate
23 Judiciary Committees, what he says, that is why I need
24 reactions back whether we can say to the committees, "The
25 major interested parties have agreed to the adoption of
26 these guidelines." We are going to have to hear from --

1 MR. NIMMER: I think what you say to Congress, to
2 the committees, is whatever the fact turns out to be;
3 that is, either there is general agreement; there is
4 agreement except for such and such a party; whatever.
5 But let me add, I think it is important even if there is
6 a failure of total agreement by all the parties that you
7 should so forward to the committees what these guidelines
8 are and state as accurately as you can who agrees to it
9 because Brennan may not ultimately go to the point that
10 will incorporate only if there is total agreement.

11 MR. LEVINE: I agree with that. What I am saying is,
12 though, I need input back from, I guess, Alice.

13 Are you the one that is going to be on the
14 first line?

15 MS. WILCOX: I think so.

16 MR. LACY: It depends on what you mean by "totally."
17 If the ALA, the ARL, the Special Libraries Association all
18 agree to this but the Music Libraries did not, I think he
19 will not call for a total in that sense, would he? I
20 think by "total" he really means both sides, the substan-
21 tial interests on both sides. I do not think he necessarily
22 means every person.

23 MS. WILCOX: Arthur, could you read that statement
24 again?

25 MR. LEVINE: Dee is typing it.

26 JUDGE FULD: Is there any other thing that we have

1 to take up?

2 MR. LEVINE: Yes. You mean apart from the guidelines?

3 JUDGE FULD: Yes.

4 MR. LEVINE: The staff would like to move at the next
5 meeting to photocopying and perhaps alternate sessions on
6 photocopying data bases just in terms of the preparation
7 of meetings, and it is useful for our purposes. I think
8 it is time -- we decided to hold up on hearings of photo-
9 copies until the bill was passed or was not passed and we
10 will know that, certainly, in the next week or two. That
11 is one thing.

12 Two: I would like to mention a couple of
13 projects that we are involved in.

14 MR. LACY: Before you leave photocopying, there are
15 two sorts of areas here: One would be whether this should
16 be an amendment of the presumably about to be adopted law
17 and since the law itself provides for a five-year review
18 of a rather extensive and thorough sort, it would seem to
19 me to be relatively pointless to undertake recommendations
20 to the Congress of an amendment of the law before it has
21 been granted. So the main thing on photocopying that has
22 really been left up to us, isn't it, is the question of
23 the guidelines or clearing house arrangements, or whatnot,
24 on photocopying that it is agreed requires the permission
25 of the proprietor but where the circumstances are such,
26 an ordinary case by case, item by item, transaction by

1 transaction negotiations. Is that what we are really
2 going to be talking about?

3 MR. LEVINE: I think largely.

4 MR. NIMMER: There are other things, too.

5 MR. WEDGEWORTH: I hope not.

6 MR. LACY: What other things?

7 JUDGE FULD: Bob?

8 MR. WEDGEWORTH: I hope that is not the focal point
9 for our discussions. I think I would like to see us go
10 to a more fundamental level of dealing with this question
11 of photocopying similar to what Arthur Miller was beginning
12 to articulate yesterday. I, for one, would resist simply
13 trying to look at this problem in terms of agencies and
14 mechanisms that we can presently foresee as being able to
15 carry out this activity. I think that it would be much
16 preferable to look at what the compensable uses of copy-
17 righted works ought to be and then moving from there in
18 which you might have many different patterns for that
19 occurring rather than clearing houses or what have you.
20 To me, I would like to start at the fundamental question
21 and not start with the practical manifestations of it.

22 MR. NIMMER: I agree with Bob's remarks but, beyond
23 that, aren't we putting the cart before the horse by
24 trying to decide, first, what are the issues we are going
25 to address? Shouldn't we first get the information? We
26 have not had any input into the area of photocopying such

1 as we have had in the computer area. Let us be educated
2 in the whole area and then decide what areas we should
3 attack and the nature of the attacks.

4 MR. LACY: What is the schedule for the completion
5 of the studies we have --

6
7 MR. FRASE: Most of them are not going to be completed
8 until next spring, where both our own and those -- like the
9 input study and so on.

10 MR. LACY: I certainly am for -- I hope to get
11 involved in it earlier -- the comprehensive review of the
12 whole thing, a view to establishing really long-range
13 policies. To some extent I think CONTU has been boxed in
14 on this and the law has been passed and Congress has said,
15 "Five years from now we want this reviewed to see if it
16 works and what changes are to be made." I think it may
17 be relatively fruitless for us to come in with a report
18 a year from now -- and maybe not -- I would be sort of
19 perfectly willing to consider doing it more -- to do that
20 fundamental job, I think we certainly need to be informed,
21 as Mel says, but the mechanisms we have set up to inform
22 ourselves in some detail in order to produce a report.

23 MR. WEDGEWORTH: I think there is a lot of information
24 presently available that will be very useful for the
25 Commission to have. I have heard John and others comment
26 quite extensively on what has happened vis-a-vis the

1 arrangements with the British Lending Library. I say,
2 let us get Morey here and have him present his information
3 and you can ask those questions directly as to what the
4 nature of this activity is. Let us get Gordon Williams
5 at the Center of the Research Library to come before us
6 and we can interrogate him directly and have him present
7 the statistics on their operations, since these seem to
8 be controversial areas of activity.

9 I think there are a couple of things that we
10 can do pending the availability of the other studies that
11 are in progress.

12 MR. LEVINE: Fine.

13 MR. HERSEY: I think we also have to think of this
14 in longer range terms, too. Going to the fundamental
15 question Peter Weiner raised the issue today whether
16 computer copying and photocopying aren't going to merge.

17 MR. MILLER: Indeed, the uses of compensable uses
18 and how you use them crosses both technologies.

19 MR. WEDGEWORTH: Yes.

20 MS. WILCOX: We need some of the vendors to come or
21 some of the technologists to come.

22 MR. NIMSE: We do.

23 MR. LACY: In any event, just politically, we need
24 to have all their testimony, whether we can functionally
25 do much with it or not -- I do not disagree.

26 MR. LEVINE: I think, just again, as a political

1 matter, though, that at the first meeting perhaps we ought
2 to hear from the major associations who have been involved
3 in photocopying problems; the AAP; the Authors League --

4 MR. PERLE: No.

5 MR. LEVINE: -- the ALA, ARL.

6 MR. PERLE: No, no. We have heard from them over
7 and over again.

8 MR. LEVINE: Congress has heard from them.

9 MR. PERLE: Let us get the technologies.

10 MR. NIMMER: We can go back to them later.

11 MR. LEVINE: Technology is, in some cases, easier.

12 MR. LACY: Will we, though, specifically tackle this
13 clearing house situation? I do not look forward to doing
14 that.

15 MR. HERSEY: It is not a clearinghouse.

16 MR. LACY: Well, I was using that for shorthand to
17 mean the sort of things --

18 MR. NIMMER: This microfilm thing can bear on that,
19 Dan. Our photocopy subcommittee met the other day and I
20 think there are some possibilities.

21 MR. FRASE: The problems are some of these things
22 are not going to mature on university level.

23 MR. LEVINE: Let me just tell you about a couple of
24 studies that we are funding. There was a study done in
25 1968 on the cost of the interlibrary loan and it was found
26 that, interestingly enough, at something like 5.6 for a

1 \$20 subscription, it became uneconomical for the library
2 to request copies rather than subscribe to the book. It
3 is interesting.

4 We are now funding an updating of that done by
5 the people who did the original study and the results of
6 that will be available February '77.

7 We are also funding, very modestly, a round-
8 table discussion at Princeton Educational Testing Center
9 October 12 and 13 organized by the National Inquiry into
10 Scholarly Communications, "Ed Booher's group." That is the
11 shorthand. At that, many of the groups who have been
12 involved in the areas that we are concerned, the NCLIS
13 photocopying study, Indiana University Group, the Machlup
14 group, the Baumol group, will get together and discuss
15 ways that their studies can perhaps fit CONTU's needs.
16 Any Commissioner --

17 MR. PERLE: When?

18 MR. LEVINE: October 12 and 13. Any commissioner
19 who wishes to attend, please let us know so that we can
20 make the necessary arrangements.

21 MR. WEDGEWORTH: The 12th and 13th?

22 MR. LEVINE: October 12 and 13. Educational Testing
23 Center.

24 MR. NIMMER: When is our next meeting?

25 MR. LEVINE: Our next meeting is October 21 and 22
26 and that will be in Washington.

1 The meeting in November, I believe, is November
2 18 and 19 and I think we will have that in New York.

3 MRS. DOUGHERTY: Did you change the dates?

4 MR. HERSEY: November --

5 MR. LEVINE: 18 and 19.

6 MR. WEDGEWORTH: I am going to have to miss that one,
7 probably.

8 MR. PERLE: October 21 and 22?

9 JUDGE FULD: 21 and 22.

10 MR. LEVINE: Isn't that what we had originally said?

11 MR. FRASE: Thursday and Friday.

12 MR. LEVINE: Are Thursday and Friday still -- we are
13 scheduled through the end of the year on Thursdays and
14 Fridays.

15 MR. MILLER: Do you have one December or none in
16 December?

17 MR. LEVINE: We do have one in December and, I believe,
18 it is the 15th and 16th, but do not hold me to that.

19 MR. FRASE: The 16th and 17th are not Thursday --

20 JUDGE FULD: 18 and 19.

21 MR. LEVINE: I am sorry. I am in 1977. 18th and
22 19th in November; 16th and 17th in December.

23 MR. PERLE: Do we really want to do that?

24
25 MR. LACY: I think we are going to need one.

26 Arthur, if we are going to have the October

1 meeting devoted to photocopying, November will be the next
2 meeting in which we return to --

3 MR. LEVINE: Data bases.

4 MR. LACY: -- to the computer terminal base. My own
5 feeling is that, having given this a great deal of thought,
6 that we may be closer than I would certainly have thought a few
7 months ago to formulating at least a first draft
8 effort at some language on at least several, some of the
9 four basic computer questions: Protection of programing;
10 protection of data basing; the question of the entry into
11 computer data bases; and the copyrighted and literary work
12 and the copyright statutes of the work, quote created
13 unquote by a computer.

14 I think we have reached or will have by November
15 reached a point of diminishing returns and further sort of
16 discussions of the state of their order and computer things
17 unrelated to the specific questions.

18 What I would hope would be possible before the
19 November meeting would be that the staff, in consultation
20 with the several subcommittees that are working on this,
21 could have prepared a draft of what would go to Congress,
22 including presumably both some recommended statutory
23 language and some explanation. Perhaps alternatives of
24 two or three different pieces of statutory language which
25 could have been sent out to the potential witnesses for
26 the November 18 and 19 hearing so that we could be getting

1 comments on those jobs -- not necessarily entirely by
2 witnesses who come in here, but written comments by
3 other people. I think that is the only way we will start
4 to bring the question into focus.

5 MR. HERSEY: It would have to be alternatives.

6 MR. MILLER: Issues and options.

7 MR. LACY: I think these would not be things that
8 the Commission has yet approved. "These are things on
9 which the Commission wants your response: Would this
10 work? What is wrong with this? What is right with it?"
11 Those should have been drawn up before the October meeting
12 in at least a first draft and perhaps we could reserve a
13 couple of hours at the October meeting to take a look at
14 those and, of course, the subcommittees involved would
15 have been working on them anyway, so we could see whether
16 they were in good enough shape to send out for comment.
17 Surely we would not want to represent them as in any way
18 Commission recommendations at this time, but I think it
19 is going to be very hard to come to grips with the issue
20 until we get it down on paper.

21 MR. PERLE: I just wanted to make sure nothing will
22 be circulated unless the Commission as a whole, has said,
23 "Circulate it in the way of the draft." Is that right?

24 MR. LACY: No. I do not think that is necessarily
25 right. Certainly nothing would be circulated without the
26 permission of the Commission as a whole but I think the

1 Commission as a whole might, having looked at some
2 preliminary drafts, tell the staff, "You and the
3 subcommittee refine this and go ahead and send it out."

4 MR. PERLE: This first draft inertia is almost
5 impossible to overcome.

6 MR. LACY: Certainly I am not suggesting anything
7 go out that the full Commission would not have wanted to
8 go out. I think what we would be talking about then would
9 be the November meeting before we voted on sending it out
10 even for comments, without having had any outside comment
11 yet, and then we would be well into next spring before we
12 go to the outside.

13 MR. LEVINE: May I ask whether instead of full
14 Commission approval whether we did not deal with the
15 subcommittees because it is just very difficult.

16 MR. PERLE: Unanimous vote of the subcommittees.

17 MR. HERSEY: Yes. Let us be sure that these are
18 options; not drafts of recommendations because we have
19 not really discussed some of the fundamental issues yet.

20 MR. WEDGEWORTH: I think that I share that opinion,
21 perhaps not for the same reasons. I think that we have
22 got to get over the first hurdle, as Dan suggests, and I
23 really would like to see the subcommittees come to grips
24 with each of these questions with the staff and we come
25 up with some drafts that the Commission would see and then
26 we can go beyond that where you will not have to have the

1 full Commission's approval to prepare something, but I
2 think the full Commission ought to have one opportunity
3 to discuss these basic issues before we start talking with
4 any of the witnesses again or new witnesses that we might
5 bring in.

6 MR. LACY: I would agree.

7 MR. LEVINE: Would or would not?

8 MR. LACY: Would.

9 MR. LEVINE: You are not suggesting that we just not
10 have any witnesses in October? That is not what you mean?

11 MR. WEDGEWORTH: No.

12 MR. LEVINE: No witnesses on the specific --

13 MR. WEDGEWORTH: No witnesses on the specific drafts
14 that we may have come up.

15 MR. LACY: What I would be hoping at the October
16 meeting, that is a two-day meeting, and perhaps one day
17 could be confined on the -- well, one day or a good part
18 of the day could be reserved for sufficient discussion on
19 these computer issues to let us begin moving forward on it.
20 Or else maybe devote the whole -- I have a feeling we can
21 easily find ourselves pushed into a closing date without
22 having materially considered the thing and I suspect there
23 is going to be a lot of revision and changing back and
24 forth in terms of comments that we get. It is just very
25 hard to get focused comments from people unless you give
26 them something to comment on, so I think the sooner we

1 begin our own discussions in terms of some specific drafts
2 of reports, the better.

3 MR. LEVINE: Okay. I would just hope that the
4 discussions would revolve around the ideas in the drafts
5 rather than the language, because I think we all recognize
6 the committee, as a whole, is drafting --

7 MR. LACY: Those satisfied with the approaches might
8 be willing to delegate to the subcommittees and to the
9 staff specific drafting problems. Particularly, since we
10 are stuck at the stage of sending out comments.

11 MR. LEVINE: If I can just report one or two other
12 things: One is that we have hired a policy analyst who
13 Ms. Karpatkin knows who will begin work in about two weeks.
14 Mike and I had discussed with the George Washington
15 University School of Policy Analysis and Scientific
16 Technology Studies and they wrote up a proposal for us,
17 which the planning committee has seen. They would propose
18 doing something for \$100,000. I think the proposal really
19 does not make much sense and I do not think it will be
20 necessary to go ahead with that, with the policy analyst
21 on staff.

22 JUDGE FULD: It would be a mistake to go ahead with it.

23 MR. LEVINE: I think so, too. The Judge has seen it
24 and Mel has seen it and I think Dee has read it. Bob has
25 not had a chance to carefully look it over, but it is
26 essentially --

1 MR. NIMMER: It is a marvelous example of jargon.

2 MR. LACY: I had a feeling by changing a very few
3 words it could have been a proposal to do a policy analysis
4 of reorganizing the sewage system of Santa Monica.

5 MR. NIMMER: And probably was.

6 MR. LACY: Or anything else. They were going to
7 consult all the experts and do all this and I also have
8 the feeling that they would spend most of their time
9 consulting with us and I do not think any of us have time
10 to sit down and listen to people for \$100,000 worth of
11 their time.

12 MR. WEDGEWORTH: Are we going to get a budget statement following
13 the close of the fiscal year for the Commission?
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1 MS. DOUGHERTY: We can.

2 MR. LEVINE: I assume so, if you would like one.

3 MR. WEDGEWORTH: I think it would be useful.

4 MR. LEVINE: To see how the money is spent.

5 JUDGE FULD: Some of it is in the report that you
6 drafted, isn't it?

7 MR. LEVINE: Yes. But that is only proposed. That
8 is proposed budget; that is not money that is spent.

9 MS. DOUGHERTY: It generally takes two or three
10 weeks after the close of the year to get a budget run off.

11 MR. WEDGEWORTH: I just wanted to be sure we were
12 scheduled to have some kind of report.

13 MR. LACY: Arthur, at the risk of being repetitious,
14 are we leaving it that it is the hope at least that the
15 several subcommittees will get material into you before
16 the October meeting on their respective areas in the
17 computer field that would permit discussion at the October
18 meeting?

19 MR. LEVINE: That is fine.

20

21 MS. WILCOX: Do you have a copy, Arthur, of the
22 cover letter?

23 MR. LEVINE: That is just what is being placed in
24 front of you.

25 MR. HERSEY: Could you have clean copies of the
26 agreed guidelines as soon as possible?

1 MR. LEVINE: Yes. It will be Monday before we can
2 do it.

3 MR. LACY: Is this going to be sent out as a
4 mailogram or Telex? Congress may have adjourned before
5 everybody --

6 MR. LEVINE: No. We cannot do that. My assumption
7 was, I guess correctly, that perhaps Alice, you, and John
8 would just have to orally read it over the phone to people.
9 Unless you have --

10 MR. LACY: I have not got anything to read over the
11 phone.

12 MR. LEVINE: Okay.

13 MR. HERSEY: I can get it to Irwin; Lieb can get it
14 from him.

15 MR. LACY: You were saying you wanted a clean copy.
16 I think I could reconstruct it maybe, although I did not
17 take as careful notes as you did, but I would be very
18 grateful for a really clean one.

19 JUDGE FULD: Bob?

20 MR. WEDGEWORTH: Before we break up, for the record,
21 I would just like to thank Mel Nimmer for the arrangements
22 that he made for this meeting. I think it has not only
23 been a productive one, but it has also been a very pleasant
24 setting.

25 JUDGE FULD: We all join in that.
26

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2 MR. NIMMER: Accommodations to which all of the
3 parties have subscribed.

4 MR. LEVINE: In the last sentence of the first
5 paragraph, I changed it from "compromise" to "accommoda-
6 tion to which all of the parties can subscribe to."

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10 (The meeting adjourned at 4:15 P.M.)
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STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, Susan M. Herington, CSR 3088, a Notary
Public in and for the State of California, do hereby
certify:

That the foregoing transcript was recorded steno-
graphically by me at the time and place herein named, and
was thereafter reduced to typewriting under my direction
and supervision;

That the foregoing comprises a true and correct copy
of the proceedings had and reported by me.

I hereby certify that I am not interested in the event
of the action.

IN WITNESS WHEREOF, I have subscribed my name and
affixed my seal this 20 day of September, 1977

Susan M. Herington
NOTARY PUBLIC IN AND FOR THE
STATE OF CALIFORNIA
SUSAN M. HERINGTON
NOTARY PUBLIC - CALIFORNIA
RINJIFAI
LOS ANGELES COUNTY
Commission Expires Oct. 21, 1979

