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ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW

TWENTY-EIGHTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

APRIL 29, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, April 29, 1986.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-eighth report to the 99th Congress. The committee's report is based on a study made by its Government Information, Justice, and Agriculture Subcommittee.

JACK BROOKS,
Chairman.

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APRIL 29, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

TWENTY-EIGHTH REPORT

BASED ON A STUDY BY THE GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE SUBCOMMITTEE

On April 22, 1986, the Committee on Government Operations approved and adopted a report entitled "Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview." The chairman was directed to transmit a copy to the Speaker of the House.

I. EXECUTIVE SUMMARY

This report reviews how current laws and policies regulating the collection and dissemination of government information apply to electronic information systems sponsored by Federal agencies.

Agencies are making increasing use of modern computer and telecommunication technology to establish electronic data bases containing public information. These electronic information systems offer an opportunity to increase the efficiency of agency information activities, make government information more widely available, and permit agencies and others to make better use of the data.

A principal goal of government information policy is the maintenance of general public availability of information in the possession of the government except where confidentiality is appropriate in order to protect a legitimate governmental or private interest. The report finds there is a risk that agencies may be able to exert greater control over information in electronic information systems

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than is possible with data maintained in traditional, hard-copy formats.

Legal ambiguities, practical limitations, and economic constraints may allow Federal agencies to restrict unduly the public availability of government data maintained electronically. The result could be diminished public access to federally operated public data bases; increased agency power over data users and information system contractors; and unnecessary government interference in the marketplace for information products and services.

There is necessarily some competition between Federal agencies fulfilling statutory missions to make government information available to the public and the growing private sector information industry. Electronic information systems expand the ability of Federal agencies to offer products and services to the public and can exacerbate this competition. While agencies must fully comply with statutory disclosure requirements, agencies should attempt to preserve a role for private sector companies in offering information products and services by engaging in fair competition with the private sector.

The report identifies problems raised by electronic information systems and suggests how the new technology can be employed without undermining the objectives of government information policy. The report recommends that: Agencies use the new information technology to broaden and improve public use of government information; more administrative guidance on the development and use of electronic information systems be provided; agencies consult regularly with those affected by electronic information systems; competitive procurements be used for the acquisition of automated information products and services; and laws that have been interpreted to allow agencies to maintain exclusive control over electronic data bases be modified.

II. Introduction: What's at Stake

The ongoing revolution in computer and telecommunication technology is producing major changes in the way that the Federal Government collects, maintains, and disseminates information. One consequence of the new technology is the development by Federal agencies of electronic systems for the collection and dissemination of government information.[1]

Information and the ability to access it quickly and reliably have become a source of political and economic power. This report considers information policy issues raised by Federal Government use of electronic information technology.

Illustrative of the potential and the problems inherent in electronic information systems is the Securities and Exchange Commission's proposed EDGAR system. EDGAR stands for "Electronic

[1] An electronic information system within the scope of the committee's present inquiry has two characteristics. First, the system maintains data in electronic format and is capable of supporting use of the data base through remote terminals. Second, the information in the system is public. The committee is not concerned in this report with electronic data systems containing information that is classified, purely internal to an agency, or otherwise clearly unavailable for public dissemination.

Data Gathering and Retrieval", and it is the most ambitious Federal information system now under active consideration.

EDGAR will permit the SEC to collect, process, and disseminate over six million pages of securities filings each year through electronic means. Today, all of those documents are printed and filed on paper. EDGAR will not only support internal SEC processing of prospectuses, registrations, and other filings, but all documents will be made available to outside users through interactive computer networks operated by private sector companies.

The contractor selected to operate EDGAR will be required to support internal SEC use of the system and to permit external users to obtain electronic copies of the EDGAR data base. The contractor will generate revenue through the sale of the data to external users.[2]

According to SEC Chairman John S.R. Shad, EDGAR "has the potential to revolutionize the manner in which investment decisions are made and executed."[3] Shad expects that EDGAR will increase the efficiency and fairness of the securities markets; accelerate access to the capital markets; enhance the SEC's ability to protect investors and to maintain fair and orderly markets; accelerate SEC processing of corporate filings; and reduce errors and costs by eliminating the need to transfer data from one format to another.[4]

If EDGAR works as Chairman Shad expects, EDGAR will bring about positive changes in the way the securities markets operate and in the way that the markets are regulated. Electronic data systems operated or sponsored by other agencies also offer the prospect of increased government efficiency and better implementation of statutory objectives. In addition, these systems should provide an opportunity to expand the availability of government information to more people and to make the information more useful.

But EDGAR and similar systems also raise hard questions and present difficult policy choices. Centralized data systems with sophisticated telecommunications equipment are not cheap. Initial SEC estimates were that EDGAR will cost in excess of $50 million over 5 years.[5] The actual cost is likely to be much higher than this estimate.

While not all agencies are considering systems as large as EDGAR, it is apparent that computerized data systems can be expensive. Who will pay the cost? Will data users outside an agency be asked to pay high prices for public data that is now available for free or at minimal cost? What type of user fees are appropriate? Will submitters of data be required to share in the cost of the systems?

Other difficult questions also arise. Will electronic data be distributed in an equitable way that permits easy redissemination by

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[2] During the planning process for EDGAR, several major changes in the financing plans have been made. See text accompanying notes 212–217.

[3] *Electronic Collection and Dissemination of Information by Federal Agencies,* Hearings before a subcommittee of the House Committee on Government Operations, 99th Cong., 1st sess. 20 (testimony of SEC Chairman John S.R. Shad) [hereinafter cited as "hearings"].

The committee acknowledges the assistance of Nancy Miller, Analyst in Information Science and Technology, Science Policy Research Division, Congressional Research Service, in the preparation of these hearings and this report.

[4] Hearings at 21.

[5] Id. at 55 (testimony of SEC Deputy Executive Director Kenneth Fogash).

all interested parties? Could dissemination arrangements give an agency or a private company monopoly control over public information? Will the government offer products and services in competition with private companies? Will access rights under the Freedom of Information Act and other laws be fully preserved? [6]

At a practical level, the dissemination problems presented by electronic data systems are significantly different from the problems presented by the distribution of government information in paper or other hard-copy formats.[7] That difference arises in large part from the relative ease by which paper documents can be reproduced and used and the relative difficulty of supporting the reproduction and use of electronic data bases.

The redistribution of government information that is only available on paper continues to be a common practice. Since government information cannot be copyrighted,[8] the information is in the public domain and anyone is free to reproduce the data or the document on which it appears. Because copying machines and printing presses have become commonplace and relatively inexpensive to operate, anyone can readily redistribute government data. Thus, no Federal agency is in a position to control the use or the redisclosure of public domain data that it generates during the course of its business.

In a book on the First Amendment, Yale Law Professor Thomas Emerson considers the possibility that monopolistic government communication could distort the American system of free expression:

> [I]t is very easy to visualize situations in which the government's voice may overwhelm or displace all others and thus seriously distort the system of free expression. This occurs mainly when the government has a monopoly or near-monopoly over the media or institutions of communication.[9]

It is entirely appropriate that Federal agencies are unable to regulate the use of government information. This inability prevents the government from maintaining an information monopoly, from exercising political control over data, and from limiting or discouraging others from using the data. It helps to assure a diversity of voices. Free flow of government information also encourages widespread use of a valuable resource that has been created with public funds.

Government information policies—as shaped by the First Amendment to the Constitution, the Copyright Act, the Freedom of Information Act, the Paperwork Reduction Act, and the Privacy

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[6] A preliminary list of questions presented by Federal agency plans to establish electronic data systems was compiled by Rep. Glenn English, chairman of the Subcommittee on Government Information, Justice, and Agriculture, at the beginning of the subcommittee's investigation. See 130 *Cong. Rec.* H1614–15 (daily ed. March 14, 1984). Although somewhat out of date, the list remains a good outline of problems with electronic data systems. The list of questions is reprinted in Hearings at 10–11.

[7] In a recent lawsuit involving a dispute over access to a publicly accessible, State-operated, electronic data base containing legislative information, the Second Circuit commented that the "case arises out of advances in a developing technology and is governed neither by direct precedent nor by close analogue." *Legi-Tech* v. *Keiper,* 766 F.2d 728 (2d Cir. 1985).

[8] See text accompanying notes 88–91.

[9] T. Emerson, *The System of Freedom of Expression* 712 (1970).

Act—prevent or discourage the government's exploitation of the power inherent in government information. Professor Emerson writes:

> The principle would certainly be accepted that the government may not maintain a monopoly of the means or institutions of communication in any significant sector of the system of expression the effect of which is to exclude private persons and groups from ownership or operation of similar facilities.[10]

The distribution of government information through electronic information systems, however, has a potential to allow Federal agencies to maintain a monopoly or near-monopoly over information. This potential arises because of the size, technical requirements, and expense of these systems.

The establishment of an electronic information system takes a considerable amount of advanced planning. An electronic data system needs sophisticated computer and telecommunications hardware and software. Users also need hardware and software in order to have access to and to manipulate the data. Although all of this technology is available today, the costs of the computer and other equipment needed to operate an electronic data base data can be high.

As a result, when information is in an electronic format, duplication and redistribution may no longer be as simple as making copies of a book or document on photocopying equipment. The complexity of electronic information systems means that it can be difficult to reproduce and maintain a duplicate data base.

Another feature of an electronic data system is that the conversion of data into electronic formats can be expensive. The cost discourages the re-creation of a data base from paper records and can be prohibitive unless the data base can be copied electronically.

If copies of agency data bases were routinely made available in machine-readable format, the possibility of agency control over data would be lessened. However, Federal agencies are now asserting the right to deny requests for electronic copies of records. Agencies argue that their disclosure obligations are fully met by releasing printed copies of electronic data bases.[11] By refusing to provide an electronic copy of a computerized data base, an agency may also be strengthening its monopoly over the most useful version of that data base.

The practical difficulties of re-creating and redistributing electronic data means that agencies can have a greater ability to control the way in which government data—which is in the public domain—can be obtained, used, and redistributed by those outside government. This is a significant potential danger with electronic data systems and a primary concern of the committee.

An agency might exploit control over government data for a variety of purposes. It might be used to create a constituency of data users who are dependent on the agency; to pressure government contractors into providing free services; or to sell public domain

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[10] Id. at 713.

[11] See the discussion of *SDC* v. *Mathews* at text accompanying notes 131–149.

data for a high price and generate revenues outside of the appropriations process. Information control can also be used for more overtly political purposes.

A hypothetical example can illustrate the potential of electronic data systems for affecting an agency's control over public information. Suppose that a statutory responsibility of Agency XYZ is the creation of a catalog of abstracts of government reports and publications. The purpose of this catalog is to make information about government data products widely available and to assure that the benefits of those products can be shared by all.

Issued in paper, such a catalog would be relatively inexpensive. Because the abstracts are in the public domain, anyone would be able to reproduce the catalog in whole or in part. Private publishers or individuals might reproduce selected portions of the catalog to meet the special needs of selected communities of users.

When Agency XYZ converts the catalog into an electronic data base, the abstracts become more useful. For example, an electronic data base can be updated daily. More important is the ability to create indexes of the data on demand. Each user can create individualized subsets of abstracts on subjects of interest.

This ability to create new subsets of data makes an electronic data base very powerful and much more valuable than a paper catalog. Searches of the data base become easier, faster, cheaper, and more thorough. This ability is so valuable that those unable to employ an electronic search system suffer from a significant disadvantage.[12]

Agency XYZ was unable to control use or reproduction of the publication when it appeared in paper. Suppose, however, that the agency is legally able to refuse disclosure of the computer tape containing the abstracts.[13] Because of the great expense of duplicating the electronic data base from the printed catalog, the agency would likely have the only copy of the electronic data base for the catalog.

Concerns over monopolistic control of data are not necessarily avoided even if Agency XYZ should allow public users to search its electronic data base. Without any competition for the computerized search services, the agency would have a captive audience of users. The agency would only have to offer services of its choice rather than services that might be demanded by users. The agency might provide free or low-cost service to favored users. It might charge high prices to some and use the profits to subsidize other users or pay for other agency activities.

If demand for services exceeded the supply,[14] Agency XYZ might ration services and deny some people access to the data base, perhaps even using political criteria. The agency might also impose substantive limits on computer searches for political purposes. The agency could even employ the system for surveillance purposes by keeping track of who is using the system and by monitoring the nature of requests.

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[12] See text accompanying note 40.

[13] This is not an unrealistic supposition. See text accompanying notes 131-149.

[14] See Hearings at 281-82 (testimony of NLM Director Donald Lindberg) ("Certainly [Medlars] is a rare and scarce commodity. We could not afford to receive an unlimited number of inquiries on a casual basis.").

By controlling access to the computerized search system, Agency XYZ would have a type of monopoly over data that was compiled at public expense for a public purpose. There would be no competition for electronic services. Diversity of distribution would, as a practical matter, be severely restricted. The open marketplace in information generated by the government would be diminished. The specter of government control of public data for political purposes would be raised.

This example is not entirely hypothetical. The details are an amalgam of real-life data systems now in place or under development. Some of the monopoly issues have already been the subject of litigation involving a State electronic information service.[15] In 1984, the Bill Drafting Commission of the New York State Legislature began to offer to the public a computerized data base containing the full text of legislation and other related information. The system is called "Legislative Retrieval Service" (LRS).

Legi-Tech, a private company offering a computerized data services using legislative information, was denied the ability to subscribe to LRS. Legi-Tech sued. Subsequent to the filing of the lawsuit, the State legislature enacted a law that prohibited the sale of LRS to entities that offer competing electronic information retrieval systems.[16]

Legi-Tech argued that the law was unconstitutional. The State defended the law as a reasonable protection of the State's "natural monopoly on computer supplied legislative information." The State was concerned that resale by Legi-Tech would undercut the profitability of its business.

The Second Circuit took a dim view of the "natural monopoly" argument and of State action that reduces competition in the debate over public issues. The court saw these actions as an exercise of censorship:

> The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion. Government may add its own voice to the debate over public issues, . . . but it may not attempt to control or reduce competition from other speakers. . . . When the state creates an organ of the press, as here, it may not grant the state press special access to governmental proceedings or information and then deny to the private press the right to republish such information. Such actions are an exercise of censorship that allows the government to control the form and content of the information reaching the public.[17]

The Second Circuit remanded the case to the district court for a determination of several factual issues, including whether the information on LRS was available elsewhere at the same time and

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[15] *Legi-Tech* v. *Keiper*, 766 F.2d 728 (2d Cir. 1985).
[16] New York Laws, chapter 257 (1984).
[17] 766 F.2d at 733 (citations omitted).

whether alternate pricing schemes would adequately protect all interests.[18]

This case and the preceding hypothetical illustrate the issues that can arise with government-operated electronic information systems. The discussion is not intended to suggest that electronic information systems should not be operated by the Federal Government. As this report discusses later, many useful systems are already in place or are planned. The earlier outline of the SEC's proposed EDGAR system illustrates some of the benefits of electronic data systems.

The point here is that electronic information systems can produce unintended results. At this early stage in the implementation of these systems by the Federal Government, it is important to understand what is at stake and what type of policies are needed to prevent undesirable consequences. It is likely that there will be a proliferation of these systems throughout the government in the next decade, and suitable policies must be developed now.

Professor Emerson's response to the possibility of a government monopoly over communications is to give private persons access to the facilities of government:

> Where, for whatever reason, the government does possess a monopoly of a medium of communication, distortion in the system can, at least partially, be avoided by giving private persons or groups access to the facilities.
>
> * * * * *
>
> This principle of access to government facilities has limited application at present. But it could become a matter of far-reaching importance.[19]

Maintaining a reasonable degree of public access to the facilities or the data in government electronic information systems will resolve some of the difficulties presented by these systems. These are not the only problems, and other issues are also considered in this report and have been raised elsewhere.[20]

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[18] State and Federal law may differ in ways that affect the result in cases of this type. See, e.g., *National Conference of Bar Examiners* v. *Multistate Legal Studies,* 495 F. Supp. 34 (N.D. Ill. 1980) (upholding right of States to obtain copyrights).

For an interesting discussion of the law in Florida regarding State information systems, see Joint Committee of the Florida Legislature on Information Technology Resources, *Remote Computer Access to Public Records in Florida* (1985).

[19] T. Emerson, supra, at 714. While Professor Emerson is primarily discussing government control of communications media, electronic information systems raise nearly identical concerns. Government control of these systems can have the effect of creating the type of government monopoly over information facilities that can distort the system of free expression.

[20] The focus of this report is on broader public policy issues presented by electronic information systems. There are many other important issues involving good management, proper procurement practices, and fair dealing that can arise. The principles recommended by the House Committee on Energy and Commerce for the SEC's EDGAR system address some of these other issues:

"(1) well-developed technical specifications and ample time for receiving competitive bids and evaluating them;

"(2) full compliance with all laws and contract procedures;

"(3) complete testing of all developmental programs so that only proven programs are included in the actual operating systems;

"(4) independent and competent evaluation of the system before it is put into operation;

"(5) establishing all policies affecting technology and use before the system is designed and implemented;

"(6) assuring full public participation in policy-making and access to the system;

Continued

The new technology of electronic data distribution can undermine the practical limitations and legal structures that have prevented Federal agencies from exploiting the ability to control access to and distribution of the information that the government collects, creates, and disseminates. This is the key issue at the heart of this report. The Federal Government must understand the consequences of electronic information systems and must recognize the need for new policies that will prevent these systems from being used in unintended ways.

It is not the purpose of this report to prevent or discourage use of the new technology. Rather, it is to make certain that government data in the public domain—information that has been compiled using taxpayer funds and that is not classified or sensitive or exempt from public disclosure—will remain freely accessible and easily reproducible, whether the data is maintained in paper form or in electronic form.

This report is intended to help guide the policy for government electronic data systems in the proper direction. As with any other government program involving complex equipment and large sums of money, there is a need for a suitable degree of direction and oversight.[21] The committee intends to provide continuing oversight as electronic information systems are planned and implemented by Federal agencies.

III. Findings

A. FEDERAL INFORMATION POLICY GOALS

1. Federal Government information policy is shaped in part by the First Amendment to the Constitution, by the Freedom of Information Act, and by the provision in the Copyright Act that prevents the government from copyrighting information. The Privacy Act of 1974 and the Paperwork Reduction Act of 1980 also establish general rules governing collection and use of information by Federal agencies.

2. The collection, maintenance, and dissemination of information is an important and necessary function of the Federal Government. Federal policy permits and, in many cases, requires agencies to be providers of information products and services.

3. A principal goal of government information policy is the maintenance of general public availability of information in the possession of the government except where confidentiality is appropriate in order to protect a legitimate governmental or private interest.

4. Policies regulating the electronic collection and dissemination of information by a Federal agency must reflect the existing statu-

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"(7) prohibiting audit and other firms who have conflicts of interest from receiving contract awards;

"(8) preventing any private contractor from having an unfair advantage over competitors who file, use, or resell the information, or from appearing to have an improper special relationship with the [Securities and Exchange] Commission; and

"(9) funding the system only as specifically authorized by law."

H.R. Rep. 99-155, 99th Cong., 1st sess. 10 (1985) (report to accompany H.R. 1602) (footnote omitted).

[21] See also *SEC: Oversight of the EDGAR System,* hearings before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 99th Cong., 1st sess. (1985).

tory obligation of agencies to make information available to the public.

5. A Federal agency's responsibility to provide for public use of agency records should not be considered to be fixed or fully satisfied at any point in time. Public access is a dynamic concept. If an agency has developed the ability to manipulate data electronically, it is unfair to restrict the public to paper documents. An agency cannot justify denying the public the benefits of new technology by preserving, without improvement, the same type of access that was provided in the past.

B. THE ROLE OF THE GOVERNMENT IN INFORMATION DISSEMINATION

1. There has always been some competition between the Federal Government and private sector over information products and services, and future competition is inevitable.

2. The requirement of Office of Management and Budget Circular A-130 that a Federal agency provide adequate public notice before beginning or terminating information products and services will help to achieve a proper role for the government in the establishment of electronic information systems.

3. Laws and policies regulating government information practices do not require or permit a Federal agency to provide information products and information services in the same manner as a private company.

4. Current law and policy permit a Federal agency to charge user fees for electronic dissemination of agency information based on the cost of dissemination. Fees should not be used to prevent an agency from complying with statutory requirements to maintain the public availability of government information.

C. ELECTRONIC INFORMATION TECHNOLOGY

1. Increasing amounts of information—both private and public—are being maintained in electronic data bases. This trend will continue and will accelerate.

2. The electronic collection, maintenance, and dissemination of information by a Federal agency can undermine the practical limitations and legal structures that have prevented the agency from controlling public access to and use of the information that the government collects, creates, and disseminates.

3. Electronic information systems offer the opportunity to make more government information readily available to more public users. The technology also permits government information to be used in ways that are not possible when the information is stored on paper records.

4. The development and installation of an electronic information system requires advanced planning and may require sizable capital expenditures. An electronic data system needs computer and communications hardware and supporting software. Public users of electronic information systems need to have access to computer and communications hardware and supporting software in order to have access to the data.

5. Electronic information systems offer the prospect of increased efficiency in government information programs.

6. Electronic information technology does not alter existing requirements that a Federal agency maintain and disclose information. Public information maintained by a Federal agency should remain freely accessible and easily reproducible, whether the data is maintained in paper or electronic form.

7. The Federal Government must understand the consequences of electronic information systems and must recognize the need for new policies that will prevent these systems from being used in unintended ways.

8. There is little communication among Federal agencies about electronic information activities, and there is little central administrative guidance.

IV. Recommendations

A. PUBLIC ACCESS TO AGENCY RECORDS

1. In carrying out a statutory mandate to make government information publicly available, a Federal agency should use modern technology to improve the range and the quality of public access to agency records. As technology permits an agency to upgrade its own ability to access, copy, and manipulate data, an agency should make reasonable attempts to allow public users of agency information to share the benefits of automation.

2. To the greatest extent practicable, a Federal agency should support a diversity of information distribution mechanisms. Not all public users are willing or able to use computerized record systems. At a minimum, an agency must retain the ability to provide promptly paper copies of public records maintained electronically whenever those records are requested under the Freedom of Information Act.

B. COPYRIGHT POLICY

1. The current policy in the Copyright Act against copyright of government information by the Federal Government is sound and should not be changed. Other policies and practices that allow a Federal agency to exercise copyright-like controls over government information need to be modified.

2. In *SDC* v. *Mathews,* a Freedom of Information Act case involving access to the computer tapes of a federally operated electronic information system, the court held that the tapes were not agency records within the meaning of the FOIA. This decision is incorrect both as a matter of law and as a matter of policy, and the decision should not be followed.

C. CONSULTING WITH PUBLIC USERS

1. A Federal agency planning an electronic information system should actively consult with all parties who will be affected by or interested in the automation. This includes submitters of information, users, resellers, and potential information system contractors. Consultation will help to assure that any automated system sponsored by an agency will not only meet its own needs but also the needs of others.

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2. A Federal agency may find it necessary to engage in active outreach programs to encourage users to come forward and identify their needs. An agency cannot rely on users to speak up on their own initiative during initial planning stages. The outreach program of the Federal Maritime Commission is a model that other agencies should follow.

3. Each Federal agency planning an electronic information system should consider the need to provide for the transition from paper to electronics. Users as well as agencies need time to adjust to automation. An agency cannot meet its public disclosure obligations if the agency's automation plans proceed at a pace that cannot be matched by public users. For example, given the importance of Securities and Exchange Commission filings to the financial markets, the maintenance of a paper backup to the proposed EDGAR system for a period of time is a prudent course. Only when EDGAR has been fully tested and found to be completely reliable and when users have been given a reasonable period to adjust to the new distribution system should paper filings be eliminated.

D. OPEN, COMPETITIVE PROCUREMENTS

1. In order to ensure that electronic information systems are established in a fair, economical, and orderly fashion, a Federal agency must make certain that there has been adequate advance notice to the Congress, potential contractors, the user community, and the public at large. There must be full compliance with laws regulating the acquisition of automated data processing equipment and services, including requirements for competitive procurements.

E. USER FEES

1. General user fee policies limit a Federal agency charging fees for providing access to public information to the recovery of the marginal cost of dissemination. Unless there is a change in these policies, an agency should set and collect fees within the existing framework.

2. There may be a need to grant some Federal agencies statutory authority to establish revolving funds for electronic information systems in order to facilitate the collection and application of user fees.

F. COMPETITION WITH THE PRIVATE SECTOR

1. A Federal agency that unavoidably competes with the private sector in providing information products and services should compete fairly. Fair competition means that an agency should limit the services that it offers to the public and should leave the private sector to provide additional value-added services. An agency should not offer an information service to the public simply because the capability to provide the service exists.

2. If consistent with statutory responsibilities for maintaining the public availability of information, a Federal agency should structure an electronic information program in order to allow a role for the private sector.

3. No Federal agency should be able to maintain a monopoly over the dissemination of public data, and no agency should permit an agency contractor to exercise monopoly power over agency data.

G. OVERSIGHT

There is a need for some central guidance and coordination of electronic information system policy within the executive branch. However, no formal institutional or organizational changes are necessarily required. The Office of Information and Regulatory Affairs in the Office of Management and Budget should become a more visible resource on and coordinator of electronic information activity.

V. Public Access to Public Records

Policies regulating the electronic collection and dissemination of information by Federal agencies must necessarily reflect the existing statutory obligation of agencies to make information available to the public. New technology does not alter the requirements imposed on agencies to maintain and disclose public records. Electronic information systems must preserve public access rights without diminution and, where possible, should extend the availability and utility of government information.

A. STATUTORY DISCLOSURE REQUIREMENTS

The laws establishing and regulating Federal agencies are filled with general and specific provisions requiring agencies to make records available to the public. General laws mandating disclosure include the Freedom of Information Act,[22] Government in the Sunshine Act,[23] and Federal Advisory Committee Act.[24]

Specific laws requiring disclosure are numerous and varied. Some agencies have broad and general disclosure mandates. For example, the law establishing the Department of Agriculture provides that one of the duties of the Department shall be:

> to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition.[25]

Other agencies have been assigned the statutory responsibility to maintain the public availability of specific categories of information. For example, the Securities Act of 1933 provides that:

> information contained in or filed with any [securities] registration statement shall be made available to the public under such regulations as the [Securities and Exchange] Commission may prescribe . . .[26]

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[22] 5 U.S.C. § 552 (1982).
[23] 5 U.S.C. § 552b (1982).
[24] 5 U.S.C. Appendix (1982).
[25] 7 U.S.C. § 2201 (1982). See *P.A.M. News Corp.* v. *Butz*, 514 F.2d 272 n.2 (D.C. Cir. 1975).
[26] 15 U.S.C. § 77f(d) (1982). The SEC's public disclosure obligations extend well beyond the Securities Act of 1933. In his testimony, SEC Chairman John S.R. Shad stated that the SEC was established to provide protection for investors "in large part, through the full disclosure of the

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Similarly, the Federal Election Commission is required to make publicly available information regarding campaign funding statements and reports. A representative provision of the Federal Election Campaign Act requires the FEC to:

> compile and maintain a cumulative index of designations, reports, and statements filed under this Act, which index shall be published at regular intervals and made available for purchase directly or by mail.[27]

At other agencies, the publication and maintenance of a public registry is an integral part of the mission of the agency. For example, for each trademark registered under the Trademark Registration Act of 1946, the Commissioner of Patents and Trademarks is required to "cause the mark to be published in the Official Gazette of the Patent and Trademark Office." [28]

At other agencies, the collection and dissemination of information is the essential mission of the agency. For example, the Census Bureau has numerous statutory requirements to take, compile, collect, and publish census information. Specific requirements include basic population information,[29] and statistics on a range of economic sectors, including cotton,[30] business finance,[31] and manufacturing.[32]

Similarly, the "general design and duties" of the Bureau of Labor Statistics are "to acquire and diffuse among the people of the United States useful information on subjects connected with labor . . . its relation to capital, the hours of labor, the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity."[33]

Another example is provided by the National Library of Medicine, which is directed by law to "publish and make available . . . catalogs, indexes, and bibliographies" [34] that will "aid the dissemination of scientific and other information important to the progress of medicine and to the public health".[35]

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information necessary to permit informed investment decisions." In addition to the 1933 act, Mr. Shad mentioned the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. Hearings at 21-22.

[27] 2 U.S.C. § 438(a)(6)(A) (1983). See letter from John Warren McGarry, Chairman, Federal Election Commission, to Rep. Glenn English (Sept. 30, 1985), reprinted in Hearings at app. 8D ("From its inception, the Commission has operated a storefront Public Records Office where the public can receive and review information taken from the disclosure reports, along with the reports themselves.").

[28] 15 U.S.C. § 1062(a) (1982).

The House Judiciary Committee, in a report accompanying the 1985 authorization bill for the Patent and Trademark Office, discussed the broad general importance of the public patent and trademark search rooms and libraries. "Having patent and trademark records freely available to the public and widely disseminated gives a valuable benefit to the public at large. As regards patents, such access also stimulates scientific inquiry and research by providing access to inventive materials. In the context of trademark, access makes it possible for constructive notice of proprietary rights to occur." Patent and Trademark Authorization, House Rep. No. 99-104, 99th Cong., 1st. sess. 7 (Report to accompany H.R. 2434). See also Hearings at 308 (testimony of Commissioner of Patents and Trademarks Donald J. Quigg).

[29] 13 U.S.C. § 141 (1982).

[30] Id. at §41.

[31] Id. at §91.

[32] Id. at §131.

[33] 29 U.S.C. §1 (1982).

[34] 42 U.S.C § 276(a)(3) (1982).

[35] Id. at § 275.

The statutes discussed above are just a few of many that direct agencies to collect and disseminate information.[36] The ubiquity of such provisions in the laws of the United States demonstrates that a principal function of government and a principal goal of government information policy is the maintenance of public availability of information in the possession of the government.[37] The recently issued OMB circular on management of Federal information resources reflects the importance of information to American government. One of the basic considerations and assumptions in the circular states that "[t]he free flow of information from the government to its citizens and vice versa is essential to a democratic society." [38]

Especially for those agencies with specific statutory disclosure or publication requirements, the fulfillment of these requirements must be afforded a high priority. Other agencies also retain an important general obligation to make disclosable information available.[39]

B. BENEFITS OF NEW TECHNOLOGY

Modern computer and telecommunications technology offers agencies the ability to do a better job of fulfilling statutory requirements for the maintenance, publication, and distribution of government information. New technology also allows public records to be used more effectively and by more people. This point is well illustrated by the experience with the National Library of Medicine's Medical Literature Analysis and Retrieval System (Medlars).

Medlars, which dates back to the early 1960's, was one of the first government efforts to use computer technology to support the publication and use of data bases. Prior to use of the computer, indexes of medical literature were only available in print. The Medlars computer network permits users to conduct individualized

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[36] This discussion is not intended to suggest that all government information is or should be public. There are many laws that require information to be kept confidential in order to protect a legitimate government or private interest. Exemptions of the Freedom of Information Act, for example, can be roughly divided into two groups, one group primarily protecting governmental interests and the other primarily protecting private interests.

Government interests are covered by exemption one (classified information), two (internal personnel rules), five (predecisional documents), seven (law enforcement investigation records), and eight (bank supervisory records). Private interests are covered by exemption four (confidential business information) and exemption six (personal information).

The Privacy Act of 1974 is one of several laws that protects personal information. In addition, there are many other laws that protect specific categories of information, some primarily governmental and some private. For a catalog of statutes that may authorize the withholding of information under the third exemption of the FOIA, see American Society of Access Professionals, "The (b)(3) Project: Citations by Federal Agencies (1975–82)," reprinted in *The Freedom of Information Reform Act,* hearings on S. 774 before a subcommittee of the House Committee on Government Operations, 98th Cong., 2d sess. 1044–56 (1984) [hereinafter cited as *"1984 House FOIA Legislative Hearings"*].

[37] "Aside from financial transfers and national defense, the provision of information to and from the government is the most important relationship between the private and public sectors." Office of Information and Regulatory Affairs, Office of Management and Budget, *Incentives for Efficient Information Resources Management* 1 (Oct. 1983) (supplemental report to the second annual report under the Paperwork Reduction Act of 1980) [hereinafter cited as *"OMB IRM Incentives Paper"*].

[38] Office of Management and Budget, *Management of Federal Information Resources* (Circular A-130), § 7c, 50 Fed. Reg. 52729 (Dec. 24, 1985) [hereinafter cited as *"OMB Circular A-130"*].

[39] In 1982, a National Commission on Libraries and Information Science Task Force on the interaction between government and private sector information activities recommended that Federal agencies be encouraged to regard the dissemination of information "as a high priority responsibility." National Commission on Libraries and Information Science, *Public Sector/Private Sector Interaction in Providing Information Services* 9 (1983) [hereinafter cited as *"NCLIS Task Force"*].

searches of the data base. According to NLM Director Donald Lindberg:

> The computer's ability to search rapidly through a large number of references to see which meet the specified criteria results in an individualized bibliography that otherwise would not be possible.[40]

In 1985, the NLM reported that over 3,000 institutions were members of the Medlars network and that over three million searches were performed.[41]

New systems offer similar benefits. The Securities and Exchange Commission's plans for EDGAR include an expansion of the Commission's ability to make information available to investors. Terminals capable of accessing the EDGAR data base are to be maintained in each of the SEC's three public reading rooms.[42] This will reduce the time it now takes for copies of filings to reach reading rooms outside of Washington by as much as several weeks.[43]

In addition, the availability of the EDGAR data base to the public through private data base service companies that are expected to offer value-added services will enable the investing public to make better use of the information. According to SEC Chairman Shad, the result of improved access to data will be an increase in the efficiency and fairness of the Nation's securities markets.[44]

While there have always been questions about the feasibility of the SEC's plans for EDGAR as initially announced,[45] the SEC's objective of using new technology to improve public access to securities filings is both proper and commendable.[46]

In carrying out a statutory mandate to make information publicly available, an agency should use modern technology to improve the range and the quality of public access to agency records. An agency that decides to automate its own internal information operations should make reasonable attempts to allow public users of agency information to share the benefits of automation.

In contrast to the SEC, the Patent and Trademark Office's initial automation efforts failed to incorporate feasible improvements of public access to agency files. Instead, the PTO attempted to impose artificial restrictions on public users of the agency's automated trademark search system. The result of this attempt to limit public access demonstrates the shortcomings of such a policy.

The restriction on public use of the PTO system resulted from agreements negotiated by the PTO with three private companies that provided trademark search services. The PTO entered into

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[40] Hearings at 278.

[41] Id.

[42] Securities and Exchange Commission, Pre-Solicitation for an Operational EDGAR System at C-42 (July, 1985).

[43] Hearings at 38 (testimony of SEC Chairman John S.R. Shad).

[44] Id. at 39-40.

[45] See, for example, the comments of Rep. Glenn English about the financial structure for EDGAR in Hearings at 63. See also testimony of Peter Marx, general counsel, Information Industry Association, in hearings at 67-68. Subsequent to the April 1985 hearing the SEC proposed significant changes in the financing for the EDGAR system. See Securities and Exchange Commission, Pre-Solicitation for an Operational EDGAR System (July, 1985). See also 50 Fed. Reg. 47886 (Nov. 20, 1985).

[46] The authority of the SEC to implement its EDGAR plans without specific congressional approval remains in doubt. See note 241 and accompanying text.

these "exchange agreements" in order to obtain without expenditure of funds electronic copies of the trademark data base.[47] In exchange for receiving copies of trademark data on computer tapes, the PTO agreed to prevent the public from using the more advanced capabilities of the automated search system. One of the restrictions would have limited public use of the automated system to a level that was "comparable and equivalent" to a manual search of paper files.[48]

The private companies wanted the restrictions in order to ensure that the PTO's search system did not compete with their trademark search business.[49] Had the PTO terminated manual trademark searching with this restriction in effect as originally planned, the public would have been forced to use one of the private services or to forgo use of an effective trademark search technique.[50]

Complaints about the search restrictions forced the PTO to reconsider the agreements that it had negotiated. One proposal would have imposed a $30 per hour surcharge on public users of the PTO trademark search system. This fee—which would have been in addition to the basic $40 per hour charge for use of the system—was to be collected by the PTO and paid to the private companies in order to compensate the companies for the value of the restrictions that were contained in the exchange agreements.[51]

Commissioner of Patents and Trademarks Donald Quigg testified that a public hearing on this plan was held by the PTO in September 1984, and that a majority of the commenters opposed the surcharge.[52] Quigg indicated that, at the direction of the Secretary of Commerce, efforts were underway to acquire unrestricted ownership of the trademark's data bases.[53]

The end result of these agreements, restrictions, and renegotiations will be that the public will have full use of the search capabilities of the PTO's automated trademark system. This is the proper result, and one that should have been sought from the beginning.[54]

The experience of the PTO illustrates the problems with imposing artificial limitations on public access to public records maintained in an agency-operated electronic information system.[55] An

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[47] General Accounting Office, *Patent and Trademark Office Needs to Better Manage Automation of its Trademark Operations,* App. I, p. 3 (IMTEC-85-8) (1985) [hereinafter cited as *"GAO PTO Report"*].

[48] Hearings at 317-18. (Testimony of Thomas P. Giammo, Associate Director, General Accounting Office.)

Another element of the agreements with the private trademark search companies was the fixing of the price of the "Official Gazette-Trademarks" computer tape at seven times its earlier price. Giammo testified that this, in effect, inhibited public access to trademark information in computerized format. Id.

[49] *GAO PTO Report* at app. I, p. 3.

[50] Id. at app. I, pp. 3-4.

[51] Hearings at 317-18 (testimony of Thomas P. Giammo, Associate Director, General Accounting Office). The present value of the $30-per-hour payments was estimated to be $3.18 million. Id.

[52] Hearings at 298.

[53] Id. at 289.

[54] A more extensive discussion of the PTO exchange agreements can be found at text accompanying notes 224-239.

[55] Cf. *NCLIS Task Force* at 67 ("Recommendation No. 23. Do not arbitrarily restrict the Federal Government from enhancement of information products and services, even if solely to meet the needs of constituencies outside the government itself.").

agency's responsibility to provide for public use of agency records should not be considered to be fixed or fully satisfied at any point in time. Public access is a dynamic concept. As technology permits an agency to upgrade its own ability to access, copy, and manipulate data, an agency should reassess its responsibility to the public.

For example, when copying technology made it cheap and easy to produce copies of documents on demand, agencies placed copying machines in reading rooms to allow the public to make use of the new technology. As electronic information systems permit agencies to make more effective use of data, the public should be permitted to share in that improved capability.

An agency cannot justify denying the public the benefits of new technology by preserving, without improvement, the same type of access that was provided in the past. If an agency has developed the ability to manipulate data electronically, it is unfair to restrict the public to paper documents. An agency must expect to upgrade public access to and use of agency records as its own information capabilities are upgraded.[56]

A major reason why the trademark automation effort became so unnecessarily tangled was because the PTO failed to assign sufficient weight to its responsibility to maintain publicly accessible trademark files. In negotiating the exchange agreements, it appears that the PTO decided that it was more important to prevent competition with private sector information companies and to avoid expenditure of funds. Both of these goals are reasonable, but the maintenance of full, effective, and meaningful public access to trademark records is a higher priority. Only after statutory obligations to maintain public records have been fully met can other interests be accommodated.

C. CONSULTING WITH PUBLIC USERS

Each agency that maintains significant public records has a community of users with an interest in how automation will affect public access. The needs of these users should be considered when automation is planned, and outside users should be consulted throughout the planning and implementation phases.

Some of the problems of the Patent and Trademark Office are the result of the failure of PTO officials to consult with the community of users. Guy M. Blynn, executive vice president of the United States Trademark Association, testified that there were and are many people skilled in trademark matters who would have been willing and able to assist in the planning of the PTO's automation efforts. But Mr. Blynn said that the PTO did not ask the public to "aid with any proactive participation in automation planning." [57] Instead, he complained that interested parties were only asked to react to PTO proposals and that the time for commenting on complicated and lengthy proposals was only a week or two at most.[58]

Mr. Blynn concluded that the PTO lost sight of the "important public role which its records play in the life of commerce in the United States." As a result, "[i]ts automation efforts appear to

[56] See text accompanying notes 293–294.
[57] Hearings at 323.
[58] Id.

have been calculated solely to service the way in which the Patent and Trademark Office operates internally, and not the reason why it operates." [59]

A similar assessment was offered by Herbert C. Wamsley, executive director of Intellectual Property Owners, Inc. Mr. Wamsley testified that consultation by the PTO with outside users was "grossly inadequate" and that there was "very little opportunity" for the private sector to present its views.[60]

The PTO has finally begun to recognize the importance of consultation with outside users. At an October 18, 1985, hearing, Donald Quigg, the newly appointed Commissioner of Patents and Trademarks, stated that he agreed that the PTO "did make some mistakes in the way we approached the automation of trademarks." [61] He indicated that efforts would be made in the future to present options to outside users.[62]

A subsequent management review by the Department of Commerce of patent and trademark automation reached the same conclusion about the need to consult with outside groups. This review was conducted in response to the April 1985 GAO report on the trademark automation effort.[63]

The Commerce Department management review made several recommendations on consultation with public users:

> Considering the tension which has developed between PTO and its clients, particularly on the trademarks side, the Trademark Advisory Committee should be meeting more frequently to address user concerns.
>
> We also recommend that PTO consider establishing other formal advisory committees to address automation and other areas of concern to user groups.[64]

Had the PTO taken steps earlier to increase consultation with users, it is likely that many of the problems that were encountered could have been avoided entirely.

Another illustration of the value of consulting with information users outside an agency comes from the SEC. There are many libraries, financial institutions, law firms, and other organizations that regularly collect and maintain large numbers of SEC filings. These organizations have developed sophisticated systems for acquiring copies of SEC filings and disseminating them to users. Since the SEC has made filings available either on paper or microfiche, outside users have developed maintenance and distribution mechanisms geared to handle documents in those formats.

The SEC's plans to replace paper filings with electronic filings will require major changes in the way that this important community of users manages its maintenance and distribution of filings. An executive for a company in the business of supplying SEC docu-

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[59] Id.

[60] Id. at 347. The procedural complaints of both Intellectual Property Owners, Inc., and United States Trademark Association cannot be considered to be objections to automation. Both organizations support the automation of PTO's trademark records. See Hearings at 327-28 (testimony of Guy M. Blynn), and at 335 (testimony of Herbert C. Wamsley).

[61] Hearings at 310.

[62] Id.

[63] *GAO PTO Report.*

[64] Department of Commerce, *Review of Patent and Trademark Automation* I-4 (1985).

ments to public users explained the technical problems raised by EDGAR:

> EDGAR as currently designed would thwart these user needs. The data that is now transmitted electronically in the pilot program is difficult to reproduce on paper because awkward margin shifts recur frequently and the type size is too small, making the documents difficult to read and unsuitable for telecopying. Additionally, because charts, graphs, pictures and maps will be filed on paper, a duplicate, cross-referenced filing system will have to be developed and maintained by users to accommodate both the electronic filings and the accompanying paper documents that complete the filing.[65]

These users are not opposed to the SEC automation plans. Their interest is in making sure that the flow of SEC information will not be disrupted unnecessarily until EDGAR is completely operational. They propose that the SEC maintain concurrent paper filings during the test period for the electronic filing system.[66]

Given the importance of SEC documents to the financial markets, the maintenance of a paper backup to the electronic system for a period of time is a prudent course. Only when EDGAR is fully tested and successfully operational and when users have been given a reasonable period to adjust to the new distribution system should the SEC consider eliminating paper filings.

This is an issue that is likely to arise with other systems. Each agency planning an electronic information system should consider the need to provide for the transition from paper to electronics. Users as well as agencies need time to adjust to automation. An agency cannot meet its public disclosure obligations if the agency's automation plans proceed at a pace that cannot be matched by public users.[67]

The way in which the "paper" issue for EDGAR was raised illustrates another aspect of the need for public consultation. The SEC did not take action to encourage outside users to come forward and identify their needs at a sufficiently early time. EDGAR has been in the planning stages at the SEC since early in 1983,[68] but outsiders were not consulted until much later.[69]

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[65] Letter from Robert N. Snyder, executive vice president, Disclosure, to Rep. Glenn English (Nov. 8, 1985) in Hearings at app. 9C.

[66] Id.

[67] Similar issues have also arisen with other, nonpublic users. This is illustrated by the response of H. Wayne Howell, director, securities division, secretary of state, Georgia, to the SEC's December 17, 1985 (50 Fed. Reg. 51495) solicitation of comment notice regarding EDGAR. The SEC intends to share EDGAR data with State securities offices, and these offices will be important users of the data base. Mr. Howell, a self-proclaimed "enthusiastic and vocal supporter of the EDGAR Project," expressed concern about changes in the State participation aspects of EDGAR. But he specifically objected to "a systematic attempt to relegate State participation to a separate and distinct system that will only utilize certain raw data furnished by the independent contractor." See letter from H. Wayne Howell to John Wheeler, Secretary, Securities and Exchange Commission (Jan. 7, 1985).

[68] Hearings at 23 (statement of SEC Chairman John S.R. Shad).

[69] SEC Chairman Shad testified about the actions taken in the planning of EDGAR, including the formation of a task force of agency personnel, publication of a solicitation of suppliers of an electronic information system, a contract for design of the system, and a contract for a pilot system. The focus of the agency was on its own needs, the needs of those who file documents with the SEC, and the ability of a contractor to operate the system. All of these actions were appropriate, but external users of SEC documents were not brought into the planning process. See Hearings at 23–24.

Only after initial implementation of EDGAR was well underway did the SEC begin to respond to the needs of outside users.[70] This happened only after elements of the user community came forward and presented their needs. In November 1985, SEC Chairman Shad indicated that steps were being taken to improve the readability of the microfiche produced by the EDGAR system.[71] This appears to be a partial solution to one of the problems raised by the users. There are other identified needs—and possibly unidentified needs—that still must be addressed. Other steps can also be taken, at little or no cost to the SEC, that will make the system better able to meet the needs of outside users.

While it certainly is better when users identify their needs at the earliest possible time, the burden of making sure that automation plans are workable is on the agency. An agency may find it necessary to engage in active outreach programs to encourage users to come forward and identify their needs. An agency cannot rely on users to speak up on their own initiative during initial planning stages.[72]

In contrast to the planning activities of both the SEC and the PTO, the Federal Maritime Commission took positive steps at very early stages to identify the needs of users of its proposed automated tariff filing and information system.

In 1983, the FMC conducted a survey of industry views on tariff automation.[73] This was followed with the publication of a notice in *Commerce Business Daily* seeking sources for an electronic filing, storage, and retrieval system for tariffs.[74] This notice attracted a response from 31 parties.[75]

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[70] A public meeting for public users of the EDGAR system was not held by the SEC until Feb. 10, 1986, only a few weeks before the final request for proposals was scheduled to be issued.

[71] Letter from John S.R. Shad to Rep. Glenn English (Nov. 13, 1985), reprinted in Hearings at app. 1B.

[72] In 1984, the SEC sponsored a study by Mathematica of the marketability of a comprehensive EDGAR data base. See Mathematica Policy Research, *Potential Impact of the EDGAR System on the Market for Securities Information* (1984).

But this study was designed to help attract bidders and did not collect any information to assist in the design of the system in order to attract users. The stated purpose of the study was "to assess the potential market demand and user benefits associated with the information products expected to become available through EDGAR or as a byproduct of EDGAR." Id. at 1.

The study was completed in July 1984 and reported significant general interest in EDGAR. Mathematica found, for example, that potential demand for an electronic data base containing SEC information could be as much as 1.8 million subscriptions. Mathematica provided specific estimates of the demand for terminals and the amount of usage that could be expected at different prices. Based on the results of the Mathematica study, SEC Chairman Shad testified that 60,000 potential subscribers could be expected at a price of $25 per month. See Hearings at 58.

Peter Marx of the Information Industry Association criticized the study for taking place "before there was a clear definition of what the EDGAR system would look like in operation." Id. at 72. Marx testified that doing market research for information systems is not simple because there are so many different elements, including hardware, software, communications, and training. Id. at 103. See also id. at 104 (testimony of David Peyton, director, government relations, Information Industry Association) (regarding failure of information service companies).

The SEC's attention in 1984 was focused too narrowly on the goal of a cost-free system. This proved to be a great distraction. The Mathematica study did not help at all in identifying the needs of potential users, and the information it provided on the market for EDGAR services appeared to be of little value to the community of potential contractors.

[73] Hearings at 196 (testimony of James J. Carey, Vice Chairman, Federal Maritime Commission).

[74] *Commerce Business Daily* at 27 (Nov. 14, 1983). The statement of FMC Vice Chairman James J. Carey mistakenly indicates that this notice appeared in the Federal Register. See Hearings at 197.

[75] Hearings at 197. (Testimony of James J. Carey, Vice Chairman, Federal Maritime Commission.)

Following establishment of an internal FMC task force under the chairmanship of James J. Carey, Vice Chairman of the FMC, another survey was conducted among those who had expressed interest in tariff automation and a sample of carriers, conferences, freight forwarders, and shippers.[76]

Subsequently, the FMC established an advisory committee "to make continuing recommendations on the implementation of an automated tariff filing and information system." [77] The advisory committee includes representatives of all parts of the industry.[78]

It is apparent to the committee that there is considerable useful expertise on ocean tariff automation questions available in the private sector.[79] There is probably similar private sector interest in and expertise on automation issues for many other types of government records.[80]

The careful and continual consultation by the FMC with all interested parties should serve as a model for other agencies.[81] Consultation will help to assure that an automated data system sponsored by an agency will not only meet its own needs but also the needs of those outside the agency who rely on the agency's information.

Agency information systems do not operate in a vacuum. For most agency information systems containing public data, there is a community of users that relies on the system and the way in which the data is made available. Each agency has an obligation to take reasonable steps to make its data system responsive to the needs of outside users.[82] If an agency makes information available in a way

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[76] Id. at 199. See also Federal Maritime Commission, *Tariff Automation (A Functional Analysis)* 15–21 (Aug. 1985).

[77] 50 Fed. Reg. 14454 (Apr. 12, 1985). The formal notice establishing the committee is at 50 Fed. Reg. 47447 (Nov. 18, 1985).

[78] Id. See also Hearings at 199–200 (testimony of James J. Carey, Vice Chairman, Federal Maritime Commission).

[79] See, for example, the testimony of Don C. Becker, publisher, Journal of Commerce; James Devine, marketing manager, Rapid Access Tariff Expediting Services (RATES); Dean Putnam, vice president, Carrier Systems Marketing, Transax Data Corporation; and Henry Gilbertson, board of directors, Transax Data Corporation, in Hearings at 213–37.

[80] See Hearings at 78 (testimony of Information Industry Association General Counsel Peter Marx).

[81] The Tariffs Division of the Department of Transportation is currently considering automation of the international air passenger service tariffs filed under the provisions of the Federal Aviation Act of 1958. It is likely that the Department will have to confront many of the same issues now before the Federal Maritime Commission.

In August 1985, the Transportation Department published an advance notice of proposed rulemaking in the Federal Register. The notice asks for comments from the industry and the public on the costs and benefits of an automated tariff system, including possible ways that the industry and the government could cooperate in developing an automated system and the impact that automation may have on tariff filing procedures and the aviation industry. See 50 Fed. Reg. 33452–56 (Aug. 19, 1985). The publication of an agency's intention to establish an electronic information system at such an early stage in the planning for such a system is a reasonable way to solicit initial responses from interested parties.

[82] At the hearings, other agencies offering electronic information services to the public were asked whether any market research was undertaken to determine if there is an interest in electronic dissemination. None of the agencies had conducted any market research. Representatives from the Food and Drug Administration, the Census Bureau, and the Department of Agriculture expressed the view that there was a great demand for agency information and that electronic dissemination was an attempt to find a more efficient way to fill that demand. See Hearings at 270 (testimony of Gerald F. Meyer, Associate Commissioner for Management and Operations, Food and Drug Administration; Glenn P. Haney, Director, Office of Information Resources Management, Department of Agriculture; Bryant Benton, Associate Director, Bureau of the Census for Management Services). Whether it is necessary or appropriate for an agency to conduct market research in advance of offering an electronic dissemination service depends on the nature of the service, the investment involved, and the needs of the agency. At a minimum, however, an agency should attempt to design an electronic dissemination system so that some data about the success of the service is produced for later evaluation.

that makes it unusable for the rest of the world, the agency may be effectively denying public access.[83]

Finally, while agencies are planning and installing new electronic data systems, they must not lose sight of existing public access responsibilities. Agency records are now made available to the public in a variety of ways, including through public reading rooms, by publication, and in response to requests made under the Freedom of Information Act.

To the greatest extent practicable, agencies should support a diversity of information distribution mechanisms. Not all public users are willing or able to use computerized record systems. At a minimum, agencies must retain the ability to provide promptly paper copies of public records maintained electronically whenever those records are requested under the Freedom of Information Act.

VI. Government Information and Copyright Law

Federal Government information policy is shaped by a number of statutory and constitutional provisions that define the role of government in collecting information and in making information available to the public. Major contributions to that policy are made by the First Amendment to the Constitution,[84] which prohibits laws abridging the freedom of speech, and by the Freedom of Information Act,[85] which provides a mechanism by which information in the possession of a Federal agency can be requested and must be disclosed. The Privacy Act of 1974[86] and the Paperwork Reduction Act of 1980[87] also establish general rules governing collection and use of information by Federal agencies.

Another key element of government information policy—and one whose significance is not widely appreciated—is found in copyright law. Section 105 of the Copyright Act provides that copyright protection "is not available for any work of the United States Government."[88] The legislative history explains that the effect of this provision is "to place all works of the United States Government, published or unpublished, in the public domain."[89] David Ladd, then Register of Copyrights, characterized section 105 as—

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[83] A sobering example of how computerized information can become unusable comes from the Bureau of the Census. There are only two machines in the world capable of reading the computer tapes containing the records of the 1960 Census. One machine is in the Smithsonian Institution and the other is in Japan. *Report of the Committee on the Records of Government* 9 (1985).

[84] U.S. Const., amend. I. Cf. I *Nimmer on Copyright* § 5.06[B] (1985) ("[O]n a constitutional level any statute which purported to prohibit the reproduction or distribution of governmental documents by reason of the Government's property interest in the ideas or expression contained therein arguably would run afoul of the First Amendment guarantees of freedom of speech and press.") (footnote omitted).

[85] 5 U.S.C. § 552 (1982).

[86] 5 U.S.C. § 552a (1982).

[87] 44 U.S.C. §§ 3501-20 (1982).

[88] 17 U.S.C. § 105 (1982). The section also provides that the government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

When the Copyright Act was rewritten in 1976, an attempt was made to change the longstanding policy against government copyright. Opposition by the press and library communities led the conference committee to drop the proposal. See the statement of Rep. Joseph E. Karth, 122 *Cong. Rec.* E35586-87 (1976) (reprinting *Washington Star* and *Washington Post* editorials.)

[89] H.R. Rep. 94-1476, 94th Cong., 2d sess. 59 (1976) (report to accompany S.22).

> a conclusion by Congress that the public interest is served by keeping governmentally created works as free as possible of potential restrictions on dissemination.[90]

The government's inability to copyright information permits any person to reproduce a government document or government data. This is a critical feature of government information policy, and has been for many years.[91] Some aspects of Federal agency electronic information systems threaten to undercut this well-established policy against governmental restrictions on the dissemination of information. This chapter discusses the general policy and the nature of the threat.

A. COPYRIGHT AND THE PRICE OF INFORMATION

Information is an unusual economic good in that the normal rules about scarcity do not apply. Information can be shared indefinitely without depriving the original owner of the data. As a result, the same economic considerations that are applied to other goods and services may not govern the sale or disclosure of information. Economist Yale Braunstein writes about the peculiarities of information in the marketplace:

> Ordinary goods can usually have only one owner or possessor at a time. Goods may be considered scarce when one person's possession deprives another; to serve another user requires another unit. However, information can never be truly scarce in that sense, because the marginal cost of permitting an additional person to possess the information is low, and one person knowing the information does not prevent others from knowing it as well. Any number of people can know the same facts at the same time without congestion or deprivation of information.[92]

Because of the low cost of sharing existing information with another person, it is difficult to set a high price on data unless secondary distribution can be prevented. Braunstein confirms that information controls are required in order to create an appearance of scarcity:

> By the marketing procedure of controlling information and its price, however, information can be made to appear in scarce supply.[93]

Copyright is the standard device that permits creators of information an exclusive right to their work.[94] Copyright permits information to be sold at a price that reflects the value of the information rather than just the cost of reproduction. In Braunstein's

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[90] Letter from David Ladd, Register of Copyrights, to Sen. Charles Mathias (Oct. 11, 1983) (discussing S.774), reprinted in *1984 House FOIA Legislative Hearings* at 1138.

[91] The first explicit prohibition against copyright of government information dates back to the Printing Act of 1895, Ch. 23, 28 Stat 601 (1895). Prior to 1895, it was generally recognized that copyrighting of government materials was improper. Prior to 1895, "[t]here was no statute on the subject because none was necessary." M.B. Schnapper, *Constraint by Copyright* 98 (1960).

[92] Y. Braunstein, "The Functioning of Information Markets", in National Telecommunications and Information Administration, *Issues in Information Policy* 57, 58 (1981) (NTIA-SP-80-9).

[93] Id.

[94] U.S. Const., art. I, § 8, cl 8.

terms, copyright makes information appear in scarce supply and permits a price above the level of the marginal cost of reproduction.[95]

It follows that uncopyrighted information—data that can be freely reproduced without restriction and without payment of royalties—cannot be sold for a high price. Braunstein finds that, for public goods of this type where it is difficult to exclude nonpaying beneficiaries and the cost of serving extra users is low, any price other than a marginal cost price is undesirable.[96]

For information, marginal cost pricing will mean the price of uncopyrighted information will approximate the cost of reproduction. In theory, any higher price will attract other distributors who will be able to charge a lower price.[97]

This theory is confirmed in practice. It is not unusual for a popular government publication to be reprinted by a private publisher at a price lower than that set by the Government Printing Office. Better distribution and higher efficiency sometimes permit a private publisher to charge a lower price.

The economics of information are reflected in current law. Several general statutes establish a policy of selling government information at a price based on the cost of reproduction rather than the value of the information or the cost of compiling the data.

The law setting the price for the public sale of government publications provides that the Superintendent of Documents shall base the price "on the cost as determined by the Public Printer plus 50 percent." [98] Recent testimony of Acting Superintendent of Documents Donald E. Fossedal illustrates how this requirement affects the price of government publications:

> We do have somewhat of a problem because our main charge is to recover costs. If we made $15 million, the next year you might have to lower prices because you might be making too much money in the eyes of certain people, and you might want to lower the prices on the documents, which would impact against having more dollar sales. It is always a delicate balancing act.[99]

The same principle has been applied when the Archivist of the United States provides copies of documents or publications under provisions of the National Archives and Records Administration Act of 1984. Two separate provisions base the charges on cost plus an increment "for the estimated replacement cost of equipment" [100] or cost plus 10 percent.[101]

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[95] Cf. D. Peyton, "The Creation of Information: Property Rights and Subsidies" in National Telecommunications and Information Administration, *Issues in Information Policy* 75, 79 (1981) (NTIA-SP-80-9) ("[P]roducers who have intellectual property rights thereby gain a measure of market power and hence some ability to control, rather than accept, price levels.").

[96] Y. Braunstein, supra, at 58 & n.1.

[97] See Hearings at 68 (testimony of IIA General Counsel Peter Marx) ("[R]esellers will quickly push the price down very close to marginal reproduction cost.").

[98] 44 U.S.C. § 1708 (1982). According to a recent GAO report, the 50-percent surcharge was not intended to generate a profit, but was rather intended to recover certain costs of the program, including discounts, errors in calculating costs, and miscellaneous costs. General Accounting Office, *The Government Printing Office Can More Effectively Manage Its General Sales Program* 31 (1983) (AFMD-84-20).

[99] *Legislative Branch Appropriations for 1986*, hearings before a subcommittee of the House Committee on Appropriations, 99th Cong., 1st sess. 480-81 (Part 2 Legislative Branch).

[100] 44 U.S.C. § 2116(c) (Supp. 1984).

[101] Id. at § 2307.

The policy of providing government documents at a price based on the cost of dissemination has also been adopted in the Freedom of Information Act. When responding to requests for information, the FOIA permits agencies to charge fees limited to the direct cost of document search and duplication.[102]

Suggestions have been made from time to time to raise the charges for FOIA requests, but most proposals would still base the price on the cost of responding to a request.[103] However, in 1984, the Senate adopted a bill amending the FOIA that included language permitting the government to sell certain types of information at a price based on the value of the information.[104] Although the bill never passed the House, the reaction to this provision offers an interesting perspective on the general issue of government information and copyrights.

The bill would have permitted agencies to charge fair value fees for requests for records containing commercially valuable technological information. The fair value fees could be in addition to processing fees otherwise chargeable under the FOIA. The bill contained no definition of "fair value fees" [105] or "commercially valuable technological information."

If enacted, this proposal would have produced a major change in approach for determining fees for information disclosed under the FOIA.[106] The Copyright Act might also have been affected. Senator Charles Mathias, chairman of the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks, spoke of "the friction between the fair value fee provision of [S. 774], and the historic policy against copyrights on Government information." [107]

Senator Mathias asked David Ladd, the Register of Copyrights, to discuss the implications of the Senate language upon copyright law and copyright policies. Noting that the fair value fees "could

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[102] 5 U.S.C. § 552(a)(4)(A) (1982).

[103] The most common proposal has been to allow agencies to charge for the cost of reviewing documents to determine if the documents must be disclosed. See, e.g., S. 150, 99th Cong., 1st sess. § 2; H.R. 1882, 99th Cong., 1st sess. § 4 (1985); S. 774, § 2, S. Rept. No. 98-221, 98th Cong., 1st sess. (1983).

[104] S. 774, 98th Cong. 2d sess., § 2, 130 Cong. Rec. S 1794-97 (daily ed. Feb. 27, 1984).

The entire provision reads:

> "in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or procured by the Government at substantial cost to the public, is likely to be used for a commercial purpose, and will deprive the Government of its commercial value, [an agency] may provide for the charging of a fair value fee or, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the technological information, its costs to the Government, and any public interest in encouraging its utilization."

130 Cong. Rec. S 1794 (daily ed. Feb. 27, 1984).

[105] As reported by the Senate Judiciary Committee, the bill would have permitted charging of "fair value fees or royalties, or both." S. Rept. 98-221, 98th Cong., 1st sess. (1983). The reference to "royalties" was dropped on the Senate floor. 130 Cong. Rec. S 1798 (daily ed. Feb. 27, 1984).

Few observers thought that the deletion of the word "royalties" made any significant difference. See, e.g., the statement of Sen. Charles Mathias, 130 Cong. Rec. E657 (daily ed. Feb. 28, 1984) ("I have concluded that this bill would be even further improved if this section were deleted altogether."); and letter from William P. Giglio, vice president, McGraw-Hill, Inc., to Rep. Glenn English (June 7, 1984) ("[W]e do not believe that the Senate amendment completely rectified the situation."), reprinted in *1984 House FOIA Legislative Hearings* at 1135, 1136.

[106] Sen. Charles Mathias, chairman of the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks, characterized the policy underlying the FOIA as calling "for the elimination, not only of legal barriers to access to public information, but also of excessive economic barriers." 130 Cong. Rec. E657 (daily ed. Feb. 28, 1984). See also House Committee on Government Operations, *Administration of the Freedom of Information Act*, H.R. Rep. No. 92-1419, 92d Cong., 2d sess. 17 (1972); S. Rept. No. 93-854, 93d Cong., 2d sess. 163 (1974) (report to accompany S. 2543).

[107] 130 Cong. Rec. E657 (daily ed. Feb. 28, 1984).

operate as a restraint on dissemination," Ladd offered these comments:

> The equitable pricing of government information services to avoid unfairness to taxpayers who pay for the generation of such information is an important administration issue, particularly with the growth of new information services and changes in the kinds of information available through FOIA procedures. However, the principle of no copyright protection for U.S. Government works has been so broadly accepted for so long that care should be taken to avoid modifying its practical effects without confronting the question of modifying section 105 itself.[108]

Others also saw the proposal to charge fair value fees for government information as the equivalent of giving the government copyright authority. William Giglio, vice president, McGraw-Hill, wrote:

> Conditioning the release of information upon the payment of a fee determined by the market value of that information continues to appear to give the government an attribute of copyright.[109]

M.B. Schnapper, editor at Public Affairs Press and an authority on questions of ownership of government information, wrote that "the provision is equivalent to placing a constitutionally dubious price tag on the enjoyment of First Amendment rights." [110]

B. RESTRICTING ACCESS TO ELECTRONIC INFORMATION SYSTEMS

The controversy over the proposal to charge fair value fees demonstrates that there is considerable vitality in the general policy against restrictions on the dissemination of government data.[111] It is certainly reasonable to agree with Senator Mathias that questions relating to the sale for value of government information should be considered "in a context which focuses our attention on the intellectual property issues involved." [112]

The possibility that Federal agencies can, through their own actions, acquire copyright-like controls over public data maintained in electronic information systems is very real. At least one agency is already licensing use of its electronic data and restricting redissemination. That agency is the National Library of Medicine.

A basic function of the NLM is the creation of an index of biomedical literature. The computerized version of this index is Medlars (Medical Literature Analysis and Retrieval). Appropriated

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[108] Letter from David Ladd, Register of Copyrights, to Sen. Charles Mathias (Oct 11, 1983), reprinted in *1984 House FOIA Legislative Hearings* at 1138. See also 130 Cong. Rec. E658 (daily ed. Feb. 28, 1984). Ladd's reference to "section 105" is to the Copyright Act. See note 88 and accompanying text.

[109] Letter from William P. Giglio to Rep. Glenn English (June 7, 1984), reprinted in *1984 House FOIA Legislative Hearings* at 1135, 1136.

[110] Letter from M.B. Schnapper to Rep. Glenn English (Oct. 4, 1984), reprinted in *1984 House FOIA Legislative Hearings* at 1113. See generally M.B. Schnapper, *Constraint by Copyright* (1960).

[111] See, for example, Principle 5 adopted by the National Commission on Libraries and Information Science Task Force on the interaction between government and private sector information activities: "The Federal government should make governmentally distributable information openly available in readily reproducible form, without any constraints on subsequent use." *NCLIS Task Force* at 47.

[112] 130 Cong. Rec. E658 (daily ed. Feb. 28, 1984).

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funds pay the capital costs of the computer hardware and other costs of generating the data base.[113]

There are three features of the Medlars system that suggest that NLM is exercising copyright-like controls: (1) the way in which fees are charged; (2) the imposition of restrictions on redisclosure of the data base; and (3) the way in which FOIA requests for Medlars information are treated.[114]

Medlars Fees.—The way in which the NLM recovers the cost of supporting use of the data base is not without controversy. NLM Director Donald Lindberg testified that "broadly," the cost of creating the data base is paid with appropriated funds and that the costs of supporting use of the system are recovered through user fees.[115] However, there are two distinct categories of users, each with different costs and different fees.

Medlars is offered by the NLM to public users either in the form of online computer search services directly from the NLM or in the form of machine-readable copies of the data base under a license agreement.[116] The price of online use is calculated using an algorithm that takes into account connect time, citations retrieved, and similar factors. The charges average $15 in off-hours and $22 in prime time.[117]

Under the license agreement, licensees acquire a copy of the data base on computer tape and use their own computers to conduct searches. Charges for licensees are based on usage. There is a $15,000 minimum fee per year which is offset by actual usage charges of three to four dollars per hour of connect time and one cent per citation.[118]

The costs of supporting the online users and the costs of supporting the licensees are different. A portion of the operating costs for the Medlars computers can reasonably be attributed to online users, along with telecommunications charges. Whether the actual charges recover these costs precisely is a question that could only be answered after a detailed audit of the NLM's operations. For present purposes, it is sufficient to state that the charges of supporting online users are either equal to actual costs or that the charges could be readily adjusted to approximate those costs.

This same statement cannot be made regarding tape licensees. Since licensees use their own computers and their own telecommunications facilities, it appears that the direct costs to the NLM are only the costs of making and supplying a copy of the tapes.

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[113] Hearings at 279 and 280 (testimony of NLM Director Donald Lindberg).

[114] There are some portions of the Medlars system that are privately owned and that are made available to the NLM by agreement with the copyright owner. See, e.g., National Library of Medicine, Tape License Agreement-Domestic or Foreign Tape Center Serving Domestic or Foreign Users, Clause 3a, reprinted in hearings at app. 2B [hereinafter cited as *"NLM Tape License Agreement"*]. Any charges for or restrictions imposed upon use or redisclosure of these private data bases are not at issue in this report. The focus is solely on the data bases that are prepared by the NLM and are not privately owned.

[115] Hearings at 279.

[116] Id. at 278

[117] Id. at 280. In 1985, Medlars began charging a surcharge for overseas users. The surcharge represents a contribution paid by foreign users toward the cost of creating the data base. United States users have already paid for the creation of the data base through tax dollars. Id. The imposition of higher prices for foreign users is not an issue in this report.

[118] Medline Charges Chronology, reprinted in Hearings at app. 2B. There are higher usage charges for foreign users. See note 117. See also Hearings at 280 (testimony of NLM Director Donald Lindberg).

At the hearing, NLM Director Donald Lindberg was unwilling to admit that charges to tape licensees are not related to cost.

> Mr. ENGLISH. Since the purchaser of the tapes uses his own computer to conduct the search, why should he pay for the connect time?
>
> Dr. LINDBERG. If you speak simply of the tape, then it is a matter of providing for recovery of costs for access across all of NLM's products. For tapes we do factor in a charge for use, but we don't attempt to monitor it in a sort of micro way. Commercial vendors don't always have the same software as we, so we take a broad measure of usage, which is the number of hours connected, plus the number of citations printed offline.
>
> We take a broad measure of those, as broad as we can make practical.
>
> Mr. ENGLISH. Is that specifically related to your cost?
>
> Dr. LINDGERG. Well, I think our view is that it is related to the overall cost of the operation across all of the data bases.
>
> Mr. ENGLISH. You can't tie it back specifically to the cost?
>
> Dr. LINDGERG. It would be hard to tie it to a particular data base, but not across all NLM products.
>
> It is our intent that we should recover the costs to the government insofar as we are able for a valuable product, yet at the same time, try to make it very broadly available.[119]

Despite Dr. Lindberg's unwillingness to agree, it is apparent that licensees of the tapes must be paying charges that are in excess of the cost to the NLM of providing copies of the tapes. The NLM's costs of providing copies of tapes to licensees are the cost of magnetic tape, duplicating, and delivery. These costs do not vary with usage by the licensees, but the fees collected vary with licensee use.

If Dr. Lindberg's contention that overall revenues from Medlars users are equal to the costs of supporting all users is accepted, then it follows that the fees collected from tape licensees are being used to subsidize online users of Medlars. This charging of fees that are not based on the direct cost of disseminating the information is the first element of NLM's copyright-like control over the Medlars data base.

Restrictions on Redisclosure.—The second element of the NLM's copyright-like control is its restriction on redisclosure of the data base. Those who wish to acquire a copy of the Medlars tapes are asked to enter into a "license agreement" with the NLM. The agreement provides, among other things, that "[t]he licensee agrees to prevent duplication, resale, and redistribution of all or portions of the data bases supplied in machine-readable form by NLM."[120] The agreement also provides that, upon termination or revocation

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[119] Hearings at 282.

[120] *NLM Tape License Agreement* at clause 5a. The agreement provides for downloading of the Medlars data base but only for internal use by the licensee. Id. at clause 5b.

of the license, the licensee must destroy all data in machine-readable form obtained under the license.[121]

The essence of these restrictions is that the NLM retains control over use of the tapes. Those who acquire copies of the Medlars data base are unable to redisseminate the data base. This makes the Medlars data base different from virtually all other government information that is publicly disclosable. Yet NLM General Counsel Robert Lanman admitted at the hearing that the NLM has "no specific authority" to prohibit the duplication or resale of the Medlars tapes.[122]

NLM Director Donald Lindberg was asked whether it would make any difference to NLM's authority to restrict duplication or resale of the tapes if the NLM were given the authority to copyright Medlars. He answered that it woud not make any difference.[123] It is fair to conclude, therefore, that NLM is already acting as if it had authority to copyright Medlars even though it has been granted no such specific authority.

Lindberg defended the licensing agreements as essential to maintaining the quality of the service:

> We also want to be certain that the quality of the services provided are suitable, that is to say, that the integrity of the data base is maintained. That particularly shows up in the question of updates.
>
> These tapes are sent out on a monthly basis, obviously journals are published monthly and weekly, and sometimes errors are entered into the literature and retractions and corrections are published.
>
> We want to be absolutely certain that those tapes are updated to reflect such matters. That is also part of our agreement, one of the major reasons for the agreement.[124]

After the hearing, Dr. Lindberg was asked to provide additional information on the NLM's oversight of the use of the Medlars tapes. Dr. Lindberg's answer included the following comments:

> While NLM cannot monitor every step in the private sector's use of NLM tapes, it can, through its licensing agreements, exercise an element of quality control to assure the integrity of its data bases. "Integrity" of a data base has three components; accuracy, completeness and currency. NLM must be concerned with each when it licenses the private sector's use of the tapes.[125]

Dr. Lindberg's concern about the quality of the Medlars service is undoubtedly genuine. His statement suggests that the NLM does not monitor actual use of the tapes but relies instead on the provisions of the licensing agreement. A review of the agreement, however, finds little that justifies the data restrictions imposed by the NLM on the grounds of "integrity."

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[121] Id. at clause 2c.
[122] Hearings at 286.
[123] Id.
[124] Id. at 286–87.
[125] Letter from NLM Director Donald Lindberg to Rep. Glenn English (Dec. 12, 1985), reprinted in Hearings at app. 2A [hereinafter cited as "*Lindberg Letter*"].

The first component of integrity as defined by Dr. Lindberg is accuracy. The committee does not not question that the NLM takes reasonable care to assure the accuracy of its data. However, the licensing agreement not only disclaims liability but requires licensees to inform users in writing that:

> NLM represents that the data provided under the license agreement were formulated with a reasonable standard of care. Except for this representation and as otherwise specifically provided in this agreement, NLM makes no representation or warranties, expressed or implied. This includes but is not limited to any implied warranty of merchantability or fitness for a particular purpose, with respect to the data bases and NLM specifically disclaims all such warranties and representations.[126]

This clause is a standard commercial disclaimer of liability, and the committee offers no criticism of the NLM for including the clause in the licensing agreements. However, the presence of a disclaimer in this agreement is curious. The NLM justifies exercising an unprecedented degree of control over copyrighted, government information because of a special need to preserve the integrity of its data base. Yet the NLM incorporates a standard disclaimer of liability that is similar to those that might be used with any other data base that does not purport to require special controls to preserve integrity. The disclaimer, while a reasonable precaution, does nothing to support the NLM's justification of data base restrictions.

The second component of integrity cited by Dr. Lindberg is completeness. Dr. Lindberg stated:

> If the private sector vendor decided on the basis of the economics of his business to eliminate from the data base those citations which had not been called for in the last six months, the integrity would be compromised with respect to completeness.[127]

Again, the concern is genuine, but the agreement does not provide any assurances with respect to completeness. The agreement permits licensees to offer only portions of the data bases.[128] Should a licensee decide to drop parts of a data base, there is no requirement that the licensee notify NLM or, more importantly, that the licensee notify the users of the data base. Thus, the agreement offers no clear protection against the offering of an incomplete data base.

The third component of integrity cited by Dr. Lindberg is currency. But the agreement contains no provision requiring licensees to make new Medlars tapes available to users immediately upon receipt, as soon as practical, or within a fixed period of time. It is not clear whether such a provision was omitted because of an oversight or because it is unnecessary. Either answer undercuts the case for restrictions.

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[126] *NLM Tape License Agreement* at clause 4b.
[127] *Lindberg Letter.*
[128] *NLM Tape License Agreement* at clause 1b.

The agreement does require licensees to make corrections available, but even here Dr. Lindberg's currency agreement is weakened by the terms of the agreement. There is a provision requiring that certain records be corrected by the licensees within 3 months of receipt of corrections from the NLM. But the licensing agreement states that corrections are provided on a monthly basis.[129] If the maintenance of accurate records is so critical, it is not clear why licensees are allowed 3 months to incorporate these "monthly" corrections.

The reasons offered by Dr. Lindberg for the restrictions on the NLM data bases fail to justify the restrictions. Yet the most important questions regarding any need for restrictions in the name of data integrity went unanswered: Are the efforts of the NLM to ensure data integrity needed?

Dr. Lindberg was specifically asked to comment on why the users of the Medlars data bases would fail to demand that timely, accurate information be available, and why the marketplace would fail to meet those demands. He did not respond to these questions.[130]

There is every reason to believe that users of Medlars would quickly learn of any shortcomings in the data base services offered by private vendors, that users would make efforts on their own to make sure that the latest, most accurate information was available, and that vendors would be responsive to the demands of the marketplace. Even if a case could be made that the marketplace would not be responsive to the demands of Medlars users, it does not follow that restrictions on the redisclosure of the Medlars data base could be justified. If a problem can be demonstrated, other less restrictive solutions may be possible.

FOIA Requests and SDC v. *Mathews.*—The third element of NLM's copyright-like controls is its response to FOIA requests. The FOIA provides an independent mechanism for the disclosure of government records at the cost of dissemination and without any restriction on reuse or redissemination.[131] Why isn't the FOIA used to obtain copies of the Medlars data base and to avoid the restrictions imposed by the NLM?

The answer to this question can be found in a decision by the United States Court of Appeals for the Ninth Circuit in a Freedom of Information Act case. The case is *SDC* v. *Mathews*,[132] and it arose when a requester sought a copy of the Medlars tape at the "nominal" charges of the FOIA.[133] At the time of the case, the cost of the tapes was a flat rate of $50,000 per year.[134]

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[129] Id. at clause 10b.

[130] Rep. Glenn English posed these questions in writing: "Are the users of Medlars unable on their own to distinguish between a service that offers an up-to-date data base and one that does not? Is there some reason why a free market in the Medlars data base would not force all sellers of services to make the newest information available as soon as possible?" No specific response to these questions was offered. See *Lindberg Letter.*

[131] See text accompanying note 103.

[132] 542 F.2d 1116 (9th Cir. 1976).

[133] Id. at 1117.

[134] Id. at 1118. The court noted that the charge was "established in an attempt to recover some of the $10 million . . . cost of preparing the Medlars data base." Id. This is the first of several instances where information relied upon by the court differs from information provided to the committee. It is possible that some of the differences are the result of policies that changed over time.

Continued

Even an "exclusive right to wholesale" the data base is of limited value.[208] The contractor's price would be regulated by the SEC,[209] and wholesale purchasers would be able to rewholesale the data to others without restriction.[210] Thus, even in the absence of SEC price regulations, the market would establish a wholesale price that approximated the cost of duplication of the data base.

In order for an agency to acquire services without payment of cash, the agency must have something of value to exchange. The essence of the original financing plan for EDGAR was that the SEC was exchanging an interest in the data base for services. But an uncopyrighted data base of public information does not have much market value.[211]

Several months after the hearing held by the Government Information, Justice, and Agriculture Subcommittee the SEC took its first action recognizing the need to pay its own way. On July 1, 1985, the SEC issued a presolicitation document for the operational phase of EDGAR. This document indicated for the first time that the SEC was willing to pay some of its own expenses. The SEC contribution was to be as much as half a million dollars annually.[212]

The SEC later decided that an annual cash payment of this amount would not be sufficient to compensate a contractor for services valued at several million dollars. A Federal Register notice in November 1985 indicated that the SEC would agree to share more of the costs.[213]

It appears that the final financing proposal for EDGAR will call for a more complete cost-sharing agreement. The Commission will probably agree to offer funding over the 7-year life of the contract that would reimburse the contractor for the amortized cost associated with the internal SEC processing.[214]

At the same time that the SEC recognized that it would have to pay its own costs of using EDGAR, the agency also discovered that it could manage with a smaller system. The number of work stations needed for SEC processing decreased from 1,405 in the presolicitation document to 450.[215]

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[208] Many of the documents in the EDGAR data base will not be used by any members of the public and will only be of interest to the SEC. The contractor who operated the SEC reading room prior to October 1985 reported that its customers purchased copies of slightly fewer than half of documents received by the SEC during the year end May 31, 1985. See Letter from Robert N. Snyder, Disclosure, to Rep. Glenn English (June 13, 1985), reprinted in Hearings at app. 9C.

[209] SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A pp. 356–57. See also proposed SEC dissemination pricing and regulation approach at 50 Fed. Reg. 51495, 51497–98 (Dec. 17, 1985).

[210] SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A, p. 357. See also Hearings at 225. (testimony of Journal of Commerce Publisher Don C. Becker) (discussing the economics of unrestricted wholesale redissemination).

[211] See the discussion of copyright and the price of information at text accompanying notes 92–109.

[212] Securities and Exchange Commission, *Pre-Solicitation for an Operational EDGAR System* B.1.2. (July 1, 1985).

[213] 50 Fed. Reg. 47886 (Nov. 20, 1985).

[214] See 50 Fed. Reg. 47886. This SEC notice wisely states that funding is subject to annual congressional appropriation. There also has been a significant controversy regarding the need for congressional authorization for EDGAR. See text accompanying note 241.

[215] Compare Exhibit F-1 in the presolicitation documnt with the December 1985 Federal Register notice, 50 Fed. Reg. 51495, 51496 (Dec. 17, 1985). The SEC also appears willing to eliminate a requirement that would have called for the development of customized computer terminals for EDGAR. Id.

These financing plans for EDGAR mean that the SEC will pay the cost for internal processing services that it uses. The cost of the external dissemination function will be borne entirely by the contractor and passed on to other users.[216] This financing plan represents a giant step in the right direction. The SEC's recognition of the shortcomings of its original plan and its willingness to make major changes is worthy of praise.

However, the SEC may not have gone far enough. In addition to the internal SEC processing system and the external dissemination system, there is another major piece of EDGAR—the system for electronically collecting the filings. The SEC does not appear willing to pay any of the cost of the collection system.[217] Since the electronic receipt of filings is an integral feature of the system and is necessary to support the internal processing of documents, this is a cost that probably should be borne by the SEC.[218] It remains to be seen how the decision regarding the collection system costs will affect the willingness of potential contractors to bid on EDGAR.

During the time when the SEC still planned to proceed with a no-cost information system, the Federal Maritime Commission was beginning to consider its own automation needs. The FMC's general plan to automate both the collection and dissemination of ocean tariffs[219] is similar to the scope of the SEC's EDGAR system.

It appears that the FMC was heavily influenced by the SEC's original scheme. The FMC's Policy Steering Committee set out 11 objectives for tariff automation.[220] The three objectives that relate to financing are almost identical to the original objectives of the SEC:

> 1. The automated system will operate in the private sector to the extent possible.
> 2. The system will be financially self-sufficient through the assessment of user charges for access to this information.
> 3. Access by the Commission will be without cost.[221]

In response to questions at the hearing, FMC Vice Chairman Carey stated that he was not sure that all of these objectives could be met. Carey recognized that the goals contain some inherent conflicts.[222] The Commission was continuing its study in order to determine what was possible.

Compared to the SEC, the FMC may find it easier and less expensive to acquire electronic collection and dissemination services. The SEC needs a data base containing a significant amount of information not previously available in electronic format. However,

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[216] The SEC is moving closer to the design proposed by Peter Marx of the Information Industry Association. Mr. Marx testified that the internal and external subsystems be separately handled and procured. See Hearings at 73. The SEC is creating more of a distinction between the internal and external parts of EDGAR, but it does not go as far as splitting the two parts into two separate contracts.

[217] See 50 Fed. Reg. 47836 (Nov. 20, 1985) ("The contractor will be responsible for assuming all costs associated with the external receipt and dissemination system.").

[218] See text accompanying notes 178–180.

[219] See Hearings at 199–202 (testimony of FMC Vice Chairman James J. Carey).

[220] Federal Maritime Commission, *Tariff Automation (A Functional Aanlysis)* 7 (1985). See also hearings at 197–99 (testimony of FMC Vice Chairman James J. Carey).

[221] Federal Maritime Commission, *Tariff Automation (A Functional Analysis)* 7 (1985).

[222] Hearings at 199.

for the FMC's ocean tariff files, there are already existing private information companies offering both collection and dissemination services.[223] This should mean that it will be relatively easier for the FMC to achieve its objective of a role for the private sector.

Since much of the initial investment needed to create an electronic tariff system has already been made by these private companies, the FMC may also find that it can acquire the service that it requires without the sizable development expenditures that the SEC incurred.

It is unlikely, however, that the FMC will be able to meet its goal of no-cost service. As with the SEC, there is little reason to expect that any private company will be interested in providing services to the FMC without compensation. The data base that the SEC planned to offer in exchange for service had little market value because it was a public data base. This is true as well for the FMC's data base.

An approach to information automation different than that of the SEC and the FMC was adopted by the Patent and Trademark Office. The experience of the PTO with noncash exchange agreements for a data base of trademark information illustrates the relationship between restrictions on access to information and the market value of the information.[224]

In 1983, the PTO entered into three nonmonetary, barter-type agreements with private companies for the purpose of developing a trademark data base.[225] Under these agreements, PTO provided the companies with copies of PTO documents. The companies converted the documents into machine-readable form and shared with the PTO a copy of the electronic data base containing the text and digitized facsimiles of registered trademarks and incoming trademark applications. The PTO agreed to restrict use of the data base by third parties.[226] The reason for the exchange agreements was that PTO "could not project sufficient resources in fees and appropriations to pay the $3 million to pay for the creation of the computerized trademark data base."[227]

The central feature of the exchange agreements is the restriction on public access to and use of electronic trademark data bases held by the PTO. All of the data that the PTO agreed to restrict was information that was and continues to be in the public domain. None of the information is proprietary or privately owned.

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[223] The Journal of Commerce has an existing electronic data base containing the full text of virtually the entire FMC tariff file. Transax Data Corp. offers an electronic filing service that now covers more than half of all FMC filings. See Hearings at 217-25 (testimony of Journal of Commerce Publisher Don C. Becker), and at 230-32 (testimony of Dean R. Putnam, vice president of carrier system marketing, Transax Data Corp.).

[224] See text accompanying note 95.

[225] The agreements are reprinted in Hearings at app. 10. The problems with the exchange agreements were by no means the only problems encountered by PTO during its trademark automation efforts. A complete review of the project can be found in *GAO PTO Report.*

[226] Hearings at 297 (testimony of Commissioner of Patents and Trademarks Donald J. Quigg).

[227] *GAO PTO Report* at app. I, n.8, quoting from a Feb. 13, 1984, letter from the Commissioner of Patents and Trademarks to the United States Trademark Association.

PTO Commissioner Quigg said at the hearing:

"I would say that we negotiated the agreements, and the concessions that were made because that was the only way the agreement could be effected. I think that even being able to directly purchase would have been impossible, even had we had the money to do it, simply because the exchange partners did not want others competing with them." Hearings at 309.

The PTO agreed that there would be no public use of the data base except in the trademark search room and in patent depository libraries. No other remote access to the data base would be permitted.[228]

To enforce this restriction, the agreement obliged the PTO to "apply its best efforts to avoid and prevent providing" a computerized copy of the data obtained under the exchange agreements. In the event that disclosure was required by the Freedom of Information Act, the PTO agreed to provide only a printed paper copy "in a style and format which will prevent or discourage conversion to computer processable form" unless otherwise ordered by a court.[229] The legality of this agreement requiring PTO to deny FOIA requests for the computerized data tapes is uncertain at best.[230]

The PTO also agreed to limit public use of electronic search techniques to those that were comparable and equivalent to manual searching techniques.[231] This prevented public users of PTO search room terminals from taking advantage of all of the computerized search techniques. The effect was to keep the PTO from competing with the private trademark search companies that signed the exchange agreement with the PTO.[232]

Another policy change made by the PTO, although not as part of the exchange agreements, was to raise the price of the computer tapes for the Official Gazette. Originally, the tapes were sold at the cost of reproduction. The PTO raised the price 1,400 percent to $42,300. The PTO explained the change as reaffirmation of the Office's policy "to recoup the fair market value of its data base tapes."[233] A price higher than the cost of dissemination can be

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[228] See letter from Donald J. Quigg, Acting Commissioner of Patents and Trademarks to Rep. Robert Kastenmeier, chairman, House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice (Apr. 22, 1985) [hereinafter cited as "Quigg-Kastenmeier Letter"], reprinted in *United States Patent and Trademark Office Authorization,* hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 99th Cong., 1st sess. 112, 120 (1985) [hereinafter cited as *"PTO Authorization Hearings"*].

[229] See, e.g., the agreement between PTO and Thomson and Thomson, clause 8, reprinted in Hearings at app. 10. Bradford R. Huther, Assistant Commissioner for Finance and Planning, Patent and Trademark Office, testified that denying access to computer tapes was consistent with the FOIA as long as a paper facsimile was provided. Hearings at 308. Mr. Huther was presumably referring to the holding in *SDC* v. *Mathews,* 542 F.2d 1116 (9th Cir. 1976). This case is extensively discussed and criticized above. See text accompanying notes 131–153.

Even assuming that the holding of the court is correct, it may not apply to the Patent and Trademark Office. In *SDC* v. *Mathews,* the court was acting to protect the revenues of a dissemination program operated by a government agency. A different result might well be reached where, as with the PTO data base, the restriction on access to computer tapes served only to protect the revenues of a private company.

See also the discussion of *Dismukes* v. *Interior,* in note 151. Even assuming that *Dismukes* was correctly decided, the rationale might not be applicable to PTO. In *Dismukes,* the agency disclosed the information in a format that was more likely to be readable by the largest number of requesters. With the PTO tapes, it is likely that the only demand for the tapes would be for machine-readable copies.

[230] The rights of public access granted by the Freedom of Information Act cannot be modified by agency pledges to keep information confidential. See, e.g., *Ackerly* v. *Ley,* 420 F.2d 1336 (D.C. Cir. 1969) ("It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of this nature cannot, in and of themselves, override the Act.").

[231] See Quigg-Kastenmeier Letter, reprinted in *PTO Authorization Hearings* at 120–21.

[232] Id. at 121.

[233] Id. at 120. The PTO stated that it was following the OMB guidelines to recover the fair market value of the tapes. Id. But it is far from apparent that the "fair market value" provision of the OMB circular on user fees is applicable to information. See note 171. The earlier discussion of the OMB circular concludes that fees should be based on cost and not on fair market value. See text accompanying notes 163–177.

viewed as another type of access restriction, and another way of discouraging competition with existing trademark search companies.

The GAO criticized the exchange agreements for being inequitable. The PTO had placed no value on the public access restrictions, but the GAO concluded that the restrictions were worth over $3 million. As a result, the GAO found that the private companies received about twice the value that they provided to the PTO.[234]

What the PTO attempted to achieve through the exchange agreements was automation of its trademark data base without any expenditure of funds for converting the data into a computerized format. In essence, the cost of the data conversion was to be borne not by the PTO but by public users of the PTO data base.[235] This helps to explain why the PTO agreed to contracts that so heavily favored the other parties. The PTO received what it wanted and left someone else to pay the price.

It is not surprising that the public access restrictions in the exchange agreements came under strong attack. For example, Herbert C. Wamsley, executive director of Intellectual Property Owners, Inc., characterized the agreements as "giving private companies monopoly rights in the dissemination of public information."[236]

The PTO responded to the criticism by looking for a way to reduce the effects of the restriction on full access to the automated search system. The first proposal was to collect a surcharge of $30 per hour royalty fee to be paid to the search companies that negotiated the agreements with the PTO. Payment of the fee would have permitted use of enhanced search techniques. The royalty fee would have been in addition to the $40 per hour fee proposed for use of the system.[237]

Commissioner Quigg testified that this solution was "unacceptable to the public" and that the PTO is prepared to terminate the exchange agreements.[238] How this will be done remains to be determined.[239]

The entire trademark automation effort at the PTO illustrates some of the pitfalls of apparent "cost-free" contracts and barter arrangements. The strong public opposition to the restrictions on access agreed to by the PTO demonstrates that permitting an agency to withhold access to an electronic data base while releasing a paper copy is a significant limitation on public access to government information.

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[234] *GAO PTO Report* at 12.

[235] At the hearing, Rep. Glenn English characterized the transaction as "giving away public rights under the FOIA in exchange for computer services that could have been purchased." Hearings at 309.

[236] Hearings at 344. See also id. at 332 (testimony of Guy M. Blynn, executive vice president, United States Trademark Association) ("[T]he public was the loser.").

[237] Hearings at 318 (testimony of Thomas P. Giammo, Associate Director, Information Management and Technology Division. General Accounting Office).

[238] Hearings at 289.

[239] Legislation passed by the House on June 24, 1985, would prohibit much of the activity discussed here. H.R. 2434 would prohibit the imposition of fees for use of patent and trademark search rooms and the use of exchange agreements relating to automatic data processing resources. The report accompanying the bill is critical of the PTO's trademark automation activities. See H.R. Rep. No. 99-104, 99th Cong., 1st sess. (1985). The House bill is pending in the Senate.

B. LIMITATIONS ON NONCASH ARRANGEMENTS

Legal and economic restrictions on government information make it difficult for agencies to enter into noncash contracts and barter arrangements with respect to information. First, because agency data bases are in the public domain, the data bases have little market value and cannot be bartered for valuable services unless restrictions can be imposed. The SEC recognized that it could not extract any value from its data and now appears willing to pay for the services that it needs.

The PTO faced the same decision and made the wrong choice. The PTO agreed to impose access restrictions and costs on others in exchange for free services. The exchange agreements negotiated by the PTO and the access restriction that they impose violate the spirit of the Freedom of Information Act and the Copyright Act, and the agreements may well be in violation of the letter of the law as well.[240]

The PTO placed too much importance on avoiding the expenditure of funds. While saving money is important, self-sufficiency cannot be an agency's primary objective when establishing electronic information systems. Before entering into any barter agreements or other contracts for electronic information systems, agencies must be certain that they have fully met their obligations to make information public.

Second, regardless of legality, when an agency's internal use of a data base is not affected by access restrictions, the agency may not have enough of an interest to represent fairly the public's interest. This was the case with the PTO exchange agreements. The PTO did not care what type of restrictions were imposed on the public. Once its own automation needs were met, the PTO paid no attention to the public's needs or to the agency's legal obligation to make agency records available.

This is a potential problem in any type of exchange agreement involving information. An agency contemplating any type of barter or other contractual arrangement that affects the rights of either the public at large or an identifiable user group should provide maximum public notice of the terms well in advance of any final action by the agency. Affected parties must be given the opportunity to represent their own interests.

Third, barter arrangements and noncash contracts can result in diminished oversight of agency actions. For example, an agency may decide that activities that do not require expenditures of funds are exempt from the congressional authorization process. A dispute of this type has arisen over the SEC's plans for its EDGAR system.

During the time when the SEC was still planning for a no-cost contract for EDGAR, it appeared that the Commission felt that it did not need specific congressional authorization. The House Energy and Commerce Committee had a different point of view. In the report accompanying the 1985 SEC authorization bill, the Energy and Commerce Committee wrote:

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[240] See notes 229-230.

> Statutory authorization by Congress is essential for all Commission actions having a substantial impact on registrants and the public, especially where the proposed action is of questionable legality without such authorization. The authorization process removes legal obstacles while providing an opportunity to develop support and input from Congress and the public before an important new system involving radical change is put into place. The committee's intention is that the EDGAR system must be specifically authorized by statute, and that no specific authorization for it presently exists beyond the pilot project contract.[241]

The views of the Energy and Commerce Committee on the importance of and need for congressional authorizations are well-stated, and this committee concurs. Electronic information systems are major undertakings and should be carried out with ample notice to and appropriate approval by the Congress.

A different type of oversight issue arose in connection with the trademark automation efforts of the Patent and Trademark Office. General administrative oversight of the procurement of data processing equipment and services by Federal agencies is conducted under the provisions of the Brooks Act.[242] That act vests central authority in the General Services Administration for the procurement, maintenance, operation, and utilization of ADP equipment by Federal agencies.

The General Accounting Office found that the PTO's exchange agreements were contracts for the procurement of commercial automated data processing support services within the meaning of the Brooks Act.[243] The PTO did not consider its exchange agreements for computerized data processing products and services to be subject to the provisions of the Brooks Act and failed to comply with the act's requirements. The GAO concluded that for two of the three agreements, the PTO did not obtain "maximum practical competition" as required by the relevant regulations.[244] The committee concurs with the legal and factual conclusion of the General Accounting Office.

The PTO's failure to comply with applicable procurement law—and the consequences of that failure—show the need for oversight of procurements in support of electronic information systems.[245] In order to ensure that systems are established in a fair, economical, and orderly fashion, agencies must make certain that there has been adequate advance notice to the Congress, potential contractors, the user community, and the public at large, and that there must be in full compliance with laws regulating the acquisition of

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[241] H.R. Rept. 99-155, 99th Cong., 1st. sess. 9, (1985) (report to accompany H.R. 1602). In February 1986, the SEC proposed legislation to authorize the EDGAR system. It appears that the SEC now accepts the need for formal legislation authorization for EDGAR.

[242] 40 U.S.C. § 759 (1982).

[243] Letter from GAO General Counsel Harry R. Van Cleve to Rep. Jack Brooks (Mar. 13, 1985) (B-217448).

[244] *GAO PTO Report* at 6.

[245] The House Judiciary Committee approved a bill that specifically included a provision intended to insure that the PTO will fully comply with the Brooks Act in the future. See. H.R. Rept. No. 99-104, 99th Cong., 1st sess. 7 (1985) (report to accompany H.R. 2434).

automated data processing equipment and services, including requirements for competitive procurements.[246]

IX. Government Competition With the Private Sector

There is little disagreement about the general importance of information availability to the American way of life. Many will concur with the statement of Joseph W. Duncan, former Chief Statistician in the Office of Management and Budget, presented on behalf of the Information Industry Association:

> The ability of our citizens to access information about our government has a direct bearing on their participation in the democratic process. Equally important is their ability to access all other types of information, information that has a direct bearing on the quality of life our citizens enjoy.[247]

There is considerably more controversy over the way in which information products and services should be offered or provided to the public. The main dispute is the extent of the Federal Government's role in providing for the dissemination of information.

A. COMPETITION AND ELECTRONIC INFORMATION SYSTEMS

The growing private sector information industry is anxious not only to expand its offering of information products and services, but also to restrict the Federal Government from offering information products and services deemed to be in competition with the private sector. Pressure from the private sector is growing because its role in the development and marketing of information products and services is accelerating. According to the Information Industry Association:

> Technological changes have brought about an ever-expanding number of new users of information products and services and the resultant marketplace considerations have led to the development and rapid growth of a private sector information services industry.[248]

For the Federal Government, however, the collection, compilation, and dissemination of information remains an important, necessary, and continuing function.[249] The specific statutory responsibilities of Federal agencies to make information publicly available are many and varied.[250] Government agencies are and will continue to be providers of information and information services.

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[246] In December 1985, the PTO announced plans for converting some of its exchange agreements to procurement contracts through competitive solicitations or assistance instruments. The agency also announced a formal policy for barter agreements. See 50 Fed. Reg. 49980 (Dec. 6, 1985).

[247] Hearings at 156.

[248] Id. (testimony of Joseph W. Duncan).

The history of the Information Industry Association itself provides evidence of the dramatic growth of the information business. The IIA—which represents companies involved in all aspects of the collection, storage, processing and distribution of information in the commercial marketplace—has grown to nearly 400 members since its founding in 1968. Id.

[249] Cf. *OMB Circular A-130* at § 7a ("The Federal government is the largest single producer, consumer, and disseminator of information in the United States.").

[250] See, e.g., text accompanying notes 22-39.

Competition between the private sector and the Federal Government is the market for goods and services is not new.[251] However, the conflict over information products and services is particularly acute for several reasons.

First, information—and especially information generated by the government—can have a direct influence on the political system. For this reason, the Federal Government's role with respect to some categories of information has been carefully defined. For example, the ability of government to regulate the dissemination of information has been limited by the First Amendment to the Constitution and the Copyright Act.[252] In other instances, such as with the census,[253] the government has been given a specific responsibility to collect and disseminate information with both political and economic significance. Competition with the private sector over this category of data is inevitable.[254]

Second, the conflict over competition for information services is heightened by electronic information systems. A system that an agency installs to meet its own internal administrative needs can, sometimes with little additional effort or expense, provide others with increased access and data manipulation capabilities. Services that were once not available at all can now be provided by the government. Services that were formerly offered by the private sector at high prices can be offered at low cost by Federal agencies.

One effect of the new capabilities of electronic information systems is that agencies are able to increase activities that compete with private sector information companies. Pressures to generate revenues or to share data may prompt agencies to expand their functions into areas that were previously left exclusively to the private sector or where the boundary lines are less clear.[255]

Sometimes, it can be relatively easy to identify those information services that belong at either end of the scale. There are some information services that the Federal Government is prohibited from offering either by law or by policy, and these services are offered exclusively by the private sector. The most obvious examples include newspapers and other news distribution services.

There are some information services that are inherently governmental. Even the Information Industry Association concedes that "the government has long had—and will continue to have—a host of legitimate information functions."[256] Some Federal agencies, such as the Securities and Exchange Commission, exist primarily to further the public dissemination of data.[257]

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[251] See, e.g., *Should the Federal Reserve Offer Electronic Funds Transfer Services:* Hearing before a subcommittee of the House Committee on Government Operations, 97th Cong., 1st sess. (1981).

[252] See text accompanying notes 84-91.

[253] U.S. Const., art. I, § 2, cl. 3.

[254] Some information policies foster an expanded role for the private sector while, at the same time, other policies inhibit private sector activities. These differing effects result because avoiding government competition with the private sector, while important, is not a preeminent policy goal.

[255] The point here is similar to one made earlier with respect to copyright. Electronic information systems can result in changes in structure and not simply degree. For example, electronic information systems may have the effect of permitting agencies to exert a copyright-like control over public domain data, a type of control that is virtually impossible to exert when the data is not maintained electronically. See text accompanying notes 111-153.

[256] Hearings at 156 (testimony of Joseph W. Duncan).

[257] See note 26.

The difficulty is not in identifying the extremes but in finding the middle. There are no simple principles that can be applied with certainty to every information product or service or to every electronic information system. The best that can be done is to identify the factors to consider in determining whether an information activity is appropriate for a government agency or should be left for the private sector.[258]

B. DRAWING THE LINE: OTHER EFFORTS

Attempts have been made to define when it is appropriate for the government to disseminate government information products or services. While none of the formulas that has been proposed offers much assistance, a review of these attempts provides some insight into the problem.[259]

In the 1960's, the Agriculture Department established a service that permitted the public to access directly a departmental news service. The initiation of the service was challenged in court by a private company in the business of disseminating agricultural information.[259] The company alleged that the service was not authorized by statute but the court found ample authority in existing law.[260]

The company also alleged that unlawful and unfair competition by a government agency with a press entity violated the First Amendment and that the government had not demonstrated the necessary compelling interest to override the abridgement of the company's rights.[261]

The court dismissed this argument as well, showing little sympathy for the detrimental effects of the government service on the private company's business:

> The government is increasing, not limiting, the flow of information. The first amendment profits from this sort of governmental activity. Any economic loss suffered by appellant occurs because P.A.M. need no longer serve as a *re*-transmitter of government information. If P.A.M. performs a valuable press service through offering additional items

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[258] A disinction needs to be made between the issue of whether the government should offer an information product or service and *how* the product or service should be offered. The focus here is on whether the government should undertake an information activity or should leave it to the private sector. This is the first question to be asked with respect to an information product or service.

Only after it has been determined that the government has a proper role does the question of how to do it arise. Here too, there can be a dispute over the proper role for the private sector. For example, an agency might operate its own computer system or might contract with a private company to operate it. While this level of private sector involvement on the operational side is also important, it is a secondary inquiry.

See also *OMB Circular A-130* at app. IV, part 3, § (11)(a). The OMB makes this same distinction, noting that after agencies have made a decision to disseminate information, they must satisfy conditions regarding the manner of dissemination. These include a consideration of the advantages of contracting for service.

[259] *P.A.M. News Corporation* v. *Butz,* 514 F.2d 272 (D.C. Cir. 1975). This case began in 1963. The decision cited here is the second issued by the Court of Appeals during the course of the litigation.

[260] 514 F.2d at 278. The court cited two statutes, including the general departmental authority to "acquire and diffuse . . . useful information on subjects connected with agriculture." 7 U.S.C. § 2201 (1982). None of the statutes cited by the court referred to dissemination of information electronically or to any other type of dissemination method.

[261] 514 F.2d at 276.

> of news and analysis, it will succeed and thrive in the marketplace.[262]

This case suggests that government activities increasing the public availability of information are likely to be viewed with favor. Constitutional challenges to new government information services will probably be hard to raise.[263]

A different approach to defining the role of the government comes from a 1982 report of a National Commission on Libraries and Information Science task force on the interaction between the public and private sectors in providing information services. The third principle adopted by the NCLIS task force proposed a "compelling reasons" standard for judging government information activities:

> The Federal Government should not provide information products and services in commerce except where there are compelling reasons to do so, and then only when it protects the private sector's every opportunity to assume the function(s) commercially.[264]

What are "compelling reasons"? The task force admitted that it did not know. The phrase was used—

> precisely because the task force was unable to agree on what would be universally applicable rules for deciding when the Federal Government should or should not engage in an activity.[265]

The report continues with further "explanation":

> The point though really is that the choice of terms is not the material issue. It is the process by which the decision is made. The term "compelling reasons" was used precisely because it so clearly begs the question without setting out some implied basis for the decision. At the least, the term makes it clear that the answer will always be found in a process, not in a catch phrase.[266]

If for nothing else, the NCLIS task force report is admirable for its honesty on this point. The task force did not have the answer and admitted it. The report did, however, expand usefully on its concept of a "process" for evaluating when compelling reasons exist. Four recommendations called for advance notice of agency plans to market an information product or service, independent review within government, preparation of an "information impact and cost analysis," and periodic review of existing government information activities.[267]

More recently, the Office of Management and Budget attempted to provide agencies with similar general guidance on government

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[262] 514 F.2d at 278 (original emphasis).

[263] A constitutional challenge to a State-sponsored information service was successfully made in *Legi-Tech* v. *Keiper*, 766 F.2d 728 (2d Cir. 1985), but the challenge was to the discriminatory way in which the service was offered and not to the State's authority to offer the service. See text accompanying notes 15–18.

[264] *NCLIS Task Force* at 43.

[265] Id. at 44–45.

[266] Id. at 45.

[267] Id. at 65.

information dissemination activities. In December 1985, OMB issued a circular on management of information resources.[268] The stated purpose of the circular was to provide a general framework for management of Federal information resources.[269]

The policy section of the circular specifically addresses information dissemination, calling on agencies to—

> Disseminate such information products and services as are:
> (a) Specifically required by law; or
> (b) Necessary for the proper performance of agency function, provided that the latter do not duplicate similar products or services that are or would otherwise be provided by other government or private sector organizations.[270]

OMB proposes two standards for information dissemination activities, but each raises as many questions as it answers. When is a dissemination activity "specifically required by law?" Many agencies have very general statutory responsibilities to disseminate information.[271] It is not always apparent from a statute whether a specific dissemination program is required or is simply authorized. Under a generous interpretation of such statutes, all dissemination programs might be "specifically required." A closer reading might include only those publications or dissemination programs specifically identified by statute. The first interpretation is probably too broad and the second too narrow. In other words, it is not really clear how the circular's "specifically required by law" standard should be applied.[272]

The circular also allows dissemination that is "necessary for the proper performance of agency functions" provided that there is not duplication of products or services that "would otherwise be provided" by others. No definition is provided for the key concept of "necessary for the proper performance of agency functions." The accompanying analysis[273] states that each agency head must clarify the nature of the agency's dissemination obligations, but this is not of much use in interpreting the language of the circular.

The deference in the circular to private sector information activities is quite broad. Agencies cannot duplicate products or services that "are or would be" offered by the private sector. The draft circular was more direct in that it explicitly prohibited agencies from offering products and services that "could reasonably be expected

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[268] *OMB Circular A-130.*

[269] 50 Fed. Reg. 52730.

[270] *OMB Circular A-130* at §8a(9). A draft of Circular A-130 was published for comment in March 1985. The second clause of paragraph nine in the draft permitted dissemination by an agency when—

> "Dissemination is essential to the agency's accomplishing its mission, and the products or services do not duplicate similar products or services that are already provided by other government or private sector organizations, or that could reasonably be expected to be provided by them in the absence of agency dissemination . . ."

50 Fed. Reg. 10739 (Mar. 15, 1985).

[271] See, e.g., text accompanying notes 22-39.

[272] The discussion in appendix 4 of the circular appears to lean heavily in favor of a broader interpretation. This is probably an appropriate result, but the appendix is not much clearer than the text of the circular. *OMB Circular A-130* at app. 4, part 3, § 8a(1) & (2). See also letter from Rep. Glenn English to Douglas Ginsburg, Administrator for Information and Regulatory Affairs, Office of Management and Budget (May 15, 1985) (commenting on draft circular) reprinted in Hearings at app. 7B [hereinafter cited as "*English Comments*"].

[273] *OMB Circular A-130* at app. 4, part 3, § 8a(1) & (2).

to be provided by [the private sector] in the absence of agency dissemination."[274] However, there seems to be little, if any, real difference between the draft and the final circular on this issue.

The circular appears to establish avoidance of competition by Federal agencies as a primary goal of government dissemination policy. While the language of the final circular is less pointed than that of the draft, the policy is basically the same. Only when there is no possibility of competition would agencies be able to carry out information activities that are necessary for the proper performance of agency functions.[275]

Agencies would not be allowed to begin—or perhaps even to continue—any information dissemination functions if a private company were offering the same service or if a private company could be expected to offer the service. Agency information activities might be required to change as private sector companies chose to enter or to exit specific information markets.

Exactly how this is supposed to work is unclear. Suppose an agency provides public access to tariff files as a necessary part of the performance of its function. Suppose further that a private information service offers access to tariffs of the 10 largest carriers. Would the agency be required to forgo allowing public access to that subset of tariffs? The same troublesome type of question can be asked with respect of any subset of information or to any information service.[276]

It is not easy to establish a realistic general standard by which to measure the necessity or appropriateness of the diverse information products and services that are or can be offered by government agencies.[277] In the end, the OMB dissemination standard does not offer any more helpful guidance than the "compelling reasons" standard of the NCLIS task force.

There is, however, a notable similarity between the OMB effort and that of the task force. Both propose procedures for reviewing agency decisions regarding the dissemination of information products and services. This idea is considered in the next section.

C. PROCEDURAL RESPONSES

There is no magic concept or phrase that will unambiguously identify inappropriate agency information activities. There are too many differences between agencies, programs, information systems, private sector services, and user communities to expect that a single test can be applied to all. The NCLIS task force was right when it proposed to focus attention on the decisionmaking process rather than the standard to be applied.[278]

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[274] 50 Fed. Reg. 10739 (Mar. 15, 1985).

[275] Not surprisingly, the Information Industry Association was pleased with the draft OMB proposal. See Hearings at 158 (testimony of Joseph W. Duncan). The American Library Association was critical of OMB's proposed policy. Id. at 144-46 (testimony of Francis J. Buckley, Jr.).

[276] See also *English Comments*.

[277] Even the OMB circular includes alternate language. Having carefully set out a new standard for dissemination programs as noted above, the analysis accompanying the circular also states: "When agencies determine that information dissemination functions are inherently governmental, the agencies themselves should carry out the activities." *OMB Circular A-130* at app. IV, part 3, § 8a(11)(b). It is unclear how the "inherently governmental" standard meshes with the "necessary for the proper performance of agency functions" language.

[278] See text accompanying notes 264-267.

The draft circular proposed that agencies establish procedures for periodically reviewing the continued need for dissemination services.[279] Many of those who commented on the draft suggested that agencies provide adequate notice and opportunity for public comment before terminating information products and services.[280]

The final circular retained the requirement of periodic review [281] and added a requirement that agencies—

> Disseminate significant new, or terminate significant existing, information products and services only after providing adequate notice to the public.[282]

The accompanying analysis included the following explanation of the purpose of the notice and comment requirement:

> Because many government information activities are important to the government and the public, agencies must exercise care not to act capriciously with respect to information products and services. When agencies intend to commence offering new products or services, they should provide adequate advance notice so that the public may comment as to the need for the product or service. For example, if private sector interests believe they are already offering or are about to offer the same or a similar product or service—in which event the government may potentially be entering into unfair competition—such notice will allow these interests to present their case before the product or service is launched. By the same token, if many members of the public greatly depend on a particular product or service, they should be permitted to voice their views to an agency that is contemplating termination of the product or service.[283]

By requiring public debate on information dissemination issues, it is more likely that a proper result will be achieved in most cases.[284] In those instances where there is no clearly correct answer, the result will be determined through the application of law, policy, and the political process. This is a traditional way of

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[279] 50 Fed. Reg. 10740.

[280] 50 Fed. Reg. 52733 (Dec. 24, 1985). See, e.g., *English Comments* ("I recommend that OMB require agencies to use a notice and comment procedure prior to making any decision to terminate a dissemination program. Notice should include publication in the Federal Register as well as specific notification to known subscribers, users of the services, and appropriate congressional committees. It would also be appropriate to require agencies to provide advance notice of proposals to establish new dissemination systems."). See also Hearings at 17 (testimony of Francis J. Buckley, Jr., American Library Association) ("I think that a public review process that require(s) notice to the public regarding the possible elimination of either an information collection activity or a dissemination activity would allow for a broader input of information regarding the use and reuse of the information and the need for it.").

[281] *OMB Circular A-130* at § 8a(12)(a).

[282] Id. at § 8a(10).

[283] Id. at app. 4, part 3, § 8a(10).

[284] Public debate can be instrumental in influencing decisions about information systems. For example, a proposed Department of Commerce information system known as WITS (Worldwide Information and Trade System) was killed after a 3-year fight in the early 1980's due in part to opposition from private sector information companies offering a similar service. See *Government Provision of Information Services in Competition with the Private Sector:* Hearing before a subcommittee of the House Committee on Government Operations, 97th Cong., 2d sess. 39–53 (testimony of Robert S. Willard, vice president, government relations, Information Industry Association) [hereinafter cited as *"1982 Government Competition Hearings"*].

resolving public policy problems that do not lend themselves to other types of solutions.

It will be difficult to avoid reaching at least some inconsistent results. For example, newly proposed information services are likely to be scrutinized more than existing services. Terminating longstanding government information products or services may be difficult to achieve. An example is the National Library of Medicine's Medlars service.[285]

Questions have been raised in the past about whether it is appropriate for a Federal agency to be offering the type of computerized medical bibliography services provided by the NLM.[286] No action was taken to terminate Medlars, and none is proposed here. As a practical matter, a service like Medlars that has been offered for 20 years is too much of a fixture to be terminated casually.[287] Some of the pricing and access policies of Medlars are criticized in this report,[288] but changes in those policies will not entail ending the service. Proposals by Federal agencies to initiate similar types of information services will be and should be carefully scrutinized. Formal notice and comments procedures—such as those adopted in the OMB circular—will assure that there will be adequate public debate about new government information services.

D. FAIR COMPETITION BY GOVERNMENT AGENCIES

Asking whether a Federal agency should be disseminating information is, at times, too broad an inquiry. There are many types of dissemination functions that the government does and should undertake. Just because the government is properly disseminating information, however, does not mean that questions about competition with the private sector do not arise.

An agency that establishes an electronic data system will typically incorporate for its own internal use many different services beyond simple retrieval of data. As the designer of its own data system, an agency has to decide how much of a role it should play in making the system and its capabilities available to other users. Because the marginal cost of providing public services may be low, agencies may be tempted to offer additional services.

An agency should take care not to exploit the power that is inherent in electronic data systems by providing a nonessential service to the public simply because the capability to provide the service exists. This does not mean that an agency must avoid all possible competition with the private sector. Rather, an agency that unavoidably competes with the private sector in offering information products and services must compete fairly. Fair competition means that an agency should limit the services that it offers to the public

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[285] The Medlars system is described elsewhere in this report. See text accompanying notes 40-41.

[286] See *1982 Government Competition Hearing* at 39-69 (testimony of Robert S. Willard, vice president, government relations, Information Industry Association, and Allan Fox and Peggy Miller, Kaye, Scholer, Fierman, Hays & Handler).

[287] The major private competitor to Medlars has even recently made peace with the NLM. See letter from Otto ter Haar, chairman, Elsevier Science Publishing Co., to Reps. Glenn English and Thomas Kindness (Nov. 18, 1985) ("Joint public and private sector efforts to develop new information products and markets will help spur growth in the information industry in general and will promote the development of new and innovative information products.").

[288] See text accompanying notes 111-153.

and should leave the private sector to provide additional value-added services.

When an agency replaces public, hard-copy, records with a computer information system, the agency should provide public access to the electronic data in order to continue meeting its statutory dissemination responsibilities. For example, the Securities and Exchange Commission's EDGAR system proposes to eliminate paper filings altogether.[289] Public access to the SEC's electronic data base must be provided in order to carry out the agency's mission.[290] Meeting the SEC's public access responsibility through EDGAR may result in some competition with private sector information services. But the competition is unavoidable because the information service must be provided in order to fulfill the statutory role of the SEC.

EDGAR will also give the SEC the capability to perform analyses of financial data.[291] But the SEC has no plans to provide value-added analytical services to the public.[292] This, too, is a proper result. The SEC's job is to support public dissemination of financial information and not the analysis of that information. The private sector is capable of providing analytical services to the general public and any offering of such services by the SEC would be unnecessary and unfair competition.

An agency's obligation to allow the public reasonable use of an electronic data base will typically entail some upgrading of the public's ability to access, copy, and manipulate data.[293] An electronic information system can be worthless without the availability of reasonably sophisticated search capabilities. It would be unreasonable, for example, for the SEC to allow the public to use EDGAR only as an electronic page-turner on the grounds that this service duplicated the type of access now provided to paper records.[294] A value-added search service is integral to the operation of a computerized data base.

The same type of analysis can be made with other services that electronic information systems are capable of providing as an adjunct to a basic search package. For example, an agency computer system might be capable of offering public users space in the computer's memory for storage of user generated information. Such value-added service would normally be too remote and unrelated to an agency's dissemination responsibilities to justify the offering of the service. An agency should not "rent" computer storage just because it has the ability to do so.

Similarly, an agency computer system might be capable of providing an electronic mail service between public users of the system. Again, this type of service would also appear to be too remote to an agency's function, and an agency would be hard pressed to justify efforts to support private communications. If there is a demand for electronic mail services, the private sector

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[289] See text accompanying notes 65–71 for a discussion of related "paper" issues.
[290] See text accompanying notes 42–46.
[291] See Hearings at 27 (testimony of SEC Chairman John S.R. Shad).
[292] Value-added services will be offered only by private sector vendors. See id. at 54.
[293] See text accompanying note 56.
[294] See the criticism of the Patent and Trademark Office for agreeing to artificial limitations on search capabilities for the automated trademark system at text accompanying note 54.

The request was denied. None of the nine FOIA exemptions covers the Medlars data base, and the court relied on the unusual determination that the Medlars tapes were not agency records within the meaning of the FOIA and that the tapes were therefore unavailable through an FOIA request.[135]

This holding that Medlars tapes are not agency records is clearly incorrect. The Medlars tapes contain information compiled by a government agency under specific statutory authority and with the use of appropriated funds. When the tapes are sold to users, the revenues are turned over to the Treasury as miscellaneous receipts.[136] Under these circumstances, it is impossible to support the conclusion that the records are not agency records.[137]

It is apparent that the court found the tapes not to be agency records in order to support a result that it felt was justified on grounds that are not specifically recognized by the FOIA. The court was concerned that release of the tapes under the FOIA would substantially hamper the operations of the NLM. The key paragraph of the decision states:

> Here the agency is not seeking to mask its processes or functions from public scrutiny. Indeed, its principal mission is the orderly dissemination of material it has collected. The agency is seeking to protect not its information, but rather its system for delivering that information. Congress specifically mandated the agency to prepare this system and hold it as its stock in trade for sale to the public. As such the system constitutes a highly valuable commodity. Requiring the agency to make its delivery system available to the appellants at nominal charge would not enhance the information gathering and dissemination function of the agency, but rather would hamper it substantially.[138]

The committee's record provides no support for the court's conclusion that a nominal charge for the tapes would not enhance the NLM's information gathering and dissemination function. Dr. Lindberg was asked about the effect of higher and lower fees on information gathering and dissemination and basically responded that the only effect would be on revenues:

> Mr. ENGLISH. Do higher fees for the tapes enhance NLM's information gathering and dissemination function?
>
> Dr. LINDBERG. Were they to be higher than they are now, I would say no, they were not.

In this instance, Dr. Lindberg told the Subcommittee on Government Information, Justice, and Agriculture that all of the costs of preparing the data base are paid out of appropriated funds and that users are only charged the cost of supporting dissemination. See note 117 and text accompanying note 115.

[135] 542 F.2d at 1120.

[136] Hearings at 284 (testimony of NLM Deputy Director Kent Smith).

[137] Other decisions have clearly held that computerized records—whether stored in a central processing unit, on magnetic tape, or on some other medium—remain agency records for purposes of the FOIA. *Yeager* v. *DEA*, 678 F.2d 315 (D.C. Cir. 1982); *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979). *Long*—a case with a very lengthy history—was decided by the same circuit court that decided *SDC* v. *Mathews*. In *Long*, however, the court appeared to shy away from its earlier holding in *SDC* by characterizing the holding as based "solely on the nature of the information contained in the tapes." 596 F.2d at 365.

[138] 542 F.2d at 1120.

> Mr. ENGLISH. Would lower fees substantially hamper that function?
>
> Dr. LINDBERG. Well, it would mean that the overall costs would have to be made up in some other fashion. I suppose.[139]

In fact, there is no reason to believe that lower user fees would have any effect on the information gathering function of the NLM. Information dissemination, however, should be *positively* affected. Common sense suggests that a lower price would permit more people to use the information. This would enable the agency to do a better job of carrying out its statutory responsibility to "aid the dissemination of scientific and other information important to the progress of medicine and to the public health."[140]

The court also found that "[c]ontractual relationships with various organizations, designed to increase the agency's ability to acquire and catalog medical information, would be destroyed if the tapes could be obtained essentially for free."[141] Dr. Lindberg was also questioned about this:

> Mr. ENGLISH. How do the fees affect NLM's contractual ability to acquire and catalogue the medical information?
>
> Dr. LINDBERG. Probably the simplest single word answer would be not at all, none, nil . . . .[142]

Here too, the committee's hearing provides no support for the court's findings. Instead, the record supports the opposite conclusion.

On the question of the effect of fees on the NLM's contractual ability, Dr. Lindberg did go on to explain an "additional wrinkle." Noting that some of the Medlars data bases are obtained from commercial sources and that these data bases are copyrighted, Dr. Lindberg stated:

> Since [these other data bases] are copyrighted and commercial, we have the obligation to pay for that use and to pass along to our users those charges.
>
> So, the cost structure in that case, is not totally in our hands, it has to be at least enough to recover those costs which we are obliged to pay to the information provider.[143]

On this issue, Dr. Lindberg raises a reasonable concern. There are some privately owned information distributed through Medlars,[144] and some private rights may be affected. But there is no nexus between these private rights and any requirement that federally compiled data bases be sold at a high price or that further dissemination of these Federal data bases be prevented.[145] There are surely other distribution arrangements that could protect pri-

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[139] Hearings at 285.
[140] 42 U.S.C. § 275 (1982).
[141] 542 F.2d at 1120.
[142] Hearings at 285.
[143] Id. at 286.
[144] See *NLM Tape License Agreement* at clause 3a.
[145] See *Nimmer on Copyright,* supra note 84.

vate interests in copyrighted data without restricting public domain Federal data.

The testimony before the committee demonstrates that none of the NLM's substantive information operations is affected by the amount of fees charged. The court's decision permitting the NLM to continue charging higher fees did not protect any important function of the NLM. What was really at stake in the court case—and what would really be affected by the lower fees of the FOIA—is the amount of revenue generated by the NLM through Medlars.

Would lower revenues interfere with the operations of the National Library of Medicine? Dr. Lindberg was asked at the hearing about the importance of revenues to NLM's mission. He responded that generation of revenues was not part of NLM's basic mission.[146]

The committee concludes that the decision of the court in *SDC* v. *Mathews* is incorrect both as a matter of law and as a matter of policy.[147] The court misunderstood the statutory role of the NLM, misread the FOIA, and failed to consider the Copyright Act and the significance of the policy against restrictions on dissemination of government information. The court apparently thought that it was deciding a question about revenues when the real issue was one of controlling government information.[148]

The decision of the court is the linchpin of the NLM's ability to control the Medlars data base. Dr. Lindberg was asked at the hearing how NLM's operations would be affected if the decision were reversed. His response was that "it would change things radically." [149]

But Dr. Lindberg offered no explanation of how the NLM's ability to carry out its mission would be changed. Instead, he indicated only concern about how such a result would interfere with the NLM's ability to review how the data was being used:

> We would not wish to be operating in a circumstance in which anybody could take a tape for some trivial amount of money, initiate a service which we weren't aware of, couldn't monitor, couldn't guarantee, and produce a service that said National Library of Medicine, and yet wasn't true, wasn't correct, wasn't up to date.[150]

While Dr. Lindberg's concerns are sincere, the dangers that NLM's data will be misused in any significant way are minor. Any information can always be used in some way that may not have been intended by its creator. This possibility does not justify government control over public domain data.

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[146] The full text of the exchange is:

Mr. ENGLISH. With regard to how the fees relates to NLM's mission, does NLM's mission include making a profit through the sale of the tapes themselves? Is that an objective? You are talking about returning the money to the Treasury. Is this part of the overall objective?

Dr. LINDBERG. No, NLM's basic mission is to acquire, organize and disseminate biomedical information.

Hearings at 285.

[147] The proper role of user fees in the dissemination of government information products and services is discussed later in this report.

[148] For another example of how reliance on *SDC* v. *Mathews* leads to undesirable results, see note 229.

[149] Hearings at 287.

[150] Id.

The committee is concerned that the model of information control established by the NLM might be used elsewhere in government.[151] Other data maintained in Federal Government electronic information systems might also become subject to similar restrictions. Controls that may be intended to prevent unfairness or misquoting might also be used to prevent uncomplimentary use of data, censor information, or hide documents.[152]

These powers have always been denied to government. Proposals to give the government copyright controls over information have been made in the past and have been rejected by the Congress.[153]

The real danger is the possibility that, in establishing electronic information systems, Federal agencies might also acquire copyright-like controls over public information. Since such controls are not a necessary feature of these systems, there should be no difficulty in achieving the benefits of new information technology without any increase in government dissemination restrictions.

VII. User Fees

A general policy of charging fees to some users of government products and services is well established. There are several factors, however, that make it difficult to determine how to apply general user fee policies to the distribution of government information. These factors include statutory requirements that Federal agencies maintain public access to government information,[154] the limitations that result from the prohibition against copyright of government information products,[155] the peculiar nature of information as an economic good,[156] and the uncertainties of the user fees policies themselves.

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[151] A recent district court decision raises some of the same issues that are presented by *SDC* v. *Mathews*. In *Dismukes* v. *Interior*, 603 F. Supp. 760 (D.D.C. 1984), an FOIA requester sought a copy of a computer tape containing a list of names and addresses of the participants in an oil and gas leasing lottery. The requested information was admittedly not exempt from disclosure.

The Interior Department routinely made the list available on microfiche, but it refused to provide a copy of the computer tape. Interior justified its practice on the grounds that microfiche was a format that is more likely to be readily readable by the largest number of requesters. 603 F. Supp. at 762. The denial of the computer tape was upheld by the court.

It is interesting that despite the similarity of this case to the NLM case, the court in *Dismukes* did not rely on *SDC* v. *Mathews*. But it reached the same result through different reasoning. The court did not conclude that the computer tape was not an agency record. It held only that release of the microfiche copy met the legal obligation to "only provide responsive, nonexempt information in a reasonably accessible form. . . ." 603 F. Supp. at 763.

It is not clear that the *Dismukes* court's reading of the Freedom of Information Act is entirely correct. The stakes in *Dismukes* were smaller, and the case involved disclosure of names and addresses, a very troublesome area under the FOIA. Also, there is no significant copyright or revenue issue looming over the decision. Whether these differences justify the result is not clear.

But applied to other types of information, the conclusion of the court in *Dismukes* could be used to achieve the same troublesome result that was reached in *SDC* v. *Mathews*. When dealing with information, distinctions between form and substance are difficult to apply. In many instances, the form in which information is provided makes a great deal of substantive difference to the way the data can be used.

[152] For an eloquent discussion of the evils of government ownership of information, see M.B. Schnapper, *Constraint by Copyright* (1960).

[153] For a useful history of some of these efforts, see note, "A Constitutional Analysis of Copyrighting Government-Commissioned Work," 84 *Columbia Law Review* 425, 426–433 (1984). See also text accompanying notes 104–110.

[154] See text accompanying notes 22–38.

[155] See text accompanying notes 84–91.

[156] See text accompanying notes 92–110.

A. EXISTING USER FEE GUIDANCE

A statute and a 1959 Office of Management and Budget circular set out general policies for establishing fees for government services. Neither of these policy statements was specifically written to deal with the distribution of information or information services, and neither provides much help.

The user fee statute [157] provides generally that "it is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible."[158] Subject to policies set by the President, the head of each agency may prescribe regulations establishing charges for services or products.[159]

The procedural portions of the user fee statute are straightforward, but the substantive provisions are less clear. The statute requires that charges be "fair" *and* based on four factors: Costs to government, the value of the service or thing to the recipient, public policy or interest served, and other relevant facts.[160] The statute contains no ranking of these factors or other guidance on how to weigh them.

Application of these standards is difficult, at best. Consider, for example, the requirements that fees be based both on cost to the government *and* the value to the recipient. The "value to the recipient" standard suggests that fees should be set by looking outside the government at how the product or service will be used. But the "cost to government" standard suggests that fees should be set by considering internal cost. The additional statutory considerations—public policy and other relevant facts—are even more difficult to assess and to apply consistently.[161]

In any event, the earlier discussion of the economics of information suggests that the pricing of information on the basis of value rather than costs is unsupportable in the absence of the authority to copyright information.[162]

The OMB circular is somewhat longer and more specific than the user fee statute. The general policy of the circular is that a "reasonable charge" should be made to each identifiable recipient for a measurable unit or amount of government service or property from which the recipient derives a special benefit.[163]

The circular goes on to state that charges should recover the full cost to the government when a service provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large. Examples in the circular include receiving a patent, crop insurance, a license to carry on a specific business, cer-

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[157] 31 U.S.C. § 9701 (1982). This is a recodification of the language that for many years appeared at 31 U.S.C. § 483a.

[158] 31 U.S.C. § 9701(a) (1982). This general principle does not apply when another law prohibits charges or prescribes a basis for determining charges. Id. at § 9701(c).

[159] 31 U.S.C. at § 9701(b).

[160] Id.

[161] The committee is aware that there is now considerable case law interpreting the user fee statute. The cases are not helpful here because they do not involve the pricing of government information products.

[162] See text accompanying notes 92–98.

[163] Office of Management and Budget, "User Charges" ¶ 3 (Sept. 23, 1959) (Circular No. A-25) [hereinafter cited as *OMB Circular A-25*].

tificate of necessity and convenience for airline routes, a safety inspection of craft, or a passport.[164]

Thomas P. Giammo, Associate Director in the Information Management and Technology Division at the General Accounting Office, testified about the shortcomings of OMB Circular A-25 as applied to information services. He questioned whether providing information meets the test of providing benefits to an identified beneficiary:

> [OMB Circular] A-25 . . . did not have information services in mind when it was written. It seems to primarily address governmental services that are provided to confer a direct, tangible benefit on the recipient. Examples they use are the issuing of patents, issuing of licenses, furnishing of crop insurance, and so forth.
>
> . . . I don't believe access to public information is covered by [Circular] A-25 as something to be legitimately charged for. It doesn't enable the beneficiary to obtain immediate or substantial gains as opposed to the general public, which is a condition required by the circular.[165]

Mr. Giammo's doubts are well-founded. It is not clear how to interpret the circular's special benefit language when an agency is making available information that was being collected in order to carry out a general function.[166]

The circular does provide that no charge should be made when identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadlly the general public.[167] This language could be read to exclude information activities with broad public benefit, but the interpretation is not certain.

This issue was raised at the hearings with the National Library of Medicine. NLM Director Donald Lindberg was asked if the Medlars data base of biomedical research materials—which is compiled using appropriated funds—can be considered to be benefiting broadly the general public. Dr. Lindberg's response was: "Well, at least in a secondary way. I suppose one would have to admit that [the Medlars services] benefit directly those who use them." [168] Dr. Lindberg's answer is both reasonable and reflective of the uncertainty inherent in the circular when applied to information.

Other questions arise when determining the amount of the fee required to be charged under the circular. The paragraph defining costs appears to be very comprehensive, including direct and indi-

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[164] Id. at ¶ 3a(1). None of the examples in the OMB circular involves the distribution of information.

[165] Hearings at 320.

[166] A 1979 GAO report on information management policies found that there was confusion about the OMB circular among agencies and that better guidance was needed on the application of the circular to information services. General Accounting Office, *Better Information Management Policies Needed: A Study of Scientific and Technical Bibliographic Services* 29-30 (1979) (PSAD-79-62).

The committee's hearings document some of this confusion. The National Library of Medicine contended at the same time that its data base operations were not subject to the user fee statute and that some pricing policies would violate that statute. Compare Hearings at 282 (testimony of NLM General Counsel Robert Lanman) with Hearings at 285 (testimony of NLM Director Donald Lindberg). See also *Lindberg Letter.*

[167] *OMB Circular A-25* at ¶ 3a(2).

[168] Hearings at 285.

rect costs; agency overhead; and costs of enforcement, research, establishing standards, and regulation "to the extent they are determined by the agency head to be properly chargeable to the activity." [169] The circular states that the maximum fee is to be determined by the total cost and not by the value of the service to the recipient.[170]

When establishing a user fee for information, it is appropriate to exclude the value of the information to the recipient. The economics of uncopyrighted information appear to compel this result.[171]

However, setting a price for information based on total cost—including the cost of collection—remains unworkable.[172] Without the ability to control secondary distribution of the data, competition will force the price down so that any price based on total cost cannot be supported.[173] Competition in the distribution of uncopyrighted government information should result in a price that reflects only the cost of dissemination (or the cost of access).[174]

This result is consistent with the pricing policies for the Government Printing Office and the Freedom of Information Act.[175] It is also very similar to principles adopted by the NCLIS task force on interaction between government and private sector information activities. The task force adopted the following principle regarding the pricing of government information:

> The Federal Government should set pricing policies for distributing information products and services that reflect the true cost of access and/or reproduction, any specific

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[169] *OMB Circular A-25* at ¶ 5a.

[170] Id. at ¶ 5b.

In contrast, the user fee statute lists both cost to the government *and* value to the recipient as bases for setting fees. See text accompanying note 160. Since the statute does not indicate how to mesh its factors when setting fees, the circular can be considered an administrative interpretation. However, determining that the circular is consistent with the statute does not necessarily mean that the policies in the circular are otherwise suitable for the pricing of government information.

[171] See text accompanying notes 92–98.

For the same reason, another provision of the OMB circular can be eliminated from consideration. The circular mandates that, for the lease or sale of federally owned resources and property, a fair market value should be obtained, with charges based on sound business management principles and in accordance with comparable commerical practices. *OMB Circular A-25* at ¶3b. Since uncopyrighted government information is in the public domain, it is not really a "federally owned" resource. Therefore, the circular can be read as not requiring fair market pricing for information.

[172] At the committee hearings, the strongest proponent of full cost pricing was the Information Industry Association. See Hearings at 159 (testimony of Joseph W. Duncan). The IIA's advocacy of a high price for government information products and services is designed to allow private sector information companies to compete with the government.

However, the IIA does not appear to advocate a consistent policy for pricing. The IIA supports full cost pricing for the National Library of Medicine—where it has members offering competing services—but not necessarily for the Bureau of Labor Statistics or the Census Bureau. The IIA shows little interest in paying full cost for government information used in the creation of private sector information products. See letter from David Peyton, director, government relations, Information Industry Association, to Rep. Glenn English (June 17, 1985) in Hearings at app. 4.

[173] A 1983 OMB paper that discusses the pricing of information products notes that use of full cost recovery pricing by government agencies is "relatively rare." *OMB IRM Incentives Paper* at 6.

[174] A recent OMB paper suggests that market based pricing should be the preferred policy for computer based information resources. But the paper also recognizes several practical problems with implementation of this policy. These problems are very similar to the reasons behind the prohibition against government use of copyright.

The paper notes that where the government is the only supplier of information (such as the population census), it is difficult to assign a market price. Also, the public policy purposes for which records were created may preclude the higher price that might result from market pricing. See *OMB IRM Incentives Paper* at 7.

[175] See text accompanying notes 98–102.

prices to be subject to review by an independent authority.[176]

The new OMB circular on management of information resources reaches a similar conclusion. An accompanying analysis states that Circular A-25 "requires user charges only for costs of dissemination of government information, not for creation, collection, processing, and transmission of the information." [177]

B. ESTABLISHING USER FEES FOR INFORMATION

The conclusion that the price for the distribution of government information should be based solely on the cost of dissemination does not end the discussion. For electronic information systems, what costs should be considered to be dissemination costs and charged to outside users? A typical electronic system entails initial outlays for hardware, software, and data conversion. All of these outlays benefit all users of the information system. How should the costs be shared among users internal to the government and users external to the government?[178]

For this question, no simple, definitive answer can be offered.[179] There are, however, some general principles that help in formulating a policy. For example, a useful distinction can be made between the cost of creating information and operating an information system on the one hand, and the cost of providing information services to public users on the other hand.

In almost all cases, the basic cost of creating and operating an information system are expenses that would be incurred whether or not the system is shared with the public. In fact, with all agency information systems considered by the committee, the primary reason for undertaking computerization was improving internal agency operations. In no instance was improving public access the sole or even the major motivation. Thus, the costs of computerization would have been paid by the agency in the absence of a public access requirement. As a result, it is appropriate that these basic costs should be borne entirely by Federal agencies.[180]

The marginal cost of providing information services to public users is not part of the basic cost of computerization and can be charged to public users. With paper records, an information service might be making a copy of a document. Agencies typically charge for this service or provide copying machines for use by the public

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[176] *NCLIS Task Force* at 51.

[177] *OMB Circular A-130,* Section-by-Section Analysis, § 8a(8)-(12).

[178] It is always assumed in this discussion that any data system under consideration is one that is indisputably required to be maintained by an agency and made available to public users. The issue of whether an agency should offer an information service to the public is distinct from the issue of the amount of fees that should be charged for use of the service. The question of when agencies should offer information services is discussed elsewhere in this report. See text accompanying notes 259-277.

[179] The NCLIS Task Force struggled with the details of cost and pricing and concluded that no consistent formula could be adopted because of the inherent variability of the factors involved. See *NCLIS Task Force* at 51.

[180] A recent OMB paper that considered information pricing policy appears to recognize that this result is likely with what the paper called "computer based information resources" or CBIR. The paper initially suggests that market based pricing is the preferred policy. But as a practical matter, the paper notes that "[g]iven the existence of the completed information collection and internal CBIR's, the added costs to the agency of satisfying the non-Federal sector requests are the costs of putting its internal CBIR's into a publicly releasable form and reproducing them for each request." *OMB IRM Incentives Paper* at 8. See also note 174.

at a fee. Similar charges are appropriate when information services are provided through electronic information systems.

The OMB has suggested that chargeable costs may be "far more than simply copying and mailing a data tape."[181] Absent specific legislative exceptions, the OMB recommends that "the minimum charge to users should be the costs of putting the [computer based information resources] into publicly releasable form, the costs of serving requests, and the costs of reproduction."[182]

This slightly broader concept of costs of public disclosure has been put into practice. For example, at the National Library of Medicine, the agency pays the capital cost of the computer hardware and the cost of building the data base with appropriated funds.[183] Online users of the NLM's computer system pay a fee for use that covers only the marginal costs of providing the service. These costs include telephone line charges, equipment mantenance, computer operations, training manuals, and billing costs.[184]

The NLM's online charges represent one model for charging fees to cover the marginal cost of disseminating information services.[185] The Agriculture Department's electronic dissemination of information program (EDI) offers another model. Public dissemination is handled not by the Department directly but through an agency contractor. The Department compiles data at its own expense and provides a copy to its contractor. The contractor makes the EDI data publicly available using the contractor's computer network. The EDI system is intended to make data available to all interested users on an equitable basis. Users pay a fee to the contractor for its services in disseminating the information.[186]

The main distinction between the systems sponsored by the NLM and by the Agriculture Department is that in one case, the dissemination system is operated by the agency and, in the other case, the system is operated by an agency contractor. But in both cases, charges are for dissemination services only. Agency overhead and costs of information creation are paid by the agencies.[187]

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[181] *OMB IRM Incentives Paper* at 8.

[182] Id.

[183] Hearings at 280 (testimony of NLM Director Donald Lindberg).

[184] Id.

The SEC staff estimated that the communications costs of a typical on-line data base service is usually 20% to 25% of revenues. The cost of processing was estimated to range from 30% to 55% of revenues. Costs of data acquisition were estimated to be anywhere from 15% to 40% of revenues. SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A, p. 377. For Federal information systems, the costs of data acquisition are the costs that should be absorbed by the agency.

[185] The Patent and Trademark Office contends that it is following a similar "marginal cost of dissemination" policy. See Hearings at 309 (testimony of Bradford R. Huther, Assistant Commissioner for Finance and Planning, Patent and Trademark Office). However, the GAO found that the PTO's planned $40 per hour fee includes $10 to $20 worth of general overhead that would have been incurred anyway. See Hearings at 320 (testimony of Thomas P. Giammo, Associate Director, Information Management and Technology Division, General Accounting Office).

The resolution of this factual dispute is beyond the scope of this report. But a comparison of the charges by the NLM and the charges planned by the PTO shows that the PTO's charges are approximately twice those of the NLM. This suggests that the GAO's conclusion is probably well founded. See also text accompanying note 117.

[186] Hearings at 254-55 (testimony of Glenn P. Haney, Director, Office of Information Resources Management, U.S. Department of Agriculture).

[187] The Agriculture Department's contract permits the contractor to make a profit for the use of its computer network but not a profit for the value of the information that was supplied by the Department. See letter from Glenn P. Haney, Director, Office of Information Resources Management, U.S. Department of Agriculture, to Rep. Glenn English (Aug. 9, 1985), reprinted in Hearings at app. 5.

The Securities and Exchange Commission is apparently planning to provide for public dissemination in a different way. Like the Agriculture Department, the SEC plans to use a contractor to serve as an information intermediary. The public would be served by one of a presumed number of information service companies offering the data base.[188]

The SEC would also meet its public disclosure obligations by providing free access to the EDGAR data base through terminals in existing SEC reading rooms.[189] Reading rooms are maintained in Washington, New York, and Chicago.[190]

The SEC's plans for public access to the EDGAR data base through private service companies should result in a price that will be determined in a competitive marketplace. Competition should ensure that the costs to the public will be based on the value of the privately offered information services and not on the value of the publicly supported SEC data base.

The maintenance of free terminals in SEC reading rooms will make access to the electronic data base comparable to the type of access now provided by the SEC to paper documents.[191] These free terminals represent a decision by the SEC to continue to meet its obligation to maintain a basic level of public access. Whether a greater amount of free public access is needed is a decision that must be made by the SEC.

The extent to which any agency must provide free or low-cost access to electronic data bases depends on the agency's statutory responsibilities, the type of data, and the community of users. Some agencies may be able to assure adequate public access to electronic data bases even if fees are required of all users. Other agencies may find it necessary to offer subsidies.[192] In some instances, it may be appropriate for all costs of public access to be paid by the agency. Any decision about free or subsidized access should be evaluated independently of a determination of the appropriate fee for nonsubsidized information services.

A final question must be considered in connection with user fees: Should user fees for agency information systems be viewed as a potential source of revenue for the government? Current policies on user fees already permit charging fees to recover the marginal costs of providing public users with access to government information. This approach is reasonable, appropriate, and consistent with other important objectives. The committee encourages agencies to use current authority whenever appropriate to increase revenues from users of government information systems. There may be a

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[188] Hearings at 57–58 (testimony of SEC Chairman John S.R. Shad).

[189] SEC staff response to Rep. Thomas Kindness (July 25, 1985), reprinted in Hearings at app. 1A, pp. 382–83.

[190] SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A, p. 373.

[191] See, e.g., Hearings at 57 & 62 (testimony of Amy L. Goodman, associate director, Division of Corporate Finance, SEC).

[192] The analysis accompanying the new OMB circular on information resources management states that an agency may have grounds for reducing or eliminating user charges if the charges will constitute a significant barrier to meeting an obligation to place a given product or service in the hands of an identifiable group. *OMB Circular A-130* at app. IV, part 3, § 8a(11)(c).

need to grant some agencies authority to establish revolving funds in order to facilitate the collection and application of user fees.[193]

It is very unlikely, however, that additional revenues can be generated through higher fees. Current policies requiring public access to government records and prohibiting government copyright will not support fees for information products and services that produce revenues higher than the cost of dissemination.[194] This result is a direct consequence of the public purpose of the government's information role.

But for the public nature of the government's information activities, a higher price might be justified. But absent a public purpose for a particular information service, the more likely result is that the government should not be offering the service to the public. Instead, in the absence of a public purpose, the private sector should be allowed to provide any services demanded by information users.

In order to charge a higher price for government data, it would be necessary to change current law in some way. The most obvious alternative would be to grant the government some type of copyright authority.[195]

The consequences of such a change would include: (1) less public access to information that was compiled using public funds; [196] (2) the potential for increased agency control over public information and for greater political manipulation of government data; [197] and (3) increased competition between the government and the private sector for information service revenues.[198] None of these tradeoffs, which involve basic principles of open government and private sector initiative, is especially attractive.

When user fee policies are debated, the consequences of changing current policies must be fully recognized and debated. Current policies limit Federal agencies charging fees for providing access to public information to the recovery of the marginal cost of dissemination. Unless there is a change in these policies, agencies should set and collect fees within the existing framework.

VIII. Paying for Government Use of Electronic Information Systems

Some Federal agencies have been seeking to finance electronic information systems in ways that would minimize or avoid the use of Federal funds for installation and operations. While limiting the use of appropriated funds is a worthy objective, it is unrealistic to expect that the government will be able to acquire significant goods and services without the expenditure of funds. This section explores the vitality of no-cost arrangements for electronic information systems, the hidden aspects of such arrangements, and their consequences for the government and for others.

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[193] The NLM uses the National Technical Information Service to market Medlars services to the public in part because the NLM does not have "the necessary revolving fund mechanisms." *Lindberg Letter.*

[194] See text accompanying notes 171–174.

[195] Such a change was considered and rejected in 1976. See note 88.

[196] See text acompanying notes 92–98.

[197] See text acompanying notes 13–15.

[198] See generally chapter IX.

A. AGENCY ACTIVITIES

Agencies are considering or actually employing different methods to acquire the use of electronic information systems without cost. Perhaps the most influential no-cost proposal was made by the Securities and Exchange Commission for its EDGAR system.[199]

SEC Chairman Shad testified in April 1985 that there were three alternative sources of revenue for EDGAR: Appropriated funds, filer fees, and user fees. Noting that appropriated funds were scarce and that filers already make a substantial contribution through existing fees, Shad concluded that end users of EDGAR were an appropriate source of funding because they "will be the primary beneficiaries of the operational system."[200]

As originally proposed, the SEC envisioned that a contractor selected by the SEC would spend $63 million in private funds over a 7-year period to establish and operate the system.[201] This includes at least $13.5 million to cover SEC internal processing costs.[202] The SEC planned to provide no Federal funds to support EDGAR during this period, although the SEC did spend at least $9 million of appropriated funds in developing the EDGAR pilot.[203] The hardware and software developed for the pilot would be made available to the operational contractor.[204]

The idea of establishing a $63 million information system without cost and of obtaining millions of dollars of free services is as attractive as it is unrealistic. What does the SEC have to offer that would make such an investment worthwhile to a private contractor? The SEC's response:

> The principal benefit to be given the contractor is the exclusive right to wholesale the SEC filing data base. The contractor will also be allowed to compete in the retail, value-added market.[205]

How much this benefit is worth is debatable. There will be no restrictions on use of the EDGAR data base by any person. As a result, the agency contractor will have to compete with other information vendors in the retail market.[206] There is no reason to believe that the contractor would have a competitive advantage at the retail level that would justify a large investment.[207]

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[199] An outline of the original no-cost financing method can be found in SEC Chairman Shad's testimony in Hearings at 20. The details can be found in Securities and Exchange Commission, *Pre-Solicitation for an Operational EDGAR System* B.1.2. (July 1, 1985). When the presolicitation document was issued, the SEC indicated for the first time a willingness to contribute agency funds to finance EDGAR.

[200] Hearings at 34.

[201] SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A, p. 352.

[202] Id. at app. 1A, p. 364. Compare the amount of free service that the SEC expected to receive with Shad's statement that end users will be the primary beneficiaries of EDGAR. See text accompanying note 200 (this section).

[203] Hearings at 55 (testimony of SEC Deputy Executive Director Kenneth A. Fogash).

[204] Id. at 37 (testimony of SEC Chairman John Shad).

[205] SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A, p. 355.

[206] There is no evidence that the SEC ever seriously considered restrictions on the EDGAR data base. Limitations on use of public information are inconsistent with the disclosure purpose of the securities laws as well as with the copyright laws. See text accompanying notes 84–91. See also SEC staff response to Rep. Glenn English (July 25, 1985), reprinted in Hearings at app. 1A, p. 358.

[207] See, e.g., the discussion of this issue between Subcommittee Chairman Glenn English and SEC Chairman John S.R. Shad in Hearings at 60–61.

can fill it. A stronger argument is possible, however, for an electronic mail system that permits users to communicate only with the agency. An agency may find that it has an interest in making it easy for the public to communicate with the agency.

Identifying value-added computer services that agencies should or should not offer to the public as part of a basic dissemination package may not always be easy. For each data system and for each community of users, there may be statutory requirements or local reasons that support one result over another.

In general, however, agencies would do well to heed the recommendation of the task force of the National Commission on Libraries and Information Science on this subject. The task force suggested that government policy should "[e]ncourage private enterprise to 'add value' to government information (i.e., to repackage it, provide further processing services, and otherwise enhance the information so that it can be sold at a profit." [295]

E. PRESERVING A ROLE FOR THE PRIVATE SECTOR

There are many different ways that an agency can structure the dissemination side of an electronic information system in order to allow an appropriate role for the private sector. There are two obvious minimum requirements.

First, the agency must be certain that it has fully met its obligations to provide for public dissemination of its data.[296] There are different ways to accomplish this objective. Depending on the agency and the information system, it may be possible to meet disclosure requirements through electronic dissemination or through other methods. Once adequate public disclosure has been assured, the private sector should be allowed every opportunity to redisseminate and to add value to the agency's data.

Second, the agency must avoid any arrangement that affords itself or a private company with any monopoly power over the data.[297] Where the agency operates the electronic data system, copies of the entire data base should be made available so that there can be more than one source.[298] Where a contractor operates a dissemination system, the contractor must not be able to assert monopoly controls such as high prices or restrictions on redisclosure.

Some of the electronic information systems already in operation provide examples of these principles in action. They might serve as models for other agencies looking for ways to structure disclosure activities.

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[295] *NCLIS Task Force* at 63.

[296] See text accompanying notes 22–39.

[297] "The manner in which the government makes information available electronically presents problems with respect to monopoly. It happens so often that the government is in a monopolistic position with respect to information resources. Nobody but the government takes a census of population, therefore the Bureau of the Census has a monopolistic control over census data. While the government would like to have marketplace forces operating with regard to the dissemination of those data, the government is in a monopolistic position and so there can be no competition in the supply of census data in the marketplace. The least that the government can do is to assure that when the information is disseminated, it is done so in a fair and equitable manner so that everyone in the marketplace has an equal chance at the information at the same time." J.T. Sprehe, "Developing a Federal Policy on Electronic Collection and Dissemination of Information", 11 *Government Publications Review,* 353, 357 (1984).

[298] See text accompanying notes 131–153.

Food and Drug Administration.—The Food and Drug Administration is one of several agencies that makes information publicly available through an electronic news service offered by a private, electronic bulletin board vendor. Other agencies using the same service include the White House,[299] Interior Department,[300] and National Aeronautics and Space Administration.[301]

The FDA originally contracted with the private company for an electronic mail service for communication with FDA field offices. The public disclosure feature on the company's electronic bulletin board was provided at very little additional cost to the agency.[302]

The FDA makes a variety of documents available through the electronic bulletin board, including press releases and recalls, the weekly recall list, the Drug and Device Product Approvals List, the Drug Bulletin, the FDA Consumer, veterinary medicine news, summaries of FDA Federal Register documents, congressional testimony, and speeches delivered by FDA officials.[303]

Documents are placed on the electronic bulletin board at the same time they are made publicly available through other channels. All of the information on the bulletin board may be accessed, copied, and redisseminated by any of the customers of the vendor.[304] An FDA official testified that the agency will consider making the same information available to other vendors "if that procedure becomes worthwhile." [305]

The FDA's use of the commercial electronic bulletin board appears to be representative of use of the service by other Federal agencies. The FDA pays a small fee to enter and store information on the bulletin board, and users of the service pay standard commercial usage charges to the vendor.[306]

The electronic disclosure system is a supplement to the FDA's standard information distribution methods. The agency continues to fulfill its dissemination requirements, information users have a choice of access methods, private vendors are able to offer the agency information, and no one has any monopoly over the dissemination of agency information. This is a basic and effective model for electronic dissemination of agency information.

Census Bureau.—The Census Bureau also disseminates some of its information products electronically through a service called Cendata. The Cendata data base contains press releases, new product information, and selected data from current surveys—primarily highlights from published reports. Also included in Cendata are State profiles, selected statistics on countries around the world,

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[299] See letter from Sue Mathis, Director, Office of Media Relations, The White House, to Rep. Glenn English (June 26, 1985), reprinted in Hearings at app. 8.

[300] See letter from David P. Prosperi, Assistant to the Secretary and Director of Public Affairs, Department of the Interior, to Rep. Glenn English (July 15, 1985), reprinted in Hearings at app. 8.

[301] See letter from John F. Murphy, Assistant Administrator for Legislative Affairs, National Aeronautics and Space Administration, to Rep. Glenn English (Nov. 21, 1985), reprinted in Hearings at app. 8.

[302] Hearings at 241 (testimony of Gerald F. Meyer, Associate Commissioner for Management and Operations, Food and Drug Administration).

[303] Id. at 243.

[304] Id.

[305] Id. at 245.

[306] Id. at 267.

county population estimates, and short descriptions of censuses and surveys.[307]

Cendata was designed to meet several principles: avoid public access to Bureau computers; avoid competition with the private sector; reduce government costs by avoiding developing or purchasing computer services; and develop a system simple enough for a wide variety of users.[308]

Cendata is now offered to the public by two different vendors at standard commercial access charges. Any other vendors willing to meet the Bureau's requirements could also offer the service. The agreement with the Census Bureau requires that the data base be available in a full-text, menu-driven, system. Users are free to copy and use the data base without restriction.[309] In short, the Cendata system is similar in many ways to the FDA's electronic disclosure system, except that there are two private vendors of the data base.

Department of Agriculture.—A more elaborate electronic dissemination system was recently established by the Department of Agriculture. The system, called Electronic Dissemination of Information (EDI), replaced several smaller disclosure systems operated by components of the Department. The objective of the EDI system is—

> to reach organizations such as large publishers and news services, farm organizations, trade associations and the commercial electronic information and videotex services who would further enhance the data for their own marketplace and ultimately reach the broadest possible community of end users.[310]

EDI contains perishable or time sensitive data such as daily market reports, weekly and monthly crop and livestock statistical reports, periodic economic outlook and situation reports, news releases, foreign agricultural trade leads, export sales reports, and weekly world agricultural production and trade roundups.[311] Some of the data available under EDI has great value at the moment of release, and it is important that the data be widely available immediately.[312]

The USDA decided to operate EDI through a contractor who would offer a wholesale dissemination service. A contractor was selected through a competitive procurement.[313] In order to assure fair dissemination, the USDA set strict rules for the EDI contractor. The contractor had to assure equal access by all customers, with immediate release of market sensitive data. Also, in order to prevent the contractor from obtaining any unfair advantage over other vendors, the contractor was prohibited from reselling the data at the retail level.[314]

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[307] Id. at 263 (testimony of Bryant Benton, Associate Director of the Bureau of the Census for Management Services).
[308] Id. at 262.
[309] Id. at 263.
[310] Id. at 252 (testimony of Glenn P. Haney, Director, Office of Information Resources Management, Department of Agriculture).
[311] Id. at 253.
[312] Id. at 254–55.
[313] Id. at 252.
[314] Id. at 253.

This arrangement meets the basic criteria for a dissemination system in a slightly different way than the systems established by the FDA and the Census Bureau. Timely dissemination of data is assured. The EDI contractor—the sole source for electronic dissemination—is prevented by contract from asserting any of the monopoly power that might otherwise be possible. The contract basically requires the contractor to operate the dissemination system in the way that the agency would if it operated the system directly. Users of the data are free to reuse or redisseminate the data as they see fit. This is a reasonable design for an electronic dissemination system provided that the contractor can comply with the terms of the contract.[315]

Securities and Exchange Commission.—The SEC's proposed EDGAR system will be structured in a manner that is roughly similar to the USDA's EDI service. The SEC plans to select a contractor to operate EDGAR. This will include the collection and the dissemination of information electronically. The SEC will not prevent the contractor from participating in the retail market for information services, but the contractor will be required to sell the EDGAR data base at wholesale under regulation by the SEC.[316] Except for these regulations governing wholesale redistribution by the contractor, the data will be unrestricted.[317] The SEC's objective is—

> to achieve the widest possible distribution of SEC filings, at a fair and reasonable price, that permits the SEC contractor to recover its costs and earn a reasonable rate of return on its investment.[318]

There are some basic similarities among the electronic information systems operated by the FDA, the Census Bureau, the USDA, and SEC. All provide for a basic dissemination service at usage charges that do not reflect the value of the data base. All provide for private operation of the system. All are structured to permit additional distribution of the data base and competition in the retail market for value-added services.[319]

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[315] The Government Information, Justice, and Agriculture Subcommittee is currently investigating the operations of EDI in order to determine if the system is meeting all of the design criteria.

[316] Hearings at 61-62 (testimony of SEC Chairman John S.R. Shad). When asked why the regulations would be necessary, Shad responded: "To prevent unconscionable profits or anticompetitive activity by the primary vendor." Id. at 62. See also the SEC's solicitation of comment on a proposed dissemination pricing and regulation approach for EDGAR. 50 Fed. Reg. 51495, 51497 (Dec. 17, 1985)

[317] Hearings at 63.

[318] 50 Fed. Reg. 51495, 51497 (Dec. 17, 1985).

[319] It remains to be determined what is the best way to make electronic information services available to the public. For most agencies, the services are relatively new, and it is difficult to measure success. In many instances, the public may not yet be sufficiently familiar with electronic data bases to be capable of using the new services. Each agency will have a different audience with different degrees of sophistication.

The Medlars service offered by the NLM has been in operation for many years and has a large number of users. See text accompanying note 41. In other instances, electronic dissemination services were started too recently to permit a fair evaluation. See, e.g., letter from Glenn P. Haney, Director, Office of Information Resources Management, Department of Agriculture, to Rep. Glenn English (Aug. 9, 1985), reprinted in Hearings at app. 5. Some services are considered experimental. See, e.g., Hearings at 241 (testimony of Gerald F. Meyer, Associate Commissioner for Management and Operations, Food and Drug Administration).

Where access to a Federal agency data base is provided through a private information company, the success of the service may depend in large part on the marketing efforts of the company

Continued

Another similarity of all of these systems is that the basic electronic data base was newly compiled by the agency.[320] As a result, the creation and dissemination of the data base by the agency did not cause direct competition with an existing private information service.[321] The data base created by the agency became a new information resource.

Competition issues can be much more difficult to address when an agency automates a file that a private company had previously automated in whole or in substantial part. In such a case, the existence and availability of the agency data base can have a substantial effect on the investment already made by the private company.

There are two clear examples of this type. The first involves the Patent and Trademark Office. In automating trademark operations, the PTO took a variety of actions primarily designed to avoid competition with the existing trademark search industry.[322] Because the restrictions on public access and use were unreasonable, the PTO was forced by public and congressional pressure to find ways to remove the restrictions. How this will be done remains to be determined.

The experience of the PTO demonstrates why an agency should not place a higher priority on avoiding competition with the private sector than on fulfilling the agency's public access and disclosure requirements. However, it is difficult to learn much from the PTO experience because of the mistakes made during implementation[323] and because of the unresolved factual issues.[324]

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or the agency. The Census Bureau promotes the electronic dissemination services offered by the Bureau's private vendors. See Hearings at 269 (testimony of Bryant Benton, Associate Director of the Bureau of the Census for Management Services).

The Bureau of Labor Statistics also offers an electronic news release service through a private computer service company. The company is not generally in the business of providing access to electronic data bases to the public, and marketing is done entirely by the BLS. After almost 3 years of operation, the BLS electronic news release service has only 13 customers. See letter from Janet L. Norwood, Commissioner for Bureau of Labor Statistics to Rep. Glenn English (June 26, 1985), reprinted in Hearings at app. 8B.

More experience and more time will be needed to determine the best ways of providing for electronic access to agency data bases.

[320] The SEC data base will be created through electronic filing of documents by registrants.

[321] The Information Industry Association testified that there are some online data bases containing some of the information that will be in the SEC's EDGAR system. See letter from David Peyton, director, government relations, Information Industry Association, to Rep. Glenn English (June 17, 1985), reprinted in Hearings at app. 4. There is, however, no online data base containing even a small fraction of the full text of SEC filings.

[322] See text accompanying notes 47–56 and 224–239.

[323] See Hearings at 310 (testimony of Donald J. Quigg, Commissioner of Patents and Trademarks) ("[W]e did make some mistakes in the way we approached the automation of trademarks.")

[324] One important factual question is how much a PTO operated trademark search system would compete with private sector firms. Testifying on behalf of the United States Trademark Association, Guy M. Blynn said:

> "I have heard a lot of discussion and a lot of claims that the availability of the PTO's trademark records in machine-readable form would compete unfairly with private search forms. USTA does not share this concern. First of all, most private search firms bring with them their own logic to approaching the base of data and the PTO will either have a different logic or no logic at all. It will simply make the information contained in its records available but they will not give tremendous guidance as to how to get it out. Conversely, search firms get it out and they are expert in doing it.
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> "Second, search firms search other data bases which are not available at the PTO. They search data bases of all State trademark registrations, they search numerous trade directories and business lists. Consequently, I don't think there would be the type of competition that would in any way adversely affect private search firms."

Hearings at 347. See also id. (testimony of Herbert C. Wamsley, executive director, Intellectual Property Owners, Inc.).

A more interesting competition issue will arise with the Federal Maritime Commission's plans to automate the collection and dissemination of its ocean tariffs. Private companies are already providing electronic tariffs services. One company currently maintains a computerized data base containing the full text of ocean freight tariffs on file on at the FMC.[325] Another company presently offers a computerized filing service.[326]

The presence of commercial firms offering the services that the FMC needs suggests some interesting alternatives. These alternatives have been recognized by the FMC. In a preliminary planning document, the Commission set out two options for automation. The first option would be to allow continued development of private sector data bases subject to some regulation by the FMC. The FMC could purchase the services that it needs—presumably through competitive bidding where appropriate—and provide for public access to the data base in the public reading room.[327]

This approach is very attractive for several reasons. First, it would have a very low cost to the government. There would be no development expenses connected with automating the data base or establishing a computer system. Operating costs would be shared with all other users of the system. Second, the FMC could meet its public disclosure requirements by providing free terminals in the reading room in the same way that the SEC proposes. Third, the FMC would avoid competition with existing private sector companies.

There is a potential difficulty with the FMC's first option. Some method of FMC supervision of the integrity of the data base would be needed, and it is possible that this might require some minor changes in the law.[328] It would also be necessary to address the long-term maintenance of archival records. This might be handled through the continuation of paper files or the creation of permanent tariff files on microfiche.

The second alternative identified by the FMC is the development by the Commission of a single automated data base for receipt and dissemination of tariffs.[329] This would presumably be similar to the SEC's EDGAR system in scope and possibly in cost as well.

The advantages of this approach are that the FMC would be in command of the data base and could provide for marginally broader public access. There would also be fewer legal problems in establishing the filing requirements needed to support the automated data base. However, given the limited interest of the broader public in ocean tariff files and the great expense of a separate system, it

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[325] See Hearings at 219 (testimony of Don C. Becker, publisher, Journal of Commerce). In contrast, SEC Chairman Shad testified that private companies now offer only "pieces" of the EDGAR data base. Id. at 53.

[326] See Hearings at 230–32 (testimony of Dean Putnam, vice president, carrier systems marketing, Transax Data Corporation).

[327] Federal Maritime Commission, *Tariff Automation (A Functional Analysis)* 23–25 (Aug. 1985).

[328] The FMC has shown an ability to adapt its rules to permit electronic tariff filing. In *Electronic Filing of Tariffs By Common Carriers In The Foreign and Domestic Offshore Commerce of the United States,* Docket No. 84–35, the Commission found a way to support the electronic receipt of filings under certain conditions. See 50 Fed. Reg. 10966 (Mar. 19, 1985), amending 46 CFR Parts 550 & 580.

[329] Federal Maritime Commission, *Tariff Automation (A Functional Analysis)* (Aug. 1985).

is questionable whether the advantages of the second approach are worth the cost.

How the FMC will resolve these issues remains to be seen. The FMC tariff automation problem is most interesting because it illustrates the possibility of providing for reasonably complete public access to public records without creating any new private sector competition problems. If this result can be achieved, it is clearly the best of both worlds.

The circumstances giving rise to this possibility at the FMC may be unusual or even unique. There are likely to be few instances where an agency's need for an automated data base can be met by purchasing an existing service from a private company. Whenever this is possible, however, it should be explored fully.

In other cases, agencies should make efforts to assure that the private sector has a reasonable role in the electronic dissemination of agency data bases. Once the agency has provided that its disclosure responsibilities under law have been fully and fairly met, the private sector should be encouraged to offer additional information products and services to the public and possibly to the government as well.

X. Oversight of Electronic Information Policy

The issues presented by the electronic collection and dissemination of information are generally similar throughout the Federal Government. Agencies planning or implementing electronic information systems will have to identify, define, and solve the same types of problems. Each agency will have to balance its public disclosure obligations, budgetary constraints, user needs, and competitive environment in order to develop a strategy for automation.

This report has already concluded that agencies are generally not making sufficient efforts to seek out and consult with public users of agency data.[330] Agencies are also failing to seek out and consult with each other.[331] This is a serious mistake for two reasons.

First, by not attempting to learn from the experience of others, each agency wastes some time, effort, and resources by struggling with problems that may have already been considered and solved by other agencies. There is no reason why one agency should not at least consider the solutions that another agency adopted.

Second, the lack of consultation may be contributing to the development of separate, uncoordinated, and possibly incompatible information systems. While the committee is not prepared to find at this time that all agency electronic information systems should necessarily be technically compatible or otherwise similar, there are obvious advantages to the government and to users if different agency information systems shared at least some common technical or other characteristics.

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[330] See text accompanying notes 57–83.

[331] The need for increased discussion among agencies was recently recognized by the Mitre Corporation which sponsored a November 1985 workshop on electronic information issues. The stated purpose was to bring "together many agencies of the Federal Government who can share policies considered, procedures implemented, and technologies tried."

At the hearings, Rep. Gerald Kleczka asked witnesses from the Food and Drug Administration, the Department of Agriculture, and the Census Bureau whether they found any central guidance within the executive branch on electronic information issues. The response was generally negative:

> Mr. KLECZKA. Let me ask all you gentlemen whether or not you are aware of any central policy guidance in the executive branch on electronic dissemination systems? Is there someone you turn to in the administration for questions on the areas that you're dealing with? Mr. Benton.
>
> Mr. BENTON. I'm not aware of any guidance we've received, other than the public responsibility we all carry to do things that make sense in the most efficient way and with the lowest cost. No specific guidance on electronics.
>
> Mr. KLECZKA. There's no central authority that you are aware of in the Federal Government that you can turn to for problem solving or questions on where to go or——
>
> Mr. MEYER. I don't think so.
>
> Mr. KLECZKA. Done by agency, within each agency?
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> Mr. MEYER. I'm not aware of any. We proceed pretty carefully. We try to do so competitively. We have, within our own organization, some very, very sophisticated talent in the telecommunications field. The person in charge of our telecommunications was recently requested by the White House to help them with some problems they had, so we feel fairly confident about our own internal strength in this area, sir.
>
> Mr. HANEY. Mr. Chairman, when we entered into this project at the Department of Agriculture, we had a lot of questions relative to policy on the dissemination of information and some of it concerning the questions you asked about the rebate or the refund. We did not find a lot of guidance. However, we have had some consultation with staff people at OMB. There is some reference to this general subject in the recent issuance of new—and I don't have the exact quotation—but there is, out for review from OMB, a new OMB circular on information management, information resources management.
>
> There is some reference to this subject there. And we have had continuing dialog with those folk, but I think it's an area in which we would have welcomed a little more policy guidance at the time we were wrestling with some of the questions.
>
> We think we've taken the right direction; we think we're on sound ground; we think we're providing a service to the agricultural community at large, and to the taxpayer and we think it's cost effective. But there's still, I'm sure, as we get more experience, there's still going to be questions that we're going to continue to have. I think all of us are sort of breaking new ground in a sense.
>
> Mr. BENTON. Other than the section on electronic data collection and dissemination in this draft OMB circular that my colleague just mentioned, I'm not aware of any

central policy at this time. And, fortunately, as they have said, within our organization we have the technical expertise that we could accomplish this.[332]

The OMB circular referred to by two of the witnesses is the circular on management of Federal information resources. At the time of the hearing, a draft circular had been published for comment.[333]

The final published OMB circular included the following observations on electronic collection and dissemination of information:

> Federal agencies are moving rapidly to provide for collection and dissemination of information through electronic media. In developing this circular, OMB considered whether it was necessary to provide specific policies concerning electronic collection and dissemination of governmental information. OMB concluded that, except for the general predisposition in favor of applying new technological developments to information resources management, the policies that apply to information collection and dissemination in other media also apply to electronic collection and dissemination. It is important, however, that agencies recognize the necessity of systematically thinking through the application of policies stated elsewhere in this circular to electronic collection and dissemination of information. For example, when developing electronic collection programs, agencies should give particular attention to issues such as privacy, public access, and records management. When developing electronic dissemination programs, agencies should ensure that access is provided to each class of users upon reasonable terms, avoid problems arising from monopolistic control, ensure maximum reliance upon the private sector, and take necessary steps for cost accounting and cost recovery.[334]

The committee certainly concurs with OMB about the necessity that agencies systematically think through the application of information policies to programs for the electronic collection and dissemination of information. The committee concludes, however, that agencies need help in meeting this objective.

There is little communication between agencies about electronic information activities, and there is little central administrative guidance. The new OMB circular is not sufficiently specific on electronic information issues.

There is a need for some central guidance and coordination of electronic information system policy within the executive branch. No formal institutional or organizational changes are necessarily required in order to provide this oversight. Instead, the committee recommends only that one office be assigned a specific and visible responsibility to serve as a resource on and coordinator of electron-

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[332] See Hearings at 270–71 (testimony of Gerald F. Meyer, Associate Commissioner for Management and Operations, Food and Drug Administration; Glenn P. Haney, Director, Office of Information Resources Management, Department of Agriculture; Bryant Benton, Associate Director, Bureau of the Census for Management Services).

[333] 50 Fed. Reg. 10734 (Mar. 15, 1985), reprinted in Hearings at app. 7A.

[334] *OMB Circular A-130* at app. IV, part 3, § 8b(18).

ic information activity. The Office of Information and Regulatory Affairs in the Office of Management and Budget has similar responsibilities for information policy issues and already has valuable expertise in electronic information issues. OIRA should increase its visibility in this area and should be more active in talking with agencies and in making agencies talk with each other.[335]

There are several issues that OIRA might take a lead in raising. One is the problem of maintaining a historical record of information maintained in electronic information systems. Not enough attention has been paid to the long-term problems of archival records.[336] Bringing agencies together with the National Archives and Records Administration should help to find solutions.

Another matter that needs additional consideration is the need for technical coordination among agency electronic information systems. Now, each agency is developing hardware and software without any reference to the activities of other agencies. The information resources management circular references the need for Federal information processing standards.[337] Similar standards may be appropriate for electronic information systems. OIRA should take the lead in raising this issue with agencies and with the Institute for Computer Sciences and Technology in the National Bureau of Standards.

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[335] The budget documents for fiscal year 1987 that were released in Feb. 1986, indicated that OMB would be taking a more active role on "electronic filing" issues:

> OMB will sponsor a symposium on electronic filing with participants from agencies, the legislative branch, and the private sector. The symposium will be a forum to discuss policy and technical issues with the goal of issuing policy guidance on the use of electronic filing. If issued, the policy will be an appendix to OMB Circular A-130.
>
> OMB will monitor proposed and existing electronic filing and dissemination projects through its information systems and technology planning project. Agencies will be asked to report on their major information systems and to provide budgetary and planning data over the life cycle of these major systems.

See Office of Management and Budget, *Management of the United States Government (Fiscal Year 1987)* 67-69. The committee applauds these initiatives.

[336] The privately sponsored Committee on the Records of Government recently issued a report that included a formal conclusion that "[t]he danger of losing historically valuable records is greatly increased by the changeover in technology." *Report* at 41 (1985).

[337] Id. at § 9c(1).

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