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March 1995

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Henry H. Perritt Jr.

IIT Chicago-Kent College of Law, hperritt@kentlaw.iit.edu

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Recommended Citation

Henry H. Perritt Jr., *Sources of Rights to Access Public Information*, 4 Wm. & Mary Bill Rts. J. 179 (1995).
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SOURCES OF RIGHTS TO ACCESS PUBLIC INFORMATION*

Henry H. Perritt, Jr.**

I. INTRODUCTION

Public information is valuable, both economically and as a raw material of democratic government. Public and private sector publishers long have earned a return by selling public information.¹ The prospect of selling some public information and a reluctance to have other public information widely known tempts governments and their contractors to restrict access.

The temptations are the same at the federal, state, and municipal levels of both the United States and European governments,² though the legal frameworks may differ. This Article analyzes the legal issues involved when government entities want to restrict access to their information, either to prevent embarrassment or to keep others from undercutting their revenue expectations from the sale of public information. The Article mobilizes the legal arguments entitling members of the public, including publishers, to access and emphasizes the clash of interests when a government seeks to sponsor a monopoly for access to information in electronic formats. It is in this conflict of interests that new revenue-seeking temptations present the strongest threat to access.

This Article confronts the central tension between the Freedom of Information Act (FOIA)³ and similar state public records laws on the one hand, and intellectual property law on the other. FOIA and similar state laws⁴

* This Article was presented at "Access Versus Privacy: Approaches to State Information Policy," a conference held on March 17, 1995 at the Marshall-Wythe School of Law, College of William & Mary, sponsored by the *William & Mary Bill of Rights Journal* and the Virginia Council on Information Management.

** Professor of Law, Villanova University School of Law. Member of the bar, Virginia, Pennsylvania, District of Columbia, Maryland, and United States Supreme Court. The author appreciates research assistance from his law clerks, Timothy McDonough, Class of 1995, Thomas Thistle, Class of 1996, Villanova University School of Law, and proofing assistance from Susan Rexford Coady.

¹ A number of colonial printers, including Benjamin Franklin, got their start by contracting to print the laws of provincial assemblies. JOHN WILLIAM DRAPER, *LIFE OF FRANKLIN* 14-15 (Library of Congress reprint 1977).

² See Henry H. Perritt, Jr., *Commercialization of Government Information: Comparisons Between the European Community and the United States*, 4 *INTERNET RESEARCH* 7 (1994).

³ 5 U.S.C. § 552 (1988 & Supp. V 1993).

⁴ Terminology differs from state to state. For convenience, this Article refers to the

make it difficult to set up state-sanctioned monopolies for the sale of public information. Conversely, intellectual property protection makes it easier to set up state-sanctioned monopolies. Even though literal interpretation of some freedom of information statutes and the Copyright Act seem to permit state-sanctioned monopolies, below the federal level the First Amendment and the Patents and Copyrights Clause of the United States Constitution impose significant restrictions on government efforts to block access and dissemination of public information. In addition to limitations on intellectual property law, antitrust law enters into the legal equation when government seeks not to withhold information altogether, but to sponsor a private monopoly over public information.

In order to provide an appropriate technological and economic context for the legal analysis to follow, this Article begins by explaining the technology for electronic dissemination of public information. It then reviews some microeconomic principles to facilitate evaluation of the various technological approaches.

II. TECHNOLOGIES FOR PUBLISHING PUBLIC INFORMATION

Publications containing public information have distinct attributes of value for users. At the core is raw content. This is the basic message or data, with nothing added to help users find, retrieve, keep, or browse for particular pieces of information.⁵ Virtually all information products have something added to the raw content. Most products have at least some "chunking" and "tagging" value added. In the print technologies, chunking and tagging value comprises page breaks, running headers and footers, headlines, and subtitles. With digital computer technologies, chunking and tagging value includes things like record and file boundaries, paragraph breaks, and computer readable tags that can be accessed from elsewhere. In addition, more sophisticated products have "pointers," which either point to other parts of the same document, as in a table of contents, index, or cross reference;⁶ or point to a different document, as in a conventional footnote reference, or a Hyper Text Markup Language (HTML)⁷ reference to another resource on the Internet in the World Wide Web.⁸ Beyond that are the less

federal statute as FOIA and to similar state statutes as "freedom of information statutes."

⁵ An example would be an ASCII file (a raw text file readable by a desktop computer word processing program) of a statute.

⁶ These internal references are known as internal pointers.

⁷ "HTML" is a set of computer processable codes that allow text and graphical information to be published and retrieved electronically through the World Wide Web on Internet.

⁸ Pointers that refer to other documents are known as external pointers.

tangible kinds of value-added features, like extra copies,⁹ availability at other locations,¹⁰ integrity assurance, billing and collection value,¹¹ and promotional capabilities.¹²

With print publishing technologies, the publisher bundles most of these attributes of value and the consumer buys the entire bundle from that publisher. Digital computer technologies, particularly as they are implemented in distributed and open systems like the Internet, permit unbundling of the attributes of value so that one supplier may supply only raw content, and another may make available one or more other value-added attributes such as pointers that the user combines with the raw content on demand.¹³ Still other suppliers might make available billing and collection value¹⁴ or promotion value.

This facilitation for unbundling the value-added elements in publishing drastically changes the economics of publishing. In fact, it has already contributed to a more competitive marketplace with lower barriers to entry. With Internet technology, a would-be publisher needs only the capital to establish a server that adds a particular type of value, and not the capacity to own the content and other types of value, or to provide a full range of subject matter. The Internet thus provides demand economies of scope.¹⁵ A

⁹ The benefit of having extra copies is known as duplication value.

¹⁰ This benefit is known as distribution value.

¹¹ Billing and collection value might seem to shift points of view because it seems more valuable to the seller than to the purchaser. On the other hand, billing and collection value makes it easier for the purchaser to buy something on the spot and therefore can be viewed as a form of value to the purchaser as well as the seller.

¹² Marketing represents promotion value. The array of value-added elements is developed more fully in Henry H. Perritt, Jr., *Unbundling Value in Electronic Information Products: Intellectual Property Protection for Machine Readable Interfaces*, 20 *RUTGERS COMPUTER & TECH. L.J.* 415 (1994).

¹³ For example, a page on a World Wide Web server or a cluster of Gopher menu items exemplify forms of pure pointers value. World Wide Web and Gopher are applications for information organization and retrieval on the Internet.

¹⁴ Marvin A. Sirbu and other researchers at Carnegie Mellon University have proposed a billing and collection server that would use public key encryption to facilitate charging for resources obtained through the Internet. See Marvin A. Sirbu, *Internet Billing Service Design and Prototype Implementation*, 1 *J. INTERACTIVE MULTIMEDIA ASS'N INTELL. PROP. PROJECT* 67 (1994).

¹⁵ Economies of scope exist when the per unit cost is lowered due to a greater variety of unit types available from the same supplier. Demand economies of scope exist when the purchaser experiences an economies of scope situation. In other words, in traditional publishing, demand economies of scope exist for a bookstore because a user faces a lower per unit transaction cost by buying from a bookstore that has a wide variety of materials instead of having to go to one bookstore for *The New York Times*, another for *The Washington Post*, and another for *Newsweek Magazine*. See FREDERICK M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 100-02 (3d ed. 1990) (explaining economies of scope). See generally David

good example of the attractiveness of Internet technology is the "Thomas" system established by the Library of Congress to make congressional materials available in full text.¹⁶ Thomas uses a World Wide Web technology on the Internet,¹⁷ was established in a matter of weeks, and is free, contrasted with the more limited service of the Government Printing Office which uses mostly dial up access, and was established over a period of several years.¹⁸

The increased likelihood of unbundling the value-added attributes in electronic publishing has particular implications for the publishing of public information. Public information is special in that its raw content is generally considered to be non-proprietary because it is owned by governmental entities which either created it or collected it under legal mandates, whereas most other attributes of value are usually added by private publishers who own intellectual property rights in at least some of the value-added features.¹⁹ Under more traditional technologies in which the value-added features were bundled with and made practically inseparable from the content to which they were attached, the publisher gained de facto intellectual property protection for the entire bundle, including the content.²⁰ Under more recent Internet and Internet-like technologies,²¹ the content can remain easi-

J. Teece, *Economies of Scope and the Scope of the Enterprise*, 1 J. ECON. BEHAV. & ORG. 233 (1980) (stating that enterprise scope is determined by transaction costs and realization of economies associated with the simultaneous supply of inputs common to processes for producing distinct outputs); David J. Teece, *Towards an Economic Theory of the Multiproduct Firm*, 3 J. ECON. BEHAV. & ORG. 39 (1982) (exploring economies of scope for different inputs).

¹⁶ Thomas is reachable through the World Wide Web at <http://thomas.loc.gov/>.

¹⁷ See generally *Gingrich Inaugurates Thomas: Republicans to Rethink Access to Government Info*, ELECTRONIC PUB. INFO. NEWSL., Jan. 13, 1995, at 1-3 (describing the Thomas system as running on a Unix platform operating through a T1 connection (a dedicated telephone line) to the Internet); Robert Thomason, *CyberSurfing—A New Window on Congress*, WASH. POST, Jan. 12, 1995, at C7.

¹⁸ See Henry H. Perritt, Jr., Public Information in the National Information Infrastructure: Report to the Regulatory Information Service Center, General Services Administration, and to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget § 2.1.2 (May 20, 1994) (on file with author).

¹⁹ See *infra* notes 119-21 and accompanying text. Content generated by the federal government is ineligible for copyright. Value-added enhancements generated by private sector entities are entitled to copyright protection.

²⁰ The Supreme Court's decision in *Feist v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (holding that the research involved in assembling factual information—"sweat of the brow"—is not protected by copyright), is not at odds with this premise. The point is not that the raw content is necessarily protected by intellectual property (that proposition is explored much more thoroughly in other parts of this Article), but rather that the protection of value added attributes extends to the content because it is more difficult to separate the value added attributes from the content.

²¹ The key features of the Internet in this respect are its non-proprietary standards

ly accessible to end users and intermediaries alike, while the value-added contributions of entrepreneurs is protected appropriately.

III. INFORMATION POLICY PRINCIPLES

To realize the improvements in public access and in the use of public information which technology makes possible, federal, state, and local governments must adopt and implement two key policy precepts. First, they must make electronic formats available when they exist. Second, they must allow for, and promote, a diversity of channels and sources of public information.²²

The first principle, that electronic formats should be made available, is consistent with a policy statement adopted by the American Bar Association in 1990,²³ recommendations adopted by the Administrative Conference of the United States (ACUS),²⁴ policies adopted by the President's Office of Management and Budget,²⁵ and legislation passed by the Senate in 1994²⁶ which is expected to be reintroduced in the 104th Congress in 1995. To deny public access to electronic formats, as the legislature of New Jersey has done,²⁷ denies the public the benefits of publically funded public record

for packet communication and connections, and its common name and address space. These features make possible a worldwide distributed information system, functioning as an electronic marketplace, production line, and town hall.

²² See generally Perritt, *supra* note 18 (commissioned, but not necessarily endorsed, by the recipients).

²³ ABA Recommendation No. 102 (adopted August, 1990) (guidelines for applying Freedom of Information Act to electronic formats); ABA Recommendation No. 109C (adopted August 12-13, 1991) (guidelines for federal and state agency dissemination of public information in electronic form). Both ABA recommendations are available in full text for viewing or downloading from the World Wide Web at <http://www.law.vill.edu/Aba/adminlaw.html>.

²⁴ 1 C.F.R. § 305.88-10 (1993); see Henry H. Perritt, Jr., *Electronic Acquisition and Release of Federal Agency Information: An Analysis of ACUS Recommendations*, 41 ADMIN. L. REV. 253 (1989) (explanation of Recommendation 88-10 by its principal author); Henry H. Perritt, Jr., *Federal Electronic Information Policy*, 63 TEMP. L.Q. 201 (1990) [hereinafter Perritt, *Federal Electronic Information Policy*] (elaboration of Freedom of Information Act concepts developed in Recommendation 88-10).

²⁵ 58 Fed. Reg. 36,068 (1993). OMB also released draft guidelines for applying FOIA to electronic formats in late 1994 available through the Internet at <http://www.law.vill.edu/adminlaw.html> or <ftp://ftp.law.vill.edu/pub/law/ABA/ombguide.doc> or <ftp://ftp.law.vill.edu/pub/law/ABA/ombguide.asc>.

²⁶ 140 CONG. REC. S1046-02 (daily ed. Aug. 25, 1994).

²⁷ Act of Nov. 7, 1994, ch. 140, 1994 N.J. Laws § 8. "The right of the citizens of this state to inspect and copy public records pursuant to Pub. L. 1963, c. 73 . . . shall, with respect to the copying of records maintained by a system of data processing or image processing, be deemed to refer to the right to receive printed copies of such records." *Id.*

formats and significantly impairs public accessibility to public information by increasing the cost of search and retrieval. Indeed, the impairment is so great that the denial of access makes some records practically unavailable.

The policy advocating a diversity of sources and channels of information, endorsed by the ABA,²⁸ the Administrative Conference,²⁹ and the OMB,³⁰ is based on the reality that no one supplier can design modern information products to suit the needs of all users.³¹ Instead, market forces and entrepreneurial energy are crucial for learning user needs, and for experimenting in the marketplace with different distribution and marketing techniques and different value-added features in order to satisfy those needs. In addition, maintaining a diversity of channels and sources protects against censorship and manipulation of public information for political purposes. In this respect the diversity policy principle is central to the policy of the First Amendment to the United States Constitution and similar policies embraced by state constitutions. The diversity principle is inimical to any state-maintained or state granted monopoly over public information.³²

Of course, many public managers perceive a competing policy interest: the need to find new sources of financing for public activities.³³ For them, the best way to raise money for new electronic information systems and public access features is to ensure a sufficient revenue stream from the information access. One obvious way to do that is, in effect, to sell a franchise to the dissemination activity. Strategies for public finance that depend on selling franchises to perform public functions are not new. One of the main ways that King Charles I of Britain financed his government without seeking parliamentary approval of taxes was through franchises.³⁴ Some of the revolutionary fervor for both the English revolution and, more than a century later, the American revolution came from the reaction to perceived corruption associated with the granting of franchises.³⁵ Franchises are cur-

²⁸ ABA Recommendation No. 109C, *supra* note 23 (guidelines for federal and state agency dissemination of public information in electronic form).

²⁹ *See supra* note 24.

³⁰ *See supra* note 25.

³¹ *See* Perritt, *Federal Electronic Information Policy*, *supra* note 24, at 240 (explaining why government suppliers are inadequate as sole or primary sources for public information).

³² *See* HOUSE COMM. ON GOVERNMENT OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H.R. REP. NO. 560, 99th Cong., 2d Sess. 2 (1986) (criticizing the exclusive arrangements that prevent access to government information in electronic form).

³³ In addition, some governmental personnel oppose public access for fear of embarrassing criticism.

³⁴ PAULINE GREGG, KING CHARLES I, at 215 (1981). King Charles's granting of monopoly rights in production, sale, or management in return for a fee or rent became a scandal and led to the Monopoly's Act of 1624 in King James's reign, which allowed many exceptions that King Charles exploited in "an amazing series of projects." *Id.*

³⁵ *See generally* T.H. BREEN, TOBACCO CULTURE: THE MENTALITY OF THE GREAT

rently disfavored because they deprive the public of the benefits of competition,³⁶ although the temptation to set up monopolies continues in the background of public-finance discourse.

Before the Civil War, the American distaste for monopolies extended in some quarters to opposition to the granting of corporate charters and corporations in general.³⁷ Early colonial and state charters in the United States expressed an aversion to state granted monopolies.³⁸ There were, however, others who argued that monopolies may be useful ways to attain public benefits.³⁹ In fact, however, reluctance to raise taxes to pay for public activities led many early state legislatures to revert to the custom of granting monopolies to private persons to perform public activities.⁴⁰ To be sure, monopolies have a role. Otherwise, there would be no justification for government activities in any area; everything would be privatized. The issue is whether a competitive system, or one that allows monopolies, better serves the public interest.

TIDE WATER PLANTERS ON THE EVE OF REVOLUTION 86-203 (1985) (reviewing notices from the likes of Patrick Henry and George Washington, which called for the planter class in Southern colonies to reduce their need for luxuries, and at the same time expressing the belief that merchant culture in England was corrupt). The reaction to exclusive franchises in England preceding the execution of King Charles and the establishment of Cromwell's commonwealth was not so much based on a perception of corruption as it was on the exclusion of Parliament from public finance decisions. *Id.* at 9-13 (explaining how American colonists subscribed to the English "Country" rhetoric, which denounced corruption and the danger that royal interests would subvert Parliament, among other things, by granting monopolies and other patronage).

³⁶ This idea originated in terms of political economics with Adam Smith. See ADAM SMITH, *THE WEALTH OF NATIONS* 703, 712-16 (Edwin Cannan ed., 1937) (5th ed. 1789) (describing the South Sea Company as an example of the type of parliamentary sponsored monopoly that should be replaced by an independent free enterprise). *But see* Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 310-11 (1992); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 12 n.40 (1992) (characterizing Adam Smith as critical of monopoly privileges but in favor of temporary monopolies granted to authors and their assigns under the Statute of Anne as an efficient means of stimulating book production).

³⁷ See Note, *Incorporating the Republic: The Corporation in Ante-Bellum Political Culture*, 102 HARV. L. REV. 1883, 1893 (1989) (characterizing the debate between the whigs and the democrats over the nature of corporate charters).

³⁸ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 188 (1991) (citing the New Hampshire Constitution).

³⁹ Herbert Hovenkamp, *The Classical Corporation and American Legal Thought*, 76 GEO. L.J. 1593, 1608 (1988) (summarizing the views of Daniel Raymond, America's first political economist who pushed for a relaxation of Adam Smith's universal antipathy for monopolies).

⁴⁰ WOOD, *supra* note 38, at 318.

IV. THE LEGAL FRAMEWORK FOR PUBLIC ACCESS TO PUBLIC INFORMATION

The two most important bodies of law with respect to public information policy are those under the Freedom of Information Act⁴¹ and similar state statutes, and intellectual property law.

A. *Freedom of Information Acts*

1. *The Federal Freedom of Information Act*

The freedom of information acts grant a right to obtain and copy records held by governmental entities. The federal Freedom of Information Act (FOIA) extends to virtually all records held by federal agencies outside the judicial and legislative branches of government, including electronic formats.⁴² FOIA is interpreted broadly, and its exemptions narrowly.⁴³ The purpose for which one requests an agency record under FOIA is irrelevant.⁴⁴ Thus, FOIA is an instrument of the diversity principle. It undercuts efforts to establish information monopolies because it grants private sector re-disseminators an entitlement to public information notwithstanding agency efforts to block access in order to support exclusive distribution arrangements.

The main issues with respect to construction and application of FOIA involve the relationship of private intellectual property in value-added enhancements to public information and the possibility that electronic formats created from paper agency records, which are never under the control of the agency, might be outside FOIA's definition of "agency record."⁴⁵ Both of these issues are present in *Tax Analysts v. United States Department of*

⁴¹ 5 U.S.C. § 552 (1988 & Supp. V 1993).

⁴² See *infra* notes 45-69 and accompanying text.

⁴³ See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989) (reiterating this basic principle but finding that records requested by defense contractor were properly withheld under law enforcement exemption); *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (holding that burden is on agency to show that requested records were not within FOIA); *Assembly of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (reiterating pro-disclosure policy of FOIA and affirming order that Commerce Department disclose computer tapes containing census figures).

⁴⁴ *United States Dep't of Defense v. Federal Labor Relations Auth.*, 114 S. Ct. 1006, 1013 (1994) (any member of the public has as much interest as any other in FOIA disclosure; unless privilege is claimed, identity of requesting party is irrelevant.).

⁴⁵ *Long v. Internal Revenue Service*, 596 F.2d 362, 364 (9th Cir. 1979) (reversing district court determination that computer tapes were not FOIA records).

Justice,⁴⁶ presently pending in the United States District Court for the District of Columbia. In *Tax Analysts*, a non-profit publisher of public information, seeks access to JURIS, a comprehensive database of federal judicial opinions, statutes, and agency materials compiled partially by public agencies and partially by West Publishing Company.⁴⁷ The Justice Department asserts that those aspects of the JURIS database that are subject to claims of intellectual property by West Publishing Company do not constitute agency records or, alternatively, that they are privileged from disclosure by FOIA.⁴⁸ The JURIS controversy raises a number of issues of more general importance. One obvious issue is whether FOIA permits an agency to decline release of electronic formats in its possession on the grounds that the information contains copyrighted works or on the grounds that the information was made available to the government under license restrictions that prevent its release under FOIA.

Important to the JURIS issue is the analytical framework established by the Supreme Court of the United States in its review of *Department of Justice v. Tax Analysts*.⁴⁹ That case involved a 1979 FOIA request by Tax Analysts for district court tax opinions and final orders received by the tax division of the Department of Justice.⁵⁰ Tax Analysts wanted those materials to facilitate its publication of paper and electronic databases containing judicial opinions.⁵¹ It could have obtained the opinions from the clerks of the nearly one hundred district courts around the country, but found that method of acquisition unsatisfactory.⁵² The district court upheld the Justice Department's refusal to make the records available, reasoning that they had not been "improperly withheld" under FOIA because they were available from their primary sources, the district courts.⁵³ The court of appeals reversed, reasoning that FOIA only allows agencies to withhold records in their possession if one of the nine exemptions applies and none did.⁵⁴ It also found that the requested materials constituted agency records.⁵⁵ The Supreme Court determined that the case involved construction of all three jurisdictional terms of FOIA: (1) "improperly" (2) "withheld" (3) "agency records."⁵⁶

⁴⁶ C.A. No. 94-0043 (D.D.C. filed Jan. 11, 1994).

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 6; see 5 U.S.C. § 552(b)(3), (b)(4) (1988).

⁴⁹ 492 U.S. 136 (1989) (requiring Department of Justice to make available under FOIA copies of district court decisions in its possession).

⁵⁰ *Id.* at 140.

⁵¹ *Id.*

⁵² *Id.* at 139-40.

⁵³ *Id.* at 140-41.

⁵⁴ *Id.* at 141.

⁵⁵ *Id.*

⁵⁶ *Id.* at 142 (citing 5 U.S.C. § 552(a)(4)(B) (1988)).

Two requirements must be satisfied for requested materials to qualify as "agency records." First, an agency must either create or obtain the requested materials.⁵⁷ The Court declined to narrow the scope of FOIA to records generated by the agency because many studies, trade journal reports, and other materials produced outside of the agencies by both private and governmental organizations form the basis for much agency decisionmaking.⁵⁸ This concept is important for public access to electronically published materials because of the possibility that some electronic formats or value-added features would be generated by others and transferred to an agency.⁵⁹ When a government contractor creates the work, the FOIA problem is not acute because the principles of the common law of agency attribute the contractor's acts to the agency. However, there are also situations in which the agency may acquire independently generated information or value-added features such as computer programs or database formats, and use them to organize its information. In these circumstances, the conduct of the creator of the computer programs or formats may not be attributable to the agency. However, the reasoning of the Supreme Court in *Tax Analysts* nevertheless would find the first prong of the agency-record test satisfied because the agency "obtained" the records.

The second agency-record requirement is that the requested materials be under the control of the agency at the time the FOIA request is made.⁶⁰ This test contemplates that the materials be in the agency's possession pursuant to the agency's official duties.⁶¹ Therefore, the test excludes personal materials in an employee's possession even though they may be physically located at the agency, but includes "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business."⁶² The Court deflected concern that its decision would make it too easy for agencies to be burdened with FOIA requests for materials readily available elsewhere. It determined that requesters would follow the course of least resistance and generally obtain access to sources like telephone books and other publications from libraries rather

⁵⁷ *Id.* at 149.

⁵⁸ *Id.* at 144-45 (noting frequent references in legislative history to records acquired by agencies).

⁵⁹ For example, it was common in the early days of computerization for agencies to enter into contracts providing for the contractor to convert paper agency records into electronic formats, which were then delivered to the agency. See Perritt, *Federal Electronic Information Policy*, *supra* note 24, at 238 (describing litigation over patent office contract that gave conversion contractor exclusive rights to electronic formats).

⁶⁰ *Tax Analysts*, 492 U.S. at 145.

⁶¹ *Id.*

⁶² *Id.* (quoting in part Records Disposal Act, 44 U.S.C. § 3301 (1988)).

than through the FOIA.⁶³ The Supreme Court left “to another day” resolution of the issue as to whether materials purposefully transferred to another agency to avoid a FOIA request would satisfy the control test.⁶⁴

The Court rejected the Justice Department’s arguments that no FOIA “withholding” was involved because the materials were readily available from other sources.⁶⁵ Similarly, the Court rejected the Department’s construction of the statutory term “improperly,” rejecting in turn the argument that FOIA does not require disclosure of materials already disclosed and publicly available,⁶⁶ the argument that FOIA does not compel disclosure of materials disclosable under other statutes or rules,⁶⁷ and the argument that there is a broad set of circumstances in which refusal to disclose is not “improper” even though none of the FOIA exemptions applies.⁶⁸ Justice Blackmun, the lone dissenter, thought that FOIA was not the appropriate vehicle for a commercial enterprise to obtain access to raw material.⁶⁹ The rejection of Justice Blackmun’s views strengthens the inference that FOIA is an appropriate vehicle for private publishers to obtain access to basic content for their publications.

In *Tax Analysts* the Supreme Court thus suggests that the existence of private property interests in electronic formats does not necessarily preclude the content from being “agency records.” The Court also undercuts the argument that an agency can avoid a duty to disclose electronic formats merely because the same content is available in paper formats.

These same propositions are supported by case law involving records preservation statutes other than FOIA.⁷⁰ The United States Court of Appeals for the District of Columbia Circuit has rejected the argument that paper printouts of electronic communication systems are acceptable legal substitutes for the electronic records themselves.⁷¹ It is but a small step

⁶³ *Id.* at 145 n.5.

⁶⁴ *Id.* at 146.

⁶⁵ *Id.* at 150.

⁶⁶ *Id.* at 152.

⁶⁷ *Id.* at 153-54 (noting disclosure obligations for judicial materials and judicial conference rules, 28 U.S.C. § 1914 (1988 & Supp. V 1993), and expressing uncertainty as to whether this section permits a private cause of action to compel disclosure of court decisions).

⁶⁸ *Id.* at 155 (limiting *G.T.E. Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980), to circumstances involving a court order not to disclose).

⁶⁹ *Id.* at 156-57 (Blackmun, J., dissenting).

⁷⁰ In *Tax Analysts*, the Supreme Court recognized the appropriateness of borrowing definitional language from records preservation statutes for interpreting FOIA. *Id.* at 145 (quoting 44 U.S.C. § 3301 (1988)).

⁷¹ *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1286-87 (D.C. Cir. 1993) (finding that electronic versions were not merely extra copies of paper versions because electronic records contain certain additional data).

from this rejection to the conclusion that the greater utility and accessibility of electronic formats justifies obligating agencies under FOIA to disclose them when requesters prefer them over paper versions.⁷²

In *Petroleum Information Corp. v. United States Department of the Interior*,⁷³ the D.C. Circuit rejected an argument by the Department of the Interior that it need not provide a magnetic tape containing a preliminary version of a comprehensive database of land records for certain states on the grounds that the material was available in paper form from other sources and from the agency itself.⁷⁴ The court also rejected the argument that the preliminary character of the database in the requested form qualified the database for exemption under the deliberative process exemption.⁷⁵ The mere possibility of adjustment or revision to data does not justify withholding it under FOIA.⁷⁶

Disclosure obligations under FOIA do not stop with computer data; the obligations also include at least some computer programs.⁷⁷ It may be, however, that computer programs which uniquely reveal the thought process of an agency analyst may qualify for the deliberative privilege exemption.⁷⁸

2. State Freedom of Information Laws

State public records laws are not identical to FOIA; nor are state court interpretations of similar language in such state statutes necessarily the same as federal court interpretation of FOIA. Nevertheless, there is broad agreement on the basic propositions. There is virtually unanimous agreement among state courts that electronic formats are covered by state freedom of

⁷² This conclusion was emphasized by many state courts. See *infra* notes 79-85 and accompanying text. Cf. *Armstrong v. Executive Office of the President*, 810 F. Supp. 335, 341 (D.D.C.) (enumerating features of electronic records not present in paper printouts of same records), *aff'd*, 1 F.3d 1274 (1993).

⁷³ 976 F.2d 1429 (D.C. Cir. 1992) (affirming an order that agency disclose legal land description computer database file).

⁷⁴ *Id.* at 1437.

⁷⁵ *Id.* (noting factual character of information and its lack of association with policy decisions, thus disqualifying it for deliberative process exemption under 5 U.S.C. § 552(b)(5)).

⁷⁶ *Assembly of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 922-23 (9th Cir. 1992) (affirming order requiring disclosure of census data computer tapes despite argument that adjustments to data elements discernible from tapes would reveal deliberative process).

⁷⁷ *Cleary, Gottlieb, Steen & Hamilton v. Department of Health and Human Services*, 844 F. Supp. 770, 781 (D.D.C. 1993) (noting Administrative Conference of the United States Recommendation 88-10 and concluding that computer program's utility in manipulating data justifies coverage by FOIA).

⁷⁸ *Id.* at 783 (holding that computer programs reflect creator's mental processes and therefore qualify under the deliberative process exemption).

information acts.⁷⁹ There is also strong authority for the proposition that the requester can specify a computer-readable format when the agency has both paper and computer-readable formats available.

In *State ex rel. Margolius v. City of Cleveland*,⁸⁰ the Ohio Supreme Court emphasized that

a set of public records stored in an organized fashion on a magnetic medium also contains an added value that inherently is a part of the public record. Here, the added value is not only the organization of the data, but also the compression of the data into a form that allows greater ease of public access.⁸¹

The court reached its conclusion that computer-readable versions of public data must be disclosed by analogy:

[C]onsider two sets of identical public records kept on paper, with one set organized in a file cabinet, and the other kept as a random set of papers stacked on the floor. Certainly, we would not permit an agency to discharge its responsibility by

⁷⁹ See, e.g., *Maier v. Freedom of Information Comm'n*, 472 A.2d 321, 325 (Conn. 1984) (holding that state Freedom of Information Commission had power to compel agency to provide computer tapes when requester paid for cost of production, notwithstanding statutory language that referred to disclosure of "printouts"); *Jersawitz v. Hicks*, 448 S.E.2d 352, 353 (Ga. 1994) (finding that real estate deed records on computer tape were considered public record under Open Records Act, Ga. Code Ann. § 50-18-70(a) (1994)); *Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982) (finding that magnetic tapes were considered public record and that requester was entitled to a computer file listing names of physicians and amount of public funds paid out for abortions); *Minnesota Medical Ass'n v. State*, 274 N.W.2d 84, 88 (Minn. 1978) (rejecting argument that computer tapes containing abortion data were not public records); *Brownstone Publishers, Inc. v. New York City Dep't of Bldgs.*, 560 N.Y.S.2d 642, 643 (App. Div. 1990) (finding that publisher intending to sell computer databases on subscription basis was entitled to computer formats with statistical information on every parcel of real property in New York City, while at the same time noting the undesirability of cost to agency); *Szikszay v. Buelow*, 436 N.Y.S.2d 558, 563 (Sup. Ct. 1981) (finding that county assessment rolls in computer tape format must be disclosed under freedom of information law). The trial court opinion of *Brownstone Publishers, Inc. v. New York City Dep't of Bldgs.*, 550 N.Y.S.2d 564 (Sup. Ct.), *aff'd*, 560 N.Y.S.2d 642 (App. Div. 1990), noted that the record supported the requesters position that a hard copy would not provide reasonable access to the information.

⁸⁰ 584 N.E.2d 665 (Ohio 1992).

⁸¹ *Id.* at 669.

providing access to the random set while precluding the disclosure of the organized set, even though both sets are 'readable' as required by the statute.⁸²

The Ohio Court of Appeals, relying on *Margolius*, aptly described the selection of media this way in *Athens County Property Owners Ass'n, Inc., v. City of Athens*:⁸³

The basic tenet . . . is that a person does not come—like a serf—hat in hand, seeking permission of the lord to have access to public records. Access to public records is a matter of right. The question in this case is not so much whether the medium should be hard copy or diskette. Rather, the question is: Can a government agency, which is obligated to supply public records, impede those who oppose its policies by denying the value-added benefit of computerization?⁸⁴

The court affirmed an order compelling the city to make its diskettes containing rental property information available to the requesters, noting, however, that to the extent the proprietary software was necessary to make use of the data, the requesters must obtain their own copies of the proprietary software.⁸⁵

State courts, however, have been less willing to compel agencies to provide access to computerized information that represents the intellectual property of private persons. The court in *Athens County Property Owners Ass'n* was careful to avoid suggesting that a requester would be entitled not only to database information but also to a copy of proprietary software in order to read the information.⁸⁶ In *Brown v. Iowa Legislative Council*,⁸⁷ the Iowa legislature used public money to buy a database from Election Data Services, Inc., a private entity.⁸⁸ The database was built on top of census data overlaid with political boundaries.⁸⁹ The data were readable only with the use of proprietary software which the requester did not

⁸² *Id.*

⁸³ 619 N.E.2d 437 (Ohio Ct. App. 1992).

⁸⁴ *Id.* at 439.

⁸⁵ *Id.* at 439-40 (citing *Margolius*, 584 N.E.2d at 669 (stating that a governmental agency must allow copying of computer records if requester shows why paper would be insufficient medium)).

⁸⁶ *Id.* at 439.

⁸⁷ 490 N.W.2d 551 (Iowa 1992).

⁸⁸ *Id.* at 552.

⁸⁹ *Id.*

have.⁹⁰ The Iowa Supreme Court found that the requisites of trade secret protection were satisfied and therefore affirmed the trial court's refusal to order disclosure.⁹¹ It recognized, however, the conflict between the rights of the vendor to its trade secret and "the rights of citizens to information purchased for the government at public expense."⁹² It suggested that in other cases, a trial court could order appropriate disclosure of computerized materials clothed with trade secrets in a manner that would reconcile the two conflicting interests.⁹³ In *Margolius*, the Ohio Supreme Court held that "proprietary software does not constitute a public record under R.C.149.43, even if such software is necessary in order to read public information contained on computer tapes."⁹⁴ This holding, however, rather than being justified by any policy consideration, presented the narrowest conceivable construction of an earlier case that raised doubts about access rights to computerized information. On the facts of *Margolius*, itself, there was no request for proprietary software.

Some courts, however, have gone astray and denied access to computer-readable formats when other means of disclosure were available.⁹⁵ Many of these cases contain facts or ambiguous trial records that weaken the force of their precedential value.⁹⁶ An early Michigan case suggests that the existence of a commercial purpose weakens or negates an entitlement to access,

⁹⁰ *Id.* at 553.

⁹¹ *Id.* at 553-54.

⁹² *Id.* at 554.

⁹³ *Id.*

⁹⁴ *Margolius*, 584 N.E.2d at 668.

⁹⁵ See *Tax Data Corp. v. Hutt*, 826 P.2d 353, 356 (Colo. Ct. App. 1991) (relying on *Dismukes v. Department of Interior*, 603 F. Supp. 760 (D.D.C. 1984) and *American Federation of State, County and Municipal Employees v. County of Cook*, 555 N.E.2d 361 (Mich. Ct. App. 1990) [hereinafter *AFSCME*], to deny use of computer terminals when requesters could make requests to agency personnel who would retrieve the requested information); *Chapin v. Freedom of Information Comm'n*, 577 A.2d 300, 302-03 (Conn. App. Ct. 1990) (holding town clerk need not provide computer diskette of land records index when paper copies were available, in part because the statutory language provided for availability of "printout" of computer data), *cert. denied*, 580 A.2d 56 (Conn. 1990).

⁹⁶ See *Blaylock v. Staley*, 732 S.W.2d 152, 153-54 (Ark. 1987) (affirming denial of request for magnetic tape with voter registration list because of an ambiguous record which suggested that the requester wanted to borrow equipment from agency); *Asbury Park Press, Inc. v. Department of Health*, 558 A.2d 1363, 1366-67 (N.J. Super. Ct. App. Div. 1989) (finding that newspaper already given underlying data in computer form was not entitled to spreadsheet which was used to evaluate data either under state records statute or common law); *State ex rel. Recodat Co. v. Buchanan*, 546 N.E.2d 203, 205 (Ohio 1989) (denying access to tapes or software necessary to access data). *Recodat* was limited by the subsequent *Margolius* case. See *supra* notes 80-82, 94 and accompanying text.

although careful analysis shows that the commercial purpose was relevant to a balancing of access interests against personal privacy interests.⁹⁷ In *Dismukes v. Department of the Interior*,⁹⁸ the district court held that the federal Bureau of Land Management could supply information contained on a computer tape rather than supplying the computer tape itself.⁹⁹ Some state courts have followed *Dismukes*,¹⁰⁰ but many have not.¹⁰¹ In an Illinois case, the Illinois Supreme Court held that an agency was *not* entitled to satisfy a request for computer readable media with *paper* formats.¹⁰² The only bases for refusal recognized by the Illinois Supreme Court were that satisfying a request for computer media would require the generation of new programs or formats not presently possessed by the agency, or that the request for computer media followed too closely on the heels of an earlier request for the same content in paper form.¹⁰³ The Illinois Supreme Court specifically declined to follow *Dismukes*.¹⁰⁴

Few state freedom of information statutes obligate an agency to set up new means of access.¹⁰⁵ For example, the Georgia Supreme Court affirmed denial of mandamus to compel a clerk of court to set up a means of direct access via personal computers and modems to real estate deed records that were provided on magnetic tape.¹⁰⁶ In some cases, the aggregate nature of computer files has led to the conclusion that privacy exemptions shielded

⁹⁷ *Kestenbaum v. Michigan State Univ.*, 294 N.W.2d 228, 235-36 (Mich. Ct. App. 1980) (finding that existence of commercial purpose negated entitlement to computer tape containing student records because commercial purpose must be weighed against privacy invasion in order to apply "clearly unwarranted" test, and because mandating access to commercially valuable private information violates principle that public funds may not be used to support a private purpose), *aff'd*, 327 N.W.2d 783 (Mich. 1982).

⁹⁸ 603 F. Supp. 760 (D.D.C. 1984) (granting agency's motion to dismiss FOIA claim).

⁹⁹ *Id.* at 762.

¹⁰⁰ See *Tax Data Corp. v. Hutt*, 826 P.2d 353 (Colo. App. 1991) (following *Dismukes* and holding that requesters were not entitled to use computer retrieval terminals themselves as opposed to submitting requests to agency personnel).

¹⁰¹ See *AFSCME*, 555 N.E.2d at 364-65 (holding that computer media were covered by state freedom of information statute, and enumerating exceptions to disclosure obligations; declining to follow *Dismukes*); *Brownstone Publishers*, 550 N.Y.S.2d at 565 (declining to follow *Dismukes*, and requiring agency to supply information on computer tapes).

¹⁰² *AFSCME*, 555 N.E.2d at 364-65 (holding that computer media were covered by state freedom of information statute, and enumerating certain exceptions to disclosure obligations).

¹⁰³ *Id.* at 364-67.

¹⁰⁴ *Id.* at 365-66.

¹⁰⁵ See *Seigle v. Barry*, 422 So. 2d 63, 66 (Fla. Dist. Ct. App. 1982) (holding that access must be given to computerized data through programs already in use by public agency, and that new programs need not be written).

¹⁰⁶ *Jersawitz v. Hicks*, 448 S.E.2d 352 (Ga. 1994).

them from access even though individual data items within the computerized collection might be accessible.¹⁰⁷

Most of the state statutes, like the federal FOIA, do not allow for interest balancing or for assessing the reasons why a requester wants access. Under such statutes, the only occasion for considering the requester's commercial motivation is when access rights must be balanced against privacy rights under a privacy exemption.¹⁰⁸ There, the scope of the privacy exemption depends on whether the invasion of privacy is "unreasonable" or "unwarranted."¹⁰⁹ To apply this standard, a decision-maker must consider the interests of the requester to determine whether they should override the interests of the subject.¹¹⁰ Nevertheless, a few courts persist in minimizing the legitimacy of freedom of information requests by electronic publishers. For example, in *Kestenbaum v. Michigan State University*,¹¹¹ the court held that the legislature's purpose in enacting freedom of information statutes was not to provide a channel between the government and commercial publishers.¹¹² That proposition overlaps to a considerable extent with the proposition that mandating disclosure of public information to private publishers would constitute the use of public funds for private purposes, which was also a concern of the court in *Kestenbaum*.¹¹³ Both propositions are flawed.

First, the use of policy and purpose to interpret statutes is only appropriate if the statutory language is ambiguous, and most freedom of information statutes are not ambiguous; a literal construction of their terms covers com-

¹⁰⁷ See *Westbrook v. Los Angeles County*, 32 Cal. Rptr. 382, 387 (Ct. App. 1994) (reversing order giving seller of criminal background information access to computer tapes from municipal court information system on monthly basis and noting qualitative difference between information from specific docket and aggregate information).

¹⁰⁸ *United States Dep't of Defense v. Federal Labor Relations Auth.*, 114 S. Ct. 1006, 1012 (1994) (stating that in order to decide whether a record is exempt from FOIA disclosure under Exemption 6, court must "balance the public interest in disclosure against the interest Congress intended the Exemption to protect" to decide whether invasion of privacy would be "unwarranted") (quoting *United States Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989)); *United States Dep't of State v. Ray*, 502 U.S. 164, 177-78 (1991) (balancing privacy against basic policy of FOIA); *Reporters' Comm.*, 489 U.S. at 771-72 (finding that invasion of privacy cannot depend on purposes for which request for information is made, that disclosure of a private document under Exemption 7(C) must depend on nature of requested document and its relationship to "basic purpose" of FOIA, and that basic purpose is not served by disclosure of information about private citizens accumulated in various government files that reveals little or nothing about agency's own conduct).

¹⁰⁹ See *supra* note 108.

¹¹⁰ See *supra* note 108.

¹¹¹ 294 N.W.2d 228 (Mich. Ct. App. 1980).

¹¹² *Id.* at 236.

¹¹³ *Id.*

puter-readable formats. Second, the mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity. When a commercial publisher disseminates public information, it serves a public purpose, the same purpose that is the central justification for the enactment of freedom of information statutes.

This illusory conflict between public and private purposes is implicated in a 1994 amendment to the New Jersey public records law¹¹⁴ which could be interpreted to eliminate any statutory right to obtain public information in electronic formats. The New Jersey Attorney General has taken the position in litigation now pending before the New Jersey Supreme Court that this amendment does deny access to electronic formats and that such denial is good public policy because it prevents private exploitation of materials developed at public expense.¹¹⁵

In addition to statutory entitlement to public information, many states recognize a common law entitlement. Such an entitlement was used by the intermediate court of New Jersey to reverse a lower court and grant access to electronic versions of tax assessment records.¹¹⁶ These types of common law doctrines usually are uncertain in their scope both with respect to the kinds of information to which they give an access right, and to the kinds of requests or interests that justify access. Unlike FOIA, these common law doctrines balance the interest of the requester in obtaining access against the interest of the public entity in denying access.¹¹⁷

The policy principles identified earlier in this Article support the interpretation of state records access laws broadly so that they, like the federal FOIA, extend to all electronic formats and present a counterpoise to public

¹¹⁴ Pub. L. 1944, c. 140, § 8, approved November 7, 1994. That act authorizes maintenance of public records in electronic form, and also amends the access provisions of the New Jersey Right to Know Law:

The right of the citizens of this State to inspect and copy public records pursuant to Pub. L. 1963, c. 73 (C. 47:1A-1 et seq) shall, with respect to the copying of records maintained by a system of data processing or image processing, be deemed to refer to the right to receive printed copies of such records.

Id. The new language is somewhat ambiguous. It could be read only to mean that a requestor is entitled at least to paper formats if that is what the requester wants. Or, it could be read to permit the agency to limit a requester to paper formats even though the requestor wants electronic formats.

¹¹⁵ See *In re Higg-a-Rella, Inc. v. County of Essex*, No. 39,333 (N.J. Feb. 9, 1995), certifying questions to 647 A.2d 862 (N.J. Super. App. Div. 1994). The author of this Article may participate as an *amicus curiae* in the presentation of an opposing position to the New Jersey Supreme Court.

¹¹⁶ *Higg-a-Rella*, 647 A.2d at 864.

¹¹⁷ See Henry H. Perritt, Jr. & James A. Wilkinson, *Open Advisory Committee and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725 (1975) (explaining decline in role of requester interest in public access law).

agency efforts to set up information monopolies. In other words, state records access statutes should be written and applied in a manner consistent with the 1990 ABA policy statement,¹¹⁸ a consistency expressed by most of the recent state freedom of information judicial decisions.

B. *Intellectual Property Law*

1. *Copyright Protections*

The Copyright Act disables federal agencies from obtaining a copyright in public information.¹¹⁹ This disability does not extend, however, to state or local agencies. Thus, from the literal text of the Copyright Act, state and municipal governments can copyright their public information resources if such resources otherwise qualify as copyrightable works. Some states, most notably New York and Colorado, have even asserted a copyright or quasi-copyright in judicial and legislative materials, although the legitimacy of such a position has not been litigated thoroughly.¹²⁰

There are several constitutional and statutory arguments based outside the Copyright Act that potentially prohibit or limit state assertion of copyright in public information. There are also arguments based on the Copyright Act itself and on the Patents and Copyright Clause of the United States Constitution which potentially limit state or local copyrights in public information. Under section 102 of the Copyright Act, copyright does not extend to factual information.¹²¹ Moreover, Congress lacks the power under the Patents and Copyrights Clause of the United States Constitution to extend copyright protection beyond that which is necessary to provide incentives for creative efforts. In *Feist Publications v. Rural Telephone Service Co.*,¹²² the Supreme Court of the United States narrowly construed these statutory and constitutional provisions to eliminate the possibility of copyright protection for “sweat of the brow”—the effort in assembling factual information—except when the selection and arrangement of such information involves non-trivial creative contributions.¹²³ In no event can copy-

¹¹⁸ See *supra* note 23 and accompanying text.

¹¹⁹ 17 U.S.C. § 105 (1988).

¹²⁰ But see *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985); cases cited *infra* notes 137-81.

¹²¹ 17 U.S.C. § 102 (1988). Section 102(a) allows copyright in “original works of authorship.” *Id.* § 102(a). Facts are outside the scope of this phrase because no original effort is involved with respect to pre-existing facts. To remove any doubt, section 102(b) says that copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.” *Id.* § 102(b).

¹²² 499 U.S. 340 (1991).

¹²³ *Id.* at 360.

right extend to the underlying factual information.¹²⁴ The *Feist* doctrine and the underlying limits in the copyright statute and clause upon which it is based should exclude many copyrights in public information. At the very least, these doctrines exclude state or local copyright in the memorialization of physical realities. For example, they should not permit a copyright in survey information or in basic records of land ownership.¹²⁵

Beyond that, the *Feist* analysis should eliminate the possibility of copyright in primary judicial and legislative information. The information contained in a statute, legislative committee report, or a judicial opinion is the recording of an official act. To that extent it is factual. Even if one were to characterize the underlying communicative act—the words uttered by the judge or the legislative body—as the sort of creative expression traditionally entitled to copyright protection, closer scrutiny of the communicative act shows that it lies beyond the power granted by the Patent and Copyrights Clause.

The *Feist* analysis¹²⁶ proceeds from the proposition that facts may not be copyrighted because they lack the originality component that is constitutionally mandated as a prerequisite for copyright.¹²⁷ This “is true of all facts—scientific, historical, biographical, and news of the day. ‘They may not be copyrighted and are part of the public domain available to every person.’”¹²⁸ There is a reason for that constitutional limitation. The Patents and Copyright Clause gives power to the Congress to grant limited monopolies only for a particular purpose: to create incentives for original expression

¹²⁴ *Id.* at 351.

¹²⁵ See *Mason v. Montgomery Data, Inc.*, 765 F. Supp. 353, 355 (S.D. Tex. 1991) (finding that factual matters such as abstract tract boundaries, ownership name, and tract size are not copyrightable), *rev'd*, 967 F.2d 135 (5th Cir. 1992). The court of appeals reversed, holding that the district court had erroneously found that the merger doctrine barred copyright of the plaintiff's maps. *Mason*, 967 F.2d at 135. The district court had found that the maps were the only pictorial presentation which could result from a correct interpretation of the legal description and other uncopyrightable facts. *Id.* at 138. The court of appeals disagreed, finding that the underlying data could be portrayed in a variety of ways. *Id.* at 139. Thus, under the merger doctrine, the plaintiff's portrayal in its maps could be protected without preempting free use of the underlying facts. *Id.* The court of appeals found that *Feist*'s standards for selection, coordination, and arrangement pertained to application of the merger doctrine, as well as to the threshold question of originality. *Id.* at 140 n.7. The court also found that the plaintiff's added value satisfied the requirements for originality. *Id.* at 141.

¹²⁶ The court in *Feist* did not elaborate on the logic of limiting copyrightability of factual information except to point out that the facts must be available for exploitation by others. There is, however, another component to the *Feist* logic. See *infra* notes 134-36 and accompanying text.

¹²⁷ *Feist*, 499 U.S. at 347-48.

¹²⁸ *Id.* at 348 (quoting *Miller v. Universal Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981)).

by authors, and more generally to provide incentives for discovery and other creative effort.¹²⁹ Such incentives are entirely unnecessary for legislators and judges, who have a legally imposed duty to engage in the communication represented by statutes and judicial opinions. Absent the incentive justification, Congress lacks the power to extend copyright protection to these expressions.

In *Campbell v. Acuff-Rose Music, Inc.*,¹³⁰ the Supreme Court recognized the appropriateness of analyzing economic incentives in deciding the scope of copyright protection for derivative works. The Court explained that “[t]he licensing of derivatives is an important incentive to the creation of originals.”¹³¹ Justice Kennedy also recognized the importance of incentive analysis. In his concurring opinion, he expressed his concern that too broad an interpretation of the fair use privilege with respect to parodies and derivatives would “reduc[e] the financial incentive to create.”¹³² The courts of appeals have routinely recognized this centrality of economic incentive as the justification for copyright.¹³³

When the incentive is not needed, as when the authors in question are legally obligated to perform their creative effort, the Patents and Copyright Clause does not authorize a copyright. This is exactly the situation that exists for the work product of public officials. As long as they are not acting *ultra vires*, they are performing public duties when collecting and assembling information. Even if some of their selection and arrangement would seem to qualify under the *Feist* originality test, the creative component of their selection and arrangement does not stem from the economic incentive provided by the copyright law because it is legally mandated and therefore fails to qualify under *Feist*. Whenever a public duty is the cause of the expression, the incentive justification under the copyrights and patent laws is absent, and any construction of the Copyright Act to protect such official work product would be unconstitutional.

Of course, this statutory and constitutional copyright argument does not

¹²⁹ *Id.* at 349-50.

¹³⁰ 114 S. Ct. 1164 (1994) (reversing determination that rap group’s parody of copyrighted song was not fair use).

¹³¹ *Id.* at 1178 & n.23 (explaining why prima facie protection extends to derivative works).

¹³² *Id.* at 1181 (Kennedy, J., concurring).

¹³³ See *National Rifle Ass’n v. Hand Gun Control Fed’n*, 15 F.3d 559, 561 (6th Cir. 1994) (noting that scope of prima facie copyright protection is limited to uses of work that would undermine incentive for creation; use of mailing list was fair use), *cert. denied*, 115 S. Ct. 71 (1994); see also *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing goals and incentives of copyright protection); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (finding that “ultimate aim is, by this incentive [to secure a fair return for an author’s creative labor], to stimulate artistic creativity for the general public good”).

eliminate the possibility of extending copyright protection to value-added enhancements to public information so long as they are not supplied during the performance of a public duty. However, even though incentive may seem an appropriate justification for copyright protection, the Court in *Feist* specifically rejected the idea that originality can result simply from gathering facts.¹³⁴ It rejected "sweat of the brow" justification for copyright.¹³⁵ Moreover, even copyrighted compilations are copyrightable only to the extent of their original selection or arrangement. "[A] subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."¹³⁶

Several cases support the proposition that states may not assert a copyright in some public materials even though copyright statutes seem to permit it. *Building Officials & Code Administration v. Code Technology, Inc.*,¹³⁷ for example, holds that neither judicial opinions nor statutes can be copyrighted.¹³⁸ The case concerned the Building Officials and Code Administration's right to copyright a model regulatory building code. The plaintiff, Building Officials and Code Administration (BOCA), claimed it held a copyright for its publication of The BOCA Basic Building Code, which it encouraged public authorities to adopt through a licensing program.¹³⁹ The Commonwealth of Massachusetts adopted and distributed a building code based substantially on BOCA's model code, pursuant to a licensing agreement granted by BOCA.¹⁴⁰ The Commonwealth referred persons wanting to purchase a copy of the code to BOCA.¹⁴¹ The defendant, Code Technology, Inc. (CT), a private publisher, published and distributed its own edition of the Massachusetts building code.¹⁴² CT's edition was essentially the same as the BOCA edition with a few additional regulations.¹⁴³ The district court granted BOCA a preliminary injunction against CT, finding probability of success in BOCA's claim that the CT code violated BOCA's copyright.¹⁴⁴ The First Circuit reversed, addressing a question not addressed by the district court: "[W]hether inclusion of [the BOCA created materials] . . . [would have] the effect of rendering the [BOCA] materials . . . freely available for copying by anyone," not withstanding

¹³⁴ *Feist*, 499 U.S. at 347.

¹³⁵ *Id.* at 359.

¹³⁶ *Id.* at 349.

¹³⁷ 628 F.2d 730 (1st Cir. 1980).

¹³⁸ *Id.* at 736.

¹³⁹ *Id.* at 732.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

BOCA's copyright.¹⁴⁵

CT argued that because the BOCA code was adopted by the state as a set of administrative regulations having the force of law, it had lost its copyright protection and thus entered the public domain.¹⁴⁶ CT noted a line of cases dating back to the mid-1800s which held that "judicial opinions and statutes are in the public domain and . . . not subject to copyright protection," and argued this rule should be extended to cover administrative regulations such as the Massachusetts building code since these regulations have the force of law and are enforced by penal sanctions.¹⁴⁷ BOCA argued that the building code was not like judicial opinions or statutes because it was written by a private organization at its own expense and not by the government at public expense.¹⁴⁸

Synthesizing from this early case law, the First Circuit reasoned that the public "owns the law" not just because it pays the salaries of those who write the statutes and judicial opinions, but because "[e]ach citizen is a ruler—a law-maker," and therefore "[t]he citizens are the authors of the law."¹⁴⁹ Beyond that, the court found that due process guarantees access because it requires notice of legal obligations.¹⁵⁰ It also found these principles irreconcilable with BOCA's claims to limit access under the copyright law, and to decide for itself when, where, and how the code was to be reproduced and made publicly available.¹⁵¹ Nevertheless, the court left "the door slightly ajar" for BOCA to argue, based on a more complete trial record, that it was entitled to some protection by relying on the distinctions between privately authored model codes, publicly authored statutes, and judicial opinions.¹⁵²

The court in *Building Officials* analyzed several cases dating from the 1800s to support its reasoning and conclusion.¹⁵³ In *Wheaton v. Peters*,¹⁵⁴ the Supreme Court stated, without offering much analytical support, that "no

¹⁴⁵ *Id.* at 731. The court of appeals stopped short of "ruling definitely on the underlying legal issues," finding only that the BOCA's probability of success was insufficient to justify a preliminary injunction. *Id.*

¹⁴⁶ *Id.* at 733.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing *Banks v. West*, 27 F. 50, 57 (C.C.D. Minn. 1886)).

¹⁵⁰ *Id.* at 734.

¹⁵¹ *Id.* at 735.

¹⁵² *Id.* at 736; see also *Rand McNally & Co. v. Fleet Management Sys., Inc.*, 591 F. Supp. 726, 736 (N.D. Ill. 1983) (holding that map filed in Interstate Commerce Commission is tariff distinguishable from statutes and opinions promulgated by public officials, and from BOCA code adopted by public officials, even though public is bound by tariff).

¹⁵³ *Building Officials*, 628 F.2d at 732-34.

¹⁵⁴ 33 U.S. (8 Pet.) 591 (1834).

reporter has or can have any copyright in the written opinions delivered by this court; and judges thereof cannot confer on any reporter any such right."¹⁵⁵

A later Supreme Court case, *Banks v. Manchester*,¹⁵⁶ invalidated a state law which purported to allow an official reporter to obtain a copyright on the opinions of the Ohio Supreme Court.¹⁵⁷ The reporter could not claim authorship of the opinions, and the state was not a "citizen or resident" under copyright law¹⁵⁸ and thus could not obtain a copyright for itself.¹⁵⁹ The Court stated "that work done by . . . judges constitutes the authentic exposition and interpretation of the law . . . [and] is free for publication to all."¹⁶⁰

In *Nash v. Lathrop*,¹⁶¹ the Massachusetts Supreme Judicial Court ordered the reporter of decisions to permit a competing publisher to examine and copy opinions in the reporter's custody.¹⁶² The court stated:

Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices.¹⁶³

The court avoided deciding whether the state itself could hold a copyright in the opinions, deciding only that the state had not granted an exclusive right to the reporter, Little, Brown & Co.¹⁶⁴ The court also stated that the publisher had the right to make reasonable regulations to prevent damage or disruption to the orderly management of its official papers.¹⁶⁵

¹⁵⁵ *Id.* at 668.

¹⁵⁶ 128 U.S. 244 (1888).

¹⁵⁷ *Id.* at 252-53.

¹⁵⁸ *Id.* at 253. There is room for a similar argument under the present Copyright Act, which allows copyright only to a "national or domiciliary of the United States, or . . . a national, domiciliary, or sovereign authority of a foreign nation." 17 U.S.C. § 104(b)(1) (1988). The language pertaining to U.S. authors excludes institutional authors, while the language pertaining to foreign authors appears to allow governments to be statutory authors.

¹⁵⁹ *Banks*, 128 U.S. at 253.

¹⁶⁰ *Id.*

¹⁶¹ 6 N.E. 559 (Mass. 1886).

¹⁶² *Id.* at 563.

¹⁶³ *Id.* at 560.

¹⁶⁴ *Id.* Most of the court's analysis focused on the state statute authorizing the contract with Little, Brown & Co. *Id.* at 559-63.

¹⁶⁵ *Id.* at 563.

The court in *Building Officials* also cited two earlier cases, *Davidson v. Wheelock*¹⁶⁶ and *Howell v. Miller*,¹⁶⁷ which held that “although the reporter could obtain a valid copyright on his compilation and analysis, anyone could freely copy the laws themselves.”¹⁶⁸ Furthermore, “no one can obtain the exclusive right to publish the laws of a state in a book prepared by him.”¹⁶⁹ If one cuts from another’s book the general laws of a state and uses the pages thus cut, and nothing more from the first work, in preparing a competing compilation, then there would be no copyright infringement.¹⁷⁰

In *In re Gould & Co.*,¹⁷¹ the Connecticut Supreme Court held that the reporter of opinions was not entitled by his copyright or by the exclusive franchise granted him by the secretary of state to withhold slip opinions from competing publishers.¹⁷² Among other things, the court noted that the reporter’s duty was to allow the public to make copies without inquiry as to the requester’s purpose.¹⁷³ It suggested in dictum, however, that the state could copyright the text of judicial opinions through legislation.¹⁷⁴

*Georgia v. Harrison Co.*¹⁷⁵ directly brought into play the possibility of a copyright owned by the state, whereas the earlier cases involved assertion of copyright by state contractors.¹⁷⁶ The state of Georgia cited 17 U.S.C. § 105 “which specifically provides that copyright protection is not available for any work of the [U.S.] government” and argued that “if Congress had wanted to preclude states from having copyright protection it should have so provided in the Copyright Act.”¹⁷⁷ The court denied a preliminary injunction against a competing publisher,¹⁷⁸ noting that “[t]he courts of this country have long held that neither judicial opinions nor statutes can be

¹⁶⁶ 27 F. 61 (C.C.D. Minn. 1866) (denying injunction against a competing publication of legislative materials because there was no copying of marginal notes or references, and because only text of law was copied). The copyright in the statutory compilation was “awarded” to the plaintiff as the low bidder. *Id.*

¹⁶⁷ 91 F. 129 (6th Cir. 1898) (affirming denial of injunction against competing publisher of state code). Much of the opinion evaluated and rejected the defendants’ argument that they could not be enjoined from publication because they had been ordered by the state to publish their compilation.

¹⁶⁸ *Building Officials*, 628 F.2d at 734.

¹⁶⁹ *Howell*, 91 F. at 137.

¹⁷⁰ *Building Officials*, 628 F.2d at 734 (citing *Howell*, 91 F. at 137).

¹⁷¹ 2 A. 886 (Conn. 1885).

¹⁷² *Id.* at 892-93.

¹⁷³ *Id.* at 890.

¹⁷⁴ *Id.* at 892.

¹⁷⁵ 548 F. Supp. 110 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983) (vacated on unanimous request of the parties after settlement).

¹⁷⁶ See *supra* notes 166-67, 171 and accompanying text.

¹⁷⁷ *Harrison*, 548 F. Supp. at 114.

¹⁷⁸ *Id.* at 117.

copyrighted,” and that “a state’s ‘ownership’ of its statutes does not preclude anyone from publishing those statutes.”¹⁷⁹ The rationale for prohibiting copyright in such materials applied, the court found, regardless of whether the state itself or a private citizen asserts a copyright.¹⁸⁰ “The public must have free access to state laws, unhampered by any claim of copyright, whether that claim be made by an individual or the state itself.”¹⁸¹

2. *Trademark Protection*

If copyright is not an appropriate way to manage the dissemination of public information, another type of intellectual property, trademark, may prove useful. Trademark is potentially available to all three levels of government, and it raises fewer problems in realizing the policy precepts. Trademark is aimed at protecting the reputation for quality associated with particular suppliers of goods and services by reducing the likelihood of consumer confusion about the origin of similar products and services.¹⁸² Thus, assuming other statutory criteria are satisfied, a public agency could obtain a trademark for its information products and limit the use of that trademark to those it has licensed.¹⁸³ Conceivably, a state legislature could obtain a trademark for the “official version” of state statutes and deny use of the trademark to unofficial sources. This form of intellectual property permits public agencies to reduce risks of poor quality information that might harm the public, and at the same time permits a diversity of channels and sources to exist. If, over time, the consuming public prefers an unofficial source, it could have that source available and be perfectly free to reject the trademarked official source.

¹⁷⁹ *Id.* at 114.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Nebraska Irrigation, Inc. v. Koch*, 523 N.W.2d 676 (Neb. 1994) (finding no infringement of trade name because there was no likelihood of public confusing two trade names and doing business with a mistaken party).

¹⁸³ For example, Smokey the Bear is a statutory trademark. *See* 18 U.S.C.A. § 711 (West Supp. 1994); *see also* 19 Op. Att’y Gen. 361 (1889) (deciding that United States’ appropriated figure of an eagle with letters “U.S.” under it is protected and may not be used by private manufacturers). *But cf.* *Vuitton Et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769, 775 (9th Cir. 1981) (holding that national insignia is unprotectable); *George Washington Mint, Inc. v. Washington Mint, Inc.*, 349 F. Supp. 255, 262 (S.D.N.Y. 1972) (finding trademark of doubtful validity because it might mislead customers into thinking they were doing business with government); *In re Application of Gorham Mfg. Co.*, 41 App. D.C. 263 (1913) (affirming denial of registration of mark that looked like official seal of British government agency).

C. *First Amendment Arguments*

Even if the Copyright Act were interpreted to extend to public information at the state and local level, the First Amendment to the United States Constitution¹⁸⁴ and similar state constitutional grants of privileges and immunities with respect to communication and expression would limit the assertion of such copyright. The same First Amendment and state constitutional doctrines would also limit the assertion of information monopolies supported by any other source of law. The First Amendment enters the access controversy in two ways: as a limitation on direct restrictions on access and publication, and as a limitation on copyright.

There are two ways to support any monopoly: by denying access to the raw material for the monopolist's product or service, and by imposing a duty on potential competitors of the monopolist not to sell the monopoly product or perform the monopoly service. Enforcement of a duty not to disseminate directly conflicts with the First Amendment, while the denial of a right to access indirectly conflicts.

When a monopoly is granted or asserted with respect to public information, the monopoly is enforced by denying access to the underlying public information within the scope of the monopoly, and also by imposing a duty not to publish or disseminate that public information. For many years the United States Supreme Court has recognized that access to information is essential to the kind of democratic political system the First Amendment seeks to protect.¹⁸⁵ The First Amendment particularly disfavors discrimination against certain messages or certain types of communicators.¹⁸⁶ Thus, a redissemulator of public information that is denied access to public information *because* it is a redissemulator would argue that the First Amendment makes such selective denial of access unconstitutional. This argument would have equal force regardless of whether the discriminatory denial is based on state statute or common law. A redissemulator threatened with sanctions based on state law for redisseminating in competition with a state-sanctioned monopolist would argue that the source of law authorizing the sanctions violates the First Amendment and therefore is unconstitutional.

The Second Circuit accepted the general proposition that the First Amendment can entitle a publisher to electronic formats of state legislative

¹⁸⁴ "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

¹⁸⁵ *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (recognizing relationship between access to information and First Amendment), *reh'g denied*, 115 S. Ct. 30 (1994).

¹⁸⁶ *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (finding compelled access cannot discriminate against or in favor of particular points of view).

material in *Legi-Tech, Inc. v. Keiper*.¹⁸⁷ Legi-Tech sought to enjoin New York state officials from denying it access to a state-owned computerized database that contained legislative information and was available through subscription to the general public.¹⁸⁸ Legi-Tech marketed a computerized information retrieval service that summarized pending legislation, votes on bills, attendance and voting records of legislators, and campaign contributions of the New York and California legislators.¹⁸⁹ The state of New York offered a similar service to the public known as a "Legislative Retrieval Service" (LRS).¹⁹⁰ The primary difference between the two services was that LRS offered a full text of New York bills, while Legi-Tech offered only a summary.¹⁹¹ Also, LRS did not offer information about voting and attendance records of, and campaign contributions to, legislators.¹⁹²

In response to Legi-Tech's original state court action requiring the Legislative Bill Drafting Commission of New York to offer LRS to Legi-Tech on the same terms as it was offered to other customers, New York enacted Chapter 257 of the New York Laws.¹⁹³ Chapter 257 authorized the legislature to "engage in the sale of any of the foregoing services . . . to such entities [as] the president of the senate and speaker of the assembly . . . deem appropriate, except those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature."¹⁹⁴ Legi-Tech fell within the prohibitory portion of the statute and challenged the statute as unconstitutional because it denied Legi-Tech's rights to freedom of speech and of the press.¹⁹⁵ The district court considered Chapter 257 reasonable because it only sought to protect the state's natural monopoly on computer supplied, legislative information.¹⁹⁶ The district court also determined that LRS would be driven out of business if competitors were not restricted and could retransmit the state's data at lower prices.¹⁹⁷

The Second Circuit disagreed with the district court's legal theories and remanded for further findings.¹⁹⁸ The court found that New York's statute limited Legi-Tech's access to information and also its right of publica-

¹⁸⁷ 766 F.2d 728 (2d Cir. 1985).

¹⁸⁸ *Id.* at 730.

¹⁸⁹ *Id.* at 731.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (quoting chapter 257).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 731-32.

¹⁹⁷ *Id.* at 732.

¹⁹⁸ *Id.*

tion.¹⁹⁹ It also found that such restrictions could prevent Legi-Tech from publishing the full text of pending bills in New York in a package with relevant political information in a timely fashion.²⁰⁰ The court of appeals further noted that information about legislative proceedings is “vital to the functioning of government and to the exercise of political speech, which is at the core of the First Amendment.”²⁰¹

Legi-Tech asserted that LRS automatically received copies of any introduced legislation and published the contents before they were available to other dissemination channels.²⁰² On some occasions the legislation was enacted before a printed copy was available to the public, but after it was transmitted to LRS.²⁰³ Denying the private press access to such information was an exercise in censorship which allowed the government to control the form and content of the information reaching the public.²⁰⁴ There was nothing natural about a monopoly that arose “out of a combination of LRS’ special access to information and Chapter 257’s prohibition on competitors from having access to LRS’ database.”²⁰⁵

Thus, resolution of the discriminatory access issue on remand must turn on whether Legi-Tech could obtain printed copies of pending bills or other legislative information on substantially the same terms as LRS.²⁰⁶ The court of appeals perceived “no merit in the proposition that government may accord a state organ of communication preferential access to information and deny to the private press the right to retransmit the information.”²⁰⁷

Legi-Tech also claimed Chapter 257 was unconstitutional because the law denied it the same access to LRS that was offered to the public.²⁰⁸ The court held that the press has the same right of access to governmental proceedings as the general public.²⁰⁹ Furthermore, “the government may not single out the press to bear special burdens, even if evenhanded imposition of the identical burdens would be constitutionally permissible.”²¹⁰

New York also claimed a privilege to discriminate against republishers

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 733.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 736.

²⁰⁷ *Id.* at 733. “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.” *Id.*

²⁰⁸ *Id.* at 734.

²⁰⁹ *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Estes v. Texas*, 381 U.S. 532, 540 (1965)).

²¹⁰ *Id.* at 734.

to prevent competitors from getting a free ride on its costly investment.²¹¹ This argument is similar to the justification for copyright protection.²¹² While not rejecting outright this justification for the discrimination, the court of appeals did refuse to accept the existing scheme which absolutely barred republication, rather than set a price that would negate free riding.²¹³ On remand, Legi-Tech's entitlement to access to LRS would depend in part on Legi-Tech's burden of creating the same electronic enhancements itself.²¹⁴

When copyright is the basis for access or publication restrictions, the First Amendment plays a background role. The Ninth Circuit considered a clash between First Amendment interests and copyright protection in *Los Angeles News Service v. Tullo*.²¹⁵ The plaintiff, Los Angeles News Service (LANS), videotaped the sites of an airplane crash and train wreck and licensed television stations to use them on news programs.²¹⁶ The defendants, associates of Audio Video Reporting Services (AVRS), made video recordings of the news programs and marketed the recordings to individuals and businesses.²¹⁷ The court of appeals rejected AVRS' argument that the raw videotapes were not entitled to copyright protection because they merely recorded real world events, applying the general rule that almost any photograph is copyrightable because it "reflects the personal reaction of an individual upon nature."²¹⁸ Moving on to the First Amendment issues, the court noted that "[c]opyright law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas

²¹¹ *Id.* at 735.

²¹² See *Atari Games Corp. v. Nintendo*, 975 F.2d 832, 843 (Fed. Cir. 1992) (analyzing need for fair use privilege in terms of risk of free riding on copyright holder's work); *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 n.6 (9th Cir. 1991) (explaining fair use defense in terms of risk of free riding); Lee B. Burgunder, *Trademark and Copyright: How Intimate Should the Close Association Become*, 29 SANTA CLARA L. REV. 89 & nn.26-27 (1989) (noting that common purpose of trademark, copyright, and patent is to prevent free riding).

²¹³ *Legi-Tech*, 766 F.2d at 735-36. Legi-Tech stipulated that it would be willing to pay a higher price than the general public, and the court speculated that this might encompass a price that would reflect lost revenue to LRS. *Id.*

²¹⁴ *Id.* at 736.

²¹⁵ 973 F.2d 791 (9th Cir. 1992).

²¹⁶ *Id.* at 792.

²¹⁷ *Id.*

²¹⁸ *Id.* at 793 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903)). The Court cited Judge Learned Hand and Professor Melville B. Nimmer as supporting this general rule. *Id.* at 793-94. It rejected reliance on *Cable News Network, Inc. v. Video Monitoring Service of America*, 940 F.2d 1471 (11th Cir. 1991) (reversing preliminary injunction against copyright or selling network programming), *vacated*, 949 F.2d 378 (11th Cir. 1991), because the court dismissed the appeal en banc and the panel decision was vacated. *Los Angeles News Serv.*, 973 F.2d at 794 n.4.

and information are expressed and not to the ideas and information themselves.”²¹⁹

Moreover, First Amendment considerations enter into the determination of whether a given use of a particular work is fair use and therefore privileged under the Copyright Act.²²⁰ Because there was no showing that enforcement of the copyright limited the public access to the facts contained therein, the court thought the problem perceived by Professor Nimmer—that the idea/expression dichotomy codified in 17 U.S.C. § 102(b) would not adequately protect First Amendment interests—was not present in the case before it.²²¹ Thus, under the *Los Angeles News Service* analysis, whether the First Amendment allows a copyright in public information depends on the availability of the underlying information to the public through reasonable means of access.

The Supreme Court has accepted this basic idea.²²² The Court has noted that “[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public.”²²³ Combining fair use and First Amendment analysis justifies strong copyright protection for private sector redisseminators of public information, while at the same time questions copyright protection for the public information itself, where the incentives that underlie copyright are not needed. The congruence of fair use and First Amendment analysis also justifies considering First Amendment principles when shaping the boundaries of fair use, especially when public information is involved.

There are two important limitations on the First Amendment and similar state constitutional arguments, however. The first limitation has to do with

²¹⁹ *Los Angeles News Serv.*, 973 F.2d at 795.

²²⁰ *Id.* (noting, however, that Professor Nimmer’s suggestion that the idea-expression dichotomy in fair use doctrine may not adequately protect First Amendment interests); see MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.10(c)(2), at 1-83 to 1-84 (1992 ed.); see also *Twin Peaks Prods., Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (explaining that “except perhaps in an extraordinary case, ‘the fair use doctrine encompasses all claims of first amendment in the copyright field’”). The fair use doctrine, codified in 17 U.S.C. § 107 (1988), extends a privilege to certain socially desirable republication which otherwise would be copyright infringement.

²²¹ *Los Angeles News Serv.*, 973 F.2d at 796.

²²² *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556-57 (1985) (describing definitional balance between First Amendment and copyright as incorporated into idea/expression dichotomy, and noting that straightforward news reports are not copyrightable, but declining to expand fair use to destroy any expectation of copyright protection in work of a public figure). The “Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Id.* at 558.

²²³ *Id.* at 559.

the nature of the public information at issue. The First Amendment is concerned with public debate.²²⁴ Certain content is closer to the core of that concern than are other contents. For example, the proceedings of a state legislature are much easier to relate to robust public debate than are the records of public utility easements across private property. It is thus conceivable that First Amendment protection of access to public information and First Amendment frustration of state monopolies on public information might be limited to legislative, judicial, and administrative agency decisional information and not extended to more utilitarian content like that involved in geographic information systems. Nevertheless, even geographic information pertains directly to property ownership and the use of public ways. Not only is enjoyment of property—a core interest protected by the United States Constitution and state constitutions—tied up in this type of information, but there is also much political debate surrounding the ownership and use of property.²²⁵ It would be hard for a public entity to sustain the position that one can participate effectively in a debate about a zoning ordinance without access to the zoning map, even though the map is arguably utilitarian as much as it is decisional.

The other limitation on First Amendment arguments is potentially more serious. Frequently, restrictions on redissemination are not imposed by statute or common law, but by contract. Someone is licensed to use a product containing public information but the license imposes restrictions on types of use, and frequently disallows redissemination. Someone who agrees to such a license may arguably have waived any First Amendment entitlement to engage in the conduct prohibited by the license restrictions. The counter-argument would be that there is an underlying constitutional right to the information covered by the license, and that the licensor, usually a public entity, may not condition the exercise of this constitutionally protected access right on the giving up of other constitutional rights. Alternatively, the licensee could argue that the license restriction is state action that constitutes unconstitutional discrimination against certain licensees—those intending to engage in constitutionally protected communicative acts of redissemination.

²²⁴ *But see* Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994) (reversing dismissal of police officer's complaint alleging that he was dismissed for writing a novel based on his experiences at the police department and district attorney's office, stating that "[t]he First Amendment protects entertainment as well as treatises on politics and public administration").

²²⁵ For example, a WESTLAW search on March 19, 1995 of the "Allcases" database using the term "regulatory taking" retrieved 592 cases. This level of litigation over regulations that arguably constitute takings of property under the Fifth Amendment, exemplifies the level of debate more generally in a wide variety of forums.

D. Antitrust Arguments

The federal antitrust laws favor competition and thus provide legal support for the information policy diversity precepts. Someone suffering antitrust injury²²⁶ caused by a monopoly of public information can collect damages and obtain injunctions against maintenance of the monopoly. An explicit establishment or grant of an information monopoly would be a *prima facie* violation of Section 2 of the Sherman Act²²⁷ and also, assuming contracts between legally separate entities were involved, Section 1 of the Sherman Act.²²⁸ The only plausible argument against *prima facie* liability would be based on limited competitive effect.²²⁹ A defender of an exclusive arrangement for electronic formats could argue that electronic formats and paper formats constitute substitute products and therefore the restraint on competition is to be judged by considering the overall market for particular information, including paper and electronic formats. Because of the dramatic differences between utility and cost, however, it is far more likely that the markets for electronic formats and paper formats would be considered separately for purposes of assessing the competitive effect of the state-granted monopoly.²³⁰

Not all state-granted monopolies result in liability under the federal antitrust laws, however. States and municipalities regularly grant franchises

²²⁶ Consumers are the primary intended beneficiaries of the antitrust laws. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (reinstating summary judgment for defendant in antitrust case and explaining antitrust injury and standing requirement; distinguishing consumers from competitors). Thus, consumers are more likely to have standing to litigate violations of the Sherman Act than are competitors of those engaging in the alleged illegal conduct.

²²⁷ Section 2 of the Sherman Act prohibits monopolization. 15 U.S.C. § 2 (1988).

²²⁸ Section 1 of the Sherman Act prohibits combinations or conspiracies that restrain trade, and thus focuses on contracts that fix prices or limit output. *Id.* § 1 (1988).

²²⁹ Except for *per se* violations of Section 1, conduct potentially violating the Sherman Act is judged under a "rule of reason" analysis, which weighs the anti-competitive effect against pro-competitive effect; anti-competitive effect is judged with respect to a particular market. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2090 (1992) (remanding to determine whether manufacturer unlawfully tied sale of services to sale of parts for its line of micrographic equipment).

²³⁰ Competitive effect in a defined market is essential for determining whether Section 2 has been violated because one cannot determine if a monopoly exists except relative to a particular market. Market definition is less central, but still important, to Section 1 analysis. However, an explicit monopoly over publishing and distributing public information is likely to be classified as a *per se* violation of Section 1 rather than being evaluated under the rule of reason. Furthermore, market definition is far more important for rule of reason analysis because that analysis requires balancing pro-competitive against anti-competitive effects.

and set prices for products and services. Similarly, a state monopoly with respect to public information might qualify for the "state action" exemption²³¹ to the antitrust laws. In some areas, such as insurance regulation, Congress has explicitly immunized from antitrust liability certain state regulatory activities.²³² Exclusive cable television franchises escape antitrust prohibitions both because they are sanctioned by the Cable Communications Act, and because they are made legitimate by local regulatory interests.²³³ There is no such explicit exemption for other state monopolies which may regulate electronic publishing.²³⁴

There is, however, a residual state action exemption premised on federalism and its respect for state sovereignty.²³⁵ Many state regulatory programs are immunized from antitrust liability even though they limit competition because of the need to allow some elbow room for state regulatory power. In the late 1970s and 1980s the Supreme Court held that municipalities²³⁶ were not entitled to state action immunity on their own, and that they must derive any immunity from state legislative authorization.²³⁷

²³¹ See *infra* notes 232-43 and accompanying text.

²³² See McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988) (immunity from antitrust laws for state-regulated business of insurance).

²³³ 47 U.S.C. § 521 (1988 & Supp. V 1993); see *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) (city had antitrust immunity with respect to cable television franchising).

²³⁴ The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), exempts local governments and persons acting under their direction from damages, interest, and attorneys' fees under the antitrust laws, while leaving intact substantive antitrust law analysis. "The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, or in enforcement actions by the Department of Justice or the Federal Trade Commission under other statutory provisions." H.R. REP. NO. 965, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 4602, 4603.

²³⁵ See *Federal Trade Comm'n v. Hospital Bd. of Directors*, 38 F.3d 1184 (11th Cir. 1994) (finding that state action requirement shielded purchase by county hospital board of private hospital because powers granted to political subdivision by state contemplated anti-competitive effect); *Continental Bus Sys., Inc. v. City of Dallas*, 386 F. Supp. 359, 363 (N.D. Tex. 1974) (finding that state action doctrine precluded antitrust liability of city which granted exclusivity to certain bus lines serving airport).

²³⁶ Municipalities in this sense includes counties. State action immunity at the municipal and county level is important to public information policy because of the large stock of land records held at that level. Margit Livingston, *Public Access to Virginia's Tidlands*, 24 WM. & MARY L. REV. 669, 725 n.12 (1983) (referring to practice of locating land records in offices where property is located).

²³⁷ See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39-42 (1985) (finding that municipalities are not immune by virtue of their status because they are not themselves sovereign, and that state may not validate municipal anti-competitive conduct simply by

Then, in the mid-1980s, the Supreme Court relaxed federal antitrust scrutiny of municipal anti-competitive arrangements.²³⁸ No longer must a municipality demonstrate explicit state legislative intent to supplant competition with regulation. It is enough to show that the state legislature clearly contemplated municipal anti-competitive activity or that such activity was foreseeable or the logical result of the legislation.²³⁹ On the other hand, anti-competitive action under the authority of a general home rule grant would not qualify because the legislative direction is not specific enough.²⁴⁰ Moreover, active supervision of the municipality by the state is no longer required.²⁴¹ When the municipality sanctions private anti-competitive conduct, the supervision of the private conduct need be only general and potential.²⁴²

One respected commentator, Philip Areeda, suggests that proprietary activities by municipal governments, meaning "public activities that compete directly with private firms in the open market and that differ from them only in stockholder identity," might be subject to greater antitrust scrutiny, although he expresses concern that drawing the distinction between proprietary and non-proprietary activities always has proven troublesome.²⁴³ Conversely, one could argue that states and municipalities should be entitled to grant exclusive franchises to private entities to perform services that otherwise would be performed by the government itself. Because governments historically had a natural or de jure monopoly on performance of

declaring it to be lawful, but may authorize it and thereby confer immunity even if municipal activities not compelled and not supervised by state); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 393-94 (1978) (finding that municipal electric power company was not automatically exempt from antitrust scrutiny); *id.* at 422 & n.3 (Burger, C.J., concurring) (suggesting that proprietary activities of municipalities should not be exempt from Sherman Act).

²³⁸ See generally Thomas M. Gorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 228 (1987) (explaining trilogy of cases that substantially clarified application of state action doctrine to municipalities).

²³⁹ *Id.* at 242 (citing *Hallie*, 471 U.S. at 42).

²⁴⁰ *Id.* at 242 & n.97 (citing *Hallie*, 471 U.S. at 43); see also *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40, 52 (1982).

²⁴¹ Gorde, *supra* note 238, at 245 (discussing *Hallie*, 471 U.S. at 46 & n.10).

²⁴² *Id.* (discussing *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 51, 61 n.23, 66 (1985)).

²⁴³ Philip Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 443 (1981) (suggesting that waste disposal, water service, municipal transport, and public parts probably should not be included in proprietary category and that mere regulation of zoning, cable television, and other public franchises would not be proprietary). But see *Building and Constr. Trades Council v. Associated Builders and Contractors*, 113 S. Ct. 1190, 1198 (1993) (allowing project labor agreement not preempted by federal labor law because proprietary rather than regulatory in character).

public services exempt from antitrust liability, the argument would go, they should be able to delegate this immunity to their contractors. Winning with this argument, however, should depend on sustaining the proposition that competition for the privatized service would harm essential public interests. Because public information policy benefits from a multiplicity of sources and channels, the opposite is true. A monopoly is not supportive and contravenes public interest.

E. *Burdens on Interstate Commerce*

Because of the likelihood that a diversity of channels and sources for public information would involve interstate commerce, a state-sanctioned monopoly on such information adversely affects interstate commerce. Such an effect is permissible, but only if it is justified by the pursuit of a legitimate state interest.²⁴⁴ This criterion is not always satisfied.

Suppose a county sets up its land records in electronic form, and permits electronic access only under an exclusive contract whereby anyone obtaining electronic access must agree not to compete or disclose the information to anyone else. Effectively, the county has set up a monopoly in this market. Assume further that an out-of-state entrepreneur would like to purchase these electronic land records; yet the entrepreneur does not want to sign the licensing agreement because it wants to incorporate the records into a larger database of land records from many geographic areas. This section considers whether the above hypothetical would violate the Commerce Clause of the United States Constitution.²⁴⁵

The "dormant Commerce Clause" refers to an implied limitation on state power arising from the Commerce Clause. The underlying issue is whether the grant of power to Congress to control interstate commerce found in Article I, Section 8 of the Constitution prevents states from regulating interstate commerce in a subject area not addressed or dealt with explicitly by

²⁴⁴ See *infra* notes 246-66 and accompanying text.

²⁴⁵ The grant of power to Congress to control commerce both with foreign nations and between the states of the United States is found in Article I, Section 8 of the United States Constitution. This clause states: "The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8. Essentially, this clause serves as a grant of power to the Federal Congress and also as a limitation on state legislative power. Commerce is defined broadly. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (finding that hotel was providing lodging to out-of-state people, and that since black Americans were victims of discrimination, they would not travel and this would hurt interstate commerce); *Stafford v. Wallace*, 258 U.S. 495 (1922) (stating that stockyards were in "the stream of commerce," since cattle and goods were only temporarily in stockyards); *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824) (stating that "[c]ommerce among the States" is "commerce which concerns more States than one").

Congress.

In *Gibbons v. Ogden*,²⁴⁶ the Supreme Court first addressed this issue. Ogden had an exclusive steamboat operating license from New York state.²⁴⁷ Gibbons, who had a federal license to operate his vessel between New York and New Jersey, was stopped by New York from entering New York state waters because of Ogden's steamboat monopoly.²⁴⁸ Gibbons brought suit, arguing that this was a violation of the Constitution and specifically the Commerce Clause.²⁴⁹ The Court found that New York's grant of the monopoly was invalid since it interfered with interstate commerce.²⁵⁰ States, however, can regulate those parts of interstate commerce which are local in nature and need different treatment from state to state.²⁵¹

Under the holding in *Pike v. Bruce Church, Inc.*,²⁵² a two prong test is used to determine if state regulation is unconstitutional.²⁵³ First, does the regulation discriminate against interstate commerce?²⁵⁴ Second, are the burdens on interstate commerce clearly excessive compared to the local benefits of that particular state?²⁵⁵ If the answer to both of these questions is yes, then the state regulation is unconstitutional and therefore invalid.²⁵⁶

Under *Pike*, it is necessary to determine if the state regulation is discriminatory against people from other states or interstate commerce in general. A regulation or law is facially discriminatory if it imposes restrictions or penalties on out-of-state people and not in-state people. If a statute does discriminate, then the statute is unconstitutional and the state interest does not outweigh the burden on interstate commerce. In *City of Philadelphia v. New Jersey*,²⁵⁷ a New Jersey statute prohibiting out-of-state waste from entry into state was held to be invalid.²⁵⁸ There was an obvious, legitimate

²⁴⁶ 22 U.S. 1 (1824).

²⁴⁷ *Id.* at 2.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 3.

²⁵⁰ *Id.* at 221.

²⁵¹ *Cooley v. Board of Wardens*, 53 U.S. 298 (1851).

²⁵² 397 U.S. 137 (1970).

²⁵³ *Id.* at 142.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ This modern approach enhances the conflict between what might be good for one state and its citizens and what might be good for the nation as a whole. For example, in *Baldwin v. Seelig*, 294 U.S. 511 (1935), a New York statute requiring a minimum milk price was held to be unconstitutional since this amounted to economic protectionism and would have a negative effect on the national economy. *Id.* This result was reached despite the fact that the statute may have helped certain citizens of New York and the New York state economy.

²⁵⁷ 437 U.S. 617 (1978).

²⁵⁸ *Id.* at 628.

state interest in keeping waste out, and yet there was no need to discriminate and burden interstate commerce.²⁵⁹ A state, in pursuing a legitimate state interest, cannot use a discriminatory method to achieve that interest if there are effective non-discriminatory procedures that can be used.²⁶⁰ If a regulation is facially discriminatory, then there must be a legitimate state interest that outweighs the discrimination on interstate commerce, and there must be no alternative non-discriminatory means to achieve that state interest.²⁶¹

A statute may be discriminatory in effect but not facially discriminatory.²⁶² This occurs when a state does not explicitly treat out-of-state people differently, but in the practical aspects and application of the statute it puts a greater burden on out-of-state people than in-state people.²⁶³ Even if a state statute or regulation is found to be non-discriminatory, it may violate the dormant Commerce Clause if it puts too great a burden on interstate commerce.²⁶⁴ Conversely, a state law can burden interstate commerce and be upheld so long as it pertains to local matters and the burden on interstate commerce is not too great.²⁶⁵

In evaluating a state-sanctioned monopoly over public information within this framework, one must consider the following questions. First, is the interest the state identifies in justifying the monopoly a legitimate state interest? Second, is the burden on interstate commerce too great? The argument against the monopoly is stronger if it discriminates in favor of the in-state entities on its face.

²⁵⁹ *Id.*

²⁶⁰ *Hughes v. Oklahoma*, 441 U.S. 322, 376 (1979). If there is an available, non-discriminatory alternative that is not used, then the statute is unconstitutional. *Id.*

²⁶¹ *Barclays Bank v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2287 (1994) (Scalia, J., concurring) (even narrowed dormant Commerce Clause test would invalidate state law that facially discriminates against interstate commerce).

²⁶² There are some scholars and judges who do not believe in this balancing approach. They argue that if a statute is non-discriminatory on its face then the dormant Commerce Clause does not apply. Gillian E. Metzger, *Unburdening the Undue Burden Standard*, 94 COLUM. L. REV. 2025, 2042 (1994) (explaining and criticizing balancing approach in dormant Commerce Clause analysis).

²⁶³ See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-54 (1977).

²⁶⁴ *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2217-18 (1994) (applying test and finding that local interests did not justify burden imposed on commerce); see also *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment) (explaining dormant Commerce Clause balancing test is "like judging whether a particular line is longer than a particular rock is heavy"); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring in part and concurring in the judgment) (criticizing use of balancing test in dormant Commerce Clause cases).

²⁶⁵ *West Lynn Creamery*, 114 S. Ct. at 2211.

In the hypothetical, the public land records in electronic form could be sold and used across state lines. It is virtually certain that this business is in the realm of interstate commerce. The county is willing to sell to anyone, whether they are in-state people or out-of-state, as long as they agree not to sell or compete with the county.

The burden is significant. An out-of-state publisher buying this product is unable to distribute these public records in electronic form for publication, analysis, public policy comparisons, or academic research. The burden on interstate commerce would be enormous if all county and public records could only be bought from the county in which the records originated. There does not appear to be a very strong state interest other than to perhaps raise revenues.²⁶⁶

F. *Substantive Due Process and Equal Protection*

Substantive due process under the Fourteenth Amendment of the United States Constitution immunizes persons from deprivation of life, liberty, or property except when the deprivation is justified by a legitimate state interest.²⁶⁷ Equal protection analysis is similar.²⁶⁸ A state-established monopoly on electronic publishing adversely affects First Amendment interests, which involve a fundamental right, and therefore should trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment²⁶⁹ and probably would trigger similar scrutiny under a substantive due process doctrine.²⁷⁰ It would be difficult for a state or municipality to show how an information monopoly is necessary to promote a legitimate state interest. There is little authority for the proposition that making money is a legitimate state interest. Thus, it is hard for states to justify interfering with private entrepreneurial interests. It would also be difficult to justify information monopolies on the grounds of ensuring an accurate flow of public information, because the less restrictive trademark approach is available to protect

²⁶⁶ Generally, strong state interests involve the health, welfare, and safety of their citizens. *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984) (local safety interests accorded particular weight in dormant Commerce Clause analysis).

²⁶⁷ U.S. CONST. amend. XIV; *see Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 777 (1993) (Souter, J., concurring in part and dissenting in part) (noting that civil rights conspiracy claim could be evaluated under either substantive due process or equal protection test).

²⁶⁸ *But see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987) (questioning whether equal protection and substantive due process standards are same in property taking cases).

²⁶⁹ *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (finding that state sales tax targeting general interest magazines, while exempting other publications, violated First Amendment rights).

²⁷⁰ *See supra* note 267 and accompanying text.

any interest in avoiding errors in public information.

Thus, state monopolies on public information could be vulnerable to attack under the Reconstruction era civil rights acts²⁷¹ when they are established at the state and local level, and to challenges as constitutional torts when they are established at the federal level.

V. PERMISSIBLE INFORMATION POLICIES

The legal and policy constraints on information monopolies still leave all levels of government with an enormous range of possibilities for disseminating electronic information products. First, and most basically, there is nothing in the foregoing analysis that prohibits charging for access to public information. Virtually every major policy statement and access law permits governmental entities to charge for the cost of providing access to public information.²⁷² Just as agencies may charge for the cost of providing access to raw content, so also may they charge for access to value-added features. However, the pricing for public information is regulated.²⁷³

Instead of trying to tease a more precise answer to the cost allocation question out of the characteristics of a particular public information product or information system, however, it is better simply to express a basic policy position on whether full costs or only direct costs should be reflected in the price for public information products. After doing this, it is best to then focus on the competition inherent in the diversity principle as a practical means of limiting the price that can be maintained for public information from governmental sources. Theoretically, private disseminators of public information will price at or close to marginal costs, and if a public source is pricing much higher than marginal costs, consumers will buy from the private sources instead of the public source, unless greater reliability and visibility of the public source justifies a premium price in the minds of consumers.

²⁷¹ 42 U.S.C. § 1983 (1988); *id.* § 1985(3).

²⁷² See 5 U.S.C. § 552(a)(4)(A) (1988 & Supp. V 1993) (agencies must promulgate regulations establishing fees for filling FOIA requests); Fla. Stat. Ann. § 119.07(1)(a) (West 1995) (establishing right to access upon payment of statutory fee); *id.* § 119.085 ("The custodian shall charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee shall include the direct and indirect costs of providing such access."); OMB Circular A-130, 58 Fed. Reg. 36,068 § 8(a)(7)(c) (1993) ("Set user charges for information dissemination products at a level sufficient to recover the cost of dissemination but no higher.").

²⁷³ See *infra* part VI.

VI. PRICING

Limiting copyright and quasi-copyright protection for public information, as this Article advocates, raises questions about how public information can be priced. Pricing arguments have to do with cost accounting: Whether prices for public access to public information may reflect a portion of the fixed costs of agency information systems, perhaps including systems designed to collect public information.²⁷⁴ Most policy guidelines addressing cost accounting say that only the direct costs of providing public access should be recoverable.²⁷⁵

However, determining direct costs is not simple. Volumes of decisions of public utility commissions address controversies over allocating fixed and joint costs.²⁷⁶ Automated information systems usually have a relatively high proportion of fixed costs for capital goods—hardware, software, and communications facilities—that produce a variety of output streams. When one of these streams is public access, how much of the fixed and joint cost should be allocated to that stream as opposed to others presents an essentially indeterminate question.

The absence of copyright protection and other monopolies means that any price will be subject to competitive pressure. Indeed, the pricing issue for public information merges with the issue of how electronic information can be priced whenever intellectual property protection is weak, as in Internet environments where infringement is easy to commit and difficult to detect.

Microeconomic theory explains that competition will force prices to a

²⁷⁴ See generally *MCI Communications Corp. v. American Tel. and Telegraph Co.*, 708 F.2d 1081, 1114 (7th Cir. 1982) (explaining controversy over use of marginal, average variable or average total cost as the standard for measuring predatory pricing); *In re IMB Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 988 (N.D. Cal. 1979) (explaining marginal, average variable, and average fixed cost measures).

²⁷⁵ Compare OMB Circular A-130, 58 Fed. Reg. 36,068 § 8(a)(7)(c) (1993) ("Set user charges for information dissemination products at a level sufficient to recover the cost of dissemination but no higher. They shall exclude from calculation of the charges costs associated with original collection and processing of the information.") with Fla. Stat. Ann. § 119.0851 (West 1995) ("The custodian shall charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee shall include the direct and indirect costs of providing such access.").

²⁷⁶ See e.g., *Colorado Office of Consumer Counsel v. Public Utils. Comm'n*, 786 P.2d 1086, 1094 (Colo. 1990) (explaining controversy over joint cost allocation); *Knutson Towboat Co. v. Oregon Bd. of Maritime Pilots*, 885 P.2d 746, 754-55 (Or. App. 1994) (approving joint cost allocation); Robert A. Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18, 86 n.91 (1993) (affirming well established principle of public utility regulation that allocation of joint costs is essentially arbitrary).

level close to marginal cost.²⁷⁷ The existence of high fixed costs increases the challenge of staying in business because marginal cost pricing means that fixed costs may not be covered.²⁷⁸ Conventional publishing has high fixed costs compared to variable costs,²⁷⁹ but Internet architectures with their easy duplication, cheap routing, and distributed production possibilities, probably change this relationship between fixed and variable costs significantly. Thus, the newer technologies for providing public access to public information probably reduce the risk that marginal cost pricing will make it impossible for nonsubsidized publishers to stay in business. In the past, marginal cost pricing by a public entity for an information product threatened private sector disseminators because they would have had to meet the agency's price to remain competitive, but such a price would not permit them to cover their fixed costs. Technology required that any dissemination include not only content but also added value, inseparably bundled together.

Now, with Internet architectures, it is feasible for agencies to make available the raw content of public information, and marginal cost pricing for that content reduces the costs of private sector redisseminators. As they add value, they can increase their prices for the added value above what the agency charges for the raw content. As long as the agency charges prices for each of its own value-added elements that covers the marginal costs of providing those elements, there is no unfair competition by the agency. Competitive advantage is driven solely by efficiency in producing the value-added elements.

There also is another kind of competitive risk—the one intellectual property law addresses. Even when fixed costs are a relatively small part of total cost, the original producer of a publication faces a threat of free riding when a competitor can produce essentially the same product without incurring the same fixed costs as the original publisher. For example, if the competitor simply copies chunking and tagging and pointers value, the competitor has the benefit of the originator's fixed investment without paying the cost (assuming the cost of copying is less than the cost of creating the chunking and tagging and pointers value in the first place).

The best pricing strategy to be sought by public policy is the following: The agency should price at marginal cost for access to the basic content, letting taxpayers pay the fixed costs of collecting and assembling this raw content, as is usually the case, if collection and assembly of the raw content is within the agency's statutory mandate. This presents no threat to private

²⁷⁷ EDWIN MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 241 (2d ed. 1975) (“[A]t the equilibrium price, price will equal marginal cost for all firms that choose to produce, rather than shut down their plants.”).

²⁷⁸ *Id.* (“Price may be above or below average total cost, since there is no necessity that profits be zero or that fixed costs be covered in the short run.”).

²⁷⁹ Printing presses and binderies cost more money than the labor and paper to print a significant press run.

sector publishers because agencies have a natural monopoly over the raw information.²⁸⁰ The policy preserves a role for private sector publishers not only when agency activity is limited to relatively raw forms of the information, but also when additional value-added features are paid for with public money. What is essential is that all private sector competitors get the benefit of the public investment at cost. As long as that is true, taxpayer subsidy of agency activities will not pose a threat to private sector activity aimed at adding value.

Any private sector entity that adds value can obtain access to the agency-produced baseline at the marginal cost to the agency and have her added-value protected by intellectual property. Then, the only risks of free riding are the risk of undetected or unpunished intellectual property infringement and the risk of free riding on "sweat of the brow." Public policy can lower the threat of that kind of free riding by making little "sweat of the brow" necessary through systems like Internet distribution and GILS finding aids.

VII. CONCLUSION

This Article argues that both government and private entrepreneurship have a role to play in realizing the advantages of information technology with respect to public information. It also argues, however, that governments need to choose between engaging in proprietary activities in a genuinely competitive environment and engaging in more limited public activities. If governments wish to engage in the former and become value-added electronic publishers, they should do so in a competitive marketplace without trying to extend inherently governmental monopolies into private markets. If, on the other hand, governments want to act within the protections of governmental privileges and immunities like the traditional monopolies over public services, they should limit themselves to traditional maintenance and release of relatively basic content, leaving the value adding activities to others. In no event should governments establish or sanction monopolies over public information.

²⁸⁰ This natural monopoly does not mean that private sector entities are prohibited from collecting the information; it just means that it would not pay them to do so.

