The Disclosure and Reproduction of Copyrighted Agency Records under the Freedom of Information Act

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I. Introduction

Since the passage of the Freedom of Information Act\(^1\) (FOIA) in 1966, the FOIA's emphasis on governmental openness and disclosure of agency processes through access to agency records has been in constant struggle with opposing forces, both from within the government and without. This struggle\(^2\) has been focused primarily on the nine exemptions found in the Act.\(^3\) The exemptions provide guidance to courts in determining the legality of withholding government documents from public scrutiny.

The Copyright Act of 1976\(^4\) also has been a battleground of competing interests and public policies.\(^5\) The Copyright Act protects the expression of ideas from unauthorized exploitation. Like the FOIA, the major controversies under the Copyright Act have focused on one part of the statute, section 107,\(^6\) commonly referred to as the fair use doctrine.\(^7\) Under that

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\(^1\) 1982 by Roy Seth Gordet
\(^2\) A FOIA lawsuit typically arises when a party requesting an agency record is thwarted by the agency's refusal to release the information. The party then sues in a federal district court to compel disclosure.
\(^3\) 5 U.S.C. § 552(b) (1976).
\(^5\) Congressional hearings on revising the copyright laws have been conducted continuously since 1955.
\(^7\) Section 107 provides:

[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
doctrine, one who reproduces all or part of a work does not infringe upon a copyright if his reproduction is minimal or his motives noncommercial. Section 108 expands upon section 107 by establishing special applications of the doctrine in library settings.

In Weisberg v. United States Department of Justice the Court of Appeals for the District of Columbia examined the interaction between the FOIA and the Copyright Act of 1976. The issue before the court was "whether administrative materials copyrighted by private parties are subject to the disclosure provisions of the FOIA." The court held that the existence of a copyright does not automatically render FOIA inapplicable to agency records. In Weisberg the government argued that the court could also exempt these agency records from the FOIA under the exemption for trade secrets and confidential business information. Under the current framework of the FOIA, any exemption for agency records clearly must fall under exemption three: exemption by specific language in a separate federal statute. Also apparent is that copyright issues similar to that in Weisberg must be resolved under the FOIA framework. No precedent exists for defining copyright as either confidential business information or a trade secret. Therefore, only exemption three can conceivably prevent disclosure in the face of FOIA mandates.

This comment demonstrates that the existence of a copyright cannot, of its own accord, be an effective reason for non-disclosure. Rather, subject to the delicate economic forces underlying the fair use doctrine, the government's position vis-à-vis copyrighted documents must adjust accordingly when

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

9. 631 F.2d 824 (D.C. Cir. 1980).
10. Id. at 825.
11. Id.
12. The government had argued that both exemption three and four prevented disclosure. Id. See also, Brief for Appellant at 39-43, Weisberg v. United States Dep't. of Justice, 631 F.2d 824 (D.C. Cir. 1980).
those documents form part of a government information system like the one mandated by the FOIA.\textsuperscript{13} An ever-increasing flow of documents and information will complicate any such adjustment. Regulating information technology such as computers and data processing, provides the best opportunity for Congress to deal effectively with the problem. These new solutions can be incorporated into new, more comprehensive legislation.

The complex confrontation of law and policies in Weisberg requires the consideration of the larger problems underlying the development and dissemination of information in both the public and private spheres. This comment explores the interaction of the Copyright Act's fair use doctrine with the amended exemption three of the FOIA. The comment concludes with a discussion of the current proposals for maximizing the efficiency of government information systems\textsuperscript{14} and suggests an alternative solution.

\section{II. Judicial Interpretation of Exemption Three}

\subsection{A. The Language of the Exemption}

Exemption three states that the FOIA does not require disclosure of matters that are: "specifically exempted from disclosure by statute, \ldots provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. \ldots"\textsuperscript{15} As discussed below a statute can qualify for the exemption in three distinct ways. Exemption three differs from the other exemptions in that it does not specify the documents that may be withheld. It refers instead to documents that are already exempted by other

\textsuperscript{13} Possibly, in the future the copyrighted documents will be treated under exemption four, for trade secrets and confidential business information, or under an exemption four-type approach.

\textsuperscript{14} The Copyright Act's relation to the FOIA will provide a special perspective from which to view such systems.

In Federal Aviation Administration v. Robertson, the United States Supreme Court applied the less-exacting language of the original exemption three to a statute that granted an agency broad discretion to withhold documents. Public interest lawyers requested that the Federal Aviation Administration (FAA) make available Systems Worthiness Analysis Program Reports which consisted of the FAA's analyses of the operation and maintenance performance of commercial airlines. Section 1104 of the Federal Aviation Act permits the FAA Administrator, upon receiving an objection to public disclosures of information in a report, to withhold disclosure when it would adversely affect the objecting party's interest and it would not be in the public's interest. Therefore, the Court permitted the FAA to withhold the documents. Congress viewed the Court's interpretation in Robertson as giving an agency "'cart blanch' [sic] to withhold any information [it] pleases." Congress amended exemption three to preserve the vitality of the FOIA's original purpose of promoting full governmental disclosure. The effect of the 1976 amendment was to overturn Robertson. The Supreme Court has only interpreted exemption three twice since the 1976 amendment. Nevertheless, lower courts have frequently applied the exemption to a wide range of statutes.

16. Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029 (1976). The author refers to such statutes as "pre-existing nondisclosure statutes" because statutes drafted after the FOIA will probably be drafted in a way that will take the FOIA into consideration. Id. at 1029 n.5.
17. 422 U.S. 255 (1975).
19. 422 U.S. at 257.
21. 422 U.S. at 258 n.4.
B. Three Representative Case Studies

Three cases exemplify the judicial approaches to exemption three. The first, *American Jewish Congress v. Kreps*, contains a thorough analysis of a particular statute in the exemption three context. The plaintiff in *Weisberg* relied extensively on *American Jewish Congress* to support his contention that the Copyright Act is not an exemption three statute. The statute at issue in *American Jewish Congress* was the Export Administration Act of 1969 (EAA). The EAA endows the Secretary of Commerce with the broad power to impose export controls in pursuit of specified objectives. One such objective is to discourage American exporters from participating in certain boycotts that would restrict American foreign trade. The Secretary has the option to withhold any information he obtains in enforcing the Act if he considers it in the public interest to do so. When the American Jewish Congress sought access to boycott-request reports received by exporters from foreign governments, it was denied access and brought suit. Referring to legislative history, the Court of Appeals for the District of Columbia asserted that subsection A of exemption three was intended to include only "those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception.'" The court also pointed out that, in contrast, subsection B allows some administrative discretion in two carefully defined situations. The underlying thrust of both subsections is to "assure that basic policy decisions on government secrecy be made by the Legislative rather than the Executive branch."

Applying these standards to section 7(c) of the EAA the court held that the "determination of whether 'the withholding of the information' is contrary to the national interest

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25. 574 F.2d 624 (D.C. Cir. 1978).
26. Plesser & Halperin, supra note 24, at 47.
29. 574 F.2d at 628.
30. Id.
31. Id.
should not rest in an administrator." The court also found that the EAA would not qualify under subsection B because of the lack of specificity of the subject matter. As a result, plaintiffs were permitted access to the documents in question. The administrator's sense of "public interest," by itself, was deemed an insufficient ground in light of the other requisites of exemption three. The courts, rather than the administrator, should determine the public interest.

In contrast, in Iron & Sears v. Dann, the Court of Appeals for the District of Columbia found that despite the presence of some "residual administrative discretion," section 122 of the Patent Act would not lead to an abuse of agency discretion that could result in nondisclosure in situations where Congress intended disclosure. In Dann, the appellant sought access under the FOIA to all decisions of the Patent and Trademark Office that disposed of requests by would-be patentees desiring a filing date earlier than the one initially assigned to their applications. The court referred to Congressional intent in enumerating certain characteristics of the Patent Act that required nondisclosure: (1) affirmative requirement of nondisclosure, (2) specificity of material, (3) a narrow "special circumstances exception," (4) no previous general access to the materials, and (5) potential disruption of the statutory scheme.

The court applied these standards to the three classifications of patent applications. It held that documents are exempt from the FOIA if they relate to pending and abandoned applications, but they are fully subject to the Act if they relate to applications that have been issued as patents. The court's willingness to draw these "procedural" distinctions

33. 574 F.2d at 630. The court noted that a "central aim of the FOIA has been to substitute legislative judgment for administrative discretion." Id. at 628.
34. Id. at 630-31.
35. Unfortunately, the individual administrator often determines the "public interest" for the purpose of granting a fee waiver. Bonine, Public Interest Fee Waivers Under the Freedom of Information Act, 1981 DUKE L.J. 213.
37. Id. at 1220.
39. 606 F.2d at 1220.
40. Id. at 1218. The court divided applications into three categories: pending, terminated without issuance, and issued.
41. Id. at 1221.
42. Id. at 1222.
among the patent applications significantly influenced the court’s decision on the status of the application under the FOIA. The Patent Act is analogous to the Copyright Act in that both copyrights and patents are forms of intellectual property. Such an approach could be applied in a modified form to the copyright situation.

The third case, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, was handed down after the *Weisberg* decision. The United States Supreme Court scrutinized section 6(b)(1) of the Consumer Product Safety Act (CPSA) and considered whether section 6(b)(1) prevents the disclosure of accident reports by the Consumer Product Safety Commission pursuant to a request under the FOIA. That section requires the Consumer Product Safety Commission to notify a manufacturer at least thirty days before the public disclosure of information pertaining to a manufacturer’s product if it is to be described in a way that would enable the public to identify the manufacturer.

The Commission argued that section 6(b)(1) was not intended to apply to FOIA requests, but instead applied only to Commission-initiated public disclosures such as press releases or news conferences. The Commission argued that when information is released on its own initiative, the Commission implicitly represents that it believes the disclosed information is valid. On the other hand, when the Commission releases information in response to a FOIA request, the Commission is obliged to release whatever materials it possesses and need not comply with section 6(b)(1) because it is not vouching for the integrity of the released information.

The Court rejected that argument and found that section 6(b)(1), by its own terms, applies to the “public disclosure of any information.” Since “sufficiently definite standards” are established by the statute, the Court held that section 6(b)(1) falls within the scope of exemption three. The Court determined that section 6(b)(1) did not grant the Commission

45. 447 U.S. at 108.
46. Id.
47. Id.
48. Id.
overly broad discretion to refuse to comply with FOIA requests. Insufficiently definite standards would have denied section 6(b)(1) classification as a statute falling within the parameters of exemption three. According to the Court, section 6(b)(1) "requires that the Commission 'take reasonable steps to assure' (1) that the information is 'accurate,' (2) that disclosure will be 'fair in the circumstances,' and (3) that disclosure will be 'reasonably related to effectuating the purposes of the CPSA.'"  

The Commission had claimed that fulfilling the section 6(b)(1) requirements for all FOIA requests would lead to "insurmountable burdens." The Court found that in enacting section 6(b)(1) Congress intended to balance consumer interest with the need for fairness and accuracy in the Commission's information disclosure practices. The Court concluded that no "insoluble conflict" existed between section 6(b)(1) and the FOIA.

The courts emphasize the importance of the wording of the third exemption in strictly applying the exemption to statutes which potentially prevent disclosure. In addition, the legislative history of both the FOIA and the amendment to exemption three appear to require that an exempting statute "manifest a firm commitment to secrecy" before it can be used to prevent disclosure of agency records. The Supreme Court's recent decision in Consumer Product Safety Commission v. GTE Sylvania may herald the erosion of this "commitment to secrecy."

C. Copyright Act is Not an Exemption Three Statute—Weisberg v. United States

The Copyright Act of 1976 attempted to modernize the copyright scheme in order to facilitate its application in a society with rapidly evolving means of communication. Cable

49. Id.
50. Id. at 123.
51. Id. at 123-24. In this case strict interpretation of a statute actually coincided with what the court determined to be the underlying policy issues.
52. Note, supra note 16, at 1046. Although written before any of the judicial analysis surveyed in this comment, the commentator's conclusion has been subsequently verified by the courts. See, e.g., American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978).
53. The initial aim of the new statute was to codify and rationalize. Political lobbying forced it to go slightly beyond that aim. E. Kitch & H. Perlman, Legal
television and data processing are prime examples of technology that the old law was unable to treat effectively. The old law was premised on the principle that the author should have exclusive right to make reproductions of his work. The new act espouses a new form of the traditional misappropriation doctrine: the owner has the exclusive right to the commercial exploitation of his work.

In *Weisberg v. United States* a private party sought access to photographs in the possession of the FBI. The photographs related to the assassination of Reverend Martin Luther King and were the property of Time, Inc. Time held a copyright on the photographs and had previously been unwilling to share the contents of the photographs with Weisberg unless Weisberg paid a reproduction fee which Weisberg considered exorbitant.

In *Weisberg* the government argued that the Copyright Act was an exemption three statute. It based its claim on section 106 of the Copyright Act which provides in part:

Subject to Sections 107 through 118, the owner of copyright under the title has the exclusive rights to do and to authorize any of the following:

1) To reproduce the copyrighted work in copies or phonorecords;

3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.

The government contended this language prevented the FBI from reproducing or distributing the photographs to Weisberg. It argued that the terms of this section are sufficiently powerful...
specific to qualify as an exemption three statute under subsection A.

The government also looked at the fair use provisions of the Copyright Act and concluded that the four factors enumerated therein constituted the required "particular criteria" needed to qualify under subsection B. The court of appeals did not rule directly on these arguments, but instead merely quoted the district court's finding that the Copyright Act fails to meet the requirements of either subsection of exemption three. The court of appeals appeared to grant tacit approval to what it considered an obvious conclusion.

Nothing in the language of the Copyright Act requires either nondisclosure or secrecy. Applying the judicial analyses of exemption three statutes surveyed above, the language of section 108 clearly does not provide sufficiently specific standards to circumscribe administrative discretion which would thereby enable the Copyright Act to fall within either of the subsections of exemption three.

III. THE FOIA AND FAIR USE—A COLLISION COURSE

A. Introduction

In Weisberg the Court of Appeals for the District of Columbia determined that the Copyright Act is not concerned with nondisclosure or secrecy. Nevertheless, certain issues that are easily resolved under the Copyright Act become more complex or unusual when analyzed under the FOIA. Among these issues are: reproduction, the charge for reproduction, who should be assessed that charge, whether royalties should be awarded, and who is liable for infringement if a court later determines that the reproduction did not constitute fair use. These problems, compounded by the procedures of the FOIA,
arise exclusively under the copyright statute because it is the only statute specifically concerned with reproduction of documents and the costs of reproducing such documents.\textsuperscript{66}

The FOIA provides that, where disclosure is authorized, copying shall be performed by the government at a nominal charge.\textsuperscript{67} The language and legislative history of the FOIA suggest that the right to copy was provided solely to enhance the underlying right to inspect.\textsuperscript{68}

B. \textit{Fair Use in the Library Context Before the New Copyright Act—Williams & Wilkins Co. v. United States}

The economics of photocopying is related to the larger problems of the economics of fair use and copyright protection.\textsuperscript{69} Although it was decided before the enactment of the 1976 Act, \textit{Williams & Wilkins Co. v. United States}\textsuperscript{70} remains the most influential case in this area. \textit{Williams & Wilkins Co.} involved the photocopying and dissemination of articles originally appearing in academic journals published by Williams & Wilkins Co. The National Institute of Health and the National Medical Library photocopied the articles upon request from private parties. The Court held that defendants had not infringed because they satisfactorily demonstrated that their acts fell under the fair use doctrine.\textsuperscript{71} The Court of Claims reasoned that Williams & Wilkins Co. did not demonstrate sufficient harm to its business,\textsuperscript{72} that medical knowledge would be impeded were the photocopying and distribution in question disallowed and that a legislative resolution was imminent. Therefore, the court determined that it should defer

\begin{itemize}
\item \textsuperscript{66} See supra note 59 and accompanying text.
\item \textsuperscript{67} 5 U.S.C. § 552(a)(4)(A) (1976).
\item \textsuperscript{68} Note, \textit{The Definition of \textquoteleft Agency Records\textquoteright Under the Freedom of Information Act}, 31 STAN. L. REV. 1093 (1979). \textquoteleft[T]he right to copy \ldots is supplemental to the right to inspect and makes the latter meaningful.	extquoteright \textit{Id.} at 1097 n.18 (quoting \textit{Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles at 42}).
\item \textsuperscript{69} See, e.g., L. Seltzer, \textit{Exemption and Fair Use in Copyright}, 89-119 (1978).
\item \textsuperscript{70} 487 F.2d 1345 (Ct. Cl. 1973), aff'd by equally divided court, 420 U.S. 376 (1975). For an excellent and thorough analysis of the case and its historical context see Perlman & Rhinelander, \textit{Williams & Wilkins Co. v. United States: Photocopying, Copyright and the Judicial Process}, 1975 SUP. CT. REV. 355.
\item \textsuperscript{71} 487 F.2d at 1362.
\item \textsuperscript{72} \textit{Id.} at 1357-59.
\end{itemize}
to Congress rather than propose a novel judicial resolution.\textsuperscript{73}

C. The 1976 Copyright Act as a Codification of the Fair Use Doctrine

The legislative resolution came soon thereafter in the form of the Copyright Act of 1976. Nevertheless, the Act’s fair use provision, section 107, adopted the judicially developed formulation of the doctrine.\textsuperscript{74} In other words, no legislative resolution was made. In the analysis of one commentator, Congress attempted to balance copyright protection with the need for dissemination of knowledge which, in effect, left the current library practices unchanged.\textsuperscript{75}

Historically, the copyright laws provided for fair use.\textsuperscript{76} Congress codified specific exemptions that authorize one person to copy another’s work.\textsuperscript{77} Each exemption embodies a public policy that a certain group or activity deserves special treatment under the Copyright Act. These exemptions were created to deal with situations not traditionally included within the fair use doctrine. The free use of copyrighted materials for nonprofit educational institutions is among these exemptions.\textsuperscript{78} In the 1976 Act, Congress revised the scheme by blurring the distinction between these exemptions and the traditional doctrine of fair use.\textsuperscript{79} This concept is crucial in considering proposals for facilitating the application of the fair use doctrine in a special context, such as the FOIA.

D. The FOIA in the Library Context—SDC Development

\textsuperscript{73} Id. at 1360-61.

\textsuperscript{74} Section 198, however, sets out more specific rules for photocopying in the library context. See Pegram, Photocopying in Profit Oriented Organizations Under the Copyright Revision Act of 1976, 34 Bus. Law 1251, 1277-79 (1979).

\textsuperscript{75} Id. at 1282. Another commentator has emphasized that Congress had at least considered developing more specific criteria for fair use and had explored the possible concomitant effects on the underlying economic rationale of fair use in the photocopying context. L. Seltzer, supra note 69, at 50.

\textsuperscript{76} See L. Seltzer, supra note 69.

\textsuperscript{77} 17 U.S.C. app. § 110 (1976).

\textsuperscript{78} Id.

\textsuperscript{79} Conversation with Leon Seltzer, Esq., Stanford, California, January 30, 1981. Seltzer contends that Congress must eventually rectify its errors. The Act itself provides that section 107 must be re-evaluated after a five-year trial period. 17 U.S.C. app. § 107 (1976).
Many of the difficult photocopying issues now before the court involve the library setting. Both private and public libraries participate in interlibrary loan programs that require extensive photocopying of materials. In these and other circumstances, librarians may find themselves copying materials without knowing the identity of the person to receive the materials or the motives for requesting duplication of the materials. In addition, libraries encourage photocopying in order to minimize both the lending and the theft of materials.80

The issue of whether undue advantage should be taken of the FOIA in order to avoid copying costs arose in SDC Development Corp. v. Mathews.81 The private parties in that case sought access to a computerized medical information system developed and administered by the National Library of Medicine. Rather than pay the annual subscription fee and concomitant hourly rate for access to this data bank,82 SDC Development Corp. requested the information under the FOIA. The case presented two threshold issues: first, whether the National Library was an “agency” as defined by the FOIA,83 and second, whether this data bank constituted “records” as defined by the FOIA.84 The case was not decided on either of these grounds; instead the court looked to issues of equity and public policy:

The agency is seeking to protect not its information, but rather its system for delivering that information . . . . Requiring the agency to make its delivery system available to the appellants at nominal charge would not enhance the information gathering and dissemination function of the agency, but rather would hamper it substantially.85

Economic factors relating to the proper functioning of the agency would not permit the government to release the

80. See Pegram, supra note 74.
81. 542 F.2d 1116 (9th Cir. 1976).
82. The data bank is called MEDLARS (for Medical Literature Analysis and Retrieval System).
83. The issue of what constitutes an agency record was also the “threshold” issue in Weisberg according to the Court of Appeals. 631 F.2d at 827.
84. See generally Note, Agency Records, supra note 68.
85. 542 F.2d at 1120. The court looked to statutory language and legislative history in reaching its conclusion.
“agency records.” The court determined that to permit access to the documents by means of the FOIA would completely undermine the otherwise viable system used by the National Library. The fact that the library’s system set arbitrary prices and permitted various exceptions did not dissuade the court from finding that SDC was attempting to circumvent a valid procedure for obtaining the information.

The interrelationship of access and price is the crux of the problem confronting courts in cases like Weisberg and SDC Development Corp. In Weisberg the court easily distinguished SDC Development Corp. on its facts. The court held that in Weisberg “the requested materials plainly ‘reflect the . . . operation, or decision-making functions of the agency,’ because they will permit evaluation of the FBI’s performance in investigating the King assassination.”

In SDC Development Corp. the court looked to economics, Congressional intent, and public policy in making its determination. It did not directly consider the formal judicial doctrine of fair use. SDC’s use clearly would not qualify under that doctrine. In contrast, Weisberg proclaimed a scholarly and totally noncommercial purpose. Nevertheless, what would be the result if Weisberg were to decide that he would like to exploit some commercial advantage he has obtained from his research? Or suppose his research would not contribute to an increase in public knowledge? How should a court decide these issues in advance? Under the present scheme these questions are not satisfactorily answered.

86. 631 F.2d at 828 (quoting SDC Dev. Corp.).
87. The new Copyright Act had not yet been enacted.
88. The code itself offers examples of fair use: “criticism, comment, new reporting, teaching . . . , scholarship or research . . . .” 17 U.S.C. app. § 107 (1976). Circumstances similar to Weisberg involving parallel issues regarding fair use were before the court in Time v. Bernard Geis, 293 F. Supp. 130 (S.D.N.Y. 1968). At issue there was the use, in a commercially available book of photos derived from the frames of a copyrighted film depicting actual events surrounding the assassination of President Kennedy. The court upheld the defendant’s right to copy the frames because of the public interest in the murder of a president. The court merely implied that a balancing approach based on customary fair use principles provided guidance in reaching its conclusion.

Motive has posed a more difficult problem in the context of exemption four. See infra note 102 and accompanying text.
89. A similar problem in FOIA litigation has given rise to the “Public Benefit” test. Bonine, supra note 35, at 238-46 (discussing the “Public Benefit” test in the FOIA context).
IV. RECONCILING FAIR USE AND THE FOIA

A. Public Policy Versus an Economic Structure

The solution to the fair use problem, as it relates to access of information generally, lies in reconciling economic factors with public policy concerns, most importantly the first amendment. As isolated in Weisberg, the fair use issue is easily resolved by relying on both the traditional concept of scholarly research and on the public policy of access to government operations under the FOIA. This "denial of access" use of copyright has not previously been used openly. The concept used by the government in Weisberg, however, is not totally novel. How it will be used in the future is uncertain.


Apparently an author's political perspective strongly influences his views on this issue. Another author feels that copyright and the First Amendment are following "parallel routes to similar destinations", but that courts do not generally recognize this. Timberg, A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age, 75 NW. U.L. REV., 193 (1980).


91. One group of researchers asserts that copyright could be used to suppress information. Breslow, Ferguson & Haverkamp, An Analysis of Computer and Photocopying Copyright Issues From the Point of View of the General Public and the Ultimate Consumer, in 4 COPYRIGHT CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD 134 (N. Henry ed. 1980). The group is aware of "no way of systematically exploring whether such use of copyright is substantial or is likely to become so in the future." Id.

Under the new Act, registration (or deposit for that matter) is not a prerequisite for obtaining a valid copyright. 17 U.S.C. app. § 408(a) (1976). In contrast to the old law, all that is now required for an effective copyright is that the work be set in a fixed tangible medium. 17 U.S.C. app. § 102(a) (1976). The concept of the "copyright" as personal property appears to place a greater emphasis on its privacy component. Various provisions that encourage prompt registration and possible deposit, however, restrict this tendency. For example, a suit for copyright infringement cannot be brought until the work has been registered with the Copyright Office. 17 U.S.C. app. § 205(d) (1976). For a detailed summary of the advantages of copyright registration, see H. HENN, COPYRIGHT PRIMER, 69-73 (1979). In deciding whether to register or deposit works with the government, these advantages must be balanced with the relinquishment of confidentiality. The Copyright Office does not require that all materials be deposited and has outlined categories not requiring deposit. 37 C.F.R. § 202.19(c) (1981).

It is also possible that certain standardized tests be categorized "secure test,"
B. Balancing Economic Factors in Fair Use

Most commentators consider the economic loss criterion listed in Section 107,92 of paramount importance.93 Reliance on economic loss in determining infringement, however, does not resolve the fair use cases.94 This is due in part to the difficulty of assessing present and potential losses resulting from an infringement. How far into the future should a court look in anticipating a potential loss? The issue of the scope of potential markets, as an aspect of economic loss, must be balanced against the public's interest in the creation of new works.95 The issue is intensified when the parties are dealing with one another through an intermediary. The FOIA context requires the government to be this intermediary.

Section 108 is Congress' attempt to account for the libraries' frequent intermediary role as photocopiers. According to one commentator, section 108 puts the courts back into the "access" and "price control" business.96 In any event, Section 108(f)(4) applies where the library or archives independently develops a contractual royalty-type arrangement with the copyright owner. This is one step towards eliminating the "intermediary" problem. Such an arrangement is a market-determined economic mechanism wholly within the dynamics of the copyright scheme.97 It has also been proposed that the copyright laws should require procedures for negotiated agreements that will take a cost-benefit approach in resolving fair

thereby enabling the party to substitute summaries or samples of the tests without leaving the text in the possession of the Copyright Office. The status of these tests has recently been a source of controversy. See, e.g., Association of Am. Colleges v. Carey, 482 F. Supp. 1385 (N.D.N.Y. 1980); National Conf. of Bar Examiners v. Multi-state Legal Studies, Inc., 495 F. Supp. 34 (N.D. Ill. 1980). The reason these testing agencies have sought copyright is not to preserve the strict confidentiality of their tests, but rather to guard against infringement. It would appear that these special rules should not serve to bring copyright within the guidelines of exemption three requirements for nondisclosure.

92. See supra note 7.
93. See, e.g., SELTZER, supra note 69, at 12.
94. Perlman & Rhinelander, supra note 70, at 393. Seltzer discusses the reasons why microeconomic theory is not effective in analyzing the publishing industry. SELTZER, supra note 69, at 6 n.20.
95. Perlman & Rhinelander, supra note 70, at 393. The public interest in access, the main issue in Weisberg, should probably also be weighed.
96. SELTZER supra note 69, at 90.
97. Id. at 96. In Weisberg, Time was initially unwilling to provide the photographs when confronted directly by Weisberg.
use issues. This is close to a compulsory licensing scheme that would require as complete an accountability as possible.

C. The Importance of Exemption Four Case Law in Proposals for Improving the FOIA

Much of the controversy regarding the government's role as repository of the information of private parties vis-a-vis the FOIA has centered on exemption four. As a result, proposals for improving the system have been discussed almost exclusively in the context of that exemption. Agencies and courts have been sensitive to the impairment of the government's ability to collect and organize data from private parties. Considering the inevitable economic consequences, it is in the government's interest to assert its right to private information. Although clearly in the government's interest, it may be detrimental to the private sector which might be more reluctant to develop new information. Perhaps some limited

98. Id.
99. Timberg, supra note 90, at 241-43. The author encourages a broader application of fair use in general. Id. at 244.
100. SELTZER, supra note 69, at 119. Seltzer concludes that a new statutory solution is not required; the government should either abandon any attempt to regulate this photocopying process and allow individuals to devise private contracts or, as in Europe, control the system completely by monitoring such "fair use" by imposing taxes on machines or libraries. Conversation with Leon Seltzer, Esq., Stanford, California, January 30, 1981.

Exemption four states that the FOIA does not apply to matters that are trade secrets, or to commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. § 552(b)(4) (1976).

The scope of the so-called "Reverse-FOIA" suits has been changed drastically since Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Chrysler held that although information falls within an FOIA exemption, it may nevertheless be disclosed at the agency's discretion. Because the FOIA exemptions are only permissive the submitter has no power under the FOIA to sue the agency. Id. at 290-94. However, the submitter can seek redress under provisions of the Administrative Procedure Act, 5 U.S.C. § 702 (1976). For an excellent analysis of the implications of Chrysler, see Note, Protecting Confidential Corp. v. Brown, 80 COLUM. L. REV. 109 (1980).
103. Greenawalt & Noam, supra note 102, at 412.
104. Id. in 1976, the Food and Drug Administration said that since major revisions were made in the FOIA in 1974, 90 percent of its FOIA requests had come from
protection for information could be developed similar to the protection afforded patents, in order to increase incentives for the development of such information.106

D. Critique of Current Proposals

Several significant, but primarily academic, ideas for restructuring the public information system have been proposed in the context of exemption four.106 The potential impact of these proposals on the copyright scheme and its interaction with the FOIA will be considered.

One comprehensive proposal has as its goal citizen education.107 That proposal is unfortunately premised on the dubious ground that agencies are willing to comply with the requirements of the FOIA without judicial review. It proposes the establishment of agency "libraries" for cataloging information.108 That proposal is not very different from the present scheme of bureaucratic file systems. It points up the overlap between an ordinary general public library's function as lender of books (and information) and the government and its agencies to assume the role of such a "public" library from which an informed public can "borrow" information.109 In such a situation, does the Copyright Act's section 108, as a means to a workable solution to the entire "library-photo-

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105. Greenawalt & Noam, supra note 102, at 412. There would likely be opposition under the first amendment. At the present time copyright protection is not even permitted for any publication written by government researchers. 17 U.S.C. app. § 105 (1976).


108. Id. at 42.

109. For an example of such a system, see SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976).
copying" controversy, control over the "systematized procedures of the FOIA and the Administrative Procedure Act? According to the Ninth Circuit in SDC Development Corp., the underlying equity interests that gave rise to sections 107 and 108 of the Copyright Act will govern the outcome of any case. Accordingly, the current system for balancing interests is inadequate. The government should release only the information necessary for citizen education of agency performance. This approach reserves the most crucial aspect of decision-making to the courts. The legislature, however, should have a greater voice than these authors are willing to allocate. Nevertheless, under this proposal, each individual agency would develop its own system.

Critics of the FOIA assert that this has already happened and that the public is thereby encountering new obstacles in its quest for more government access. Under this first proposal, administrative enforce-

110. Id. at 1120.
111. Koch & Rubin, supra note 106, at 50.
112. Id. at 55. This is a reformulation of the issue in Weisberg that neither the district nor the appeals court had any difficulty deciding. Judicial discretion served as the ultimate arbiter. The authors state in this regard: "Private information that finds its way into government files—whether through actual compulsion, the submitter's self-interest or voluntary submission—does not serve this purpose and need not be released." Id.
113. Id. at 56-57. A more realistic look at the present structure of administrative procedure as a foundation for improvement is found in Note, supra note 102, at 132-35.

Like other government agencies, the Copyright Office has established its own policies and procedures in order to respond efficiently to requests under the FOIA. 37 C.F.R. § 203. Thus, the Copyright Office "makes available for public inspection and copying records of copyright registrations and of final refusals to register claims to copyright" 37 C.F.R. § 203.4(a). There also exists a Supervisory Copyright Information Specialist who is responsible for responding to all initial requests submitted under the FOIA. 37 C.F.R. § 203.4(d).

In Weisberg, the plaintiff directed his request to the FBI. The plaintiff would probably have been unsuccessful in directing his request to the Copyright Office, had it possessed the photographs, because the photographs would not have met the test set forth in SDC Dev. Corp. v. Matthews, 542 F.2d 116 (9th Cir. 1976). SDC Dev. Corp. required that the requested document genuinely reflect the agency's performance.

However, the court in Irons & Sears v. Dann, 606 F.2d 1215 (D.C. Cir.) cert. denied, 444 U.S. 1975 (1979), did not apply this strict standard in permitting disclosure of patent applications under FOIA. There have not been any cases litigated involving the Copyright Office.

114. See Ranii, Battling the FOIA Tangle, Nat'l L.J., May 4, 1981, at 1. col. 1; Bonine, supra note 35. Bonine also makes some interesting recommendations for bringing uniformity to the agencies' task of determining who should pay how much for searching and duplicating agency records under the FOIA. Id. at 257-58.
ment is deemed more effective than judicial enforcement. The authors of the proposal consider the present public information system a failure because it does not serve the public interest and does not effectively disseminate information. They recommend that a separate agency administer the public information system. In view of the complexities of coordinating the new developments brought on by new technology, this proposal must be seriously considered only if it can bring together experts equipped to deal with the problems. At this point the proposal appears unrealistic because it ignores the political and economic problems such a system would encounter.

A second proposal emphasizes governmental access based on a rationale that follows not from a concern for a more open government, but rather "from an economic analysis of the proper role for government in the dissemination of private information." The granting of any property interest in information is viewed as a potential source of inefficiency. Therefore, a governmental mechanism should be established to contribute to submitters of private information the difference between their loss and the requestor's gain. This would theoretically insure the submitters against additional losses from misuse of their documents. Such a system would force the government to assume the role of a "Copyright Clearance Center" under the FOIA. It is not surprising that the government has been reluctant to assume such an onerous responsibility.

Under this plan, an agency mechanism would determine

116. Id. at 59.
117. Id. at 58.
118. A subcommittee staff member at the 1980 Congressional hearings on the FOIA notes that a centralized "Information Czar" had been considered but is an unlikely possibility because of its "Big Brother implications." Lawscope, 67 A.B.A. J. 146 (1981). Professor Miller has observed that the Congressional idea for an "information policy" dates back to 1969. Miller, supra note 106, at 248.
119. Note, Nonfree Information supra note 106, at 346. The author sees the FOIA procedures as circumventing the regular market process.
120. Id. at 348 n.57. He further analyzes other forces at work in such a transaction, such as privacy interests. Id.
121. Id. at 371.
122. The author envisions such a system as increasing equity and efficiency, but it is impossible to verify such a hypothesis.
123. The Royalty Tribunal authorized by 17 U.S.C. app. § 801(a) (1976), which sets royalty for Cable Television users, is a limited form of such a system.
whether efficiency warranted the disclosure of a given document. The agency could provide for nondisclosure if the benefits of disclosure to a competitor do not exceed the costs involved. The courts essentially use that procedure now under the test set forth in *National Parks & Conservation Association v. Morton.* The ultimate goal of the agency would be efficiency and equity.

This plan is a more sophisticated version, in terms of its economic analysis, than the 1971 idea of Professor Arthur Miller which called for greater efficiency under the FOIA. Further sophisticated economic analysis is required, however, before the government can venture into these uncharted waters of market control of public information dissemination. The role of copyright in this overall framework is potentially overwhelming. One commentator has even predicted that the copyright law will eventually determine patterns of knowledge.

E. Licensing & Fair Use—An Alternative Proposal

As the amount of information stored by the government increases, the government will assume a greater role in dealing with the information. What is less obvious is that the private sector's role in this process must also increase accordingly as it interacts more extensively with the government. The National Library system (from the Library of Congress to local libraries) is a part of various governments. Many of the documents in these libraries are copyrighted. The documents, however, are open to public noncommercial interests by means of the fair use doctrine.

The disclosure principles of the FOIA ignore copyright issues to the extent that distinctly commercial interests are not

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124. Note, *Nonfree Information* *supra* note 106, at 355. The author concedes that such economic analysis would be difficult, but no more difficult than a judge's task in assessing damages in a libel case. *Id.* at 360 n.87.
125. 498 F.3d 765 (D.C. Cir. 1974).
128. N. HENRY, COPYRIGHT, INFORMATION TECHNOLOGY, PUBLIC POLICY, PART I: COPYRIGHT—PUBLIC POLICIES (1975). Henry sees the Copyright Act as broader in scope than the FOIA because it is a constitutional principle with "awesome" application to public policy as it relates to public knowledge. *Id.* at 17.
129. *Id.* at 54-76.
130. See *supra* notes 6, 7 & 88 and accompanying text.
at stake. This is but another way of postulating that the Copyright Act cannot qualify as an exemption three statute under the FOIA. Commercial interests are protected under the FOIA if the "privileged," "confidential," and "business" requirements of exemption four are satisfied. Even then, the copyright issue becomes peripheral.

By changing the nature of the application of fair use in the library photocopying context, Congress has the power to significantly alter the nature of copyright. For example, a compulsory licensing system would prevent would-be "fair users" from making use of the copyrighted materials. A compulsory licensing system could be avoided by providing an administrative hearing to determine the commercial consequences of the second party's use. In the FOIA context, such a system has broad implications for any government agency acting as a library on behalf of a party seeking copies. Copyright principles, set forth in the Constitution, are more pervasive; any major reform in the area where these two systems overlap must first occur in the copyright sphere. This does not mean that the FOIA cannot be improved until the copyright law is altered. It does mean that changes in the FOIA based on the economics of information as applied to confidential business information or trade secrets cannot be applied in the copyright context until the copyright scheme, and fair use in particular, undergoes drastic reform that more adequately considers the underlying economic aspects of the copyright system. Until such changes are effectuated copyright will play an increasingly important role in the context of FOIA litigation.

V. Conclusion

Copyrighted documents are not to be denied to a FOIA requestor under either exemption three or exemption four. The Copyright Act is clearly not a nondisclosure statute under the three criteria in exemption three. Nevertheless, a copyright is significant in determining the fairest procedure in the interests of all the parties involved. Whether other factors

131. See Timberg, supra note 90, for a convincing rationale for such an approach.
133. See notes 92-95 & 119-26 supra.
deemed significant by Congress or the courts will prevent disclosure pursuant to a request will be determined by the facts of the individual case.

The fair use doctrine of the Copyright Act of 1976 and exemption three of the Freedom of Information Act now account for the merging of underlying policies of the two statutes. The two Acts equip the courts with a basic approach to a resolution of the major issue in Weisberg—an issue that may arise in the future. Technology, the greater need for efficiency, and public awareness will force Congress to dig more deeply into the underlying policies and practical functionings of these statutes in order to resolve issues under the two Acts. The ultimate result will be a greater sensitivity to the needs that both statutes serve—fairness in the access to and dissemination of information.

The unique problem presented in Weisberg underscores the larger problem of access and dissemination. As the areas of copyright and access to information increasingly overlap, the financial or practical rewards will become more significant, and it will be incumbent upon Congress to respond to this challenge. For meaningful reform to occur, both statutes must be adjusted to better account for their respective underlying social and economic consequences. The main achievement of Weisberg and SDC Development Corp. is in emphasizing the interdependence of the two statutory systems. For the moment, the application of judicial principles of equity within the present statutory framework will suffice, but the potential for inconsistency and inequality is great.

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