CHAPTER

The Establishment, Mandate, and Activities of the Commission

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The United States and other nations are facing a challenge in this last quarter of the twentieth century in the development of policies concerned with information. Forces of economic and technological development are leading to what has been called the postindustrial society, a society in which the source of wealth lies not only in the production and distribution of goods but also in the creation and dissemination of information.[2] The ownership and control of information and the means of disseminating it are emerging as national and international policy issues.[3] Concerns about the impact on individual freedom posed by the control of the flow of information are at the forefront of public debate. The adequacy of the legal structure to cope with the pace and rate of technological change frequently has been called into question.[4] This report deals with certain aspects of the ways in which the copyright law should apply to the new technological means of handling information.

This Commission was created to assist the President and Congress in developing a national policy for both protecting the rights of copyright owners and ensuring public access to copyrighted works when they are used in computer and machine duplication systems, bearing in mind the public and consumer interest. Copyright in the United States is created by legislation enacted under a specific grant of power in the Constitution.[5] The first copyright law was enacted in 1790 and has been amended and revised many times. During the development and growth of such diverse technologies as radio, television, phonographs and records, tape recorders, motion pictures, photoduplication machines, computers, juke boxes, and community antenna systems, the copyright law, in effect, was essentially that of 1909 with a few later amendments.

For many reasons, including the impact of the technology explosion of the first two-thirds of this century, Congress and the copyright community (i.e., authors, publishers, film makers, broadcasters, the recording industry, educators, and librarians) became increasingly dissatisfied with the existing copyright law. It was generally believed that a complete revision rather than piecemeal amendment was in order. To initiate that revision, the Congress appropriated funds in 1955 for the Copyright Office of the Library of Congress to prepare a comprehensive study recommending changes in the law. Twenty-one years elapsed before both Houses of Congress agreed upon a completely revised law. That agreement may have been made possible, at least in part, by the creation of this Commission to study two of the most complex and controversial problems related to copyright revision: photocopying and computers.

By 1967, when Congress was considering bills to revise the 1909 Act, it was apparent that the copyright problems raised by computer uses had not been dealt with directly in the bills then before the House of Representatives and the Senate.[6] It was also clear that any adequate study of this problem would seriously delay the enactment of an urgently needed general revision bill.

To avert such a delay, in the summer of 1967,

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[2] BELL, THE COMING OF POST-INDUSTRIAL SOCIETY (1973).

[3] Ringer, *The Unfinished Business of Copyright Revision*, 24 U.C.L.A. L. REV. 951, 976 (1977).

[4] See SALTMAN, COPYRIGHT IN COMPUTER-READABLE WORKS (1977); Privacy Protection Study Commission, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977); National Commission on Electronic Fund Transfers, EFT IN THE UNITED STATES (1977).

[5] U.S. Const., Art. I, § 8, cl. 8.

[6] 90th Cong., 1st sess., 1967, H.R. 2512; 90th Cong., 1st sess., 1967, S. 597.

the late Sen. John L. McClellan and the Senate Subcommittee on Patents, Trademarks and Copyrights met with representatives of authors, publishers, educators, librarians, computer users, and executive agencies. Soon after that meeting, Senator McClellan introduced a bill providing for the establishment of CONTU "to study and compile data on the reproduction and use of copyrighted works of authorship (1) in automatic systems capable of storing, processing, retrieving, and transferring information, and (2) by various forms of machine reproduction." [7] This bill passed the Senate on October 12, 1967, during the first session, but the House of Representatives took no action on it.

Meanwhile, various users of copyrighted materials were concerned that the revision bill would place unwarranted restrictions on the use of copyrighted works in the computer-based information systems then coming into widespread use. They believed that these restrictions would retard the creation and dissemination of materials needed for use with computer retrieval systems and suggested a three-year moratorium on liability for copyright infringement by uses in those systems. During that period the new Commission, to be created by Senator McClellan's bill, could confront and study the matter. Authors and publishers, however, were totally opposed to such a moratorium and made it known that if it were attached to the bill they would attempt to prevent passage of the entire bill. The tension eased when Senator McClellan proposed to the interested parties a middle ground, which was then embodied in a new draft of the general revision bill, introduced in the 91st Congress on January 22, 1969.[8] Section 117 of that bill provided that the law on the use of copyrighted works in computer systems would be unaffected by its enactment. The legislation included a separate title to establish a Commission. No further action was taken, however, during the 91st or 92d Congress on either the general revision bill or the proposed Commission.

During the 93d Congress, another bill was introduced which included, among other matters, a provision establishing the Commission.[9] This bill was enacted on December 31, 1974, as Public Law 93–573, which gave the Commission three years to study and compile data and make recommendations on legislation or procedures concerning:

(1) the reproduction and use of copyrighted works of authorship:

(A) in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and

(B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and

(2) the creation of new works by the application or intervention of such automatic systems of machine reproduction.

On July 25, 1975, seven months after the bill was enacted President Ford announced appointment of the following Commissioners, according to the criteria set out in the organic legislation:

From authors and other copyright owners:

- John Hersey, President of the Authors League of America, Inc.
- Dan Lacy, Senior Vice-President, McGraw Hill, Inc.
- E. Gabriel Perle, Vice-President—Law, Time, Inc.
- Hershel B. Sarbin, President, Ziff-Davis Publishing Co.

From copyright users:

- William S. Dix, Librarian Emeritus, Princeton University [10]
- Arthur R. Miller, Professor of Law, Harvard Law School
- Robert Wedgeworth, Executive Director, American Library Association
- Alice E. Wilcox, Director, Minnesota Interlibrary Telecommunications Exchange

From the public:

- George D. Cary, retired Register of Copyrights
- Stanley H. Fuld, retired Chief Judge of the State of New York and the New York Court of Appeals
- Rhoda H. Karpatkin, Executive Director, Consumers Union
- Melville B. Nimmer, Professor of Law, University of California at Los Angeles Law School

[7] 90th Cong., 1st sess., 1967, S. 2216.

[8] 91st Cong., 1st sess., 1969, S. 543.

[9] 93d Cong., 2d sess., 1974, S. 3976, the text of which is found in Appendix B.

[10] Commissioner Dix died on February 22, 1978.

The Librarian of Congress and the Register of Copyrights were designated ex officio members of the Commission; of these two, only the Librarian had a vote in Commission matters. Stanley H. Fuld and Melville B. Nimmer were designated chairman and vice-chairman of the Commission, respectively.[11]

As previously indicated, seven months of the three-year term allotted the Commission for the completion of its task had already passed by the time the Commissioners were appointed. At its initial meeting on October 8, 1975, the Commission, after appointing Arthur J. Levine as executive director and authorizing recruitment of a staff, proceeded directly to outline its substantive goals.[12] The scope of the work entrusted the Commission was discussed, and it was noted that not only the issues related to computer uses and computer-assisted creation of copyrighted works would be studied, but also the separate issue of photocopying.

The Commission, as originally conceived, was designed primarily to assist in the resolution of issues relating to the impact of the computer on copyrighted works, but the organic legislation added the photocopying issue to the Commission's mandate.[13] The concern of copyright proprietors with the impact of photocopying on the dissemination of their copyrighted works has grown considerably since 1967.[14] At the outset, the Commissioners' first organizational task was to develop a systematic approach for addressing the major issues in their mandate. Since Congress was still considering the photocopying issue, the Register of Copyrights urged the Commissioners to concentrate their initial efforts on the computer problem.[15]

In the meantime, so the Commission could better understand the complexities of the photocopying issue and the views of publishers, authors, librarians, and users, an ad hoc committee was appointed to report to the full Commission on the various issues relating to photocopying.[16]

The Commission decided that, rather than pursuing the computer-related issues to the exclusion of photocopying, it should carry on parallel studies. It was also recognized that before the Commission could set any final schedule for its work, it would have to educate itself on the actual and potential technologies and practices in the two areas of its mandate. The Commission had already begun to study photocopying. It now directed the staff to plan an information program on the computer issue to give the Commission an overall view of the current state of computer science and technology,

[11] Biographical statements about the Commissioners appear in Appendix C of this report.

[12] Biographical statements about the Commission staff appear in Appendix D of this report.

[13] 90th Cong., 1st sess., 1967, S. 2216, in which the Commission was initially proposed, referred to the purpose of the Commission as being "to study and compile data on the reproduction and use of copyrighted works of authorship (1) in automatic systems capable of storing, processing, retrieving, and transferring information, and (2) by various forms of machine reproduction." While subsection (2) referred to machine reproduction, the drafters of that bill had not envisioned the impact of modern reprography, and photocopying was not considered to be as significant or complex a problem as any of those created by the computer. The report accompanying S. 2216 does mention photocopying as one of the problems for which a study commission was then being proposed (see 90th Cong., 1st sess., 1967, S. Rept. 640), but testimony at hearings on bills for the general revision of the Copyright Act indicate that the computer, rather than the photocopying machine, was the main reason for the creation of a special study commission. (See *Hearings on S. 597*, 90th Cong., 1st sess., 1967, pts. I–IV.)

[14] Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975), an equally divided Supreme Court, without a written opinion, left undisturbed the decision of the U.S. Court of Claims, 487 F.2d 1345 (1973), that the photocopying of medical and scientific journals done by the National Library of Medicine and the National Institutes of Health as part of their medical research and education activities did not constitute infringement of the copyrights in the journals copied.

[15] Several reasons for first considering the computer problems were evident at this time. Certain photocopying issues were addressed by section 108 of the bill then pending in Congress which became the 1976 Act. Legislative proposals concerning the computer issue had not only been omitted from that bill, but by specific statutory language (section 117) all rights in computer-related works were to be frozen in their pre-revision status, presumably pending recommendations of the Commission. The Commission believed that hearings on photocopying might impinge unnecessarily on the provisions relating to photocopying in that bill and that the hearings on that issue should therefore be deferred until after the legislative effort was completed.

[16] Judge Fuld appointed Commissioners Hersey, Lacy, and Dix as members of the committee.

and of the ways it might be applied in the future to the storing, processing, retrieving, and transferring of information.

In response to the Commission's request for basic information on computer technology, representatives of companies concerned with information and computers briefed the Commissioners on the historical development of computers, the current state and future potential of computer technology, the use and applications of data bases, and the way new works are created by computer use. Professional societies assisted the Commission staff in setting up panels of experts to instruct the Commissioners in various forms of information flow and developing means for information access. Among the subjects covered were the impact of technology on the processing of information, the educational functions of computers, management of information, and the uses of micrographics in publishing and copying technology. Representatives from consumer and public interest organizations advised the Commission of their concerns.[17]

The Commissioners also heard presentations from representatives of the principal trade associations in the computer and information sciences who were conversant with the new means of transferring information and were concerned, in various ways, with the need to provide legal protection for the rights of the creators and publishers of works disseminated by these new means. The witnesses emphasized that changing methods of storing, retrieving, and printing data were affecting traditional publishing practices.

After conducting these initial investigations, the Commission adopted a preliminary research plan, prepared by the staff, to guide its work through the rest of its term. The computer issues were categorized as follows: (1) computer uses of conventional works of authorship, (2) proprietary rights in data bases, (3) computer software, and (4) new works created by application of a computer. Accordingly, the Commission decided that it would hold public hearings and initiate the collection of information on computer-related issues beginning in the summer of 1976. Subcommittees dealing with the computer issues would then analyze this data and would draft reports, which would be circulated for public comment and refined for a final recommendation to Congress at the end of the Commission's term. The photocopying issue was to be the subject of hearings beginning in the winter of 1976. The Photocopy Subcommittee would then prepare its report on that issue so it could be circulated for public comment and put in final form as recommendations to Congress before the end of the Commission's term.

To expedite the work of the Commission, Chairman Fuld assigned the following Commissioners to four subcommittees: (1) Photocopying, Vice-Chairman Nimmer, with Commissioners Hersey, Lacy, Wedgeworth, and Wilcox; (2) Computer Software, Chairman Fuld, with Commissioners Miller and Perle; (3) Computer Data Bases, Commissioners Cary, Lacy, and Wedgeworth; and (4) Computer-Created Works, Commissioners Dix, Karpatkin, Miller, and Sarbin.

The Commission directed the staff to arrange for certain research contracts and to initiate a series of hearings to gather the views of both proprietors and users of copyrighted works. In the photocopying area, the research activities were directed primarily toward assembling data on the volume and nature of photocopying of copyrighted materials. In the computer area, research efforts principally dealt with attempting to define the impact on both users and producers of proprietary protection for computer-produced works, software, and data bases. One particularly difficult task was to define the impact on the ultimate consumer of changes in copyright law and procedure applicable both to photocopying and computer uses.

The results of these studies as well as the views of interested parties were presented to the Commission in a series of hearings beginning in May 1976.[18] The witnesses represented a wide spectrum of interests concerning photocopying, computer software, data bases, and new works. These witnesses appeared as individual experts in some instances but more often represented interested organizations—publishers, authors,

[17] A listing of all persons appearing before the Commission, including the subject of their discussion and dates of appearance, appears in Appendix E of this report.

[18] See Appendix G for a chronological listing of the meetings and hearings conducted by the Commission.

librarians, information companies, computer manufacturers, independent software producers, computer users, and various professional associations.[19] The information given by these witnesses and collected by the research projects provided the foundation for the preparation of the various subcommittee reports and the subsequent Commission deliberations.

The studies conducted for the Commission are discussed in the chapters of this report dealing with the substantive areas to which they apply.[20] The study that addressed the questions of impact on the general consumer, however, deserves some mention at this point, since it concerned all of the areas considered by the Commission.[21]

Early in the Commission's deliberations, the question was raised of the impact of any recommendations that the Commission might make on the ultimate consumer or the public at large. The answer to the question was not readily apparent. Consequently, the Commission directed the staff to plan a study that would attempt to address this topic. After a general plan was developed, contracts were placed with the Public Interest Economics Center (PIE-C) and the Public Interest Satellite Association (PISA) to prepare an economic analysis of these issues and to convene two conferences of representatives from interested consumer and public interest organizations to provide additional information for the analysis.[22] The findings of that study generally were that copyright protection for works produced by and used in conjunction with computers and reprographic systems was appropriate so long as it did not impede public access to such works or otherwise extend monopoly power. The results of that study are considered in the analysis of the Commission's recommendations which follow.

In addition to the hearings held by the full Commission on a regular basis, the subcommittees met to formulate, draft, and revise their respective reports concerning their areas of inquiry. After Commission review, these reports were offered for public comment, and the full Commission reviewed letters and took testimony from those who responded.

As work progressed, it became clear that Congress had been correct in providing three years for the Commission to complete its work. Because there had been a seven-month delay between the legal creation of the Commission and the appointment of its members, Representative Kastenmeier introduced a bill which, after it became law, granted the Commission an additional seven months to complete its work and prepare this report.[23]

During the Commission's life, the Act of 1976 was enacted and became effective. In anticipation of the work of the Commission and of this report, the drafters of the statute explicitly stated that it did not address or deal with computer issues.[24] Instead, it addressed and dealt with certain photocopying issues by codifying the equitable defense of "fair use" and by expressly specifying certain additional rights of some libraries and archives.[25] Guidelines for interpreting those provisions relating to interlibrary loan photocopying were developed with the Commission's assistance and incorporated by Congress into the Conference Report.[26] These guidelines are discussed in detail in Chapter 4.

The computer use issues addressed by the Commission and discussed in Chapter 3 are of relatively recent vintage. In this respect they differ from certain photocopying issues which were the subject of concern as early as the 1930s.[27] Under the copyright law in force during the early phases of computer development, it was unclear whether unauthorized placement of a copyrighted work into a computer amounted

[19] See Appendix F for a listing of witnesses and the organizations represented.

[20] A bibliography of the reports prepared for the Commission and a summary of each research project appears in Appendix H.

[21] BRESLOW, FERGUSON, AND HAVERKAMP, AN ANALYSIS OF COMPUTER AND PHOTOCOPYING ISSUES FROM THE POINT OF VIEW OF THE GENERAL PUBLIC AND THE ULTIMATE CONSUMER (1978); hereinafter cited as PIE-C Report.

[22] A listing of the representatives from these organizations may be found in Appendix H under the PISA Conferences.

[23] 95th Cong., 1st sess., 1977, H.R. 4836; this became P.L. 95–146 (1977). (The text of this act appears in Appendix B.)

[24] 17 U.S.C. § 117, and House Report, *supra* note 1, p. 116.

[25] 17 U.S.C. §§ 107 and 108.

[26] *Supra* note 1, p. 72.

[27] For example, the so-called Gentlemen's Agreement on Photocopying was established in 1935 to provide guidelines for the most common types of library photographic reproduction.

to the preparation of a copy in violation of the rights of the copyright owner, in view of the Supreme Court's holding that a piano roll was not a "copy" of the music it caused to be played, since it was incapable of being read by the unaided human eye.[28]

Even when an apparent work of authorship was prepared for computer use and then employed in conjunction with a computer, federal copyright could exist under the 1909 Act only if the work had been published with the requisite copyright notice. Unpublished works were protected by state law dealing with common law copyright. But if the work was published without the notice required by the federal copyright law, it was in the public domain under the 1909 Act. Again, this meant that few federal copyright questions were raised.

Modern computer systems either are used or have the capability to transmit, store, and receive information across great distances. In conjunction with telephone lines or specialized communications facilities, a computer, coupled with a cathode ray terminal or a printing device, may be used to display or copy information located either in its storage unit or in that of another computer thousands of miles away. Under the new copyright law, the information displayed or copied may often be a copyrighted work. The terms *display* and *copy* are important for the purposes of this report, since each of those acts, unless authorized, constitutes a copyright infringement.

A brief overview of the most relevant provisions of the 1976 Act may be helpful in placing in context the discussions which follow.

[28] White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

Federal copyright now protects original works of authorship in conventional or electronic media from the moment of their creation, without the need to affix notice and publish as required under the old law.[29] Since no action need be taken to acquire the copyright, much of the material used or stored in computer systems will be copyrighted. Copyright protection lasts for the life of the author plus fifty years [30] or, in the case of works which are anonymous, pseudonymous, or made for hire,[31] for seventy-five years from publication or one hundred years from creation, whichever period is shorter.[32]

The owner of copyright in a work has the exclusive right to do or authorize the following: (a) prepare copies of the work; (b) prepare derivative works based upon it;[33] (c) distribute copies of it publicly by sale, rental, lease, or lending; (d) perform certain works publicly; and (e) display certain works publicly. When someone other than the copyright owner—or a person acting with the owner's permission—commits one of those acts, it is an infringement of the copyright unless it comes within an exception provided by the law.[34] The copyright owner possesses against infringers such remedies as injunctions, damages and profits, costs and attorney's fees, or criminal prosecution.[35]

[29] 17 U.S.C. §§ 102(a) and 302.

[30] 17 U.S.C. § 302(a).

[31] Works made for hire include all works made by employees within the scope of their employment and certain specifically ordered or commissioned works. 17 U.S.C. § 101.

[32] 17 U.S.C. § 302(c).

[33] Derivative works include translations, abridgements, transformations, and adaptations. 17 U.S.C. § 101.

[34] 17 U.S.C. § 501(a).

[35] 17 U.S.C. §§ 502, 504, 505, and 506.