COPYRIGHT AND STATE GOVERNMENT: AN ANALYSIS OF SECTION 119.083, FLORIDA'S SOFTWARE COPYRIGHT PROVISION*

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I. INTRODUCTION

The Florida Legislature amended the Public Records Law[1] in 1990 to allow state and local agencies to copyright data processing software developed by an agency for its own use.[2] In Florida the authority to copyright internally-developed materials, including agency-developed software programs, "must be *expressly* granted to [an] agency."[3] Before the enactment of this new copyright provision, only a very small number of public agencies had such authority.[4] Section 119.083, *Florida Statutes*, however, allows *any* agency "to hold copyrights for data processing software created by the agency and *to enforce its rights* pertaining to such copyrights."[5] For the purposes of this section, an "agency" is broadly defined as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . ."[6]

The impetus for this broad grant of statutory authority came from "[c]ertain local governments and local government organizations"

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1. FLA. STAT. ch. 119 (1991).

2. Ch. 90-237, 1990 Fla. Laws 1769 (codified at FLA. STAT. § 119.083 (1991)).

3. OFFICE OF THE ATT'Y GEN., FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL 70 (1990). Before enactment of § 119.083, it was not clear whether local governments had the authority to copyright internally-created software. *See, e.g.*, Staff of Fla. H.R. Comm. on Govtl. Ops., HB 2225 (1990) Staff Analysis 3 (Apr. 4, 1990) (on file with comm.) [hereinafter HB 2225 Staff Analysis].

4. *See* STAFF OF FLA. JT. LEGIS. INFO. TECH'Y RESOURCE COMM., FLORIDA'S INFORMATION POLICY: PROBLEMS AND ISSUES IN THE INFORMATION AGE 84 (1989) (on file with comm.) [hereinafter PROBLEMS AND ISSUES].

5. FLA. STAT. § 119.083(2) (1991) (emphasis added).

6. *Id.* §§ 119.011(2), .083(1)(a) ("'Agency' has the same meaning as in s. 119.011(2) . . .") (1991).

which argued "that they should be able to recoup costs for developing software and possibly generate revenue from the sale of software."[7] Thus, the statute says an "agency that has obtained a copyright for data processing software created by the agency may sell" or license the copyrighted software at fees "based on market considerations."[8] This right to copyright and sell agency-created software programs is limited only by the statutory caveat that fees for software sold or licensed to an "individual or entity solely for application to data or information maintained or generated" by that agency are subject to the more proscriptive fee provisions of section 119.07(1).[9]

The extent to which state and local government agencies in Florida are making use of this extended authority to copyright software programs is discussed later in this Article. However, because federal copyright law preempts any state-created rights within the general scope of copyright,[10] it is first necessary to consider the breadth and application of the Federal Copyright Act of 1976[11] before analyzing Florida's new copyright statute. Thus, Section II of this Article offers a general overview of federal copyright law and Section III examines its application to computer software programs. Section IV discusses the issues raised by section 119.083, *Florida Statutes*, which grants state agencies the right to copyright agency-created software. Section IV also contains results of a survey conducted by the Florida Joint Committee on Information Technology Resources (JCITR). The survey, which has been reprinted as an Appendix to this Article, explored state and local government agencies' use and sale of agency-copyrighted software. Finally, Section V draws conclusions from the analysis in Section IV.

II. OVERVIEW OF FEDERAL COPYRIGHT LAW

As stated in Article I, Section 8 of the *United States Constitution*, the purpose of federal copyright law is "[t]o promote the Progress of

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7. HB 2225 Staff Analysis, *supra* note 3, at 4.

8. FLA. STAT. § 119.083(3) (1991).

9. *Id.* Section 119.07(1)(a) allows an agency to recover only the actual cost of duplication; § 119.07(1)(b) authorizes collection of an additional special service charge for the extensive use of information technology resources.

10. *See* 17 U.S.C. § 301 (1988); H.R. REP. No. 1476, 94th Cong., 2d Sess. 130 (1976) [hereinafter 1976 HOUSE REPORT]. *See also* Banks v. Manchester, 128 U.S. 244, 252 (1888) ("No authority exists for obtaining a copyright, beyond the extent to which Congress has authorized it."); Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983) (state regulation in the area of copyright is preempted by federal law), *cert. denied*, 469 U.S. 819 (1984).

11. 17 U.S.C. §§ 101-20 (1988).

Science and useful Arts."[12] Because "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors," copyright seeks to protect an artist's or scientist's economic interests by a grant of exclusive—but limited—controls over his or her work.[13] These controls include the right to reproduce and distribute the copyrighted work, prepare derivative works based on the original, and display or perform the work publicly.[14] These exclusive rights are qualified, however, by limitations specified in the Federal Copyright Act of 1976.[15] In other words, subject to express statutory limitations, the copyright owner has the right to control when and in what manner a copyrighted work is disseminated to the public.

In stimulating the creation of intellectual works through economic incentive, copyright seeks to balance an author's property rights in his or her intellectual endeavors with the public's interest in the ideas expressed in those works. As the Third Circuit Court of Appeals noted, "we must remember that the purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture, and development."[16] The U.S. Supreme Court has held: "To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[17]

A. The Scope of Federal Copyright Protections: Original Works of Authorship and the Idea/Expression Dichotomy

The Federal Copyright Act of 1976 protects "*original works of authorship* fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[18]

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12. Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Protection for inventors and their "discoveries" is found in the U.S. Patent Act, 35 U.S.C. §§ 1-376 (1988).

13. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954). Generally, a copyright "endures" for the life of the author plus 50 years. *See also* 17 U.S.C. § 302 (1988).

14. 17 U.S.C. § 106 (1988).

15. *Id.* §§ 107-20.

16. Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1235 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

17. Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (1991).

18. 17 U.S.C. § 102(a) (1988) (emphasis added).

Originality is the *sine qua non* of copyright; to qualify for copyright protection "a work must be original to the author."[19] The amount of originality required, though, is minimal; there is no requirement of novelty or uniqueness. Rather, "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[20]

Additionally, the Federal Copyright Act of 1976 offers examples of the types of original work that may be protected by copyright at 17 U.S.C. § 102(a). Because "technological developments have made possible new forms of creative expression that never existed before," the statutory list of examples, which encompasses new expressive forms including computer programs, is purposely illustrative rather than exclusive.[21]

The scope of copyright is limited to original *expression*, however, and does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery," regardless of its form.[22] Therefore, "[t]he mere fact that a work is copyrighted does *not* mean that every element of the work may be protected."[23] Using computer programs as an example, copyright protects the "expressive elements" of the program, but not "the ideas, processes, and methods embodied in" the program.[24] Thus, a computer program is copyrightable only "to the extent that [it] incorporate[s] authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves."[25] Yet although the distinction between idea and

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19. *Feist*, 111 S. Ct. at 1287.

20. *Id.*; *see also* Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 48 (D. Mass. 1990) ("'original' . . . refers to works that have been 'independently created by an author,' regardless of their literary or aesthetic merit, or ingenuity, or qualitative value") (quoting 1976 HOUSE REPORT, *supra* note 10, at 51).

21. *See* 1976 HOUSE REPORT, *supra* note 10, at 51.

22. 17 U.S.C. § 102(b) (1988). *See* Mazer v. Stein, 347 U.S. 201, 217 (1954) ("copyright . . . protection is given only to the expression of the idea—not the idea itself") (citation omitted). While expression is protected by copyright, the idea is "dedicated by the author to the public domain upon publication." Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 707. The idea/expression dichotomy was first articulated by the U.S. Supreme Court in Baker v. Selden, 101 U.S. 99 (1879). In *Baker*, the Court held that although a particular accounting method was an uncopyrightable idea, the book that described the method was copyrightable expression. *Id.* at 105.

23. *See* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1289 (1991) (emphasis added).

24. *Paperback Software*, 740 F. Supp. at 53.

25. 1976 HOUSE REPORT, *supra* note 10, at 54. *See also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates."); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir.

expression is a requisite threshold in nearly all copyright litigation, "no one has been able to articulate how or where to find the elusive line between 'idea' and 'expression' for software."[26] Because of this, separating "the purpose or function" of a computer program—its idea—from "everything that is not necessary to that purpose or function"—its expression—can be particularly difficult.[27]

However, not all expression is copyrightable. In addition to the minimal degree of originality required, the expression of an idea must be separable from the idea itself.[28] That is, if there are only a limited number of ways one may express a particular idea, then the expression of that idea *merges* with the idea itself and cannot be copyrighted.[29] For example, in more traditional literary works, "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic" are not copyrightable;[30] to allow copyright protection for such stock literary devices would grant the first author a monopoly on "commonplace ideas."[31] The rationale for this merger doctrine is rather simple: copyright protection for the expression of an idea so inextricably tied to the idea itself as to be inseparable would, in effect, extend protection to the underlying idea—a direct violation of section 102(b).[32]

1986) ("It is axiomatic that copyright does not protect ideas, but only expressions of ideas."), *cert. denied*, 479 U.S. 1031 (1987).

26. Pamela Samuelson, *Reflections on the State of American Software Copyright Law and the Perils of Teaching It*, 13 COLUM.-VLA J.L. & ARTS 61, 63 (1988). *See also* National Commission on New Technological Uses of Copyrighted Works (CONTU), *Final Report and Recommendations* (1978), *reprinted in* 5 COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD 1, 44 (N. Henry ed., 1980) [hereinafter CONTU *Report*] ("[i]t is difficult, either as a matter of legal interpretation or technological determination, to draw the line between the copyrightable element of style and expression in a computer program and the process [or idea] which underlies it"). The idea/expression distinction in more traditional subjects of copyright is no less troublesome. According to Judge Learned Hand, "[n]obody has ever been able to fix that boundary [between idea and expression], and nobody ever can." Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

27. *See Whelan*, 797 F.2d at 1236 (emphasis omitted); SAS Inst., Inc. v. S & H Computer Sys., Inc., 605 F. Supp. 816, 829 (M.D. Tenn. 1985) (the idea/expression distinction, "difficult and *ad hoc* in any case, is particularly difficult in the case of complex computer software") (citations omitted); RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY § 1.03(3)(c) (1991 Cumulative Supp. No. 2).

28. *See* Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 58 (D. Mass. 1990).

29. *See, e.g.*, Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971); NIMMER, *supra* note 27, § 103(3)(c).

30. Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978); *see also* Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 616 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

31. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

32. *See* 17 U.S.C. § 102(b) (1988); *see also Kalpakian*, 446 F.2d at 742 (protecting expres-

As applied to computer programs, the merger doctrine becomes compelling because "programmers generally strive to create programs 'that meet the user's needs in the most efficient manner,'" a concern which "may so narrow the practical range of choice as to make only one or two forms of expression workable options."[33] Therefore, in the context of computer programs:

> copyrighted language may be copied without infringing when there is but a limited number of ways to express a given idea. . . . [T]his means that when specific instructions, even though previously copyrighted, are the only and essential means of accomplishing a given task, their later use by another will not amount to infringement.[34]

Thus, the question becomes whether "other programs can be written or created which perform the same function as" the program at issue, a question which must be answered on a case-by-case basis.[35] In sum, the "original and substantial" expressive elements of an idea embodied in a computer program will be copyrightable if "the expression of [the] idea has elements that go beyond all functional elements of the idea itself, and beyond the obvious, and if there are numerous other ways of expressing the non-copyrightable idea."[36]

B. Statutory Limitations on Exclusive Rights

There are statutory limitations on the scope of copyright as well. The exclusive rights granted in 17 U.S.C. § 106—reproduction, distribution, performance and display, and preparation of derivative works—are subject to the specific limitations of sections 107-20.[37] The fair use provision of section 107, and the limitations on exclusive rights for computer programs in section 117 are also particularly relevant to this Article.

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sion "in such circumstances would confer a monopoly of the 'idea' upon the copyright owner"); Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 679 (1st Cir. 1967) (an idea "would be appropriated by permitting the copyrighting of its expression"); NIMMER, *supra* note 27, § 1.03(3)(c) ("if there is only one or a very limited number of ways to express an idea, copyright must be denied in order to preserve free use and exchange of ideas").

33. Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544 (E.D.N.Y. 1991), *aff'd*, 61 U.S.L.W. 2003 (2d Cir. June 22, 1992) (citation omitted).

34. CONTU *Report*, *supra* note 26, at 20.

35. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984).

36. Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 59 (D. Mass. 1990).

37. *See* 17 U.S.C. § 106 (1988).

1. *Limitations on Exclusive Rights: Fair Use*

The fair use doctrine is defined as a "privilege" in someone other than the owner of the copyright "'to use the copyrighted material in a reasonable manner without [the owner's] consent.'"[38] This doctrine stipulates that the use of a copyrighted work for certain purposes such as scholarship and research "is *not* an infringement of copyright."[39] As with the statutory limitations specified in the Federal Copyright Act of 1976, the purpose of the fair use doctrine is to place limits on the copyright owner's property rights, thereby encouraging creative use of the protected material.[40] Therefore, application of the fair use privilege entails balancing the "exclusive right of a copyright holder with the public's interest in dissemination of information."[41]

Under the Federal Copyright Act of 1976, the determination of whether a given use of a copyrighted work is fair requires consideration of the following factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (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
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.[42]

These statutory factors, which are used by the courts in determining whether a particular use should be considered fair and reasonable, require a case-specific analysis. A finding of fair use will defeat a claim of copyright infringement.[43]

2. *Limitations on Exclusive Rights: Computer Programs*

The Federal Copyright Act of 1976 provides that a computer program may be copied or adapted by the owner if it is necessary to the

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38. *See* Rosemont Enters. v. Random House, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citation omitted).

39. 17 U.S.C. § 107 (1988) (emphasis added).

40. Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1255 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).

41. Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

42. 17 U.S.C. § 107 (1988 & Supp. 1992).

43. *Id.*

utilization of the program, or is for archival purposes only.[44] Although this limitation is much narrower than that found in the fair use provision, section 117 acts to "ensure that rightful possessors of copies of computer programs may use or adapt the[] programs for their use," and favors the public interest over the copyright owner's exclusive property rights.[45] Thus, an otherwise infringing use that fits into either of these two narrowly-drawn categories will not, like a finding of fair use, violate a valid copyright.

C. *Copyright Infringement*

Subject to the express statutory limitations in sections 107-20, violation of any of the exclusive rights enumerated in section 106 constitutes infringement.[46] To establish a claim of copyright infringement, a plaintiff must prove both ownership of a valid copyright and the defendant's unauthorized copying of the protected material.[47]

1. Copyright Ownership

A certificate of copyright registration constitutes prima facie evidence of the validity of the copyright.[48] However, even though the U.S. Copyright Office is responsible for making an initial finding of copyrightability and registering copyright claims, the courts ultimately determine what is copyrightable through litigation.[49] Thus, when the Copyright Office registers a copyright claim, "neither the public nor the courts should assume that the Copyright Office has made a determination that individual component parts of the work are necessarily entitled to copyright protection."[50]

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44. 17 U.S.C.A. § 117 (West Supp. 1992). It should be noted that the Federal Copyright Act of 1976 makes a distinction between "[o]wnership of a copyright" and "ownership of any material object in which the work is embodied." 17 U.S.C. § 202 (1988).

45. *See* 1976 HOUSE REPORT, *supra* note 10, at 1.

46. 17 U.S.C. § 501 (1988). Jurisdiction over infringement actions is given exclusively to the federal courts. 28 U.S.C. § 1338(a) (1988).

47. *See, e.g.*, Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 141.1 (1964). Intent is not necessary for a finding of infringement. 17 U.S.C. § 501 (1988). Rather, intent is considered only in establishing the proper statutory damage award. *Id.* § 504(c)(2). Under § 504(c)(2), a copyright owner who proves willful (intentional) infringement may collect as much as $100,000 per incident in statutory damages.

48. 17 U.S.C. § 410(c) (1988). Although copyright protection is not dependent upon registration, a claim of infringement cannot be brought until registration has been made. *Id.* §§ 408(a), 411(a).

49. *See id.* §§ 409, 410(a), (c); Brief Amicus Curiae on Behalf of the Register of Copyrights at 7, Lotus Dev. Corp. v. Borland Int'l, No. 90-11662-K, 1992 WL 186062 (D. Mass. July 2, 1990) [hereinafter Brief Amicus Curiae].

50. Brief Amicus Curiae, *supra* note 49, at 16.

In other words, copyright registration merely creates a *presumption* that the subject matter is copyrightable—a presumption that may be overcome by "evidence which brings into question the copyrightability of the work."[51]

2. *Unauthorized Copying*

Having established ownership of a valid copyright, a plaintiff must next offer proof of unauthorized copying of the protected work. Because direct evidence may be difficult to produce, copying is most often established by indirect evidence showing not only the defendant's access to the copyrighted work, but, more importantly, that the similarity between the two works is substantial enough to support an inference of copying.[52] The determination of whether the copying appropriated significant portions of the copyrighted work dictates a quantitative as well as a qualitative analysis, balancing "the substantive interests of [the] author against the free flow of ideas and technology for use by others."[53]

Generally, the test for determining substantial similarity is a two-step process that requires first, a determination of whether the amount of similarity between the two works supports a conclusion that the protected work was copied, and second, whether the copying was prohibited.[54] The first step in this process requires expert testimony; the second the testimony of the average lay observer.[55] Because of the intricate technical issues inherent in software infringement

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51. Digital Communications Assocs., Inc. v. Softklone Distrib. Corp., 659 F. Supp. 449, 456 (N.D. Ga. 1987) (citing Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986)). Presumably, evidence of an invalid registration under chapter four of the Federal Copyright Act of 1976 or a violation of § 102 (such as improper subject matter or a non-copyrightable expression) would defeat a presumption of validity. *See id.* at 464.

52. *See, e.g., id.*; Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1231-32 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); NIMMER, *supra* note 27, § 1.03[4]. In Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977), access was defined as the "opportunity to view or to copy" the copyrighted work. However, the court also stated that "[n]o amount of proof of access will suffice to show copying if there are no similarities." *Id.* Only *copying* is prohibited by the Copyright Act; a work that is independently created—even if identical to the copyrighted work—will not infringe the copyright. *See* NIMMER, *supra* note 27, § 1.03[4].

53. NIMMER, *supra* note 27, § 1.03[4].

54. *See* Arnstein v. Porter, 154 F.2d 464, 468-9 (2d Cir. 1946); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987) (discussing application of *Arnstein* to computer program infringement). An otherwise infringing use of copyrighted material may be permitted if it falls within one of the statutory limitations contained in sections 107-20 of the Federal Copyright Act of 1976. *See supra* notes 38-45 and accompanying text.

55. *Arnstein*, 154 F.2d at 468-69.

litigation, many courts have rejected this two-prong test, and have relied heavily—and almost exclusively—on expert testimony.[56] Regardless of whether substantial similarity is found, however, any "similarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form" will preclude a finding of infringement under the merger doctrine.[57]

Because "[c]omputer software is comprised of component parts, each of which may be separately copyrightable," the complexity of traditional copyright law is compounded when applied to computer software programs.[58] And, although the copyrightability of the different program components is well-settled, questions concerning the proper scope of copyright protection for software are far from answered.[59]

3. *Remedies for Infringement*

The various remedies available for copyright infringement are outlined in the Federal Copyright Act of 1976.[60] A court may order an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[61] A court may also order the impounding or destruction of all violative copies.[62] Monetary damages may also be awarded. The court awards either actual damages, in the amount of damage actually suffered by the copyright owner as a result of the infringement plus any profits made by the infringer, or statutory damages, which are capped at either $20,000 or $100,000, depending on the willfulness of the violation.[63]

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56. *See, e.g.*, *Whelan*, 797 F.2d at 1246; Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544 (E.D.N.Y. 1991), *aff'd*, 61 U.S.L.W. 2003 (2d Cir. June 22, 1992).

57. NIMMER, *supra* note 47, § 143.11. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) ("there[] must be substantial similarity not only of the general ideas but of the expression[] of those ideas as well"). For a discussion of the merger doctrine, see *supra* text accompanying notes 33-41.

58. Leslie Myles-Sanders, *Who Owns the Software? Intellectual Property in the Computer Industry After* CCNV v. Reid, 70 MICH. B.J. 664, 667 (1991).

59. *See, e.g.*, Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 875 (3d Cir. 1982) (copyrightability of computer programs is firmly established); Samuelson, *supra* note 26, at 61-2; Patricia Keefe, *Software Copyright a Mixed Bag*, COMPUTERWEEK, Feb. 12, 1990, at 35.

60. 17 U.S.C. §§ 501-11 (1988).

61. *Id.* § 502. Proof of irreparable harm is not required for a preliminary injunction when a plaintiff can make a prima facie showing of infringement or show a reasonable likelihood of success on the merits. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

62. 17 U.S.C. § 503 (1988).

63. *Id.* § 504. Under § 504, a copyright owner may elect to recover statutory damages rather

III. COPYRIGHT AND COMPUTER SOFTWARE PROGRAMS

After more than twenty years of consideration and study, Congress enacted a revised copyright act in 1976 which offered copyright protection to new forms of creative expression and communication made possible by developments in technology.[64] Although the 1976 Act did not make specific reference to the copyrightability of computer programs, legislative history makes it clear that programs were meant to be governed by the new act.[65] Based on a concern that the proposed copyright act might not adequately address problems raised by computer technology,[66] Congress created the National Commission on New Technological Uses of Copyrighted Works (CONTU).[67] CONTU's mission was to recommend changes in copyright law necessary to ensure protection for computer programs.[68]

A. CONTU and the Computer Software Copyright Act of 1980

CONTU, in its Final Report to Congress, concluded that the Federal Copyright Act of 1976 provided adequate protection for computer programs, but recommended that the copyright law be amended "to make it explicit [that computer] programs, to the extent that they embody an author's original creation, are proper subject matter of copyright."[69] Although the CONTU report "did not propose any statutory changes with respect to *copyrightability* of computer programs,"[70] it recommended two changes to the 1976 Act: the addition of a definition of "computer program" to section 101, and the repeal of section 117, to be replaced with a new section limiting the copyright owner's exclusive rights in computer programs.[71] These two

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than actual damages plus profits. Section 504(c)(1) sets a range of from $500 to $20,000, "as the court considers just." Section 504(c)(2) allows damages up to $100,000 in cases where the court finds that "infringement was committed willfully."

64. Federal Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-20 (1988)). *See* Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 48 (D. Mass. 1990); 1976 HOUSE REPORT, *supra* note 10, at 51; NIMMER, *supra* note 27, § 1.03[2].

65. *See* 1976 HOUSE REPORT, *supra* note 10, at 54 (the term "literary works" includes computer programs); *see also id.* at 116 (the 1976 Act encompasses "copyrightability of computer programs").

66. *See id.* at 116.

67. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201(b)-(c), 88 Stat. 1873, 1874 (codified at 17 U.S.C. § 201 (1974)).

68. *Id.*

69. CONTU *Report*, *supra* note 26, at 1.

70. Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 50 (D. Mass. 1990).

71. CONTU *Report*, *supra* note 26, at 12. Section 101 of the Federal Copyright Act of 1976 defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101 (1988). *See supra* notes 44-45 and accompanying text for a discussion of amended § 117.

recommendations were adopted by Congress with only slight modification and formed the basis of the Computer Software Copyright Act of 1980.[72]

Enactment of the Computer Software Copyright Act and the subsequent amendment of the Federal Copyright Act of 1976 seem to have generated more questions than answers regarding the application of traditional copyright protection to computer software programs. This is in part because a certain amount of similarity and standardization among computer programs is desirable, if not mandated.[73] As a result, many commentators believe that application of traditional copyright law to this new form of technology is inappropriate, and they have called for a new form of intellectual property law specific to computer technology.[74]

Additionally, while the CONTU Final Report advocated copyright protection for computer programs and emphasized the fundamental distinction between copyrightable expression and uncopyrightable process and idea, it did not explicitly define the scope of protection for software and did not offer any guidelines for distinguishing between protected expression and an unprotected process or idea.[75] This lack of direction has led to disagreement among the appellate circuits and to a great deal of confusion in the software industry about the exact scope of protection for computer programs. Indeed, the problem is such that one commentator has suggested that "the scope of software copyright protection . . . depend[s], at least in part, upon geography."[76]

B. The Scope of Software Copyright Protection

One of the first issues that arose after amendment of the Federal Copyright Act of 1976 was whether all computer programs, regardless

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72. Pub. L. No. 96-517, 94 Stat. 3015 (1980). Because of its direct relationship to the enactment of the Computer Software Copyright Act, the CONTU Final Report is frequently used by the courts as a form of legislative history. *See* NIMMER, *supra* note 27, § 1.03[2] n. 28; W. David Taylor, III, Comment, *Copyright Protection for Computer Software After* Whelan Associates v. Jaslow Dental Laboratory, 54 MO. L. REV. 121, 135 (1989).

73. *See* Samuelson, *supra* note 26, at 65 ("progress in the technological arts is more often promoted by standardization"); Keefe, *supra* note 59, at 35.

74. *See, e.g.*, Samuelson, *supra* note 26, at 71-73; OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-TCT No. 527, FINDING A BALANCE: COMPUTER SOFTWARE, INTELLECTUAL PROPERTY, AND THE CHALLENGE OF TECHNOLOGICAL CHANGE (May 1992) [hereinafter FINDING A BALANCE].

75. NIMMER, *supra* note 27, § 1.03[1]; *see also* Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 50 (D. Mass. 1990).

76. Esther R. Schachter, *Software Protection in the Throes of a Legal Morass*, 33 DATAMATION, June 1, 1987, at 49, 56.

of form or function, were copyrightable.[77] The basic principle "that all computer programs which meet the threshold requirements of the [1976] Act can be protected by copyright, regardless of their form, their function, or their fixation in a given medium" evolved from a number of early software copyright cases.[78]

In the next generation of cases, however, the federal appellate courts faced more difficult issues, including the actual scope of copyright protection for computer software programs, and "the proper test for infringement in software cases."[79] The first of these second-generation cases, *Whelan Associates v. Jaslow Dental Laboratory*,[80] was a landmark decision representing the "'farthest extension' of copyright protection of software by the courts to date."[81]

In *Whelan* the Third Circuit grappled with the idea/expression dichotomy as applied to copyright of computer software, and determined that "the purpose or function" of a computer program is its uncopyrightable idea, and that which "is not necessary to that purpose or function" of the program is the copyrightable expression of the idea.[82] Concluding that "[t]he 'expression of the idea' in a software computer program is the manner in which the program operates, controls and regulates the computer," the *Whelan* court held that copyright protection of a computer program may extend beyond the program's literal code to its *structure, sequence, and organization*—the program's *expression* as broadly defined by the *Whelan* court.[83]

Although the *Whelan* holding has been followed by a number of courts in determining the scope of copyright protection for software programs,[84] other courts have rejected it. Less than six months after *Whelan* was decided, the Fifth Circuit, in *Plains Cotton Cooperative Association v. Goodpasture Computer Service, Inc.*, rejected the

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77. *See generally* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984) (program written in object code and operating system program both copyrightable); Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870 (3d Cir. 1982) (object code copyrightable). Generally, computer programs are written in source code, which is more intelligible to humans, and are then translated into object code for use by the computer. Application programs serve to help the computer user perform specific tasks; operating system programs, on the other hand, manage the computer's internal functions. *Apple*, 714 F.2d at 1243.

78. Taylor, *supra* note 72, at 130-32 (footnotes omitted).

79. *Id.* (citations omitted).

80. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

81. Taylor, *supra* note 72, at 121 (citations omitted).

82. *See Whelan*, 797 F.2d at 1236 (citation omitted) (emphasis omitted).

83. *Id.* at 1238-40 (citation omitted) (emphasis added).

84. *See, e.g.*, Digital Communications Assocs., Inc. v. Softklone Distrib. Corp., 659 F. Supp. 449, 456 (N.D. Ga. 1987); Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127 (N.D. Cal. 1986).

Whelan holding, relying instead on a Texas district court case which held that the organization of a program, or its "input formats," was an idea, *not* an expression, and "thus w[as] not protected by copyright."[85] More recently, a district court in the Second Circuit criticized the *Whelan* decision as being too simplistic and, finding the *Whelan* test fundamentally flawed, flatly rejected it as "inadequate and inaccurate."[86]

In addition to the still unsettled issues of scope and the idea/expression distinction addressed in *Whelan* and *Plains Cotton*, a number of other unresolved—and equally complicated—legal issues are currently challenging both the courts and the software industry. These issues include whether the underlying structure of computer programs, user interface formats, and the functionality of programs are part of the program's protectable expression; and whether a copyright is infringed by user modifications to copyrighted software.[87]

As long as these issues remain unresolved, "true predictability in matters of software copyright remains out of reach,"[88] and software vendors—whether private corporations or public agencies, defendants, or plaintiffs—will continue to use litigation as a means of defining the scope of copyright protection for computer programs.[89]

IV. ISSUES

A. The Rampant Rise in Litigation and the Cost of Protecting a Copyright: Issues Associated with the Copyright of Agency-Created Software

A government agency has a number of alternatives in procuring new software programs to meet its needs. It may purchase off-the-

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85. 807 F.2d 1256, 1262 (5th Cir.), *cert. denied*, 484 U.S. 821 (1987) (citing Synercom Technology, Inc. v. Univ. Computing Co., 462 F. Supp. 1003, 1014 (N.D. Tex. 1978)). *Compare* Samuelson, *supra* note 26, at 64-65 (*Plains Cotton* explicitly rejects *Whelan* holding), *and* Taylor, *supra* note 72, at 149 (*Plains Cotton* and *Whelan* reconcilable).

86. Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544, 559-60 (E.D.N.Y. 1991), *aff'd*, 61 U.S.L.W. 2003 (2d Cir. June 22, 1992). Specifically, the district court, noting "that there is no necessary relationship between the sequence of operations in a program, which are part of *behavior*, and the order or sequence in which those operations are set[] in the *text* of the program," criticized *Whelan* for using the terms *structure, sequence, and organization* interchangeably. *Id.* This court also found that "[s]ince the behavior aspect of a computer program falls within the statutory terms 'process,' 'system,' and 'method of operation,' it may be excluded by statute from copyright protection." *Id.* (citing 17 U.S.C. § 102(b) (1988)).

87. Samuelson, *supra* note 26, at 66 (footnotes omitted).

88. Taylor, *supra* note 72, at 154.

89. *See, e.g.*, Peter Krass, *Why So Many Lawsuits?*, INFORMATIONWEEK, June 3, 1991, at 40, 44.

shelf software, it may enter into an agreement with a third party for custom-developed software, or it may develop its own software in-house.

With the enactment of section 119.083, *Florida Statutes*, any Florida agency that develops its own software, or retains the right to copyright custom-developed software under contract with a third party, may now copyright and market those software programs. According to a recent survey of state and local government agencies conducted by the Florida Joint Legislative Committee on Information Technology Resources (JCITR) on the use and sale of agency-copyrighted software, 249, or 62%, of the 401 agencies responding had developed software in-house, with 13% attempting to copyright the software.[90] Nearly one-fourth (eighty-five) obtained the copyright on software developed for the agency by a third party.[91] Although thirty-six agencies reported that they had attempted to copyright software developed by or for the agency, only twenty marketed agency-copyrighted software through sale or license.[92] Of those twenty agencies, twelve reported having actually sold or licensed copyrighted software for more than the actual cost of duplication.[93]

The effects of a decision to enter the software market with agency-copyrighted programs may be widespread and long-lasting, and a number of issues should be considered before an agency commits itself to such a course of action.

1. Defining Rights and Enforcing Copyright

If an agency is going to market its copyrighted software, it must be willing to protect its copyright against potential piracy. This means some agency resources must be devoted to enforcing its copyrights against infringement. In addition, software development procedures must be designed to prevent infringing on the rights of others. Lawsuits over protection of intellectual property rights are proliferating at an alarming rate—more than 6,700 were filed in 1990, an increase of almost 60% in just a decade.[94] And the legal costs for such suits seem

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90. *See* Appendix, *infra*, at 476, 477.

91. *See* Appendix, *infra*, at 476.

92. *See* Appendix, *infra*, at 477, 480.

93. *See* Appendix, *infra* at 480.

94. *See* Anne S. Gallagher, *Software Suits: Who Wins?*, INFORMATIONWEEK, Oct. 21, 1991, at 84. One software developer, Autodesk, reports it has more than 300 copyright infringement cases currently pending, and has resolved more than 4,000 cases in the last four years. *See* Jim McNair, *Software Hardball: Industry Takes Offensive Against Piracy*, MIAMI HERALD, June 5, 1992, at C1, C5. In addition, according to a survey of predominantly U.S. companies on how such companies safeguard their intellectual property, 67% of those responding stated they "are

to be rising exponentially. According to various estimates, litigating a complex intellectual property claim can cost from $260,000 to more than $2 million.[95] An attorney who specializes in computer law predicts, "If you're in the computer business, the question now isn't how you'll get sued but when."[96]

In the software industry in particular, copyright "[l]itigation is becoming a business tactic, not a practice of last resort."[97] Some commentators cite the increase in competition among software vendors as a reason for this increase in competition;[98] others point to the confusion in both the industry and the courts over the actual scope of copyright protection.[99] Software developers "also point to the difficulty of ascertaining whether a new software product violates an existing . . . copyright" as a reason for the increase in litigation.[100] Yet whatever the reason, it is clear that software developers "'view intellectual property rights as a business tool for the 1990s,'" and that the willingness—and, some might say, eagerness—to enforce a copyright is considered vital to protect a valuable asset.[101] In light of this, agency response to JCITR survey questions concerning steps taken to guard against infringement seems rather simplistic, and perhaps even a bit naive. Of those Florida agencies copyrighting software, 75% stated that they do not have a regular, consistent plan for protecting against infringement of software copyright.[102] More startling is the fact that fewer than one-fourth of the agencies actually take steps to ensure

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engaged in litigation to protect or defend" their intellectual property rights. The survey was conducted by the Conference Board, a non-profit international business information service. *See* Ronald E. Berenbeim, *Safeguarding Intellectual Property: A Report from the Conference Board*, 924 CONFERENCE BOARD REPORT 15 (1989).

95. *See* Gallagher, *supra* note 94, at 84. Altai, Inc., a small software vendor from Arlington, Texas, incurred $2.5 million in legal expenses in successfully defending itself against a claim of copyright infringement brought by Computer Associates International. Robert Moran, *Software Copyrights: Ruling Narrows Protection*, INFORMATIONWEEK, June 29, 1992, at 15; *see also* Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544 (E.D.N.Y.), *aff'd*, 61 U.S.L.W. 2003 (2d Cir. June 22, 1992).

96. Julia King, *It's C.Y.A. Time*, 26 COMPUTERWORLD, Mar. 13, 1992, at 85 (quoting August Bequai, an attorney specializing in computer law).

97. Mitch Kapor, *Litigation vs. Innovation*, 5 BYTE, Sept. 1990, at 520.

98. *See, e.g.*, Krass, *supra* note 89, at 40, 44.

99. *See, e.g., id.* at 44; Schachter, *supra* note 76, at 50-51 (the exact limits of copyright protection have not been determined).

100. Krass, *supra* note 89, at 44.

101. Gallagher, *supra* note 94, at 84 (quoting Mark P. Whine, intellectual property lawyer with the Minneapolis-based firm Oppenheimer Wolff & Donnelly). According to a White Paper on software piracy prepared by the Software Publishers Association, the software industry had annual U.S. revenues of $4 billion in 1990, and lost $2.4 billion to piracy in the United States alone. SOFTWARE PUBLISHERS ASS'N, WHITE PAPER (April 1992).

102. *See* Appendix, *infra*, at 479.

that agency-created software will not infringe on the software copyrights of others.[103] However, at the time the survey was taken, in February 1992, only two agencies had a copyright infringement suit threatened or filed against them.[104]

2. *Liability*

Under current federal law, copyrighting agency-created software may result in unexpected exposure to liability for the producing agency, and marketing that software is certain to increase the risk. States have not always faced such exposure, however. Before 1990, government agencies were generally held immune from copyright infringement actions based on the doctrine of sovereign immunity.

Historically, the United States Supreme Court has interpreted the Eleventh Amendment of the *U.S. Constitution* to prohibit a citizen of a state from suing the state—or one of its employees when acting in his or her official capacity—for tort liability, unless the state had expressly waived its immunity to suit.[105] A number of states have used their Eleventh Amendment immunity to defeat claims for damages under the Federal Copyright Act of 1976. In *B.V. Engineering v. UCLA*, for example, the Ninth Circuit Court of Appeals held that the doctrine of sovereign immunity barred the plaintiff's claim against professors at UCLA for copyright infringement.[106] In closing, the court recognized that its holding would "allow states to violate the federal copyright laws with virtual impunity," and called on Congress to remedy the problem.[107] Congress responded by enacting the Copyright Remedy Clarification Act of 1990.[108] The purpose of the new legislation, which amends the Federal Copyright Act of 1976, is "to clearly and explicitly abrogate State sovereign immunity to permit the recovery of money damages against States."[109] Thus, a state and its officers and employees are no longer immune from damages for

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103. *See* Appendix, *infra*, at 479.

104. *See* Appendix, *infra*, at 479.

105. *See* Welch v. State Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 (1987) (citing Hans v. Louisiana, 134 U.S. 1, 10 (1890)).

106. 858 F.2d 1394 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). *See also* Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

107. *UCLA*, 858 F.2d at 1400.

108. Pub. L. No. 101-553, 104. Stat. 2749 (1990) (codified at 17 U.S.C. §§ 501-511 (Supp. II 1990)).

109. H.R. REP. No. 282(I), 101st Cong., 2d Sess. 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3949, 3950.

copyright infringement, and they are now subject to the same remedies for copyright violation as private persons or entities.[110]

Public employees may also be at risk of personal liability. In Florida, a governmental employee cannot be held liable "as a result of any act, event, or omission of action in the scope of his employment or function . . . ."[111] But because federal law preempts state law within the general area of copyright, "state law cannot provide immunity to persons sued for violating the Copyright Act . . . ."[112]

In addition to the risk of liability for copyright infringement, agencies that copyright and market software may be exposing themselves to liability for programs which do not function as warranted or anticipated.[113] The Ninth Circuit Court of Appeals has expressed the opinion that a manufacturer of defective computer software might be subject to strict liability.[114] Under strict liability theory, a seller is subject to liability for damages "even though he has exercised all possible care in the preparation and sale of the product."[115]

3. *Limitations on Development and Hidden Costs*

Government agencies have an obvious incentive for developing marketable software in-house. Rather than budgeting agency funds for the purchase of software, an agency can accomplish its mission with programs produced in-house while simultaneously benefitting from potentially profitable sales of the copyrighted software to third parties. However, this requires well-defined, written policies on when in-house development is an appropriate alternative to purchase, as well as internal or external controls on funds diverted from other agency tasks into software development.[116]

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110. 17 U.S.C. § 511 (Supp. II 1990).

111. FLA. STAT. § 768.28(9) (1991).

112. Richard Anderson Photography v. Brown, 852 F.2d 114, 122 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989). In *Richard Anderson*, which was heard before the enactment of the Copyright Remedy Clarification Act, the Fourth Circuit held that a state employee could be held personally liable for a claim of copyright infringement even though the state was immune from the same claim. *Id.* "The mere fact that [the employee's] conduct was undertaken in the course of her state employment does not . . . relieve her of individual liability . . . ." *Id.*

113. *See* King, *supra* note 96, at 85 ("As consumers, businesses and courts look to assign blame in cases where technology [has] run[] amok, firms may[] find themselves liable for errors caused by faulty software and systems.").

114. Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1039 (9th Cir. 1991).

115. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1963).

116. An early draft of Florida's new copyright statute provided that all funds obtained by an agency from licensing or selling copyrighted software would be deposited in an account earmarked for data processing or information resources management. HB 2225 Staff Analysis, *supra* note 3, at 1. As passed, however, the statute contained no such provision. Instead, state

An agency that decides to market its copyrighted software must also consider the hidden costs of competing in a commercial market. These costs include debugging, technical support for purchasers, upgrades, and new releases. All too often, the cost of software is "erroneously considered to be the cost of initial development."[117] However, the cost of software development does not end when development is completed and the marketing phase begins. Instead, costs continue to increase as "a result of the maintenance that is required for software, whether it is *corrective, adaptive, perfective, or preventative* maintenance."[118] Therefore, in successfully marketing copyrighted software it is important for an agency to recognize what may be significant post-production maintenance costs in addition to the initial costs of software development.[119]

When asked by the JCITR survey to mark all factors that the agency considers in establishing the sale or license price for agency-created software, 48% of those agencies copyrighting and marketing software chose the cost of duplication, and an equal number considered personnel time as a pricing factor.[120] Other factors considered included market considerations (35%); costs of production materials (22%); marketing and promotional costs (17%); profit margin or revenue generation (17%); and rent and utility costs (9%).[121] Although the cost of maintenance was not a factor specifically listed in the survey, there was an "Other" category in which a responding agency was asked to describe any other factors it considered which were not listed. Six of the twenty-three agencies (26%) that answered this question chose "Other," but not one listed maintenance as a price factor even though the agencies were asked about the types of maintenance or support provided.[122]

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agencies "may" deposit their proceeds in an agency trust fund, and "[c]ounties, municipalities, and other political subdivisions of the state may designate how such sale and licensing proceeds are to be used." FLA. STAT. § 119.083(3) (1991). These proceeds represent a new source of revenue for agencies, independent of legislative control or oversight. For statistical information on how agencies are spending their software copyright revenues, see Section V. of the JCITR survey, Appendix, *infra*, at 480.

117. Jill S. Weaver, A Model for the Total Cost of Software p.v. (1991) (unpublished M. Sci. thesis, Fla. State Univ.).

118. *Id.* at 19 (citations omitted).

119. According to one estimate, companies that develop and market software devote approximately 70% of available programming resources to support and maintenance. CRAIG JENSEN, THE CRAFT OF COMPUTER PROGRAMMING 291 (1985); JAMES MARTIN & CARMA MCCLURE, SOFTWARE MAINTENANCE: THE PROBLEM AND ITS SOLUTIONS 9 (1983) (corporate data processing organizations spend 80% of their time on program maintenance).

120. *See* Appendix, *infra*, at 481.

121. *See* Appendix, *infra*, at 481.

122. *See* Appendix, *infra*, at 481. One agency that checked "Other" stated that it did not

4. Private Sector Competition

In contrast to private sector software developers, a government agency that copyrights and markets its software does not depend upon the need for profit. As a result, private sector competition may be stifled by public agencies offering similar software at a price below what non-public software producers can offer. As one author states,

> [i]t is frequently assumed that government can produce information products and services comparable to those available from the private sector at the same or lower cost. There is no evidence to support this assumption. It is true that government can *sell* information for less. This is because the price is subsidized by taxpayer dollars—not because the cost of production is less.[123]

There is no sure road map for governmental success either. How does or should a government agency price a product when the ordinary rules of free enterprise do not apply? Should a premium piece of software be marketed at an above-average price in an attempt to seek higher profits? Should it be priced below cost to drive competitors out of the market? Should the initial program be inexpensive, with the profits coming from later upgrades once a purchaser is committed to a particular program through purchases and staff training? Alternatively, in establishing the "true" price of a program, what effort should be expended in determining the proportion of agency office rent, personnel costs, and other expenses attributable to software development and paid for by public revenues?

Many private sector software developers worry that public agencies marketing copyrighted software will seek full-fledged competition with the private sector without providing a level playing field. In commenting before the House Governmental Operations Committee on Florida's software copyright bill, a report from the Information Industry Association (IIA) stated:

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actively market its copyrighted software. Twenty-three agencies responded to the survey question on types of software support and maintenance provided. In the category of technical support, 14 agencies provided technical support by telephone; six by mail; three in person at the agency office; and three provided technical support at the buyer's place of business. Ten of the agencies offered training—eight of the 10 at the buyer's office, and six at the agency's. Other types of support provided included development of program upgrades (nine agencies); debugging (eight); customization of software programs (four); and software installation (five). In addition, three agencies reported that support is provided by a third party through a contract with the agency. Interestingly, two agencies reported that they do not provide *any* support for the software they copyright and market, responding that the software is sold "as is." *See* Appendix, *infra*, at 482.

123. Kenneth B. Allen, *Access to Government Information*, 9 GOV'T INFO. Q. 67, 74 (1992).

> One question the Legislature should ask is whether it serves the public interest to give so many diverse agencies so much incentive to devote public resources to the development and marketing of such a wide range of computer software. Since the legislation does not appear to be limited to software necessary to support the agency's mission, the temptation to divert resources into potentially profitable software ventures could prove overwhelming to some agencies.[124]

Although none of the agencies responding to the JCITR survey have succumbed to the temptation described by the IIA, the potential for abuse exists,[125] and government agencies have distinct advantages over their private sector competitors. These advantages include exemption from certain taxes, overhead costs that are not easily attributable and thus are not allocable to software development, and freedom from the necessity of generating revenue to ensure survival of the organization.

B. Public Policy and the Problems Inherent in Government-Held Copyrights

The Federal Copyright Act of 1976 precludes copyright protection for any work of the federal government, the rationale being that to allow "government copyright would only restrict free dissemination of valuable government information."[126] Rooted in the traditional First Amendment tenet that a strong and viable democracy is dependent upon a well-informed citizenry, this statutory prohibition attests to the "'conclusion by Congress that the public interest is served by keeping governmently created work as free as possible of potential restriction on []dissemination . . . .'"[127] There is no corresponding prohibition on state governments in the 1976 Act; thus, works of state

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124. Report from Info. Indus. Ass'n to Fla. H. Comm. on Govtl. Ops., Comments on Proposed Software Copyright Legislation 5 (Jan. 10, 1990) (on file with comm.) [hereinafter Report from Info. Indus. Ass'n].

125. The statutory language in § 119.083 is quite broad, and nothing in the statute precludes an agency from developing software not required "to support the agency's mission." FLA. STAT. § 119.083(2) (1991).

126. Maurice B. Stiefel, Note, *Piracy in High Places—Government Publications and Copyright Law*, 24 GEO. WASH. L. REV. 423, 433 (1956); *see also* James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. ENT. L.J. 263, 270 (1987). Although the federal government is prohibited from obtaining copyright, it may, however, receive and hold "copyrights transferred to it by assignment, bequest, or otherwise." 17 U.S.C. § 105 (1988).

127. Committee No. 308, Copyrights Division, *Gov't Relations to Copyright*, 1989 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT 195, 206 (citing Letter from David Ladd, Register of Copyrights, to Sen. Charles M. Mathias (Oct. 11, 1983), *reprinted in* 1984 House FOIA Legislative Hearings at 1138)) [hereinafter *Gov't Relations to Copyright*].

governments may be copyrightable, "depending on state law and policy, and '*subject to exceptions dictated by public policy*'" governing federal copyright law.[128] In authorizing its agencies to hold copyright, then, a state legislature must recognize the fundamental principles of federal copyright law, and should make a clear statement of its own policy in accordance with those principles.

Central to any discussion of public policy is the notion that federal copyright law is not based upon an author's exclusive right to his writings, but upon the idea that science and arts will be promoted and the public best served by granting authors a limited monopoly on their creative efforts.[129] Copyright law focuses on an individual's right to reap the reward of his or her efforts;[130] it seeks to protect an author's economic incentive to create by granting a monopoly limited in both time and scope, yet broad enough to allow the author to realize an economic return, thereby encouraging production of new and innovative work.[131] However, "[a] competing concern is the recognition that free and unrestrained access to the works of others encourages a greater dispersion of knowledge," which "hastens the development or discovery of new ideas and theories" and greatly enhances the public welfare.[132] Indeed, the United States Supreme Court has stated that the contribution and corresponding benefit to the public welfare is the "'primary object in conferring the copyright monopoly'";[133] without such benefit, the copyright monopoly would be detrimental to society as a whole. Therefore, public policy—based on constitutional principles—requires that "the copyright 'system of rewards is to be no more extensive than is necessary . . . to elicit a socially [optimal] amount of creative activity.'"[134]

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128. *See* Building Officials & Code Adm'rs v. Code Technology, Inc., 628 F.2d 730, 735-36 (1st Cir. 1980) (quoting ALAN LATMAN, THE COPYRIGHT LAW 43 (5th ed. 1979)) (emphasis added). Case law may limit a state's right to copyright its work, however. *See, e.g.*, Banks v. Manchester, 128 U.S. 244 (1888) (state court opinions are in the public domain and cannot be copyrighted); Davidson v. Wheelock, 27 F. 61 (D. Minn. 1866) (rejecting copyright on state statutes).

129. H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909) [hereinafter 1909 HOUSE REPORT]; *see also* John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1023 (1989) (purpose of copyright is "to generate a public benefit," not to protect natural right of author).

130. Andrea Simon, Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425, 442 (1984) (quoting Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 574 (1977)).

131. Beryl R. Jones, *Copyright: Factual Compilations and The Second Circuit*, 52 BROOK. L. REV. 679, 688 (1986).

132. *Id.* at 689.

133. *See* Simon, *supra* note 130, at 439 (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

134. *Id.* at 440 (quoting United States v. Bily, 406 F. Supp. 726, 730 (E.D. Pa. 1975)). *Cf.*

The tension created by balancing the individual author's economic interests with the public's interest in dissemination is an inherent aspect of copyright protection, and, because of this, enactment of a law authorizing copyright by state agencies requires consideration of two questions: "First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public?"[135]

1. Economic Issues

The incentive-based rationale for copyright protection "assumes that copyright is needed to prompt authors to undertake creative labors."[136]

A government agency, however, produces its potentially copyrightable works "to promote the general welfare, *independent of any need for economic benefit*, and since salaries both induce and compensate government employees for their efforts,"[137] one must seriously question the *need* to offer copyright protection for government-created works.

Notwithstanding the incentive rationale, government copyright is frequently viewed as a potential source of much-needed revenue. For example, supporters of the legislation creating section 119.083, *Florida Statutes*, which authorizes government agencies to sell or license copyrighted data processing software at market value, argued that copyright would allow state agencies to recoup development costs and generate revenue.[138] In light of the strong public policy arguments favoring dissemination of information over protection of an author's property right, however, an argument supporting copyright protection based *only* on generation of revenue seems insufficient. Rather, "[w]hat we want to know is the extent to which less revenue will, in fact, mean less production . . . [and] to what extent is [copyright] protection likely to be *necessary* in order to secure production."[139]

Kidwell, *supra* note 129, at 1023 ("The [copyright] reward should not exceed that necessary to stimulate the necessary investment in either authoring or publishing.").

135. *See* 1909 HOUSE REPORT, *supra* note 129, at 7.

136. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1908 (1990) (citing Mazer v. Stein, 347 U.S. 201, 219 (1954)).

137. Simon, *supra* note 130, at 440 (emphasis added).

138. *See* HB 2225 Staff Analysis, *supra* note 3, at 4.

139. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 62 (1986) (statement of Hon. Stephen Breyer, Circuit Judge, First Circuit Court of Appeals, Boston, Mass., before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, and the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary) (emphasis added) [hereinafter OTA, INTELLECTUAL PROPERTY RIGHTS].

Presumably, a government agency in Florida is producing only that software essential to agency operation in furtherance of its public duties, and would produce such software regardless of the potential economic or commercial incentives for the agency.

2. *First Amendment Concerns*

The goals of both copyright law and the First Amendment, which courts have traditionally held protect the right to receive information,[140] seem complementary. Each strives in its own way to encourage expression, thereby "increasing exposure to ideas and enriching democratic discourse."[141] Yet, in encouraging production and dissemination, copyright—which allows an author the exclusive right to determine access to the protected work—may actually limit public access to information. In so doing, copyright protection directly conflicts with the First Amendment goal of encouraging the free flow of ideas.[142]

Because "[n]o expression is more relevant to the vitality of the democratic dialogue than works of the . . . [g]overnment,"[143] the potential for conflict between copyright law and the First Amendment increases significantly when government seeks to protect its own work through copyright. Broad and unobstructed dissemination of government works "serves the enlightenment function of the First Amendment," which is easily frustrated if government is given a copyright monopoly on its output that "might well be used to withhold certain works from the public."[144] In such situations, the First Amendment "may well preclude copyright."[145]

At the very least, copyright protection for government works may inhibit *meaningful* public access. In this electronic age, access to the software which controls and manipulates a government data base may be as important as access to the data base itself. In Florida the Fourth District Court of Appeal analogized a software program used to access information stored in a computer to a code book necessary for

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140. Simon, *supra* note 130, at 446 n.115 (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943)).

141. *Id.* at 446. *See also* Swanson, *supra* note 126, at 263 ("Copyright gives authors the incentive to create; the First Amendment gives them the right to communicate.").

142. *See* Simon, *supra* note 130, at 447.

143. Swanson, *supra* note 126, at 270.

144. *Id. See also* Simon, *supra* note 130, at 452 n.155 (copyright is viewed as "a device to screen and select users, stifle criticism and prevent access to materials").

145. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[B][4], at 5-58 n.29 (1992).

meaningful interpretation of government data.[146] Thus, "[i]t would be unreasonable to give a person a message in code without supplying a code book to decipher the message, and it would be equally unreasonable to provide public records without supplying the program to access them."[147] Similarly, software has been compared to "the key that unlocks the information, that removes the cap from the lens."[148]

Although section 119.083 allows an agency to copyright and market the software it creates, a provision in the statute precludes an agency from denying or restricting public access to the software "for application to data or information maintained or generated by the agency . . . ."[149] Nevertheless, according to the JCITR survey of public record custodians on the use and sale of agency-copyrighted software, only three of the fourteen agencies responding stated that they *always* comply with requests for such access; one agency stated it *never* complies.[150] Additionally, four of the nine agencies responding said they denied access to agency-created software because the "*[a]gency* determined that the software was not needed to analyze public records data."[151]

Given the growing trend toward object-oriented programming and data bases, granting government agencies authority to copyright software becomes increasingly troublesome. With object-oriented software, "information . . . becomes encapsulated in software objects," and it is difficult, at best, to separate software from data.[152] Specifically, "a software object contains both program instructions and information," and because object-oriented software makes the two even more inseparable, "[t]he limited distinctions that now exist will disappear quickly as most software becomes available as objects."[153]

According to a report recently issued by the congressional Office of Technology Assessment, "[s]oftware is necessary for users to access and manipulate digital information stored inside a computer or on storage media. It is difficult, with some modern programming techniques,

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146. *See* Seigle v. Barry, 422 So. 2d 63, 66 (Fla. 4th DCA 1982) ("Where a public record is maintained in such a manner that it can only be interpreted by the use of a code then the code book must be furnished to the applicant."), *rev. denied*, 431 So. 2d 988 (Fla. 1983).

147. PROBLEMS AND ISSUES, *supra* note 4, at 86.

148. Joseph L. Ebersole, *In Perspective: Copyright of Government Software Will Not Improve Tech Transfer*, FED. COMPUTER WK., DEC. 2, 1991, AT 15.

149. FLA. STAT. § 119.083(3) (1991). *See also* HB 2225 Staff Analysis, *supra* note 3, at 1.

150. *See* Appendix, *infra*, at 478.

151. *See* Appendix, *infra*, at 478 (emphasis added). Interestingly, nearly one-fourth (22%) of the agencies responding said they denied access to software because it was against agency policy to "provide copies without payment of the full market price" for the software—a clear violation of § 119.083(3).

152. Joseph L. Ebersole, *Copyright Protection for Government Software Isn't Needed*, FED. COMPUTER WK., May 18, 1992, at 38, 39. *See also* Edith Herman, *Coalition Hits Fed Software Copyright Legislation*, FED. COMPUTER WK., May 11, 1992, at 1, 69.

153. Ebersole, *supra* note 148, at 50.

to distinguish between the computer program and the data the program manages."[154] Thus, giving government agencies a monopoly over software through copyright necessarily results in the same control over the information and data inextricably intertwined with that software—a result that raises serious First Amendment concerns about access to government information. "Public interest in speech *from* the government is as keen as it is in speech *about* the government."[155]

C. *Software as a Public Record*

A related issue involves agency-created software as a public record. Because a public record, defined as "work created by public employees and financed by public money," belongs to the public, it consequently falls in the public domain.[156] Both federal law and public policy preclude copyright protection for that which is in the public domain.[157] Computer software programs developed by a government agency to serve the needs of the agency are generally considered public domain software.[158] However, some still question whether agency-created software constitutes a public record under Florida law.

In Florida "public records" are defined as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[159] In construing this definition, the Florida Supreme Court held in *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, that "a public record . . . is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[160] The Attorney General has cited the *Shevin* definition as support for the conclusion "that a computer program developed by a pub-

154. *Finding A Balance, supra* note 74, at 19.

155. Simon, *supra* note 130, at 450.

156. *Id.* at 430.

157. The statutory basis for this prohibition is found in 17 U.S.C. § 102 which allows copyright protection only for *original* works of authorship. The concept of public domain is much broader, however, encompassing not only works created and published before the enactment of copyright laws, such as Shakespeare's plays, or works on which the copyright has expired, such as Mark Twain's *Huckleberry Finn*, but also potentially copyrightable works for which protection is denied due to public policy. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

158. *See, e.g.*, William D. Goran, *What's the Appropriate Role of Public-Domain GIS Software?*, GIS WORLD, Apr. 1992, at 72.

159. FLA. STAT. § 119.011(1) (1991).

160. 379 So. 2d 633, 640 (Fla. 1980).

lic agency in order to perform certain [agency] functions is a public record for purposes of ch. 119."[161]

A number of statutory arguments bolster this conclusion. First, the fact that the provision authorizing the copyrighting and marketing of agency-created software was drafted as an amendment to the Public Records Law rather than codified as an amendment to the law by Statutory Revision after its enactment could lead to the conclusion that the Legislature considered such software a public record.

Second, section 119.07(3)(q), *Florida Statutes*, exempts "sensitive" agency-created software from the inspection and copying requirements of chapter 119, Florida's Public Records Law. Because the Legislature specifically exempted sensitive agency software from the dictates of the Public Records Law, presumably all agency-created software—sensitive or not—is public record. The Legislature seemed to recognize this argument in that the fees for access to agency-copyrighted software "solely for application to data or information maintained or generated by the agency" must be determined in accordance with section 119.07(1), the general fee provision governing most public records.[162]

Finally, the Federal Copyright Act of 1976 defines a "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer *in order to bring about a certain result.*"[163] Consideration of this definition in conjunction with the *Shevin* public record definition lends support to the Attorney General's conclusion that software created by an agency "*in order to perform certain [agency] functions*" is a public record under Florida law.[164]

D. Copyright and the Federal Government: Proposed Legislation to Allow Federal Agencies Limited Software Copyright

Although 17 U.S.C. § 105 precludes copyright protection for works of the federal government,[165] legislation currently before Congress would allow a federal agency to copyright agency-created software in specific and very limited circumstances.

The Technology Transfer Improvements Act of 1991, House Bill 191, would amend the Stevenson-Wydler Technology Innovation Act of 1980[166] by granting federal agencies the authority to obtain copyright

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161. 1986 FLA. ATT'Y GEN. ANN. REP. 236, 238.

162. FLA. STAT. § 119.083(3) (1991). Unless otherwise prescribed by law, all public records are subject to the fee provisions dictated by § 119.07(1), *Florida Statutes*.

163. 17 U.S.C. § 101 (Supp. 1992) (emphasis added).

164. 1986 FLA. ATT'Y GEN. ANN. REP. 236, 238.

165. *See supra* notes 126-28 and accompanying text.

166. 15 U.S.C. § 3710a (1988).

for computer software "prepared in whole or in part" by agency employees in partnership with the private sector under cooperative research and development agreements (CRDAs).[167] Additionally, the proposed legislation would give the government-employed author of the copyrighted software a share of any royalties realized from the software's commercial sale or license.[168] According to Representative Constance A. Morella,[169] sponsor of House Bill 191, the purpose of the bill is "to enhance technology transfer from [] federal laboratories" by replicating "provisions of the Federal Technology Transfer Act of 1986, which applies to federal *patents* created under CRDAs. Since the passage of that act, the licensing of federal patents has become an important avenue for the transfer of government inventions to private industry for commercial use."[170]

House Bill 191 was further narrowed during committee hearings to "expressly exclude[] data bases from coverage."[171] As amended, the bill defines computer software as "a computer program as defined in the copyright law and any instructions to use the program, but *not data, data bases, and data base retrieval programs.*"[172] In testifying before the House Judiciary Committee's Subcommittee on Intellectual Property, Representative Morella "noted that H.R. 191 is not a major information policy-making vehicle," but rather "'is truly just a limited response to a specific problem.'"[173]

In contrast, one could consider section 119.083, *Florida Statutes*, "a major information policy-making vehicle" in that it sets a precedent by authorizing state agencies to profit from the commercial sale of what is arguably public record.[174] And, Florida's copyright provision is cer-

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167. H.R. 191, 102d Cong., 1st Sess. § 2 (1991). The companion bill in the Senate is substantially similar to the House bill. S. 1581, 102d Cong., 1st Sess. (1991).

168. *See* H.R. 191 § 3 (amending § 14 of the Stevenson-Wydler Act).

169. Repub., Maryland.

170. Constance A. Morella, *Federal Software Needs Protection*, FED. COMPUTER WK., May 11, 1992, at 17 (emphasis added).

171. *Markup of Bills H.R. 191 & H.R. 2941: Markup Sessions Before the Subcomm. on Technology and Competitiveness and the Full House Comm. on Science, Space, and Technology*, 102d Cong., 1st Sess. 10 (1991) (statement of Rep. Morella, sponsor of H.R. 191) [hereinafter *Markup Sessions*].

172. *Id.* (emphasis added). *See also* Morella, *supra* note 170, at 53 ("[H.R. 191] has been carefully constructed to apply to the operational aspects of the software rather than the informational content of databases in which the software operates.").

173. *See* Herman, *supra* note 152, at 69 (citing *Markup Sessions*, *supra* note 171, at 9).

174. *See, e.g.*, Testimony of Frank Hagy, Director of MIS, City of Orlando, and President of the Florida Local Government Data Processing Assoc., at Public Hearing on Proposed Rules for Electronic and Optical Imaging Systems, Dep't of State, Bureau of Archives and Records Management (June 8, 1992) (minutes of hearing available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). In his testimony, Mr. Hagy recommended that the Bureau "avoid[] focusing on the public's right-to-access; this is not the issue. *The real issue . . . is the ability to copyright and sell data.*" *Id.* at 10 (emphasis added).

tainly not a limited response to a specific problem.[175] Unlike the proposed federal legislation—as noted before the House Committee on Governmental Operations—section 119.083 does not contain limiting language on the types of software an agency can copyright. Therefore, a state agency could conceivably succumb to purely commercial interests, and copyright and market agency-created software which is not "necessary to support the agency's mission."[176]

Section 119.083 is also easily distinguished by its breadth—*all* agency-created software in Florida is copyrightable and marketable.[177] By allowing copyright of only that software developed by a federal agency under a cooperative research and development agreement with a private entity, the proposed federal legislation is extremely narrow in scope and breadth. Representative Morella made it quite clear that all other government-produced software remains free and accessible: "Federal software, which is freely available, will continue to remain freely available to the public under [H.R. 191]."[178] One cannot say the same for software created by a Florida agency.

Even though House Bill 191 has garnered bipartisan congressional support and the endorsement of the Register of Copyrights, it has been met with increasing opposition from the software industry and public interest groups. Consequently, the bill's passage is not assured.[179] Critics of the proposed legislation, while supporting its goals, fear that allowing federal copyright of software would actually reduce commercialization while threatening First Amendment rights.[180] In addition, they warn that House Bill 191 "represents a 'drastic shift' in copyright policy that could have a 'detrimental impact on the public's right to know.'"[181] At least one commentator, pointing to 1988 and 1989 amendments to the Stevenson-Wydler Act that offer limited intellectual property protection for public domain software, claims House Bill 191 is not needed and would actually weaken rather then strengthen the information industry in the United States.[182]

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175. Ch. 90-237, 1990 Fla. Laws 1769 (codified at FLA. STAT. § 119.083 (1991)).

176. *See* Report from Info. Indus. Ass'n, *supra* note 124, at 5.

177. *See* FLA. STAT. § 119.083(3) (1991). The only statutory qualification limits the fees an agency may charge for access to software necessary for application to agency information or data; copyright for such software is not precluded.

178. Morella, *supra* note 170, at 53.

179. *See* Herman, *supra* note 152, at 1.

180. Ebersole, *supra* note 148, at 15.

181. Herman, *supra* note 152, at 69 (quoting letter from coalition of 21 companies, trade associations, and public interest groups to Representative William Hughes, chair of the House Judiciary Committee's Subcommittee on Intellectual Property).

182. *See* Ebersole, *supra* note 152, at 38, 39.

Various federal employees have voiced concern as to the impact of House Bill 191 as well. They fear that allowing copyright of federal software as specified in the proposed legislation would cause some federal researchers to "withhold information that might be commercially valuable."[183] Others fear that the resolution, by placing emphasis on copyrighting and licensing federal software, will cause a shift in priorities from basic research to research with commercial applications.[184] In either case, the enactment of House Resolution 191 may well inhibit rather than enhance the free flow of ideas by causing a negative impact on technological research and technology transfer.

C. *Copyright and State Government: How Other States Legislate the Copyright Issue*

Florida is not the first state to confront the issue of authorizing governmental copyrights. According to a subcommittee of the Patent, Trademark and Copyright Section of the American Bar Association, by 1989 at least twenty-eight states had claimed copyrights on a variety of very basic state-produced materials.[185] An increasing number of states have also moved to protect agency-developed software. At least seven states, including Kansas, Oklahoma, Oregon, Utah, Virginia, and Wisconsin, have exempted computer programs from their public records laws, and others have specifically provided for copyright or copyright-like control over agency-created software.[186]

In Alaska, state law authorizes state agencies and municipalities to copyright software and to protect their copyrights through enforcement procedures.[187] Utah has recently passed new legislation which provides: "A governmental entity that owns an intellectual property right and that offers the intellectual property right for sale or license may control by ordinance or policy the duplication and distribution of the material based on terms the governmental entity considers to be in the public interest."[188]

California exempted agency-developed software from its public records law in 1988, authorizing state agencies to "sell, lease, or license

183. GOVERNMENT ACCOUNTING OFFICE, GAO/RCED No. 90-145, TECHNOLOGY TRANSFER: COPYRIGHT LAW CONSTRAINS COMMERCIALIZATION OF SOME FEDERAL SOFTWARE 40 (1990).

184. *Id.*

185. *See Gov't Relations to Copyright*, *supra* note 127, at 224.

186. *See infra* notes 187-214 and accompanying text.

187. ALASKA STAT. §§ 29.71.060, 44.99.400 (1991).

188. UTAH CODE ANN. § 63-2-201(10)(a) (1992). This legislation was effective July 1, 1992.

the software for commercial or noncommercial use."[189] In an effort to protect the public's right to access governmental records, however, the California amendment stipulates that the mere storage of information in a computer does *not* affect its status as a public record. Instead, "[p]ublic records stored in a computer shall be disclosed as required by this chapter."[190]

1. Minnesota

Minnesota has one of the oldest and most well-known laws authorizing its agencies to copyright software. Minnesota's recently amended statute provides:

> When a request under this subdivision involves any person's receipt of copies of public government data that has commercial value and is a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, data base, or system developed with a significant expenditure of public funds by the agency, the responsible authority may charge a reasonable fee for the information in addition to the costs of making, certifying, and compiling the copies.[191]

Under authority of this statutory provision, a private firm, Ultimap Corporation, entered into a licensing agreement with Hennepin County in 1987 to market and improve an agency-developed software package, a demographics program called Ultimap.[192] The terms of the agreement required Ultimap Corporation to pay Hennepin County royalties on sales of the software program.[193] In 1987, the county received $500,000 in licensing fees and royalty payments, and predicted an additional $2 million in royalties over the next five years.[194]

Since that time, however, the software program has proven only a qualified success. After receipt of the initial fees and royalties in 1987, Hennepin County received royalty payments of only $134,900.[195]

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189. CAL. GOV'T CODE § 6254.9(a) (West 1992). Further, during the 1992 legislative session, Assemblyman Ferguson introduced AB 3219, legislation which would have made it a misdemeanor for government agencies in California "to use public funds to market software in competition with private companies." NAT'L COUNCIL OF STATE LEGISLATURES, 1 STATE INFO. POLICY NEWS 6 (July 1992). Although the bill passed the Assembly, it died in the Senate Committee on Transportation after being amended. *Id.*

190. *Id.* § 6245.9(d).

191. MINN. STAT. ANN. § 13.03 (West 1992).

192. *See* PROBLEMS AND ISSUES, *supra* note 4, at 89.

193. *Id.*

194. *Id.*

195. Telephone Interview with Gary Kamp, Acting Director of the Hennepin County Department of Information Services (Feb. 10, 1992) (on file with Fla. Jt. Legis. Info. Tech'y Resource Comm.).

Because Ultimap Corporation owned only the right to sell the copyrighted software and not the copyright itself, the corporation had difficulty securing financing.[196] As a result, Hennepin County sold its copyright to Ultimap Corporation in mid-1991.[197]

Gary Kamp, Acting Director of the Hennepin County Department of Information Services, believes a number of factors contributed to the program's limited success, including a weak economy, unanticipated competition, and overly ambitious goals.[198] Nevertheless, Kamp feels the software program was an overall success, and states that, although the County has not sold or licensed any other software, it would make the most of similar opportunities, should they arise.[199]

2. *Wisconsin*

Wisconsin has also experienced a full cycle of agency software development and copyright. The Wisconsin Legislature created a system of twelve regional Cooperative Educational Service Agencies (CESAs) which was designed to assist local school districts in cooperatively purchasing or providing services.[200] In 1985, with concern over the financial stability of available software vendors and the quality of their offerings mounting, one CESA decided to develop its own administrative software program, Integrated Management of Payroll and Accounting (IMPACT).[201] By charging fees in excess of cost for other services provided to its member school districts, the CESA accumulated sufficient funds to undertake development of the software.[202] Once developed, four CESAs jointly marketed the software program to the school districts beginning in 1987.[203] By the end of 1989, the program was in use in sixty-one school districts and five CESAs.[204]

In response to complaints of unfair competition with the private sector, the Wisconsin Legislative Audit Bureau prepared a report on the

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196. *Id.*

197. *Id.* The structured $1 million deal included an initial cash payment, monthly payments over a one-year period, and a percentage of Ultimap Corporation's net income for the years 1993 to 1996, with a minimum payment provision. Additionally, Hennepin County retained rights to copies of the software program, with continued maintenance for itself and its political subdivisions. *Id.*

198. *Id.*

199. *Id.*

200. LEGISLATIVE AUDIT BUREAU, STATE OF WISCONSIN, AUDIT SUMMARY NO. 89-41, AN EVALUATION OF COOP. EDUC. SERV. AGENCIES PROD. AND MKTG. OF COMPUTER SOFTWARE 2 (1989).

201. *Id.*

202. *Id.* at 3, app. II. Estimated cost of the initial program was $312,000. *Id.*

203. *Id.* at 2.

204. *Id.*

IMPACT experience. A summary of some of the report's criticisms and suggestions for improvement follows:

a. Written Policies

The Audit Bureau expressed concern over the lack of any written policy on when software should be agency-produced as opposed to purchasing software from the private sector. The Audit Bureau felt that a lack of documentation would hamper an agency in assessing the capabilities of private vendors or its own staff, and would prevent comparisons.[205] "Written policies would assist [agency] staff in determining the most appropriate means of meeting an [agency's] needs, and could also be used by the Legislature and members of the public as a standard to which [agency] activities could be held accountable."[206]

b. Pricing Mechanisms

The Audit Bureau emphasized the need for the CESAs to use care when setting prices so that the CESA would not earn sizeable profits but would not set prices so low that they would undercut private vendors competing with the CESAs.

"It is evident that the CESAs set the base price of IMPACT at a level which was consistent with prices for comparable software packages marketed by private vendors, and actual costs related to production had little effect on product price."[207]

c. Program Maintenance

The cost of maintaining the software program also troubled the Audit Bureau. While the actual numbers compiled by the Audit Bureau were disputed, the CESA acknowledged that maintenance and support of the marketed program would be an additional expense.[208] "Staff time and costs required to 'de-bug' the program and respond to school staff questions and requests [had] been considerably greater than anticipated."[209]

The Audit Bureau report concluded by making recommendations "to adopt policies on competition and to improve the accountability of [agency] decisions to produce goods and services."[210]

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205. *Id.*
206. *Id.* at 14.
207. *Id.* at 16.
208. *Id.*
209. *Id.* at 17.
210. Letter from Dale Cattanach, Wisconsin State Auditor, to Sen. Brian B. Burke and Rep. Peter W. Barca, co-chairs of the Wisconsin Jt. Legis. Audit Comm. (Dec. 6, 1989) (on file with Fla. Jt. Legis. Info. Tech'y Resource Comm.).

3. *New Mexico*

New Mexico has taken a slightly different approach. According to Terry Boulinger, Director of Marketing for New Mexico Tech-Net,[211] each agency in the state deals directly with Tech-Net in determining its software needs.[212] Tech-Net then copyrights any software that is developed, and licenses it back to the state agency and to all agency-approved entities at no cost.[213] Tech-Net allows public access to the software, but charges a flat fee of $1,000 to anyone who wants the software's source code. The point of having a low, flat fee, says Boulinger, is to encourage dissemination of information and interaction between the state government and private entities, while enabling Tech-Net to recover some of its basic development costs.[214]

V. CONCLUSIONS

By restricting access to agency-created software through copyright, section 119.083 runs contrary to government policies and intrudes upon First Amendment interests.[215] In addition, any legislation authorizing state agencies to profit from the commercial sale of agency-created software—as does section 119.083—sets a dangerous precedent for copyrighting and marketing other public records with potential commercial value, a precedent which directly contradicts Florida's rich tradition of open access to public records.[216]

Because government agencies in Florida rely "on justifications other than financial considerations" for producing software, copyright protection for works created as a result of a government agency's public

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211. Tech-Net is a private non-profit organization offering remote electronic access to state records and other services.

212. Telephone Interview with Terry Boulinger, Director of Marketing for New Mexico Tech-Net (May 14, 1992) (on file with Fla. Jt. Legis. Info. Tech'y Resource Comm.).

213. *Id.*

214. *Id.* Under federal copyright law, any modifications to Tech-Net's copyrighted software could themselves be copyrighted as a derivative work, but the copyrighted original remains protected from unauthorized copying. 17 U.S.C. § 101 (1988) (definition of derivative work); *Id.* § 103(b) (copyright in derivative work extends only to the material contributed, "as distinguished from the preexisting material employed" in the derivative work).

215. Andrea Simon reached a similar conclusion in an article evaluating the problems created by copyrighting work commissioned and funded by the government. Simon, *supra* note 130, at 466 (Restricting access to government works is "not only inconsistent with the policies supporting the government copyright prohibition, but it also intrudes impermissibly on highly protected first amendment interests.").

216. *See, e.g.*, Hugh Archer & Peter L. Croswell, *Public Access to Geographic Information Systems: An Emerging Legal Issue*, PHOTOGRAMMETRIC ENGINEERING & REMOTE SENSING, Nov. 1989, at 1575; Lori P. Dando, *Open Records Laws, GIS, and Copyright Protection: Life After Feist*, 4 URISA PROC. 1 (1991); Dale Friedley & Larry Colbert, *Reaching for Consensus in Public Information Access Policies*, 4 URISA PROC. 50 (1991).

function is unnecessary and, therefore, inappropriate.[217] The objective of copyright protection is "to promote knowledge, . . . '*not* . . . to maximize returns to authors and inventors.'"[218] Thus, if the work a Florida agency is seeking to protect through copyright would have been produced "apart from any opportunity to exploit it commercially—because, for example, performance of a governmental function required the information—then copyright seems unnecessary,"[219] and the Legislature should repeal section 119.083.

Failing this, the Florida Legislature should amend the statute to curb its broad grant of authority. As currently written, section 119.083 allows Florida agencies to copyright and market *any* agency-created software. To avoid the potential for abuse and the possible diversion of public funds into commercial software ventures, the Legislature should limit agencies to developing only software that is necessary to support their public mission.[220] Furthermore, if agency-created software is to be protected by copyright, there must be a clear statement of policy in accordance with federal copyright law and the concomitant public policy, and it must be proven that "the incentives supposed to result from protection lead to increased production . . . sufficient to outweigh [the] disadvantages of protection."[221]

Keeping in mind the criticism leveled at the Wisconsin legislation, the Florida Legislature should consider the approach taken by New Mexico together with the results in Minnesota as a model for amending section 119.083. The Legislature should, at the very least, develop a statewide policy consistent with federal copyright law and traditional public policy. After all, "[t]he challenges of new technologies is not a gauntlet to be thrown at proven principles, but a call to the exploration of innovative approaches to new issues, directed at preserving traditional and cherished values."[222]

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217. Richard M. Mosk, *Copyright in Government Publications*, BEVERLY HILLS B.J., Mar.-Apr. 1971, at 24, 29; *see also* Kidwell, *supra* note 129, at 1023.

218. Ginsburg, *supra* note 136, at 1909 (citing Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 592 (1985)). *See also* Jack B. Hicks, Note, *Copyright and Computer Databases: Is Traditional Compilation Law Adequate?*, 65 TEX. L. REV. 993, 996 (1987) (ultimate objective of copyright law is "dissemination of works to the public").

219. Kidwell, *supra* note 129, at 1023.

220. *See supra* note 124 and accompanying text.

221. Dennis S. Karjala, *Copyright, Computer Software, and the New Protectionism*, 28 JURIMETRICS J. 33, 46 (1987) (public policy underlying copyright strives "to draw an efficient balance between incentive for production of works and the dissemination of information for the promotion of culture and learning").

222. OTA, INTELLECTUAL PROPERTY RIGHTS, *supra* note 139, at 51 (statement of Jon A. Baumgarten, quoting the Declaration of Mission and Principles of the American Copyright Council).

APPENDIX

QUESTIONNAIRE ON THE USE AND SALE OF AGENCY-COPYRIGHTED SOFTWARE

The Florida Legislature's Joint Committee on Information Technology Resources is conducting this survey to collect information on your agency's experiences with and opinions about a 1990 Florida law, s. 119.083, F.S., which allows government agencies and other public bodies to copyright and sell or license software which they create. Please complete this questionnaire and return the completed form in the enclosed envelope. If you need assistance or have any questions about this survey, please call Committee staff at (904) 488-4646 or SUNCOM 278-4646.

For our follow-up purposes, please provide the name and phone number of the questionnaire respondent: question specific

This questionnaire has six sections. Please follow the directions for each.

I. SOFTWARE USE

This section of the questionnaire concerns the computer software used by the agency. "Software" includes both applications and operating systems programs. Please circle the appropriate answer for each question.

1. Does this agency use any computer software *other* than commercial software it purchases?
   Out of 401 Yes (65%) 262 No (35%) 139
2. Has this agency ever produced its own software?
   Out of 401 Yes (62%) 249 No (38%) 151 No answer(<1%) 1
3. Has this agency ever contracted with someone else to develop software for the agency's use, where the agency kept the copyright to the program?
   Out of 401 Yes (21%) 85 No (78%) 314 No answer(<1%) 1
4. Has this agency ever developed software which was intended only for sale and not for use by the agency?
   Out of 401 Yes (0%) 0 No (100%) 401

[If you answered YES to *any* of the questions #1 through #4 above, please continue to the next page.]
[If you answered NO to questions #1 *through* #4 above, please go to Section VI on the back of the questionnaire.]

II. SOFTWARE PROTECTION

This section of the questionnaire concerns copyright for any software that has been developed by or for the agency. Please mark all the answers that apply.

5. Has this agency tried to copyright any software developed by or for the agency?
Out of 270 Yes (13%) 36 No (86%) 233 No answer(<1%) 1

If yes, what steps has this agency taken to provide copyright protection for its software? (Please mark all that apply.) Out of 36

(67%) 24 Copyright symbol placed on all copies
(47%) 17 Copyright registered with the federal Copyright Office
(53%) 19 Relied on the automatic provisions of the copyright law
(06%) 2 Other (Please describe)

6. How many software copyrights does this agency hold with the federal Copyright Office? *Answer combined with #7*
7. If the agency has filed copyrights with the federal Copyright Office, on what date was the first software copyright filed?

381 respondents held no copyrights as of 1992
3 respondents did not answer this question
Those 17 who did gave this information:

# of copyrights	year of first copyright
4	1975
3	1983
2	1984
12	1984
5	1985
37	1986
30	1989
1	1990
1	1991
1	1991
1	1991
1	1992
1	1992
1	1992
2	1992
3	1992
1	no answer

III. SOFTWARE AS PUBLIC RECORD

This section of the questionnaire concerns this agency's response to requests for its copyrighted software. Please mark the answers that apply.

8. By law, those who wish to use agency-copyrighted software solely on data of the agency are entitled to receive the software at the agency's cost to copy it. How often does this agency receive these requests for copies of its own copyrighted software at the cost-to-copy price? *Out of 36*

(67%)	24	Never
(31%)	11	Less than one request per month
(0%)	0	One to five requests per month
(3%)	1	More than five requests per month

9. How often are these requests met by the agency? *Out of 14*

(8%)	1	Never
(33%)	4	Sometimes
(33%)	4	Often
(25%)	3	Always

10. What are the most common reasons that unfilled requests are *not* met? (Please mark all that apply.) *Out of 9*

(44%)	4	Agency determined that the software was not needed to analyze public records data
(56%)	5	Requestor did not intend to use the software for application solely to agency data
(22%)	2	Agency policy is to not provide copies without payment of the full market price for copyrighted software
(44%)	4	Other (Please describe)

IV. AGENCY LITIGATION

This section of the questionnaire concerns legal actions taken by the agency or brought against the agency. Please mark all the answers that apply.

11. How does this agency protect against infringement of its software copyrights? (Please mark all that apply.) *Out of 36*

(17%)	6	Review similar software in the market for infringement
(6%)	2	Warning letters are sent to infringers
(0%)	0	Have a fund to pay for pursuing potential lawsuits
(75%)	27	No regular, consistent plan for software protection established
(14%)	5	Other (Please describe.)

12. Has this agency ever filed suit or threatened to file suit to prevent infringement of its software copyrights?
Out of 36 Yes (0%) 0 No (100%) 36

If yes, describe the result of such filed or threatened suits.

13. Does this agency take steps to ensure software it develops will not infringe on the software copyrights of others?
Out of 270 Yes (23%) 61 No (49%) 133 No answer (28%) 76

If yes, what steps does the agency take? (Please mark all that apply.)

Out of 61

(69%)	42	Review similar software in the market before development
(11%)	7	Isolate software developers
(25%)	15	Other (Please describe)

14. Has this agency ever had a suit threatened or filed against it to prevent it from infringing another's software copyrights?
Out of 270 Yes (1%) 2 No (80%) 215 No answer (20%) 53

If yes, describe the result of such filed or threatened suits.

V. SOFTWARE SALES

This section of the questionnaire concerns the sale or license of software copyrighted by the agency. Please mark all the answers that apply.

15. Has the agency ever offered for sale or license any software for which the agency held the copyright?
Out of 270 Yes (7%) 20 No (92%) 248 No answer (1%) 2

16. Has the agency ever sold or licensed, for more than the cost of duplication, any software to which it held the copyright?
Out of 270 Yes (4%) 12 No (95%) 257 No answer(<1%) 1

17. Has the agency ever assigned to anyone some or all of its rights to a software program in exchange for compensation or other rights?
Out of 270 Yes (4%) 11 No (96%) 258 No answer(<1%) 1

If yes, please describe the transaction.

[If you answered YES to *any* of the questions #15 through #17 above, please continue.]
[If you answered NO to questions #15 *through* #17 above, please go to Section VI on the back of the questionnaire.]

18. How many different software programs have been sold or licensed by the agency?

19. When did the agency first sell or license a software program?

20. Estimate the agency's total gross revenues from software sales or licenses.

380 respondents had not sold any software
2 respondents did not answer this section
Those 19 who did gave this information:

# of programs sold	year of first sale	total revenue
3	1975	did not answer
1	1977	$ 40,000
1	1981	0*
3	1983	$ 10,000
2	1983	$ 7,500
12	1984	did not answer
2	1985	$ 8,250
5	1986	$ 60,000
5	1987	$600,000
3	1989	0*
2	1990	$ 500
1	1990	0*
6	1990	0*
1	1990	$ 26,536
1	1990	$ 30,000
5	1991	did not answer
1	1991	$ 1,000
1	1991	0*
2	1992	$ 3,250

* lack of revenue indicates other considerations

21. Which of the following entities have purchased or licensed software from the agency? (Please mark all that apply.) *Out of 23*

(9%) 2	Private individuals
(26%) 6	Private companies
(26%) 6	City government agencies
(26%) 6	County government agencies
(13%) 3	State government agencies
(30%) 7	Other (Please describe) _____

22. What factors are included in establishing a price for the software the agency sells or licenses? (Please mark all that apply.) *Out of 23*

(48%) 11	Personnel time	(22%) 5	Costs of production materials
(17%) 4	Profit margin (revenue generation)	(9%) 2	Rent and utilities
(17%) 4	Marketing/ promo costs	(48%) 11	Cost of duplication
(35%) 9	Market considerations	(26%) 6	Other (Please describe)

23. How has the agency marketed its software programs? (Please mark all that apply.) *Out of 23*

(30%) 7	Presentations or displays
(09%) 2	Engaged in competitive bid process
(04%) 1	Hired staff to market and promote software
(30%) 7	Contracted with outside entity for marketing and software promotion
(04%) 1	Purchased advertising
(13%) 3	Direct mail
(17%) 4	Articles or notices in trade letters
(48%) 11	Other (Please describe)

24. How does this agency support the software it sells or licenses? (Please mark all that apply.) *Out of 23*

(17%) 4	Customization of programs	(61%) 14	Technical support by telephone
(22%) 5	Software installation	(26%) 6	by mail
	Training provided	(13%) 3	in person/buyer's office
(26%) 6	at the agency's office	(13%) 3	in person/agency office
(35%) 8	at the buyer's office	(35%) 8	Debugging
(39%) 9	Program upgrades developed	(22%) 5	Other (Please describe)

25. Please estimate, by percentage, the distribution of revenues from software sales or licenses into the following categories.

	(%)
Data processing and information resources (i.e., computer hardware and software)	— — — —
Forwarded to agency fiscal office	— — — —
Unspent to date	— — — —
Other _____	— — — —

There were 14 respondents that gave a distribution for revenue in the following categories:

Computer resources:

10 said 0%
1 said 90%
3 said 100%

Agency fiscal office:

6 said 0%
8 said 100%

Revenue Unspent:

12 said 0%
1 said 10%
1 said 50%

Other Points of Distributions:

12 said 0%
1 said 50%
1 said 100%

VI. COMMENTS

This section of the questionnaire seeks comments on the effects of s. 119.083, F.S., on survey respondents, and additional issues and concerns of the agencies receiving this questionnaire. Attach additional sheets if necessary.

26. Has this agency ever purchased software from another public agency?
Out of 401 Yes (12%) 48 No (84%) 338 No answer(4%) 15

If yes, please describe the other agency and the program, price, service, and other aspects of the experience.

27. Has this agency ever traded its software for that of another public agency?
Out of 401 Yes (5%) 21 No (91%) 363 No answer(4%) 17

If yes, please describe the other agency, the programs, the nature of the transaction, and other aspects of the experience.

28. What impact has the passage of s. 119.083, F.S., (allowing government agencies to copyright software) had on the agency? Out of 401

Big Impact	23	(6%)
No Impact	317	(79%)
No answer	47	(12%)
Little Impact	5	(1%)
Unknown	6	(1%)
Other	3	(1%)

29. If this agency has not taken advantage of s. 119.083, F.S. in the past, would it consider doing so in the future? Why or why not? *Out of 401*

yes:	(35%)	141	unknown:	(19%)	75
no:	(26%)	103	no answer:	(20%)	82

Reasons to:		
build revenue/save money	34	(8%)
recover cost	22	(5%)
allows price setting	3	(1%)
enhance information sharing	8	(2%)
protect software rights	13	(3%)
clearly define ownership	1	(<1%)
Reasons not to:		
prefer commercial software	4	(1%)
programs too specialized	13	(3%)
too costly to maintain	5	(1%)
agency too small	33	(8%)
no need to copyright	22	(5%)
moral/ethical issues	12	(3%)
avoid conflict of interest	2	(<1%)
Other, generic answers:	42	(10%)
No answer:	187	(47%)

30. Does this agency have a policy on software procurement, e.g., when to produce software itself and when to acquire it elsewhere?
Out of 401 Yes (13%) 53 No (80%) 322 No answer (6%) 26

If yes, please enclose a copy of the written policy or describe it.

31. Please feel free to provide any additional comments that would help the Committee understand the issues surrounding s. 119.083, F.S.