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ABSTRACT

This paper reviews 10 years of debate in Europe on commercial rights of access to government information, starting with the United Kingdom's innovative Government Tradable Information Guidelines of 1996 and ending with the European Commission's Draft Green Paper on Rights of Access in 1996. United States market development and commercial rights of access are compared to the European situation, and the needs of the European information industry in this regard are reviewed in detail. The paper looks at access to legal and business information as critical case studies, citing access to the United Kingdom VAT Register as a recent case study. The decline in government copyrights and the increase in public domain data released onto the Internet is contrasted with the growing tendency to create new information monopolies through privatization and deregulation. The 19 key principles developed by the European Information Industry Association (EIIA) for adoption as industry guidelines are appended. (Author/SWC)

Rights of Access in the Information Society: Europe's Quandary Over the Exploitation of Public Sector Data

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Rights of access in the Information Society: Europe's quandary over the exploitation of public sector data

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Abstract: *The paper reviews ten years of debate in Europe on commercial rights of access to government information, starting with the UK's innovative Government Tradable Information Guidelines of 1996 and ending with the European Commission's Draft Green Paper on Rights of Access in 1996. US market development and commercial rights of access are compared to the European situation, and the needs of the European information industry in this regard are reviewed in detail. The paper looks at access to legal and business information as critical case studies, citing access to the UK VAT Register as a recent case study. The decline in government copyrights and the increase in public domain data released onto the Internet is contrasted with the growing tendency to create new information monopolies through privatisation and deregulation.*

Keywords: electronic democracy, copyright, public sector, data protection, privacy, electronic publishing, European Union

In the 10 years of active debate on commercial rights of access to public sector information in Europe, the situation has changed entirely and yet remained very much the same. It is possible for private sector activists to say, as one did recently, 'Government information is free, yet everywhere it is in chains', while a public servant could riposte 'Government information was in chains but now most of it is on the Internet'. Yet this debate was intended to provide a stimulus for the growth of the information marketplace and of the commercial sector in electronic publishing in Europe by emulating US experience and by providing a form of developmental support without subsidy. Government, by providing primary information without charge, would stimulate inventive entrepreneurs to add high levels of value in order to make such information more effectively available to targeted groups of users. This notion of value added was a vital one in the ideology of the private sector: it allowed companies to live with the idea of non-exclusive licensing by government to the private sector, since value added would be the competitively exclusive element, and it allowed government at once to licence the core information non-exclusively and add value in its own context. This meant that the idea of non-exclusive access to core or primary information was not at odds with a government printer, like the HMSO in the UK, adding its own levels of value to government information for re-sale, or business information parastatal organisations like CERVED or CAMERDATA adding value to information for their user communities, or the German organisations like the FIZ institutes or STN network adding value to their own databases by placing them in an appropriate retrieval and networking environment.

The essential problems with this apparently felicitous market development model emerged in practice. It proved extremely difficult to define source or primary information, to define value-added services and, indeed, to get governments to keep their side of the bargain and set up appropriate licensing procedures. Such raw primary data, which information market companies had simply seen as core statistical data, government announcements and administrative orders, statutes and secondary legislation, and databases of information collected from the public at large by reason of statutory requirement, have often proved to be difficult to track down in practice. Both government and the private sector have been guilty of deluding themselves that there is more value in these databases than there sometimes is, and where genuine attempts have taken place to catalogue government information holdings (the UK Department of the Environment Spatial Database Initiative is a case in point), private sector take-up has been disappointing. Where such take-up has taken place, negotiations have been drawn out into exhaustive contractual debates which frustrate the essential purpose behind the original UK guidelines of 10 years ago.

Many of the instances given in this paper concern practice in the UK. This is deliberate, on two grounds. In the first instance, the UK Guidelines on Government Tradable Information of 1986 were the first development in Europe of this nature, and much of the thinking from that process was adopted into the European Commission's Guidelines on the Synergy between the Public and the Private Sector of 1989. On the other hand, the UK's retention and use of Crown copyright demonstrates attitudes towards retention of control of government information which are amongst the most clear-cut in Europe and which tend to throw up case studies of real interest. This does not imply for a moment that issues discussed are not fully relevant in all other parts of the European Union, or indeed that UK practice, because it is so obvious, presents a particular problem. Unwillingness to

licence utilisation of government data does not need legal sanction to be effective. The number of instances in which database developers have been able to collect information from all Member States in order to create integrated, cross-border, value-added products which help and support trading activity and derive from non-exclusive licences granted by the Member State governments, remain very few and far between. In some Member States it is clearly and legendarily impossible for commercial entities in other Member States even to attempt to licence government information, regardless of the equality of treatment issues which may be involved.

Let us go back, however, to the beginning and revisit some of the underlying principles to see what practical sense we have made of them over the last ten years. Pioneers of access to government information arguments in Europe 10 years ago did not think that they were making particularly revolutionary suggestions. They believed that if the strategic goal was to create a free trade area in Europe with greater transparency and lower barriers, in order to promote and increase trade and therefore wealth and employment on a transnational basis, then the removal of barriers to trade caused by inadequate, insufficient or unreliable information was of prime importance. They identified government as the source, although not the only source, of information used in the trading process and, at a time when the prevailing notion was one of 'level playing fields', it seemed natural to seek common conditions of access to government information in the various states of the European Union in order to create conditions sympathetic to the development of pan-European databases. Insofar as the *Guidelines on the Synergy of Public and Private Sectors in the Information Marketplace* were an attempt to do this, they are commonly reckoned to have failed. But the key markers that they laid down were as follows:

1. Governments should licence freely and non-exclusively to allow the information industry to grow through adding value through re-use of public sector database collections.
2. Governments should be encouraged to create catalogues of licensable information and make them available to private sector developers.
3. Having licensed private-sector companies to invest in developing government data to serve markets better, governments should not normally go out and create other services with the tax-payers' money in order to compete with these licences.
4. Re-use of primary source data by private sector organisations should normally be free, although the Guidelines recognised the rights of governments in some instances to make cost recovery of the cost of actually supplying the information to the private sector (as distinct from the costs of its collection).
5. Article 2(4) of the Berne Convention should be utilised to allow governments to 'exempt from copyright all texts covering legislation, public administration, economic and social policy and activity, and norms and standards'.

These principles remain close to the heart of the private sector database industry in Europe and, indeed, are the most important elements within the 19 articles which the European Information Industry Association has put forward to the European Commission as part of its expectations for a draft directive on commercial rights of access to government information.

With guidelines like this in place (and the UK national version even had a model contract produced by HMSO attached to it), it might be thought that matters would change rapidly. They did not, and it is instructive to see why. We identify the following major reasons:

1. The guidelines were not effectively communicated to responsible individuals within Member State governments and, indeed, few Member State governments had officials deployed specifically to manage information policy. Where such policy coordination did exist, as for a time in the UK, it was simply coordination and not control. It did not, for example, prevent wayward departments from going in their own directions.
2. Neither government nor the private sector were sufficiently aware of government primary source data holdings. No catalogues were produced in many countries and, where they were (as indicated above, in the UK), they were ineffectively deployed.
3. In the late 1980s Member State governments were becoming very concerned to reduce government expenditure in the face of industrial recession and began to see government information as a revenue source. Just as the private sector over-emphasised the economic opportunity on its side, so the public sector did the same. Hard-pressed bureaucrats sought budget relief from data sales, even though any revenue flows tended to go to central Treasury controls rather than to individual operating departments.
4. During this period, and increasing in strength throughout the period, the pervasive movement towards privatisation of state functions and the removal of former government activities into parastatal or privatised organisations was a key policy feature. There was a tendency for organisations to be privatised with their information resources. British Telecom took the United Kingdom telephone directory with it, for example, and certainly regarded this as a commercially exploitable entity (selling annual licences for re-use for sums reputed to be in excess of £500,000 per annum) until its regulator proposed re-regulating this area in 1995.

There are countless other examples of this unthinking creation of information monopolies by government, and a certain amount of evidence that where government was conscious that it was creating new monopolies, it succumbed upon the grounds that the information concerned was a vital part of the asset base of the newly privatised organisation and could be one of its exploitable benefits. Besides taking more and more government servants off the payroll, the privatisation movement has sharply reduced the amount of information within the scope of the guidelines, and this in itself might be taken as a critical reason for their failure.

It is necessary to give this background in order to demonstrate why we are where we are. However, we need to keep on reminding ourselves that the arguments originally advanced in the guidelines had nothing to do with government policy or making better informed citizens. The arguments put forward then, as now, were commercial and economic, and they related to developmental opportunities which were as clearly in front of European Union citizens then as they are now. And since some of the opposing interests have at times expressed a view that this simply reflects the avaricious desires of private-sector information service developers who wish to corner public-sector information and re-sell it at a profit to tax-payers, who funded its collection in the first place, it is worth looking at some of the areas of opportunity that are created if access to government information without barriers is allowed:

- The potential for cross-border information services is enhanced. Private sector investment in the translation and harmonisation of information resources becomes more realistic if the rules for release of information are the same in each Member State, the point of availability is clearly known, the type of cataloguing that we have referred to above has taken place to allow relevant resources to be recognised, and the costs of obtaining the information are calculated on the same basis in each case;
- The opportunity is enhanced in network environments where information service developers are able to charge their customers not for the underlying information content but simply for the value-added service superstructure located on top of it. Let us postulate, for example, a service that improved the European Commission's existing TED (Tenders Electronic Daily) service, and which drew deeply upon regional government tendering opportunities throughout Member States. The added service value could be intelligent agent applications which allowed users to identify subject areas and be notified by the system when opportunities of interest to them were lodged on the database. Without arguing the virtues or lack of them of such a system, the point to be made is simply that current networking styles on the Internet create conditions like this where underlying information may be free but users may choose to access information through a paid-for service that adds value to the interaction.
- Players in the information marketplace may be encouraged to promote access to information resources and more fully commercial information distribution in the one sector crucial both to government and the private information companies. This is in the area of information for small- and medium-sized enterprises, and many now believe that this can only be achieved on an international value-added basis through the use of ubiquitous networking. The drive to get things right in this context has so far been ineffective. Countless programmes, funded by Member State governments and the European Commission, have sought to create local resource centres and information dispersal points based on Chambers of Commerce and other entities. By and large these have failed to change anything. A considerable body of opinion now believes that if the value of information, products and services is to become effective within the business models of SMEs then it will happen because the private sector information industry effectively markets to them. And if the private sector information industry is to be re-energised effectively to create the value-added services which SMEs will use then radical easement of access regulations governing government information is urgently required.

Clearly, then, we can conclude that neither the economic opportunities nor the industrial growth requirement have gone away in the last ten years. Indeed, in the age of the information superhighway (a term now only used by politicians and civil servants), this all takes on a desperate relevance. Three case studies drawn from the United Kingdom (once again in the lead, both as an information marketplace and as a regulatory environment under pressure in this regard) demonstrate how the effective dialogue between public and private sectors is now breaking down:

1. In regard to the release of the Register of VAT-Paying Companies in the UK, HM Customs & Excise has, over a ten-year period and in the face of the Government Tradable Information Guidelines, promulgated by another department of the same government, deployed the whole range of possible reasons for obfuscation or delay. When initial claims that the Register was Crown Copyright were rebutted, the Department took refuge in the idea that the information was confidential. When the information industry indicated that it did not seek any confidential data, but simply the complete listing of the names and addresses of companies who currently pay the tax, shorn of details of their registration numbers and the amount of tax that they pay, the Department responded that this data was part of an implied contract between the tax-paying company and the tax collector, and to divulge it would be a breach of that contract. When this argument was demolished, the Department sought refuge in the idea that the data was covered by the Official Secrets legislation, and, indeed, indicated on one memorable occasion that the legal opinion that this was so was itself covered by such legislation. Finally, in 1995, the Department was cornered and forced to relent, and initiated a public consultation on the issue. In April 1996, this consultation came to an end and the Department wrote to participants indicating that 'the core of support for (public access to the VAT Register) came from the finance, credit and information sectors who felt that such access would benefit businesses, particularly those providing business information, assessing creditworthiness, or underwriting potential business risk . . .' Particular issues of concern (there were only 100 responses to this exercise) were privacy and security and 'the additional risk of exposure to unsolicited junk mail or nuisance phone calls.' On these latter grounds it has been decided to maintain the secrecy of the VAT Register. It is one of the beguiling ironies of this UK example that a country which has no central business register, no mandatory registration of trading entities who do not seek limited company status, and therefore no ability to say how many small- and medium-sized enterprises it actually has, feels unable to

release to the information industry data which would improve the accuracy and effectiveness of business databases throughout its economy. And this on the grounds of privacy, security and the avoidance of junk mail in a country with a thriving direct marketing business, excellent business telephone directories, Yellow Pages, and Data Protection legislation which does not extend to corporate entities. As elsewhere in the European Union, it sometimes seems to the information industry as if any argument is good enough to block access to information which can only improve the economic life of the Union as a whole.

2. A further example shows government acting on the other side of the equation. In the early 1990s the Inland Revenue in the United Kingdom, responsible for the collection of all business and personal taxes except for VAT, decided to try to increase earnings from its information resources and in particular from its tax manuals. These documents were internal guidance notes for tax inspectors which advised them on the Department's own view on the interpretation of statute and case law. The tax publishing market in the UK is highly competitive, with some four major groups sponsoring competitive services. For tax accountants and lawyers only fully comprehensive services will do, and if the previously confidential Inland Revenue tax manuals were to become available the information providers felt that they needed to be available in all services. The values upon which publishers were competing in this sector were cross-referencing and commentary, not underlying information. However, in order to get the best price for its product, the Inland Revenue chose competitive tender and awarded an exclusive electronic publishing contract to one of the four competitors. It was then sued and, in a settlement out of court, agreed that a further publisher could have access to the same data. Presumably, if the remaining two competitors wish to gain access, they too will have to bring a legal process (although, hopefully, this reversal will prompt some re-thinking). However, the whole episode, finally resolved in May 1996, illustrates clearly the point made above regarding the increasing willingness of governments to trade information which is essential to key business functions in ways which could lead to the lowering of quality standards in the marketplace as a whole, even if they increase the revenue flow to central government itself.

3. A third example must be the ongoing privatisation of HMSO in the UK. We noted above the creation of data monopolies through privatisation and the problems that this created. In the case of HMSO, Crown Copyright has been specifically removed from that organisation prior to privatisation and a new licensing function will be created within the UK Cabinet Office. So, on the one hand, HMSO will be privatised without the benefit of its unique hold on UK government copyrights, which would seem to diminish its value, while on the other hand, where it does retain control of value-added services which it developed over the years and which UK private-sector interests were unable to develop, it will effectively be privatised with its information monopolies intact. Since presumably the licensing regime will prevent those monopolies from being broken, many believe that this solution provides the worst of both worlds. This solution also does little credit to a generation of adept and diligent publishers at HMSO who have used their skills to create margins which are now worth the effort of privatisation. On the other hand, the privatisation of HMSO in this peculiar manner does not add a new competitive element, or increase the diversity and variety of the UK marketplace.

But one thing clearly signalled by HMSO's repositioning is the determination of many units of government to get their information into shape and onto the Internet so that they can communicate directly with many classes of users. The latest organisation in the UK to take this stand is the Select Committee on IT to the House of Lords, and the first legislation in progress to be treated this way, the Arbitration Bill, has now been published on the Internet. Yet it appears to be the case that governments still want their cake and the ability to eat it. While making this information available in the cause of 'open government', the residual licensing body left behind by the sale of HMSO will undoubtedly continue to seek to sell Crown Copyright. In a recent submission to the European Commission from the General Council of the Bar, the governing body of barristers in the United Kingdom, the barristers noted that 'a crucial issue was whether the continuation of Crown Copyright protection in the law of the land can be justified'. The position in other countries varies but there is some consistency in the overall picture, with the exception of the UK and certain other countries having British-type laws, including India, Singapore and Israel. In the USA there is no state copyright in legislation and the same is understood to be the case in Japan. Some Commonwealth countries have moved, or are moving, away from state copyright protection for their laws; for example, there appears to be no such protection in Pakistan and Australia seems likely to abandon it. In Europe, with the exception of Ireland (where there are indications that copyright in legislation is not enforced), enquiries conducted in recent months have not revealed any country in which the state enjoys copyright protection in legislation. Responses from some 13 out of 15 European Union or EFTA countries indicate that there is no such protection. 'Access to all such information should be unrestricted and it should be available from any publisher who is willing and able to provide the service, with complete freedom of competition. The role of central government, in particular in connection with the "information superhighway" is to take the steps required'.

The irony of this situation in the United Kingdom is that the UK government has a Code of Practice on Access to Government Information and widely advertises its 'open door policy on information'. The Code of Practice on Access to Government Information includes five commitments: to supply facts and analysis with major policy decisions; to open up internal guidelines about departments dealing through the public; to supply reasons with the administrative decisions; to provide information under the Citizen's Charter about public services, what they cost, targets, performance, complaints and redress; and to respond to requests for information. Here, indeed, the chronic schizophrenia of modern governments is fully exposed: on the one hand an Open Door and, on the other

hand, a retention of state copyrights and restricted licensing policy. The information industry at large is now totally confused by these activities. Is there any chance that a French or German database developer, seeking to translate UK legislative materials into the database in his own language for the support and guidance of cross-border traders, would have any hope of understanding the nuances of UK government information policy?

The indignation of the UK barristers is also noteworthy as a symptom of increasing user resistance to government information controls. Barristers will wish to adopt legislative texts of legal instruments into their own information systems and use them for their own reference purposes. They want to buy information services from publishers for the commentary and other value-added services that they provide, and not for the value of the underlying documentation. They believe that government should not restrict their access to that, and it is hard not to agree with them.

In the light of all of these issues, the burden of expectations upon the Green Paper on access to information is very heavy indeed. In early drafts the Commission has indicated its interest in providing more transparency in this area, and the private-sector information industry in Europe has consistently, through the European Information Industry Association, urged the adoption of a directive in this area to replace the ineffective guidelines promulgated over the past ten years. The 19 key principles which information companies in Europe seek to have included in such a directive are attached to this paper as an Appendix. They take the principles cited above and expand them into a matrix of information market measures designed to cover the key issues. While it is as yet unclear as to what stance the Commission will take in the final version of the Green Paper, the fact of the Green Paper itself indicates that rumbling discontent in this area is now widely recognised, and that the Commission believes that this is not a devolved issue of subsidiarity but something upon which important economic interests in Europe rests. Given that the likely drafting and process time required for a directive will be up to five years, it is also clear that the hopes and aspirations of 1986 may have to be postponed a little longer and that we will have to seek a resolution beyond the millennium.

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Appendix: 19 key principles developed by the EIIA

1. Public organizations should, as far as is practicable and when access is not restricted for the protection of legitimate public or private interests, allow public database collections to be used by private sector companies and exploited by the information industry through electronic information services.
2. Member States should incorporate such a right of access into the conditions of release, use and exploitation of public sector data and information.
3. Member States should regularly review the data and information collected by their departments, and publish the outcome of such reviews in order to further the possibility of the re-use and re-exploitation of government-held information.
4. The principles of licensing and pricing such public data should be made clear by Member States to private sector organizations, and efforts should be made to harmonize these elements across public administrations.
5. The public sector should not place restrictions upon the type of customer or the territories to which newly-created services developed by the private sector from publicly held information sources are sold.
6. Public sector databases shall not normally be sold upon an exclusive basis if exclusivity distorts competition.
7. The public sector should encourage investment by the private sector in the development of information services based on public data.

8. When public sector bodies provide electronic information services directly, such services should not distort competition and should not be created in order to compete with pre-existing private sector services.
9. Where the public sector currently supplies electronic information services, such services should be reviewed, with a view to deciding whether they are more appropriately provided by the public or private sector, and whether greater involvement in the development of such services by the private sector is desirable.
10. Electronic information service providers within the European Community should be treated upon an equal footing and have an equal right of access to the public information held by each Member State.
11. Public sector support for information services should be in line with articles 92 and 93 or the Treaty (on aids granted by the State).
12. Direct or indirect financial support may be provided by the public sector to encourage pre-competitive research and development and the emergence of new market sectors, but should not support the viability of mature services.
13. Public funding may support services which are necessary for the public interest, provided that such services could not be economically viable and could not be provided by private sector interests.
14. There should be encouragement for joint-ventures between public and private sector interests where these are most appropriate for the development of the information marketplace.
15. Conditions governing application of public support to users of European electronic information services should not discriminate against these services on the basis of their European country of origin.
16. Public sector accounting and budgetary procedures and exchange controls should not prevent access by interested public departments to electronic information services throughout the community.
17. The public sector should seek to remove legal and other barriers to the use of public information by the private sector.
18. The public sector should, to the highest extent possible, make use of the discretion given under article 2(4) of the Berne Convention to exempt from copyright all texts covering legislation, public administration, economic and social policy and activity, and norms and s standards. Where government-held information does fall within the copyright convention, the public sector ought not to award exclusive rights or reproduction to a single organisation, as this might hinder value enhancement by other commercial sector operators.
19. When public sector information or data is made available for private sector use or exploitation, any pre-existing citizens rights of access to the original information as determined by legislation must be preserved.

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