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## **THE DEVELOPMENT OF UK GOVERNMENT POLICY TOWARDS THE COMMERCIALISATION OF OFFICIAL INFORMATION**

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This paper examines the development of United Kingdom (UK) Government policy towards the distribution of official information. Originally subsumed within the broader privatisation agenda of the 1980s, the Government appears now to perceive that the market in official information and the public policy issues associated with it are more complicated than at first understood. The development of the Internet as a new medium for electronic distribution of information and the move by many governments to invoke concerted public sector exploitation of the latter, has provoked a major internal review of UK Government plans, that were originally confined to the single issue of the terms of sale of Her Majesty's Stationery Office (HMSO) to the private sector. Once it became known that the Cabinet Office was centrally involved in this wide ranging review of policy, Parliament, commercial publishers and pressure groups have been keen to articulate a view. The Government has also sought, within its review process, to take account of developing policy in the United States (US) and the European Union (EU). For the US a deregulation policy towards official information is beginning to show signs of success in economic terms. For the EU the issue is one of markets and how to ensure that the market for official information develops in conformity with the Treaty of Rome and the Single European Market. A Green Paper on the subject has just been published. This article explores the key features of the debate and seeks to identify how far a coherent national policy is now emerging.

### **UK Policy prior to 1996 (A)**

Until the statement to the House of Commons on 9 February 1996 by Roger Freeman, Chancellor of the Duchy of Lancaster and Cabinet Minister for Public Service,<sup>1</sup> UK Government policy towards exploitation of official information was firmly rooted within a set of established criteria and objectives. The underlying assumption was that the Government had a responsibility, through the exercise of Crown copyright,<sup>2</sup> to regulate the terms and conditions

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1. HC Deb vol \* col \* 9 February 1996.

2. Copyright Designs and Patents Act 1988, s163(1). This provides that, where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties, the work is to qualify for Crown copyright protection. Sections 164-167 provide for a separate Parliamentary

under which official information might be processed and used. The priority was to ensure that appropriate arrangements existed to enable government to satisfy itself that official information it wished to publish was produced and distributed in an approved manner. This included both form and content. Where publishers wished to add value to the data or simply reproduce it commercially, a licence had to be obtained. The Government also believed that it had a responsibility to the taxpayer to ensure that a targeted pricing and charging structure was applied in order to secure a contribution towards the public sector costs of generating the information and maintaining the overall service. This also applied to the fixing of prices for official information, published and sold by HMSO itself. It was to enhance HM Treasury control of this policy that led to HMSO becoming a Trading Fund operator in 1980<sup>3</sup> and an Executive Agency in 1988.<sup>4</sup> Under these arrangements it was possible for the Treasury to impose financial targets on HMSO, which indirectly determined HMSO's commercial charging policy for the licensing and sale of official information.

The exercise of HM Treasury regulation of HMSO demonstrated that the Government wished to see a reasonable market return for official information. This was taken a step further in 1986 when the Government published tradeable information guidelines.<sup>5</sup> These called upon departments to examine and review data and information in raw or finished form on a regular basis to see whether they could be made available to the information industry. Particular emphasis was placed on the opportunities this would give the industry to develop electronic information services for public data. Although the Government gave token support to the impact this would have on the competitiveness of the economy, through the growth of the UK information services market, the reality was that very little came out of the policy initiative. Most departments did little to apply the policy, in part because HMSO remained the legal owner of all Crown copyright material. Although departments might benefit from any fees or royalties negotiated under the plan, HMSO nevertheless wished to be closely involved in each transaction and departments did not always welcome this intervention. The policy remained dormant while HM Treasury continued its fiscal regulation of HMSO.

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copyright for some parliamentary material.

3. HMSO Trading Fund Order 1980 (SI 1980, No 456) as amended by the HMSO Trading Fund (Amendment) Order 1994 (SI 1994 No 1192), Made under the Trading Funds Act 1973 as amended by the Government Trading Act 1990.

4. HMSO became an Executive Agency on 14 December 1988 with the basic aim 'to develop its business along more commercial lines within a competitive environment and to combine a continuing increase in the economy, efficiency and effectiveness with which it delivers its service with the achievement of progressively more demanding financial and performance targets set by Treasury Ministers.' Source: *Her Majesty's Stationery Office Trading Fund Accounts 1988*, HC 260 (1988).

5. Department of Trade and Industry, *Government-Held Tradeable Information - Guidelines for Government Departments in Dealing with the Private Sector*, (2nd ed, 1990).

The ten years 1986-96 was marked by increasing dissatisfaction with the administration of Crown and Parliamentary copyright. Although overall responsibility for UK policy and legislation lay with the Department of Trade and Industry (DTI), day to day management and practical administration of Crown and Parliamentary copyright was within the remit of the Copyright Unit of HMSO. Struck by the rule that the operation of HMSO should not be a direct charge on the Exchequer and that the costs of printing, publishing and distribution be met by sales income, the Copyright Unit nevertheless sought what it believed was a reasonable accommodation with the public and commercial publishing interests. Its policy was set out in a series of 'Dear Publisher' and 'Dear Librarian' letters, describing the general arrangements for copyright dealings in Crown and Parliamentary copyrights and identifying contacts within HMSO who could advise further.<sup>6</sup> These statements also indicated that in cases where specific derogations had been granted by the Copyright Unit to other departments or agencies, publishers could deal with those bodies directly.

Implicit within these statements was recognition that a public interest existed in obtaining reasonable access to official information. There was also a need to respond more openly in the light of emerging government policy on open government.<sup>7</sup> Constitutionally, however, HMSO had a relatively free hand, as no specific rights existed that would enable its policy to be challenged, except within the narrow confines of interpretation of Crown copyright or of 'fair dealing' in copyright works within the meaning of section 29 of the Copyright Designs and Patents Act 1988. In pursuit of its central objective - facilitating 'the widest possible use and dissemination of official material,'<sup>8</sup> the Copyright Unit declared its willingness to licence reproduction of official material by individuals and libraries within the framework of library and educational privilege. Publishers could also engage in commercial reproduction of Crown and Parliamentary copyright material provided it appeared in value-added form. No royalties would be sought where the reproduction was in conventional printed format. However, all Crown rights in respect of this material would be reserved and asserted where the guidelines were broken.

The relaxed administration, yet firm reservation of, Crown and Parliamentary copyright in respect of all official material, came under increasing attack in the late 1980s. On the one hand users and publishers of official information could not say that in specific cases the Copyright Unit was not forthcoming in granting concessions, yet the overall effect of the policy with its policing, particularly of commercial reproduction, had created a mood of increasing frustration among publishers. This was very much the case in respect of reproduction in electronic formats, which HMSO sought to differentiate from conventional printed forms of reproduction by requiring significant royalty payments for the concession. Underlying this policy was the belief that electronic reproduction, via compact disc or on-line access, was potentially a lucrative

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6. The *Dear Publisher* and *Dear Librarian* letters describe the general arrangements for copyright dealings in Crown and Parliamentary material and offer relevant contacts for specific business and general enquiries. The letters are available on the Internet at: <<http://www.hmso.gov.uk>>.

7. See *Open Government* Cm 2290 (1993) and *Code of Practice on Access to Government Information*, Cabinet Office (OPSS), (1994).

8. *Dear Librarian* letter, *op cit*, n 6 above.

business that HMSO should engage in so that HM Treasury targets could be met. There was also the looming question of possible further privatisation of HMSO which, if to be sold, would need to establish a presence in the market so as to attract prospective purchasers.

Dissatisfaction culminated in 1990 with the formation of the Professional Publisher's Permissions Group (PPPG) comprising the main UK legal publishers including Butterworths, Sweet & Maxwell and FT Law & Tax, the latter owned by Pearson - publishers of the Financial Times. They were concerned that the general effect of the existing arrangements was restrictive and inhibiting and imposed too heavy a burden on the publishers, both in the administration of applications and upon their ability to plan ahead. In short, they attacked Crown and Parliamentary copyright as overbroad and too protective of HMSO's own position as a commercial distributor of official information. Reference was made to the competition law implications of the policy and informal enquiries were certainly made by members of the PPPG with the European Commission (EC) as to the possible case for intervention on its part.

The PPPG sought a collective re-negotiation of the licences its members had with HMSO, designed to secure an overall reduced royalty and, in particular, better terms for the concession to reproduce official information in electronic form. Limited agreement on new terms was, in fact, reached in 1994. However, while this was taking place a dispute was developing between HMSO, Butterworths and a compact disc producer - Compliance Ltd -over the right to reproduce electronically portions of the Inland Revenue's (IR) guidance manuals. In accordance with the DTI's *Tradeable Information Guidelines*,<sup>9</sup> the IR granted an exclusive licence to Tolley, not a member of the PPPG, to publish the manuals. The IR had not published these before but, in 1995, agreed to do so within the spirit of the Government's 'Open Government Initiative'. Access to the IR's own guidance material would be of significant interest to taxpayers and their advisors, particularly in the corporate sector. The DTI's guidelines indicated that, when negotiating with the information industry, departments 'should normally do so on a non-exclusive basis.'<sup>10</sup> Exceptionally, an exclusive arrangement could be made, provided the information objectives were furthered more effectively by it. Moreover, open competition for the concession could be waived by a department, but thereafter the successful agent would be required to deal with the information industry on a non-exclusive basis, presumably in the granting of further sub-licences.

When Butterworths, in a joint venture with Compliance Ltd, arranged for parts of the IR's guidance to be published on compact disc, legal action was commenced.<sup>11</sup> The IR pointed to its exclusive licence with Tolleys, whereas the two defendant publishers declared that, under existing agreements with HMSO for the reproduction of Crown copyright material, further permission was not required. In April 1996, a confidential out-of-court settlement was reached in the case. HMSO conceded that Compliance Ltd was licensed to reproduce a range of Crown copyright material, including that originated by the IR and all dealings between HMSO, Butterworths and Compliance Ltd would continue on a commercial basis.

The case exposed a number of underlying concerns that, prior to this, had not openly surfaced.

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9. *op cit*, n 5.

10. *ibid*, p 16.

11. *Attorney General v Butterworths* (Unreported 1996).

HMSO was clearly disturbed at the growing independence of departments so far as the exploitation of official information was concerned. The exact terms of the relationship between HMSO, as custodian of Crown copyright and the departments, as producers of such material, was never very clearly defined within the DTI guidelines. HMSO anticipated that it would always, through its Copyright Unit, be involved in discussions such as those between Tolleys and the IR. However, in this particular instance, sources within HMSO admitted that the IR's deal was presented very much as a *fait accompli*.

The information industry, particularly the legal publishers, were worried about the implications of granting exclusive licences for reproduction of official information in electronic form. They had recognised that the future of legal publishing was electronic and felt they had no alternative but to challenge HMSO. They were afraid that, if exclusive licences were to be granted, there would be nothing to stop the Government from favouring a newly privatised HMSO with such arrangements to the exclusion of the rest of the publishing industry. Indeed, the Government might well offer such a guarantee to encourage potential purchasers to come forward.

At the same time as the litigation was progressing towards settlement, a lobby of public opinion was developing, fuelled by campaigning groups, such as *Liberty*, for a much more open policy towards the release of official information to the public. A major influence upon the debate was the dramatic worldwide growth in the use and availability of the Internet and the comparatively high levels of exploitation of it by other governments for the distribution of information to citizens. Until 1995, the UK Government's view was that the public interest in accessing official information was fulfilled by its agreements with publishers to reproduce Crown copyright material in print, its concessionary arrangements with libraries, which included negotiation on the price for selective subscription to official publications and its relaxed stance on photocopying of such material by individuals without prior permission.

In a letter to Roger Freeman in October 1995,<sup>12</sup> *Liberty* criticised the Government's response to the publication of official information on the Internet and its policy that the production and distribution of official information should not be a cost to the Exchequer. It pointed to the fact that, although a growing range of information was becoming available on the digital network, it appeared to have been selected randomly: 'for example, the text of the "open government" code of practice is available on-line, but the parallel code on access to National Health Service information is not. And while the text of 40 citizen's charters can be read on-line only a handful of government consultation documents are available - most dealing with Internet issues.'<sup>13</sup> *Liberty* called upon the Government to introduce a more systematic approach to the delivery of information on the network and urged a relaxation of the policy on electronic publication so that a core of official information, such as the law of the land and the proceedings of Parliament, reported in Hansard, could become available free of charge on-line.

Evidence of the deficit between alleged public expectation and official attitudes towards the task in hand, came in a remark by the Head of Copyright at HMSO in June 1995. In a contribution to the debate he said:

The decision to publish on the Internet, as well as in conventional printed form, is a

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12. Letter dated 12 October 1995.

13. *ibid*.

particular Department's, not HMSO's, though HMSO, of course, puts its very considerable technical expertise at a Department's disposal to enable it to accomplish its publishing objectives. This includes mounting items like the DTI's recent 'Competitiveness' White Paper, [14] with some 200 pages of text (including boxed text and footnotes), 70 photographs and a large number of graphs and tables. Anyone who has actually done a similar task, will know that you don't accomplish that sort of task for on-screen presentation in five minutes.<sup>15</sup>

The remark had confirmed that the Government was still adopting a devolved approach towards network access to official information, letting departments and agencies work out their own programmes for distributing information on the network. However, the cost implications were still being stressed so that departments were reminded that any loss of revenue arising from such distribution arrangements would not be compensated from the centre.<sup>16</sup> Both HMSO and the Government remained sceptical about the contribution that the Internet could make towards delivering information to the public. The Internet was described as an unregulated medium, containing unverified data that might be slow to access depending on the time of day that the user was on-line.<sup>17</sup> There were many other means of serving the information needs within the control of HMSO and these arrangements were working satisfactorily.

### **The Proposed Privatisation of HMSO (A)**

It is now clear that, during this period, the Government was formulating its plans for a public announcement on the sale of HMSO. Although HMSO's turnover had increased from £260 million *per annum* to over £375 million over the previous 15 years, with reductions in staff from 6300 to 2900 over the same period, the Government believed that additional steps were needed to improve HMSO's performance still further, while continuing to reduce its cost to the Exchequer.<sup>18</sup> More recently, HMSO has continued to achieve its financial targets although turnover has fallen by 10% compared with its 1990 returns.<sup>19</sup> The statement finally came in September 1995 when Roger Freeman announced the decision to privatise HMSO provided that satisfactory arrangements could be made for the future provision of services to Parliament. This

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14. *Competitiveness - Forging Ahead*, Cm 2867 (London: HMSO, 1995). It is found on the Internet at <<http://www.open.gov.uk/>>.

15. Robbie, 'Primary Legal Materials - The other side of the Coin', (1995) 6 *Computers and Law* 2 pp 3-4.

16. CCTA, *Making the best use of the Internet* (1995) at p 9.

17. See also Robbie, 'Crown Copyright - Bete Noire or White Knight?', 2 *Journal of Information, Law and Technology* (JILT) <<http://elj.warwick.ac.uk/elj/jilt/leginfo/2robbie/>>.

18. HL Deb vol \* col 718 18 January 1996.

19. HC Deb vol \* col 1277 18 December 1995.

had been a particular concern of members of both Houses, including Madame Speaker. She had sent a letter, prepared by the House of Commons Commission, to the Leader of the House of Commons seeking assurances about the ability of a private sector purchaser to maintain the quality of service required by Parliament.<sup>20</sup> Continuous daily demands of a specialised nature were imposed on HMSO, which involved the timely production of the Order Paper, Hansard, bills and other documents. These were essential to the transaction of parliamentary business. Without the necessary documents the House and its committees would be unable to function.

The Government sought to relieve these worries by assurances that HMSO would not be sold to any bidder whom the Government considered could not meet the strict criteria of purchase, which included guarantees on meeting existing commitments and maintaining rules on security. New supply and service agreements between HMSO and Parliament, which were due to take effect on 1 January 1996, could secure Parliament's requirements if its terms were built in to the privatisation.<sup>21</sup>

The second major concern that the Government had at this time towards the sale was precisely what arrangements to propose regarding Crown copyright and on what basis the newly privatised HMSO might take up its place in the market. In view of HMSO's recent skirmish with the PPPG, the Government was keen to present proposals to Parliament that would not be seen as unduly favouring HMSO's competitive position. In December 1995, Roger Freeman announced that, on privatisation, a residual body named HMSO would be established in the public sector to administer Crown copyright. If Parliament wished, this could include Parliamentary copyright as well.<sup>22</sup> The remainder of the business would be sold under the name 'The Stationery Office'. Crown copyright would be retained for all Crown copyright material in the back catalogue of HMSO publications, with a re-print licence available to the new owner to ensure a continuing availability of official publications. In the case of future Crown copyright material, the new Stationery Office would need to obtain a licence on the same basis as other interested parties. The Government also confirmed its intention to continue existing arrangements for non-exclusive licensing of Crown copyright material, including concessionary terms for certain educational and non-commercial purposes.<sup>23</sup>

At this stage uncertainty continued about the terms on which members of the PPPG and the new Stationery Office would be allowed to engage in value-added electronic reproduction of Crown copyright material. Negotiations between the PPPG and HMSO on this issue had broken down prior to the court action over the IR's guidance manuals. PPPG members were suspicious that an exclusive licence for this purpose might be granted to the new Stationery Office in order to attract a suitable buyer.

### **Roger Freeman's Statement to the Commons (A)**

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20. Letter of 8 November 1995 published in HC Deb vol \* col 455 11 December 1995.

21. HC Deb vol \* col 990 13 December 1995.

22. HC Deb vol \* col 989 13 December 1995.

23. Letter from Roger Freeman, Chancellor of the Duchy of Lancaster, to Peter Ainsworth MP, HC Deb vol 271 col 370 9 February 1996.

On 9 February 1996 the position was clarified when Roger Freeman made a policy statement to the Commons on the future administration of Crown copyright. It contained a significant extension of the concession, allowing commercial publishers to reproduce, in value-added format, the text of acts, statutory instruments and statutory rules and orders without prior permission of HMSO and on a non-exclusive basis. From now on this would be extended to include, not only conventional printed texts, but electronic and microform formats as well. The Government repeated its objective, which was to ensure the continued availability of official publications to the public, but it saw no need to alter its position on the desirability of recovering, where appropriate, the costs of preparation, production and dissemination of the material. The Minister also revised the Government's earlier, somewhat dismissive attitude to the Internet as a medium for delivery of official information. In his statement Roger Freeman indicated that HMSO would now release on to its Internet service the summaries of more than 200 Acts of Parliament from 1984 to date. Henceforth, the full text of all new Acts would be placed on the Internet.

Whether the Government fully recognised the implications of this commitment can be questioned, for one of the first Acts of Parliament to appear on the Internet - the Data Protection Act 1984 - was placed there without including amendments brought in by subsequent legislation. This fact identified one of the weaknesses of the present HMSO operation, for MPs were also complaining at this time that there appeared to be no formal arrangement to update, in print, legislation that had been amended. This led the House of Commons De-Regulation Committee<sup>24</sup> to declare an urgent need for a complete and up-to-date statute book.

Had the Government replied directly to this point, it would have drawn MPs attention to its plans to produce a Statute Law Database (SLD) in 1997. The project is under the control of the Statutory Publications Office and, when complete, will be a value-added electronic version of the statute book backdated to 1991. Copyright terms and charging policy have yet to be announced, but a disappointing feature of the programme is the Government's decision to charge for access. It has not yet been explained how this product will vary from the commitment of the Government, announced by Roger Freeman, that statutory material will be placed free on the Internet. If the latter is to be released without charge, it is presumed that the SLD will offer a value-added service to justify the subscription. The Government has also got to make it clear how competition will be encouraged. Will other publishers be free to exploit the statute book in order to provide alternative information services to the nation or will exclusive licences be granted by the operator, designed to restrict participation in the market? A similar position applies in respect of law reports where commercial value-added services dominate, both in the recording of judgements and in their publication. Currently, there appears to be no suggestion that case extracts, representing the core of a judgement, be published in digital form free of charge as part of any 'essential service' to the public.

Roger Freeman's statement of 9 February 1996 made it clear that policy for reproduction of parliamentary materials, including Hansard and select committee reports, was the responsibility of Parliament and not of government to determine. In fact he knew, at the time, that the matter was in fact under review by both Houses of Parliament through the Information Committee of the House of Commons and, in the upper House, via the Select Committee on the House of Lords' Offices. Both Committees reported within 24 hours of each other drawing very similar

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conclusions.<sup>25</sup>

In the Commons, the Information Committee considered a report of the Electronic Publishing Group (EPG) established by the Board of Management of the House of Commons under the Chairmanship of the Editor of the *Official Report*. The Information Committee, in endorsing the EPG report, noted the increased use of electronic methods for the publication of documents and the rapid growth of the Internet for dissemination and access. It accepted the recommendation that the full official text of parliamentary publications be published free of charge on the Internet. If implemented, this 'would bring about a most valuable augmentation to current methods of providing access to House documents (including the *Official Report*).<sup>26</sup> The Committee believed this would encourage 'wider public interest in, and knowledge of, the business of the House.'<sup>27</sup>

The Committee also agreed with the other principal recommendation of the EPG report that 'external bodies wishing to make use of parliamentary copyright electronic material, with a view to added-value processing and selling on, or combining with other electronic information, should be allowed to do so under licence agreements made with each House.'<sup>28</sup> The Information Committee noted the suggestion that licences should be non-exclusive and that the licensee undertake to provide Parliament with copies of the resulting product free of charge. Consideration of the financial implications of the proposals was deferred until the Commons Finance and Services Committee reported. The latter had recently received a paper from the Chairman of the EPG on the costs involved in implementing the Report's recommendations.

The Select Committee on the House of Lords' Offices, in a brief report, drew very similar conclusions to its counterpart in the Commons. It agreed that its publications should be made available free of charge in electronic form and the medium for free distribution should be the Internet. It also recommended that, by a system of licensing, 'electronic material should be made freely available, on a non-exclusive basis, to commercial publishers who wish to process it and add value to it.'<sup>29</sup> Copyright licences should be issued free of charge 'except in exceptional circumstances.'<sup>30</sup> The Committee also declared that HMSO (and after privatisation, the

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25. HC Information Committee, *First Report Electronic Publication of House of Commons Documents*, HC 328 (1996); HL *Second Report from the Select Committee on the House of Lords' Offices* HL 58 (1996).

26. *ibid.*, p v.

27. *ibid.*

28. *ibid.*

29. *op cit*, n 25 p 1.

30. *ibid.*

Stationery Office) as, the 'normal and preferred agent for the official publication of Parliamentary material,' be invited to administer the proposed source database of Parliament's electronic material, to place it on the Internet and keep it up-to-date.<sup>31</sup> This would be subject to negotiation of prices and conditions, the implication being that the House should pay for this service.

The Committee recommended that future administration of Parliamentary copyright should reside, after privatisation, with the residual HMSO retained under public sector ownership. An administration fee would be shared, *pro rata*, by both Houses. The House of Commons Information Committee was a little more cautious on this point. It wanted the responsible Officers of the House to continue to examine the relationship between the House and the residual HMSO, assuming privatisation took place. It wanted to wait for the conclusion of the new copyright agreement between Parliament and HMSO, which was under negotiation, before reaching a final decision. It anticipated that if such an agreement was entered into it would be of short duration so that, if necessary, different arrangements could be made. The Committee was also specific in making the general point that any new owners of HMSO's printing and publishing operation should neither be advantaged nor disadvantaged in relation to other potential equivalent licensees.

#### **Reaction to these Developments (A)**

The reaction to Roger Freeman's statement and to the two parliamentary reports was positive. Publishers were pleased that the Cabinet Office had relaxed its concern about the loss of direct revenue resulting from the dilution of the monopoly over distribution of Hansard. This suggested that the principle of cost recovery was no longer quite the paramount objective that it once was. There was also pleasure that the concession on electronic formats had been granted. However, Crown copyright was still to be retained in respect of all relevant documents 'to ensure consistency and accuracy in reproduction'.<sup>32</sup> Moreover, the concession only extended to 'value-added' reproduction in printed, electronic or microform media. It seemed that a publisher, who wished simply to reproduce statutory material, devoid of the value-added component, would only be allowed to do so if the normal permissions were obtained.

It was also noted that the proposed policy was not being extended to the broader and more loosely defined category of quasi-legislative material, such as codes and departmental guidance notes. The Government indicated that these embraced the publications of many departments and agencies 'which may have views in specific cases on the context of any reproduction'.<sup>33</sup> In the House of Lords, Earl Howe indicated that a standard licence for value-added reproduction of most quasi-legislative material was already available and that consideration was being given to the possibility of extending this to electronic publishing.<sup>34</sup>

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31. *ibid.*

32. HL Deb vol \* col 69 13 March 1996.

33. HL Deb vol \* col 68 13 March 1996.

34. HL Deb vol \* col 87 18 March 1996.

In the Spring of 1996, the debate took on a new dimension when several events took place. Firstly, the Head of Copyright at HMSO, irritated by HMSO's critics, began a robust defence of HMSO policy. He indicated that income streams generated by commercial exploitation of Crown material saved the taxpayer some £20 million per year and successive governments had seen this as a reasonable thing to do.<sup>35</sup> He also reminded critics that the liberal licensing regime had effectively given legal publishers 'free and unrestricted access to Acts and SIs for use in their wide variety of textbooks and reference material.' This enabled such works to be offered to readers at affordable prices and was now to be extended to electronic formats. In addition, he drew attention to HMSO's longstanding practice of reducing or waiving fees for reproduction of Crown copyright material for educational purposes, in works of scholarship or in the publications of learned societies or similar non-profit-making organisations. The Copyright Unit issued approximately 2000 permissions *per annum* and where charges were levied, fees ranged from a single payment of £50 to continuing annual incomes running into many thousands of pounds.

The second significant development arose with the Government's response to the broader criticism of its policy on access to official information, of which the HMSO component was a part. This came from the lobby of publishing and professional interests who were keen to articulate their view of the impact present policy was having on the nation's competitiveness. The Government was challenged to explain what was really gained by the continued requirement for licensing. The simplified arrangements, announced by Roger Freeman, were good but publishers would still need to re-negotiate licences when use by the licensee changed or the term of the licence expired. This acted as a powerful break on the publishing industry.<sup>36</sup> Another lobbyist saw the continued reluctance to make full information freely available as a brake upon innovation and economic activity in the UK.

Critics also drew the Government's attention to the more liberal regime in the US under the Paperwork Reduction Act (PRA) 1995.<sup>37</sup> Section 3506 stipulates:

(d) With respect to information dissemination, each agency shall:

(1) ensure that the public has timely and equitable access to the agency's public information, including ensuring such access through

(A) encouraging a diversity of public and private sources for information based on government public information;

(B) in cases in which the agency provides public information maintained in electronic format, providing timely and equitable access to the underlying data (in whole or in part); and

(C) agency dissemination of public information in an efficient, effective, and economical manner;

(2) regularly solicit and consider public input on the agency's information dissemination

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35. *op cit*, n 17.

36. Unpublished correspondence with the author.

37. PL 104-13 which amends 44 USC Ch 35 and became effective 1 October 1995.

activities;

(3) provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products; and

(4) not, except where specifically authorized by statute

(A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public;

(B) restrict or regulate the use, resale, or redissemination of public information by the public

(C) charge fees or royalties for resale or redissemination of public information; or

(D) establish user fees for public information that exceed the cost of dissemination.

The assumption underlying this approach is that the interests of government, the citizen, business, the information sector and the economy are best served by opening up government information to the full force of market forces.<sup>38</sup> Thus, in addition to promoting a market in official information for the benefit of the US public, the creation of exclusive licensing arrangements between agencies and publishers, the levying of fees above dissemination cost for access, or the placing of controls on any commercial exploitation or re-sale of the data, are prohibited by law unless specific statutory exemption is made.

In the House of Lords, Lord Lester of Herne Hill, who had asked a number of questions about HMSO privatisation and dissemination of Government information, suggested to the Government that it might adopt a similar policy to that of the US.<sup>39</sup> In reply Earl Howe, on behalf of the Government, re-iterated the official view that, where appropriate, the commercial exploitation of Crown material should ensure some financial return to the taxpayer.<sup>40</sup> Earl Howe indicated that the little used 1986 guidelines on government-held tradeable information continued to offer a sound basis for its supply to the private sector.

Although not well known at the time, it is now clear that when Roger Freeman was making his statement about the future of Crown copyright and the new concessionary arrangements, the Office of Public Service of the Cabinet Office, through a separate Interdepartmental Working Group, had commenced a review of future policy on access to government information. The outcome of this review is not yet known, but there is evidence that discussion has broadened beyond the immediate issues surrounding Crown copyright. The Government is keen to develop a synergy between its policies on open government, the promotion of the UK information industry and the political benefits to be gained from a policy of 'information technology (IT) for all.' The review seeks to build on the liberalisation of the Crown copyright regime to see what further steps can be taken. While not wanting to 'follow my leader' in respect of the US model, the Government is keen to research the economic implications of adopting a more liberal policy

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38. View of commercial information provider expressed in an unpublished letter to the Cabinet Secretary dated 28 March 1996.

39. HC Deb vol \* col 86 18 March 1996.

40. HL Deb vol \* col 87 18 March 1996.

on the licensing of government information. The aim is to ensure that overall policy on publication of official information reflects current developments both domestically and internationally.

### **Public Information Policy - A Choice of Models (A)**

The first signs that the Government was beginning to undertake a wider assessment of information policy became apparent in 1994/95 with the publication of a several reports and consultative documents. One of these was the Government Centre for Information Systems (CCTA) Report on *Information Superhighways*.<sup>41</sup> This indicated that, towards the end of 1993, the Government was becoming increasingly aware of the beneficial effect Vice President Gore's "Information Superhighway" activity was perceived to have on the US IT and telecommunications industry.<sup>42</sup> The report was referring to the Clinton Administration's initiative, announced in February 1993, to establish a high level taskforce to articulate and implement a National Information Infrastructure (NII).<sup>43</sup> The latter was defined as 'a seamless web of communications networks, computers, databases and consumer electronics designed to put vast amounts of information at users' fingertips'.<sup>44</sup> The assumption was that information services would become such a strategic resource in the 21st Century that steps must be taken now to put in place the technological, financial and managerial structures necessary to deliver the NII for the US.

The cornerstone of the policy was the securing of private investment to build superhighway infrastructure; fostering and securing competition for US industry; providing open access to information on the superhighway; avoiding the creation of information 'have's' and 'have nots' and building a flexible and responsible government. The UK Government noted these and indicated that good domestic foundations already existed to enable the UK to be a major player in superhighways. It referred to public and private sector investment in digital technologies and the promotion of competition in all sectors of the telecommunications market, since the privatisation of British Telecom in 1984. The CCTA report referred to a three tier model describing different aspects of the information superhighway - the development of consumer services between government and citizens, the building of systems platforms to deliver such

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41. CCTA, *Information Superhighways - an update on opportunities for public sector applications in the UK* (1995).

42. *ibid*, p 4.

43. First announced in *National Information Infrastructure - Agenda for Action* (1993). Internet ref <<http://iitf.doc.gov>>. See further Saxby, *Public Policy and Legal Regulation of the Information Market in the Digital Network Environment* (Oslo: Tano Press, 1996) p 48 *et seq*. Internet ref: <<http://www.echo.lu/lu/legal/en/access/access.html>>.

44. *ibid*, Executive Summary.

services and the communications infrastructure through which connection could be made. The Government gave further support to international superhighway initiatives at a G-7 Ministerial Conference in Brussels, in February 1995, when the Government endorsed a number of pilot projects and agreed to take part in one, designed to develop increased use of on-line systems.<sup>45</sup>

It seems apparent that, up to this time, the Government's primary concern was to develop a coherent infrastructure policy that would keep it in touch with similar initiatives by other governments. It had not yet begun to evaluate whether existing policies on public information, as set out in its tradeable information guidelines of 1986-90, would need to be adapted to fit the new digital network environment. The Government appeared satisfied that its Code of Practice on open government and its policy on competitiveness within the public and private sectors, were appropriate for the creation and provision of official information.<sup>46</sup> Its plans for the privatisation of HMSO fell clearly within the terms of a policy that regarded the treatment of public information as a commercial commodity, as the best means of serving the nation as a whole. This, in turn, was part of the privatisation policy, first developed by Mrs Thatcher in the 1980s and best summed up as follows:

The Government examines regularly the functions it carries out and the services it delivers ... Where a job no longer needs doing, the function is abolished. If a service need not be the responsibility of the Government, it is privatised. Where a service cannot be provided by the private sector alone, its expertise and resources will be involved as far as practicable in partnership with the public sector, for example through the Private Finance Initiative (PFI). This will bring benefits to tax payers and consumers.<sup>47</sup>

It is submitted that the Government is now becoming increasingly aware that rigid adherence to the consequences of its privatisation policy may not necessarily produce the best conditions for the exploitation and use of public information. Following its public statements on proposals to privatise HMSO, a persistent lobby has urged government to think carefully about the impact of a commercialisation policy that uses public information as a means of raising revenues for the taxpayer. The argument put forward is that reference to privatisation of public information services is misleading as government will still continue to control the market through its retention of intellectual property rights under Crown copyright. The suggestion is that the broader domestic economy would benefit from a greater diversity of public information sources and that this can only be achieved if government relinquishes its controls over access to, and subsequent use of, public information.

### **Diversity and Commercialisation Models compared (A)**

The alternative model for such a policy, emanating from the US, proposes diversity as the key to maximising the benefits of government information. US information policy is set out in the PRA of 1995,<sup>48</sup> which establishes the framework within which agencies shall perform their

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45. The 'Government On-line' project in joint collaboration with the Treasury Board of Canada.

46. *op cit*, n 7.

47. *Competitiveness Forging Ahead* Cm 2867 (London: HMSO 1995) para 10.4.

48. *op cit*, n 37.

information resources management activities. It establishes an Office of Management and Budget (OMB) to oversee this task through the introduction of standards, guidelines, assessment and compliance procedures. US Federal information policy is based on the premise that government information is a valuable national resource, and that the economic benefits to society are maximised when government information is available in a timely and equitable manner to all.<sup>49</sup> Fostering diversity among groups involved in disseminating it include profit and non-profit making entities, such as information vendors and libraries, as well as state and local government. Proponents of this model argue that the citizen and economy are better served if government actively disseminates its information at cost and particularly the raw content from which value-added products can be made. This approach rejects any attempt to exert copyright-like controls or other restrictive practices on government information on the grounds that it is counter-productive and not in keeping with fundamental democratic values.

One of the main reasons why the UK Government has asserted a commercialisation policy, within a framework of Crown copyright control, has been to maximise revenues to the Exchequer. In so doing it has preserved the position that the Government itself should continue to be a major publisher of government information. The diversity model, however, asserts that the entry of other entities into the market will release entrepreneurial energy, resulting in a much wider product range of official information services and the delivery of new services to commerce and the public. For the UK, the question must be asked whether the administration of the 2000 or so permissions to reproduce Crown copyright material, handled by the Copyright Unit of HMSO on an annual basis, is really serving the domestic economy to a satisfactory degree if its primary purpose is to maximise revenues. The £20 million it generates in licence payments must be weighed against the broader impact upon the UK economy of opening up government information to the full extent of market forces.

One commercial information provider described the present situation thus:

The underlying assumption behind UK government policy is that the best economic return to the Exchequer results from a transaction based licensing regime whereby civil servants and would-be licensees negotiate, on a case by case basis, a commercial licence based on the type of use to be made and on the perceived value to the licensee of the rights granted. These negotiations can, and often do, take weeks if not months, and in some cases, years to conclude. Government officials generally do their best to negotiate a reasonable licence but they do not always find it easy to understand the business of the licensee. They can also be concerned about the effect that the licensee's activity will have on the Government's own publishing business. These negotiations act as a powerful break on innovation and, therefore, economic activity in the UK.<sup>50</sup>

Direct measurable evidence of the economic impact that the diversity model has had in the US is not readily available. However, commentators assert that the evidence is plain to see. For

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49. Weiss and Buckland, 'International Information Policy in Conflict: Open and Unrestricted Access versus Government Commercialization. Will inconsistent Government Policies Inhibit Development of a Global Information Infrastructure?' *Harvard Information Infrastructure Project* (1996) p 1.

50. Unpublished letter to the Cabinet Secretary, 28 March 1996.

example, they point to the success of the US manufacturing industry in compact discs which is the largest in the world.<sup>51</sup> Its proponents argue that the industry only got its start because of the huge store of copyright-free government information available as content. Such advocates also identify the growing range of new industries, utilising government information, such those concerned with weather data, patent information and digital mapping.<sup>52</sup> There is no reason, they say, why such provision should not run side-by-side with government information services and with non-profit sectors of the economy.

In its support of the diversity model, the US OMB points to the growth in international demand for the sharing of official information. This is particularly so in the case of scientific, environmental and geographic data, the pooling of which serves the information needs of the wider community. The OMB argues that monopoly claims on certain categories of information can hinder such co-operation. It cites problems that federal agencies encounter when national treatment of government copyright requires the agency to withhold release of the information to third parties or restrict its availability to the public. The OMB points to the fact that US Freedom of Information legislation<sup>53</sup> does not provide a categorical exemption for copyrighted official information. This means that agencies have neither the authority nor the means to adhere to the imposed restrictions of other nations.<sup>54</sup>

Such a problem arose at the July 1995 Congress of the World Meteorological Organisation (WMO) over the distribution of predictive weather data. As a United Nations agency the WMO has, for 45 years, worked with national organisations to facilitate global access to their domestic data sources, as a means of understanding global weather patterns and improving the predictive capabilities of weather analysis. The WMO was faced with proposals that would have restricted access to certain categories of information. This was pressed for so that states, determined to do so, might gain commercial benefit from its release. The WMO negotiated a compromise (Resolution 40) which allowed those nations to place 'conditions on the re-export for commercial purposes' of data and products beyond a defined minimum compulsory set.<sup>55</sup>

The lack of international consensus on the rules governing access to core meteorological data is currently exposed in a possible dispute between the US and the EC over the proposed formation of ECOMET - a company representing sixteen EU and European Economic Area (EEA) national government meteorological services (NMS). The matter is currently being considered, within the

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51. *op cit*, n 49 p 5.

52. *ibid*, p 6.

53. Freedom of Information Acts 1966, 1974, 1986.

54. US Office of Management and Budget, 'Management of Federal Information Resources - Part 111', vol 61 *Federal Register* 34, 20 February 1996 p 6452.

55. Statement to the EC by Charles Ludolph of the International Trade Administration of the US Department of Commerce, 'EC DG IV's Article 85(3) Review of Ecomet and Access to the European Commercial Weather Service Market' (1996) p 2. See also Notice pursuant to Article 19(3) of Council Regulation No 17 concerning Case No IV/34.563 - Ecomet, 95/C 223/02, OJ C223/2.

EC, by way of the review procedure provided for in Article 85(3) of the Treaty of Rome.<sup>56</sup> This exempts agreements or associations between undertakings from liability under Article 85(1) where the EC deems this, in the particular circumstances, to create a resulting benefit. The US has complained that ECOMET 'is setting unreasonable prices for access to government weather data and models, has set conditions of access to EU service markets and meteorological data that are burdensome or unreasonable, and will directly or indirectly restrict market access.'<sup>57</sup> The US argue that basic weather data should be openly available and that NMSs should introduce free and unrestricted access to both domestic and other nation's environmental data.

Commercial service providers have also complained that EUMETSAT - a similar grouping of NMSs, controlling access to satellite meteorological information, has adopted encryption techniques designed to ensure that the private sector pays for access to specific satellite data. Although the organisation notionally maintains a 'non-discriminatory' pricing policy, individual members of EUMETSAT are permitted to fix charges within their own jurisdiction for a three year period, by which time commercial operators may have been driven from the market. This is because European and US NMSs are not required to pay such fees. The US has expressed similar concern in respect of ECOMET, fearing that its members will enjoy favourable terms, compared with the US and other countries, in respect of access to ECOMET environmental data and products. Its position has been described thus:

The US believes that the commercial revenue generating activities of NMSs should be completely separate from the public service activities of these same organizations. It should be clearly established that commercial activities by governmental organisations do not benefit in the form of free or preferential access to weather and climate data and products. Without this "firewall" to separate the NMS governmental function, there are attendant opportunities for cross-subsidization, such as development of new and improved products by NMS personnel paid by tax revenues before being transferred to the commercial arm, and an undeniable potential for even more restrictions, predatory pricing policies, and anti-competitive business practices.<sup>58</sup>

### **The Cabinet Office Policy Review (A)**

In commencing the review of government policy on public sector information, which involves testing the arguments for removing restrictions on Crown copyright altogether, it is not clear whether the Cabinet Office has extended the analysis to include agencies operating, either as a 'Trading Fund', or a fully privatised operation. Under the Trading Funds Act 1973 (as amended) designated agencies are required to be self-sufficient on cost while achieving such further financial objectives as HM Treasury may, from time to time, require.<sup>59</sup> In the case of agencies,

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56. Article 85(3) provides a formula whereby restrictive agreements may be granted exemption from the prohibition in Article 85(1).

57. *op cit*, n 55 p 1.

58. *ibid*, p 3.

59. Trading Funds Act 1973, as amended by the Government Trading Act 1990.

such as the Ordnance Survey (OS) and the Meteorological Office (MO), as well as a future privatised HMSO, any relaxation of Crown copyright controls in their spheres of operation would seriously undermine existing policy that requires such agencies eventually to pay their way. This is because a substantial portion of the assets of these organisations reside in their Crown copyright portfolios.

In pure revenue terms, it is suggested that the diversity model is more attractive. Agencies would continue to recover basic costs for reproduction, handling, packaging and distribution of data, but would be subsidised from public funds in respect of the shortfall in operating and developmental costs. However, there would be no reason why an agency or department could not raise additional revenues by competing in the market to maintain and upgrade public data already released. The increased cost to the Exchequer of the additional public funding of these operations would be more than offset by increased tax revenues generated by the private sector, arising from the value-added exploitation of public information. Proponents of the diversity model also point out that in many cases it is government itself that is purchasing the data. For example, the origins of the OS was as a supplier of maps to the military, whereas a major purchaser of HMSO publications is the public sector and Parliament.

The requirements of the diversity model would also diminish the prospects of disputes arising over public access to data held by government which it chose not to release. This might arise, not only in respect of data required for value-added exploitation, but also data sought by pressure groups or individuals wishing to participate in the political process. For example, in June 1996 the environmental group, *Friends of the Earth*, complained that the Government was failing to comply with the EC Directive on freedom of access to, and dissemination of, information on the environment in withholding environmental data on water companies and other privatised utilities.<sup>60</sup> The organisation complained that it had been denied data on the costs of programmes for cleaning up sewage and drinking water. On another occasion it had been unable to obtain from Railtrack information on contaminated land sites under its control for which clean up costs of £70 million had been allocated.<sup>61</sup>

In defence of existing UK policy on Crown copyright and commercialisation of official information, it is likely that its supporters will draw upon a different argument to support the *status quo*. The issue relates to which of the two models best secures the delivery of sound services and the information needs of the nation, its citizens and the wider international community. It is asserted that commercial oversight of Crown copyright by agencies, some of which can draw on decades of experience of their predecessors, will foster the comprehensive development and appropriate exploitation of the information base. The OS would point to long-term projects requiring sustained investment such as the programme, commenced in 1973 and completed in 1995, to convert all 230000 of Britain's largest scale maps to digital form.<sup>62</sup>

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60. Directive on the freedom of access to information on environment, 90/313/EEC OJ L158/56. Article 3 provides that Member States must ensure, subject to certain exceptions, that information relating to the environment is supplied to any natural or legal person without the need to prove an interest. Exceptions may apply on grounds of confidentiality, public security, *sub judice*, etc.

61. *Financial Times*, 5 June 1996.

62. Ordnance Survey, *Annual Reports and Accounts 1994/95* (London: HMSO, 1995) p 3.

Assertion of its intellectual property rights against 'unscrupulous infringers' is seen as vital to its future success and possible privatisation in 1999. Its copyright aim is to 'safeguard the present and future existence of the National Map Archive while at the same time stimulating its use both directly and within third party products. We feel we can best do this by the operation of fair and even-handed copyright policies.'<sup>63</sup> OS also suggests that the intellectual property rights it enjoys in its maps has enabled it to contract with the private sector to the extent that, prior to completion of the project in 1995, 'some 90% of the OS maps being digitised are being encoded in the private sector under contract and to OS's specification.'<sup>64</sup>

In defending the commercialisation model its adherents are also doubtful whether the market mechanism is capable of controlling inherently wasteful duplication of data sets or avoiding the loading of unacceptable costs on users wishing to develop interoperable systems. They would also point to the fact that some information services, particularly those that involve the exploitation of confidential and disaggregated data collected by different branches of government under statute, must be controlled by government servants under non-disclosure rules. However, against that argument, is the fact that the Government does not appear to perceive this as a difficulty in the case of HMSO. Under the proposed privatisation of HMSO, the handling of confidential data by the private sector purchaser is going to be regulated by contract.

The MO, which became a 'Trading Fund' on 1 April 1996, is also likely to support these arguments. During the 1995 WMO discussions on international data exchange in meteorology, the MO's Chief Executive defended UK policy on public sector information on the grounds of the quality of service it engendered. For the MO this was, by objective standards, as good as US service provision and the net cost to the taxpayer was less than in the US, even taking account of the increased tax contributions from US private sector operators arising from the more liberal regime governing data access. The MO would also point to the level of joint ventures with the private sector and the existing strength of competition it must currently endure, despite Crown copyright policy.<sup>65</sup>

The debate on the relative strengths and weaknesses of the two models is likely to continue for the time being. The Government could, of course, in respect of those agencies still operating under its oversight, continue the process of granting Crown copyright concessions. It could also, as it did in the case of the UK telecommunications industry, set market parameters over a fixed period designed to generate the growth of competition. Within these terms the Government could require organisations, such as the OS and MO, to release its data under more liberal conditions than present policies dictate. In particular, the public sector could be encouraged to release data in its possession not currently being exploited and accessed for the public good. This would

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63. Ordnance Survey Brochure, 'Digital Mapping - The Copyright Angle' (1991).

64. Rhind, 'Spatial Databases and Information Policy: A British Perspective' (1994), Proceedings of the Conference on Law and Information Policy for Spatial Databases, National Center for Geographic Information and Analysis. See further: Coopers & Lybrand, *Economic aspects of the collection, dissemination and integration of government's geospatial information*, (Southampton: Ordnance Survey, 1996).

65. In 1994/95, 44% of its revenue from commercial services came from such joint ventures. Source: *The Met Office Annual Report & Accounts 1994/95* (London: HMSO, 1995) p 3.

apply in the case of a private sector operator that had identified a niche area of the meteorological services market and sought access to MO data. In this way the Government could overcome the criticism that currently, because of Crown copyright restrictions, the development of data services is only able to proceed at the speed the public sector is prepared to allow. Such relaxation of policy might also save the public expenditure that would otherwise have been required had the Government decided that it must develop the service itself. In the case of a privatised HMSO, private sector access to its existing data archives could be negotiated within the envisioned contract for service delivery to the Government and Parliament. Tax concessions could be part of the incentive structure. Thereafter HMSO could be expected to compete with other publishers with the value-added information products it generated from public sector information.

### **EC Policy on Access to Official Information (A)**

By and large, UK Government policy towards official information has, until now, been an entirely domestic issue uninfluenced by the UK's membership of the EU. The position is now changing as the EU becomes more active in exploring how a European policy might develop in this segment of the information market. The EC approaches the issue, in the first instance, from a broader perspective, being concerned with laying the foundations for Europe's participation in the 'information society.' Until publication of the Report of the Bangemann group on *Europe and the Global Information Society*<sup>66</sup> in 1994, following the EC's 1993 White Paper on *Growth, Competitiveness, Employment*,<sup>67</sup> it was accepted that the EU was lagging behind the US and Japan in developing the policies and the infrastructure to exploit the new information and communication technologies.

These studies sought to chart how the social and economic needs of Europe's citizens could draw upon the multiplier effect of digital information in energizing every sector of the broader economy. The Bangemann group recommended a market-driven response in which the prime task of the Member States would be to safeguard competitive forces.<sup>68</sup> It made a number of recommendations designed to accelerate liberalisation of telecommunications, enhance interconnection of networks and interoperability of services and encourage initiatives in the market. One such proposal was for a trans-European public administration network aimed at providing more effective digital information interchange between administrations and subsequently its citizens.<sup>69</sup>

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66. 'Europe and the Global Information Society - Recommendations of the high level group on the information society to the Corfu European Council' (the Bangemann group) (Brussels, 1994). In: *Bulletin of the European Union*, Supplement 2/94 (Luxembourg: Office for Official Publications of the EC, 1995).

67. *Growth, Competitiveness, Employment - The challenges and ways forward to the 21st century*, COM(93) 700 final of 5 December 1993. In: *Bulletin of the European Communities*, Supplement 6/93 (Luxembourg: Office for Official Publications of the EC, 1993).

68. *ibid.*, n 66 p 13.

69. *ibid.*

The background to the development of EC thinking on official information is contained in a comment in the White Paper that one of Europe's main handicaps is the fragmentation of its various markets and the lack of interoperable links.<sup>70</sup> To overcome this the White Paper suggested that it would be necessary to mobilize resources and channel endeavours at European level in a partnership between the public and private sectors.<sup>71</sup> In this context the EC proposed, in June 1995, the establishment of a multi-annual Community programme to stimulate the development of a multimedia content industry and to encourage the use of multimedia content in the emerging information society (INFO 2000).<sup>72</sup> Within the programme was an action line designed to look at how the vast amount of information, collected and produced by the public sector, could be exploited as raw material for value-added information services offered by the private sector. This approach was in keeping with the earlier conclusion of the EC that the response to the information revolution should be market driven.

INFO 2000 identified three sets of actions designed to support this public sector role at a European level.<sup>73</sup> Firstly, specific policies should be created to regulate access to and exploitation of European public sector information. The Commission undertook to produce a Green Paper on the subject as a contribution to the debate on the way forward. Secondly, EU Member States should participate in practical initiatives to improve access to public sector information for both individuals and businesses. It suggested that directories of European public information be produced to a common format, so that they could be interlinked and easily accessed from any point in Europe. Thirdly, it called for better use to be made of existing information collections under public sector control, such as the archives of museums, libraries, copyright and patent deposit systems, educational and training bodies, historical archives and architectural and industrial objects.<sup>74</sup> It proposed that these collections be transferred from analogue to digital form within a standard format for interconnection across the EU.

### **The EC Green Paper (A)**

In its Green Paper,<sup>75</sup> published in June 1996, the EC recognises the complexity of the task

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70. *op cit*, n 67 p 23.

71. *ibid*.

72. *Communication from the Commission to the European Parliament and the Council concerning the multi-annual Community programme to stimulate the development of a European multimedia content industry and to encourage the use of multimedia content in the emerging information society (INFO 2000) COM(95) 149 final (Luxembourg: Office of Official Publications of the EC, 1995).*

73. *ibid*, p 27.

74. *ibid*, p 28.

75. *Green Paper on Access to and Exploitation of Public Sector Information in the Information Society - considerations for a European Union Policy*, (1996).

involved in developing a public sector information policy for the EU as a whole. It points out that, in preparing the Green Paper, various studies conducted over a nine year period, had been taken into account.<sup>76</sup> Its purpose was not to be prescriptive but to stimulate a wide public discussion on the issues involved. This would help the EC determine where consensus could be found and where further investigation was necessary, because immediate action was deemed either premature or unjustified.<sup>77</sup> The Green Paper stresses, at an early stage in its deliberations, the increasingly important role of the public sector as an actor in the information society. It suggests that improved information management will increase awareness of the value of information assets in the public sector. It also recognises the potential of the information and communication technologies in delivering citizen access to public sector information and its contribution towards improving government transparency and participation in the democratic process. The links between 'access to public sector information and the preservation and promotion of Europe's cultural heritage and diversity' are also acknowledged.<sup>78</sup>

From the UK Government's point of view, many of the questions raised by the Green Paper are not immediately relevant to the domestic review of policy towards Crown copyright. General analysis of the contents of the Green Paper is, however, strongly advised as any future proposals that arise from the debate are likely to have a considerable impact within all member states, particularly if the EC concludes that the outcome requires the introduction of a directive. One section, however, of the Green Paper dealing with the handling of competition and copyright issues, is directly relevant to the policy review. This section reinforces the EC's view that, where public sector commercialisation policy fails to produce an 'even playing field' for private sector competitors, or where concessions or exclusive licences are granted to private sector bodies in ways incompatible with competition rules, then legal action should follow. EU competition rules are defined by Articles 85-92 of the Treaty of Rome. The Green Paper singles out, as particularly relevant, Article 86 dealing with abuse by one or more undertakings in a dominant position and Article 90, which governs the behaviour of public undertakings or those entrusted with special or exclusive rights. It also refers to the EC's 1989 guidelines, now under review, for improving the synergy between the public and private sectors in the information market.<sup>79</sup> These called upon public administrations to avoid practices that might distort competition in the provision of electronic information services.<sup>80</sup> While endorsing the importance of applying competition rules to public sector information, the Green Paper seeks comment on the adequacy of existing rules to deliver the intended result.

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76. *ibid*, p 3.

77. *ibid*, p 4.

78. *ibid*, p 5.

79. *Guidelines for improving the synergy between the public and private sectors of the information market* (Luxembourg: Office of Official Publications of the EC, 1989). The Guidelines were published after three years of consultation as part of the Information Market Policy Action Programme (IMPACT). The Guidelines were published in consultation with information service providers, users and public sector representatives.

80. *ibid*, p 9.

Whether the proposals for the privatisation of HMSO infringe competition rules will depend substantially on the terms of the sale and, assuming the right is retained, the basis upon which the Copyright Unit continues to administer Crown copyright. To the extent that the private sector seeks to increase its participation in the public information services market, on terms determined by the Government's present commercialisation model, an increase in competition disputes is likely. These will concern the conditions by which primary information, under public sector ownership, is released into the market. The EC has clearly indicated that, under normal circumstances, the grant or maintenance of monopoly rights is not a reasonable way of achieving public service objectives.<sup>81</sup>

Recent case law supports this. EC law appears to be moving towards acceptance of the 'essential facilities' doctrine first articulated in US antitrust law.<sup>82</sup> This establishes that 'the owner of the essential facility, may not impose a competitive disadvantage on its competitor, also a user of the essential facility, by [acting] to the detriment of the competitor's service.'<sup>83</sup> The decision in *RTE and ITP v EC Commission (Magill)*<sup>84</sup> has also come close to outright endorsement of this approach. In *Magill*, the European Court of Justice ruled that, whereas the mere exercise of an exclusive right, such as copyright, by a proprietor will not normally infringe competition rules, the refusal by a dominant proprietor to licence access to data in its possession could amount to an abuse within the terms of Article 86. This would certainly apply if the copyright holder, by its actions, denied access to the raw data necessary to produce a product, in this case a television guide, where a market for such a product existed.<sup>85</sup> Whish, however, has urged caution in the application of this doctrine, arguing that the benefits of innovation and investment, including the exercise of intellectual property rights, should not normally be curtailed.<sup>86</sup>

It remains to be seen, then, whether the EC has the political resolve to apply competition rules against undertakings that are in apparent breach of Community law. There is evidence, for example, that domestic competition regulation within the Member States continues to operate in a manner inconsistent with the Treaty of Rome. In December 1995, in a decision that seems to challenge the terms of Article 90 of the Treaty of Rome, the Commercial Chamber of the French Court of Cassation reversed the ruling of the Court of Appeal of Paris holding that the domestic National Meteorological Department (DMN) was not guilty of abusing its dominant position when it refused access to meteorological data to a competing provider of weather information services. The case was brought under domestic competition regulation and the court denied

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81. DG IV, *European Community Competition Policy 1994*, (Luxembourg: Office of Official Publications of the EC, 1995) p 28.

82. The doctrine has been traced back to *United States v Terminal RR Association* 224 US 383 (1912).

83. *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*, [1995] 5 CMLR 255 at p 266.

84. *Radio Telefis Eireann and Independent Television Publications Ltd v EC Commission* C 241 - 242/9P pp 790-791.

85. *ibid*, p 791.

86. Whish, *Competition Law* (London, Edinburgh: Butterworths, 3rd ed, 1993) p 618.

access on the grounds that the specific data, concerning meteorological assistance to air traffic, was not being commercialised by DMN and thus did not infringe domestic law. The outstanding question is whether the EC will now intervene in this matter.

In another action, that may shed light on EC competition policy towards privileged undertakings, the EC has held a preliminary hearing of a case, brought by two Belgian companies, ITT Promedia and BDS which are challenging the prices charged by the Belgian public telecommunications operator, Belgacom, for access to its subscribers' list. At issue are the terms by which companies, dominant in the market, may use data they have acquired. Further evidence of EC thinking will emerge once the Article 85(3) review of ECOMET is known,<sup>87</sup> dealing with access to the European commercial weather service market.

### **Green Paper assessment of Copyright and Competition Policy (A)**

The Green Paper begins its assessment of the copyright treatment of public information by drawing attention to Article 2(4) of the Berne Convention.<sup>88</sup> This grants national legislatures the discretion to determine the type of protection to be awarded to official texts. It points out that the extent to which copyright in such works is asserted, depends on diverging national originality criteria, jurisprudence or the policies of the governments of the Member States.<sup>89</sup> Many Member States (Denmark, Germany, Greece, Spain, Italy, Luxembourg, Netherlands, Portugal, Sweden) have availed themselves of the option contained in Article 2(4) of the Berne Convention and excluded certain legal texts from copyright protection. Even in those who have not, some (eg France) have denied copyright protection to such "official material" by jurisprudence. Others, such as Ireland and the United Kingdom, give copyright protection to laws and statutes as well.<sup>90</sup>

The Green Paper concludes that the development of a homogeneous European approach towards public sector copyright may take some time to produce, as this is likely to be bound up with the broader discussion of intellectual property rights in the Information Society that commenced in 1995 with the publication of the Green Paper on the subject.<sup>91</sup> However, it does suggest that, through discussion and negotiation, there may be a case for attempting to approximate relevant policies. As a starting point for discussion it refers to the Synergy Guidelines,<sup>92</sup> published in

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87. *op cit*, n 55.

88. *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act, 24 July 1971).

89. *op cit*, n 75 p 48.

90. *ibid*, p 49.

91. EC Green Paper, *Copyright and Related Rights in the Information Society*, COM(95) 382 final (Luxembourg: Office of Official Publications of the EC, 1995).

92. *op cit*, n 79.

1989. These recommended that the public sector should use the discretion within Article 2(4) of the Berne Convention to the maximum extent so as to exempt from copyright texts of a legislative, administrative or legal nature. Moreover, it suggests that governments should not grant exclusive rights to a single organisation if this inhibits value-added enhancement of official information by other users.<sup>93</sup>

The Green Paper recognises that work must continue to integrate copyright and competition policies and refers to the partial attempt to do so in the recent Council directive on the legal protection of databases.<sup>94</sup> This creates a new *sui generis* right, providing 15 years protection against unauthorised extraction or re-utilization of whole or a substantial part of a database, whether or not that database is protected by copyright.<sup>95</sup> The right exists where there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents. In both its original and amended proposal the EC had sought to introduce increased rights of access to extract and utilise the contents of databases made publicly available by:

(a) public authorities or public corporations or bodies which are either established or authorised to assemble or to disclose information pursuant to legislation, or are under a general duty to do so;

(b) firms or entities enjoying a monopoly status by virtue of an exclusive concession by a public body.<sup>96</sup>

This did not receive sufficient Council support and was deleted from the final text. However, a review procedure was put in place requiring the EC to undertake a three yearly assessment of the working of the *sui generis* right and especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken.<sup>97</sup> These include the possibility of compulsory licences.<sup>98</sup>

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93. *op cit*, n 75 p 51.

94. Directive 96/9/EC on the Legal Protection of Databases, adopted 11 March 1996, OJ 1996 L77/20.

95. *ibid*, art 7.

96. Proposal for a Council Directive on the Legal Protection of Databases, COM(92) 24 final (13 May 1992) OJ C156/4, art 11(2). Modified Proposal COM(93) 464 final (15 November 1993) OJ C308/1.

97. Council Code of Conduct concerning Public Access to Council and Commission Documents (93/730/EC) and Council Decision of 20 December 1993 on Public Access to Council Documents (93/731/EC) OJ 1996 L340. Also, Commission Decision of 8 February 1994 on Public Access to Commission Documents (94/90/ECSC, EC, EURATOM) (includes Code of Conduct as an Annex) OJ 1994 L46.

The deleted clause was never intended to incorporate access rights to public sector data not otherwise publicly available, but it would have weakened the copyright interests of UK agencies such as HMSO, OS and the MO in respect of their published data and was therefore opposed on their behalf by the UK Government, in part for that reason. The Government no doubt continues to prefer these matters to be resolved under competition law principles as this avoids direct interference with Crown copyright policy. This would not be so if compulsory licensing arrangements were imposed.

## **Conclusion (A)**

One cannot predict, at this stage, exactly what the outcome will be of the Government's review of its policy on public sector information. In some respects it poses a genuine dilemma for policy-makers. This is because, ideologically, the Government must be attracted to the potential of the diversity model of information access and exploitation followed in the US. It offers the prospect of private sector expansion in the provision of value-added services, some of which may lead to innovative development that will strengthen the UK's overall competitiveness in the information market. However, a key aspect of the diversity approach is the relatively unrestricted access to public sector data that the model requires. Therefore, the assertion of intellectual property rights in such data by Government, through the exercise of Crown copyright, creates a major impediment to the successful integration of the diversity model in the UK.

It seems likely that, for the time being, the Government will wish to concentrate on the terms of sale of HMSO, without introducing radical changes to Crown copyright policy. Priorities are also likely to be influenced by the timing of the forthcoming General Election. However, policy analysts within the Cabinet Office will certainly continue their review on the assumption that the incoming government, of whatever complexion, will wish to continue the process as part of its 'competitiveness' agenda. If further relaxation of Crown copyright controls is to be proposed, the most difficult problem is likely to arise among those 'Next Steps' agencies or Trading Fund operators such as the OS and the MO, whose operational independence has built into it the duty to be as self-sufficient as possible on running costs. If a significant proportion of revenue is dependent upon the commercial licensing or retail sale of its Crown copyright data, the Government will have to decide on what basis the diversity model could be operated in this sector. The answer is likely to be through subsidy, at least in the short to medium term, as the market begins to self-select the participants.

In part, for this reason, it is anticipated that the Government will move progressively, rather than radically forward, in its policy development in this area. While it may wish to embrace the diversity model, for whatever gains it can deliver, this is likely to be on UK terms in which some form of regulatory control is retained. The obvious territory for concession is the Government's licensing policy, as applied in the exercise of Crown copyright. Certain types of official data, as is the case already with statutory material reproduced in conventional printed format, could be effectively released into the public domain, free of licensing constraints on exploitation and use. Such an approach would enable the Government to avoid an immediate clash with its privatised or semi-privatised agencies in respect of data under their control. In their case any relaxation of the commercialisation policy towards official information would undermine the ability of those agencies to be self-sufficient on costs. Yet the objective of privatisation is to stimulate economic

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98. *op cit*, n 94 art 16(3). The text of the Directive refers to 'non-voluntary licences'.

activity through competition and access to the market.

There continues, therefore, to be important issues to resolve. The Government may have announced concessions in respect of private sector digital access to statutory material but how much further will this extend? Will these concessions extend to the public at large or continue to be primarily directed at commercial publishers? Furthermore, what action will it take to resolve the confused copyright position of law reports? In a society that functions with an unwritten constitution, access to case law is even more important. The removal of copyright restrictions on public access to case law is also likely to strengthen the competitiveness of the legal profession and enable it to become a net contributor to the nation's earnings from invisible exports.<sup>99</sup>

In addition, the proposed parliamentary arrangements for licensing electronic material are still subject to restrictions, the case for which has not yet been argued. These include denying electronic access to data until it has been published in print and made available to MPs. While this requirement might be necessary for reports embargoed prior to a parliamentary announcement, such restrictions do not apply to many other official publications such as Hansard. The Government appears also not to have given much reasoned thought as to why the private sector should not have access to archival data for which no government plans may exist for providing digital access. This applies, for example, to back copies of Hansard, the digitisation of which may take government years to accomplish. Private sector access would significantly speed up the process and could be brought in to handle a wide range of other public sector archival information presently lying dormant. The same argument might also apply in respect of access to large data sets such as land registers, company registers, a variety of statistics and other data, routinely produced by public administrations in performance of statutory duties.

It is clear that this approach is one that the EC will support, as part of its efforts to remove impediments to the growth of the market in European public sector information. Its attraction to a licensing agenda has already been illustrated in its efforts to introduce, in the Database Directive, compulsory licensing arrangements for public sector data. Yet beyond this, much work is still required to be done before the EC is in a position to outline its strategy. For example, it still has to make its own position clear on access policy to EC and Council documentation, despite the existence of Council decisions establishing a code of conduct on the subject.<sup>100</sup> There are many details to be considered, such as defining the meaning of public sector information, the nature of the rights and obligations attaching to it and the liability issues involved. There is also the important issue of what form a universal public sector information service, available on the digital network, might take and how this would equate with the provision of parallel private sector value-added services already described.

The Government finds itself, almost unexpectedly, having to consider these matters. It is likely that it never envisaged the rapidity with which the digital network would develop. This has been the catalyst that has pressured governments, throughout the world, to respond with domestic

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99. For example the challenge from the New York bar to take on shipping matters.

100. Council Code of Conduct concerning public access to Council and Commission Documents (93/730/EC) and Council Decision of 20 December 1993 on public access to Council documents (93/731/EC) OJ L340. Also, Commission Decision of 8 February 1994 on public access to Commission documents (94/90/ECSC, EC, Euratom) (includes Code of Conduct as an Annex) OJ L46.

information infrastructure plans. Yet it remains to be seen how domestic policy will emerge. There appears to be a willingness now to embrace the digital network, but to what extent and on what basis has still to be determined. Whether this means that the UK will support the EC's 'Common Information Area' proposal for the provision of a core set of essential public information, without charge, is uncertain at a time when the Government appears so strongly wedded to its cost recovery agenda.

It may be that a two speed approach towards policy development is going to take place in which fundamental issues on access, pricing and exploitation are considered first, followed by assessment of whether adjustments are required in particular sectors where special circumstances operate. It is certainly clear that the potential opportunities that this new communications infrastructure creates for the delivery of government services and the growth of the information market, cannot be ignored. The challenge for the UK Government is to find the means to extend the success it has had in the liberalisation of telecommunications into the information market itself. It has begun to recognise that public sector data is a highly valuable resource and that to subject it to extensive regulatory control has consequences, not only for the nation's competence to compete in the information market but also, in constitutional terms, in the ability of the citizen to participate more fully in the democratic process itself.

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