

COPYRIGHT, COMPETITION, AND RESELLING OF GOVERNMENT INFORMATION: IMPACT ON DISSEMINATION

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By law, works of the United States Government are in the public domain, to protect taxpayers from paying twice for information, and to encourage the widest possible dissemination of that information. The complexities of government distribution in the print era and the slowness of the public sector in entering the electronic age allowed private sector providers to reap great profits from re-disseminating and adding value to government information. These providers now resent and challenge improvements to public sector distribution, which they characterize as unfair competition. This article challenges the argument's validity and explores whether a distinction can be usefully made between end-use and resale of government information. Many opportunities for the private sector remain in areas where the public sector cannot compete. A few ways of protecting low-cost public access and no-cost federal depository library program access are mentioned. As long as the public sector recognizes and fulfills its role to protect the diversity and equality of access, the private sector will be challenged to increase the quality and usefulness of government information and to further expand the practically-untapped markets for such information.

INTRODUCTION

Under USC 17, §105 (Copyright Act), there is no copyright on “any work of the United States Government” regardless of the medium in which it may be created.

The intent of allowing government works to reside in the public domain is twofold: to protect taxpayers from paying more than once for information (first to collect it, then again in order to acquire it); and to spread government information as widely and effectively possible: “The basic argument against permitting these publications to be copyrighted is that any material produced

and issued by the Government should be freely available to the public and open to the widest possible reproduction and dissemination” (U.S. Congress, 1978c, p. 132). The provision under Title 44, Section 505, that plates used in the publication of print documents be sold at cost plus 10% supports this view.¹ (There is a limited exception for Department of Commerce/National Technical Information Service (NTIS) publications, whose consequences will be explored below.)

Ongoing tension exists between the private and public sectors over the dissemination of government information. New formats and media, where profit-seeking providers established a market foothold before the slower-moving public sector, have exacerbated this. As a policy overview stated, “[T]he conflict over competition for information services is heightened by electronic information systems....Services that were formerly offered by the private sector at high prices can be offered at low cost by Federal agencies” (U.S. Congress, 1989, p. 181). Moreover, the for-profit sector and its primary spokesman, the Information Industry Association (IIA), have so far been more forceful, articulate, and have shown more ability to exercise political influence than the non-profit stakeholders (McIntosh, 1990). Certainly it is easier to advocate for an existing position of strength than to agree on a strategy for change when there are so many possibilities.

PRIVATE AND PUBLIC SECTORS

Title 44 has provided for public sector publication and dissemination of government information through the Government Printing Office (GPO), via the GPO sales program and the Federal Depository Library

Program (FDLP), now augmented with GPO ACCESS and other online dissemination programs.

The private sector uses the absence of copyright on government works to generate profit in two major ways: by reselling the same information, which remains in the public domain; and by adding value to the information, which “value-added” information is then subject to copyright. Unfortunately a precise definition of “value-added” is still elusive despite decades of discussion and litigation. These enhancements are protected by copyright as “derivative and collective works.” Nimmer (1978) explores the controversy surrounding such purported “value-added” enhancements as pagination, a key element in West Publishing’s stronghold on the case law market.

When dissemination was primarily limited to print forms, the private sector’s concern was focused on obtaining as much as possible of the printing monies flowing through the GPO by advocating free and open bidding and encouraging more outsourcing of printing jobs — the mechanics underlying dissemination. Since the GPO was established, a thriving business market sprang up to compete with its sales division and meet libraries’ unfilled needs. Companies such as Bernan Publishers (Lanham, MD), Claitor’s Law Books and Publishing Division (Baton Rouge, LA), Gist Works (Indianapolis, IN) and others profitably re-disseminated government information in book and pamphlet form. In areas where the Federal Government did not have the strong market presence of the GPO, such as in case law, ongoing tensions with the private sector about the content as well as the mechanics of information dissemination were already strong. Keene and Morse (1996) explain that “the federal courts have traditionally required that legal briefs cite to West’s printed reporters when available, but West claims a copyright on their internal page numbering system” (p. 492).

Since the 1980s there has been a strong initiative in the government to move to the private sector, as exemplified in the various versions of the Paperwork Reduction Act enacted by the Office of Management and Budget. In a letter to the Joint Committee on Printing (JCP) dated July 31, 1991, the American Library Association (ALA) said that it was “particularly concerned about the trend to turn more and more Government information over to the commercial sector for dissemination. This trend has resulted in the turning over of public assets to private, special interests. To date, privatization has resulted in less access and higher costs for the American public” (cited in U.S. Congress, 1991, p. 195).

TENSIONS IN NEW FORMATS AND MEDIA

Because the GPO was slow to explore new media, the private sector pioneered those areas. Products provided through Congressional Information Systems, LEXIS/NEXIS, DIALOG, and others took advantage of automation, microforms, digitized text, keyword searching, and other vast improvements over paper-and-ink documents. Because they were marketing clearly superior products, private companies attracted a wide range of customers, including depository libraries, who were theoretically receiving the same basic content through the FDLP.

Now the private sector resents public sector involvement. Katz and Plocher (1989) believe that

for the private sector, information is a proprietary commodity, and publicly-funded government information is a threat. The continuing growth of commercial applications of government information fuels the information industry’s desire to expand its growing markets and restrain government provision of information products or services. (pp. 121-122)

Ebersole (1994) and Gellman (1996) — private sector advocates in the strongholds of patent information and case law — detail the arguments against expanding the role of the public sector in electronic information provision.

- Public sector involvement is unfair competition.
- The government would have a monopoly on the information.
- There would be a chilling effect on innovation and creativity; it would have an effect “depressive of private incentive to add value to raw government data” (Peyton, 1989, p. 109).
- The public sector is less efficient in terms of cost, a widely-accepted economic principle.
- The public sector is less efficient in dissemination. Two specific cases (a history of the Navy in World War II, and the Smyth report on atomic energy) in which commercial publication distribution and sales far outstripped their GPO equivalents were cited by the American Book Publishers Council in testimony before the House Committee on the Judiciary in November, 1963 (U.S. Congress, 1978b).
- Historically, the government has been an unreliable supplier.

- Services and products would be wastefully duplicated, squandering tax money.
- They have a prior claim, because they were there first and have already made capital investments and created jobs.
- Government involvement is politically and socially dangerous; the government might engage in surveillance or censorship.

The last two arguments have been ably addressed by public information advocate James Love, who said of restricting public sector involvement on prior-claim grounds: “you are going to have basically a treasure hunt for information products by people that want to get there first, stake out their claim . . . it will work like the Mining Act. You are there, stake out your claim, you discovered the product, and nobody else can develop it,” and also, “in a clever twist of logic, the vendors have argued that in order to protect the public’s right-to-know, it must prevent the public from having online access to Government data bases. Congress should not be misled by such arguments” (cited in U.S. Congress, 1991, pp. 86, 78). The ALA has also responded to the “politically dangerous” argument in a statement by then president Patricia Berger addressed to the Senate Committee on Governmental Affairs: “[A]s more and more private-sector firms come under the control of foreign-owned conglomerates, primary reliance on the private sector for public access to government information becomes questionable and potentially dangerous” (cited in McIntosh, 1990, p. C-8). The issues of competition and duplication will be explored below.

The public sector’s concern is that there are “public good” issues that market forces will not satisfy. As the ALA (1986) warned, “it must be understood that an information need is not always synonymous with the existence of an information market” (p. 100).

- In the market, most information is perishable. But the ongoing health of a democratic society requires information to be preserved for posterity. Archiving is neither easy nor cheap and requires a long-term perspective necessarily lacking in the private sector.
- Equitable no-cost access to public information is a crucial public good which has traditionally been provided through the FDLP, with low-cost access also protected through Title 44 limitations on GPO pricing.
- Important information may have a market so lim-

ited that it will not be worth the private sector’s while, but there will be no mechanism for more marketable information to subsidize it (the “cream-ing-the-top” argument).

- The eternal problem of “fugitive documents” is worsened without public sector oversight. (Fugitive documents are government documents which are never listed or distributed through the depository program, and therefore lost to research and archiving.)

IS PUBLIC SECTOR INVOLVEMENT “UNFAIR COMPETITION”?

The crux of the private sector’s attempt to inhibit the growth of government-provided information services rests on the argument of unfair competition. Ebersole (1994) explains that because government is exempt from tax but receives tax revenues, “in essence, government agencies are in a position to price their services at a level that would be considered ‘predatory pricing’ (selling below cost) if it were practiced by a private firm and would represent a cognizable violation of the antitrust laws” (p. 86). For this reason the government does not sell goods or services unless the public good requires it.

But unlike other types of goods or services, the very existence of government information is uniquely due to the existence of the government itself. Government information is not a raw resource whose origins are outside the scope of debate. The concept of unfair competition is therefore a poor argument. In fact, the government is supplying private industry with an already-developed resource at no cost. Katz and Plocher (1989) point out that “the information industry got its start from government information activities” and

Private businesses can . . . take advantage of government information at a fraction of the true development costs. The value of this subsidy has risen as the costs of information collection have increased and the costs of maintaining and manipulating data have fallen . . . Given this relationship between government and the information industry, neither the ideologues nor the industry apologists can credibly refer to the efficiencies of the information marketplace. Likewise, claims of unfair subsidies and claims that the public is treating information as a “free good” are ludicrous. Public money, which supports government information activities, subsidizes the private sector. (pp. 122-123)

James Love provides some concrete examples:

The Federal Government has always played an important role in the development of the commercial data base vendor sector. For example, DIALOG was created by Lockheed under contracts from the Department of Defense. The Internal Revenue Service financed the development of commercial software to search IRS rulings. Mead Data Central is now using taxpayer funding to develop its searching routines for the SEC's new EDGAR data base. (cited in U.S. Congress, 1991, p. 81)

Moreover, the claim that public sector involvement will chill initiative and destroy existing jobs is based on questionable assumptions. When the government was already supplying information products, private companies successfully competed through the two main strategies mentioned above: repackaging and reselling the same basic information (copyright is not an issue), and adding value (new elements subject to copyright). These strategies have been exploited in many ways.

Repackaging/Reselling

- Private companies can offer better customer service. For example, the GPO sales program requires pre-payment, does not permit standing orders, and can be difficult or impossible to reach over the phone. Companies like Claitor's and Bernan draw customers by making it easier to transact business with them.
- The greater cost efficiency of the private sector, augmented in some cases by increased volume, can permit selling at competitive prices. Robert Claitor testified to the Senate Committee on Rules and Administration that "[w]e sell at the same price as GPO, and some of our competitors in this arena sell even lower Over 100,000 copies of *Occupational Outlook Handbook* are sold by reprint houses like ourselves in total compared to some 30,000 or so sold by GPO" (cited in U.S. Congress, 1996, p. 145).
- The private sector can develop its customer base through better and more aggressive marketing.
- Private companies have unfortunately proved to be better collectors and suppliers of government information than GPO, which is notoriously plagued by fugitive documents. Despite years of complaints and struggles around these issues, an article by Wells and Walker (1997) entitled "A Comparison of Microfiche Produced by the U.S. Government Printing Office and the Congress-

sional Information Service" reveals that during a two-year study, the CIS delivered 100% of the required publications, while GPO's fulfillment rate was only 83%, and that 74% of the titles were received from GPO over a month later than from CIS (56% more than two months later).

- The private sector can supply alternative versions of similar products to satisfy limited markets. For example, Claitor's for many years offered soft-cover versions of GPO publications to provide a cost savings to non-depository libraries and individuals; now they are offering publications in large print, and print versions of now-CD-ROM-only products like the *CLA Factbook*.

Added Value

- *Indexing*: Even keyword searching does not approach the power of intelligently-chosen access points, which rise in value as the size of the document or database increases.
- *Abstracting*: Again, as the number of documents under consideration increases, expertly-written abstracts become more essential to efficiently locating desired information.
- *Compiling, assembling, arranging, etc.*: The private sector is free to bring together information from disparate sources to create a synergistically-improved product.
- *Access software*: There are any number of possibilities in the design of searching, display, and analysis software, and powerful, sophisticated versions of these programs are already in high demand.

Some of these strategies can and must be used by the public sector as well, without providing unfair competition, because the alternative clearly penalizes the taxpayer with double payment and frustrates the public interest.

The public sector provision of government information must reach at least a minimum level of reliability and customer service or there is little point in providing it at all. Wells and Walker (1997) explain the shocking discrepancy between the GPO and CIS service they studied:

It is clear that certain committees have a much higher percentage of material not received by GPO. This could reflect either a lack of funding and staffing or a lack of commitment to making the information available to the public. CIS eliminates this problem

by sending someone to each committee to collect the information personally. (p. 221)

Amusingly, a Network Advisory Committee (1983) report speculated that the opposite would be true when comparing public and private sector provision, specifically NTIS versus ISI (Institute for Scientific Information): “[NTIS], as a government agency, probably has more clout than a private sector organization to ‘encourage’ federal agencies and private contractors to send materials to NTIS” (p. 15). If GPO as a government agency has the clout, it certainly has not been exercising it. The impassioned testimony by depository librarians and other concerned stakeholders to JCP exposes the fact that many agencies were simply violating Title 44, which has no enforcement “teeth.” Even a witness from Readex, a private company, said “it is neither the private sector nor the depository library’s responsibility to develop and maintain quality control for GPO” (U.S. Congress, 1991, pp. 102-103). Surely it would be better for the GPO or its replacement to purposely focus on adequately supplying a smaller subset of more crucial information and comprehensively listing bibliographic information for all documents, instead of allowing cuts to have overall degrading effects.²

Despite protestations from the IIA, some level of “value-added” enhancement must be provided by the government along with electronic data. There is a distinction between raw data and information, and data on its own is essentially useless for the general public. This is exactly why the private sector was delighted with the original OMB recommendation (quickly retracted) that agencies should take a “wholesaler” role and let the private sector take care of the “retail” end (McIntosh, 1990). The fallback IIA argument, as expressed by Eric Massant, is that each agency should only provide the software and indexing used internally, without considering what other audiences might want (U.S. Congress, 1996). But as an electronic information policy overview said,

An agency’s obligation to allow the public reasonable use of an electronic database will typically entail some upgrading of the public’s ability to access, copy, and manipulate data. An electronic information system can be worthless without the availability of reasonably sophisticated search capabilities. . . . A value-added search service is integral to the operation of a computerized database. (U.S. Congress, 1989, p. 184)

There is still plenty of room for additional, far more sophisticated enhancements to be developed by the private sector. “Government services tend to more of the

bread and butter, plain vanilla variety without necessarily all the additional value-added features or enhancements” (NAC, 1983, p. 19) does not exclude the service listed above.

CHANGES IN BALANCE

There have been many suggestions of how best to improve access to and dissemination of government information, outside the scope of this article.³ Whatever the outcome, whether or not the GPO will continue to supervise dissemination, it seems clear that there needs to be some form of centralized control over government information. As Betty Turock, then president of ALA, testified:

The probability of a cacophony of information sources and mediums for public access to Government information adds to the importance of central direction and coordination and the continued Federal commitment to funding that access and dissemination. (cited in U.S. Congress, 1996, p. 41)

Nonetheless, the model of information ecology proposed by McConnell (1996) — information is akin to a life form, an element of an ecosystem “most usefully created and sustained in its own niche, connected and interdependent” (p. 220) — suggests that there will continue to be many niches that can best be filled by the private sector.

Even David Peyton (1989) of the IIA says that “the situation should not be seen as either/or — either depositories enter the online era, or the government forbears from competing unfairly with the private sector” (pp. 109-110).

Senator Ted Stevens (R - Alaska), expressing the most common caveat, testified that “[y]ou have to understand the taxpayers cannot afford to provide everything to everybody in every format possible” (cited in U.S. Congress, 1991, p. 48). Nor can libraries afford to support and store everything, even if acquisition were free. The perfect government-supported information system, covering all formats at no cost for anyone, is a chimera. Where can the private sector be ready to fill needs that cannot be met through public-sector dissemination?

The private sector can provide formats no longer available through GPO sales or the FDLP. Some publishers have begun this process already, as discussed above, but the most promising area is probably small-volume or on-demand printing. Many concerns have been expressed about the printout burden to be placed

on libraries and individuals in the transition to an electronic FDLP. Standardized layout formats like Adobe Acrobat, already in wide use, combined with increasing printing technology, facilitate print reproduction of online documents. It is currently possible to have a single copy of a several-hundred-page book created and bound at a Kinko's or equivalent copy shop with a quality not too far removed from a GPO paperbound product, at a similar price. NTIS has already investigated establishing a process akin to this one; Donald Johnson said "we can ship that image of the requested document via Internet for a printout at a remote location of the customer's choice" (cited in U.S. Congress, 1996, p. 190). The outpouring of support from small printers for GPO's Internet bid postings included an e-mail dated April 23, 1996, from Barry Reischling of aBCD Printing Company, lauding the possibilities of "production printing from printfile transfers" (p. 342).

The outstanding tradition of private sector companies such as CIS providing extensive value-added products including indexing, abstracting, and compiling can thrive and expand. There is every reason to believe that society's information needs will continue to expand dramatically into the next century, and there will be a substantial market for sophisticated products. It is the nature of information to require ever more complex means to control, manipulate, and make sense of it as it mushrooms. Wider availability of government information should whet the public appetite for more.

Similarly, better alternatives to "plain vanilla" access and searching software should be in high demand. It does not take long for experienced World Wide Web users to discover the limitations of existing search engines and wish for better ones. Yet before actual experience, descriptions of the current search engines probably sound like everything that could be desired. Since time is a commodity for business, companies and others will be motivated to pay to retrieve information more efficiently, even if the government provides adequate access.

An overarching government information policy would help address problems which arise unnecessarily through lack of standardization of individual agency choices of what information to provide and how. This is the true source of wasteful duplication. The "modularization" of government information could help draw a clearer line between public and private arenas and aid both. Jones (1995) expressed the philosophical end of this change: "[I]t is this author's belief that if public access is seriously considered in the design and development of all information systems, then many of the prob-

lems currently experienced . . . could be significantly reduced" (p. 17), whereas the Superintendent of Documents addressed the need for standardization regardless of audience:

Costs for migration [to electronic dissemination] can be minimized by the adoption and use of open systems standards through the entire life cycle of information products, from the time the original source files are created by the publishing agencies to final preservation by NARA. (cited in U.S. Congress, 1996, p. 16)

Instead of the government creating a monopoly by providing public access itself, the real concern about monopoly is the trend toward agencies contracting with one company to create and market a copyrighted product, or one saddled with "copyright-like" controls. "Vital and valuable Federal information is being transferred from the public domain to organizations with exclusive distribution rights at an alarming rate," warned the Superintendent of Documents (cited in U.S. Congress, 1996, p. 10). Several egregious examples were explored in the 1996 hearings, but the problem has long existed. For example, in 1975 NASA wanted "the opportunity to enter into competitive negotiations with private publishing firms in exceptional cases so that selected NASA publications could receive the widest possible distribution" (U.S. Congress, 1975, p. 178). This violates the law and unfairly deprives other companies of the opportunity to compete. Despite the warning in OMB's revised Circular A-130 against these kinds of arrangements, agencies are making them anyway — perhaps because the request to avoid "arrangements that interfere with the availability of information dissemination products on a timely and equitable basis" leaves room for the argument that the publication is available as soon as published, to whomever wants to buy it (U.S. Office of Management and Budget, 1996).

The NTIS has exploited its legislated exemption to Section 105, whose rationale is that "NTIS is required to be as self-sustaining as possible, and not to force the general public to bear publishing costs that are for private benefit" (Copyright Act, 1976). The renaissance of NTIS under the direction of Donald Johnson has included aggressive expansion of its program, in what can be seen as a violation of the intent of Congress, into publishing arenas that have far more public appeal and relevance than the limited scope assumed in Section 105. At the same time, NTIS struggles to placate its critics in the library community by supplying copies of *Big Emerging Markets* to the FDLP only after public complaints,

and by offering full access to its document image database to depository libraries on the condition that the files be restricted to onsite use (U.S. Congress, 1996). Johnson showed his skill at deflecting uncomfortable questions, but it certainly seems disingenuous to claim that “[w]e don’t know what the phrase ‘copyright-like’ protections means” in a *written* response (p. 508)! There is no question that NTIS is doing a wonderful job of archiving and providing efficient access to specialized government information, especially now that its database is publicly available instead of only searchable through proprietary services. The problem arises when a mandate for cost recovery, combined with the laudable desire to expand services that are working, results in removing from the public domain government information that most assuredly belongs there.

NTIS is not the only agency required or inclined (due to budget restrictions) to provide information on a cost-recovery basis. Wayne Kelley, Superintendent of Documents, addressed this problem in his testimony:

Agencies need to understand that a cost-recovery requirement does not exempt them from their Title 44 FDLP obligations. However, even when agencies comply with Title 44 and provide access to depository libraries, they often act to protect their market by placing restrictions on what depositories can do with the information, i.e., no electronic re-dissemination, no networking, etc. One solution, which would not require changing the statutes which authorize/require cost recovery, would be for the Superintendent of Documents to reimburse agencies for the costs of FDLP usage out of the Salaries and Expenses appropriation which funds the FDLP. The more global solution would be to eliminate statutory requirements/authorizations for agencies to charge for their information products. (cited in U.S. Congress, 1996, pp. 349-350)

Another approach to ameliorating the problem in cases where authorizing bodies do approve such an exclusive arrangement was suggested by Marke (1967):

Instead of providing in the contract . . . that it agrees to refrain from publishing such work for sale or from authorizing others to do so . . . the government should include the following clause:

Any such copyrighted publication shall be subject to a royalty-free, non-exclusive, and irrevocable license to the government to reproduce [the materials], translate them, publish them, use and dispose of them and to authorize others to do so. (p. 65)

This at least would protect more of the public interest.

RESELLING FOR PROFIT: SUGGESTIONS

The first reaction to the idea that the private sector is profiting from reselling government information tends to be indignation. A typical exchange (undocumented, unfortunately) is quoted in Kling’s (1970) history of the GPO:

A private firm offered to publish the material at its own expense and supply the agency with several hundred copies. . . . In return, the firm wished to market the book commercially. . . . An Eastern senator, after listening patiently to the publisher’s testimony, said, “Sir, what you are saying is that if the government makes you a gift of an orchard, you will give the government a basket of apples.” (p. 166)

A strong attack on the privatization of government information by Gross (1991) complained, “in short, the government doesn’t just hand companies a license to print money, it buys them the paper and ink to do it” (p. 39).

Most interpret the intent of Section 505 to primarily benefit the public — i.e., end-users of the publications. Whether natural or legal persons, they are *using* government works to better govern themselves or as a *means* to the “pursuit of happiness.” Distinguishing between direct commercial use and profiting from *reuse* is a different issue from the “distinctions between private and commercial use” which Massant (1995) warns against. NTIS concerns which led to the exception in Section 105 were based on exactly this. In the 1975 hearings, the Department of Commerce gave the example of a 150-page publication which cost \$150,000 to create, whose price was then set at \$60 per copy: “anyone choosing to make and sell competing copies could do so for a fraction of this price” (U.S. Congress, 1975, p. 164). The government permits and even encourages this direct use of government information as a profit-generating resource with the primary aim of furthering the end-user goal through multiplication of the information product; “[t]he goal is effective implementation of a public service information activity. The market is not the standard — public service is” (Katz & Plocher, 1989, p. 124).

Copyright is a statutory, not a constitutional right, “which may be changed, enlarged, narrowed, or abolished altogether by Congress. . . . It is a law enacted not for the benefit of an individual or corporation, but for the public good” (U.S. Congress, 1975, pp. 185-186). It can be altered to meet society’s needs. In 1965, Dan

Lacy of the American Book Publishers Council even expressed the view that there is

a belief that copyright restricts or limits the circulation of a Government publication and that it may involve the “giveaway” of property created by public funds to a private publisher. In both these cases, it is the contrary that is likely to be true. . . . Copyrighting a work produced in the Government . . . asserts and defines the public’s ownership of that property and permits the Government to exact a full and just payment of royalties from any publisher who issues it so that the taxpayers can be reimbursed in whole or in part for their investment. . . . The objects of public policy in this area should . . . prevent any unjust exploitation of public property for private profit. (cited in U.S. Congress, 1978a, p. 320)

Though both the library and information community are opposed to the idea, with good reason, it nonetheless bears at least briefly exploring what benefits various copyright-like restriction *on reuse for profit* might have for the public good.

- Companies could choose between voluntarily restricting their prices to near what a public sector agency would charge, or paying a copyright-type royalty and setting as high a price as the market will bear. Theoretically an ideal market will drive prices to this level anyway: “marginal cost pricing will mean the price of uncopyrighted information will approximate the cost of reproduction. In theory, any higher price will attract other distributors who will be able to charge a lower price” (U.S. Congress, 1989, p. 174). The market does not always work this smoothly, but in theory then the private sector should not object. The successful competition of private publishers with the GPO, whose prices by law are limited to cost plus 50%, certainly indicates that there is plenty of room to eke out a profit on these terms.
- Although permitted to charge whatever they liked to the public at large, republishers could be required to offer their products to the FDLP at no charge or at a specified low cost.
- A benchmark to determine whether or not the private sector should be allowed/encouraged to exploit an information area could be based on how many companies are willing to work with an agency on what terms.
- To provide incentives to meet public information needs instead of adding burdens, a voucher-type

program for FDLs could be created. If a company met the special needs of a depository library, for example by providing print versions of desirable digitized documents, the library would use a voucher to acquire its product. The voucher or a set number of them would waive the copyright-like fee or restriction for that product.

Although the implementation of any such restrictions would probably create a bureaucratic morass and not have the desired effect, the voucher concept is similar in intent to the direct funding of depository libraries. Peyton (1989) advocates cash grants to FDLs to select materials at will: “[U]nrestricted aid would free depositories to add Federal funds to their own available funds to procure the best *mix* of content and format, and of primary and secondary materials according to their clientele’s profiles, needs, and wants” (p. 110). Interestingly, while this idea is often proposed by private-sector advocates, depository librarians themselves reject it. Donald Koeppe of ARL has stated that “I would most emphatically not want a subsidy in lieu of the depository for all sorts of reasons” (cited in U.S. Congress, 1979, p. 266). The Public Access Working Group reported specifically in regard to funding FDLP access to fee-recovery agency information, especially NTIS:

In the draft plan, the Government Printing Office takes the responsibility for paying the user fees for federal information that is not provided free to the public. While this idea solves some of the problems with fees, it creates three more. First, because the GPO is funded each year through the federal budget process, there is not guarantee that this transition will be funded, and subsequently, that these user fees could be paid each year. Second, while GPO may pay for the cost of providing access to the fee services for the depository libraries, the public would not be allowed to duplicate or retransmit this information. This leads to a third, very significant, problem — such an agreement essentially creates an agency copyright in non-copyrightable information and puts the GPO in the untenable position of enforcing restricted use of *public* information. (U.S. Congress, 1996, p. 483)

Perhaps a centrally-administered voucher program could combine the advantages of direct funding and the strengths of the current in-kind distribution program. The idea would be to reward the private sector for providing desirable products and services to the FDLP without placing an undue burden on libraries.

Another idea put forth by Perrit (1988) is that

the government should not compete if private sector prices are lower unless justified by special circumstances. But if private sector prices are higher, then the agency may consider distributing the information if there is an advantage in wide dissemination. (p. 626)

The GPO or a similar agency could monitor private sector prices on a continuing basis and provide competition if necessary to protect the public interest by keeping prices equitable. Vernon explains that “the principle here is that when you make available, at reasonable cost with good software, direct access or Internet access to these databases, the vendors do not charge as much” (cited in U.S. Congress, 1996, p. 55).

Another concern which needs to be addressed is the difficulty of distinguishing public domain government information from copyright-protected value enhancement in the electronic medium. As Betty Turock commented,

In electronic formats, it is difficult to separate the proprietary component of a database from the public information. As a result, contractors managing federal government information could attempt to restrict reproduction of public information that is available with enhancements in the databases they control, inhibiting researchers and others from downloading and analyzing data that is in the public domain. (cited in U.S. Congress, 1996, p. 380)

CONCLUSION

The private sector’s natural reaction to any information threat is to protect its existing turf. Essentially it is claiming scarcity, but so far we’ve seen, as with the repeated false alarms about cassette tape, video players, and so forth, that an information market tends to increase with availability. This is another lesson to be learned from the success of NTIS.⁴ Increased information literacy leads to requirements for more tools and dissatisfaction with a single option. In a comparison between an agency bulletin board and a commercial provider, a document librarian “said that she uses both the private and the public services, preferring to use *DIALOG* for more sophisticated searches” (McIntosh, 1990, p. 27). The private sector also complains that a government product will be inferior — but if that were the case, why would they have any problems selling a better one? The reality is that government competition may be needed to protect the public good.

So far government information has been widely ignored or underestimated and therefore difficult to obtain for the general public. The potential for marketing the wealth of resources already available, as well as new products to be created, is enormous. If the public sector is deprived by government competition of the opportunity to charge what the market will bear — which is a great deal for crucial information — there will be all the more incentive to increase profits through expanding the volume of sales. “[C]ompanies would then have to truly add value, not just sell back to us what we built with our own funds” (Gross, 1991, p. 41). As Daniel Boorstin, then Librarian of Congress, said to the Senate Committee on Rules and Administration, “[A]ggressive marketing . . . would . . . be a great service to the American public and would help us all profit from the energy, imagination, and expertise invested in government publications” (cited in U.S. Congress, 1979, p. 145).

James Love said it best:

Innovative and efficient private firms will find ways to sell information products in electronic formats, as they have for hundreds of years in paper formats. The freedom to publish Federal information will prevent abuses far more efficiently than a policy of denying public online access to Government data bases.

It is the freedom to publish which protects the information industry. If the Government publishes something, and the information company can’t compete with the Government, I don’t think I have any compassion for the private sector. If they can’t put the information in a more valuable and interesting way than the Government, it is not a problem. But believe me, they will. In fact, they will flourish even more. (cited in U.S. Congress, 1996, pp. 78, 88)

NOTES

1. USC 44, §505. Sale of duplicate plates. The Public Printer shall sell, under regulations of the Joint Committee on Printing to persons who may apply, additional or duplicate stereotype or electrotype plates from which a Government publication is printed, at a price not to exceed the cost of composition, the metal, and making to the Government, plus 10 per centum, and the full amount of the price shall be paid when the order is filed.
2. For a detailed analysis of how budget cuts affected the FDL’s efficiency, see Schreiber (1994).
3. See, for example, *Journal of Government Information* 23(3) and 23(4).
4. See Tulis and Zink (1994) and Shill (1996).

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