

This is a pre-copy-editing, author-produced PDF of an article accepted for publication in *International Journal of Law and Information Technology* following peer review. The definitive publisher-authenticated version *International Journal of Law and Information Technology*, Vol. 6, Issue 1, pp. 1-33, 1998 is available online at: <http://ijlit.oxfordjournals.org/>.

Final Draft 3 October 1997

INFORMATION ACCESS POLICY AND CROWN COPYRIGHT REGULATION IN THE ELECTRONIC AGE - WHICH WAY FORWARD?

STEPHEN SAXBY ¹

1. INTRODUCTION

In one sense it is remarkable just how much progress has been made during the 1990's in the delivery of official information to the public. Just three years ago the former Conservative Government, in its first official comment on the implications of the Internet for the provision of public sector services, discussed tentative ideas for exploiting the *Information Superhighway* for the public good. ² Since then government departments and agencies, together with business and commerce, have made significant use of the digital network, most notably the Internet to advertise services and deliver basic information to the public. Nevertheless, despite this and the associated relaxations in Crown copyright that have come with it, it is not clear that the parameters of future information policy have been defined. It is true that a significant amount of official information can now be retrieved electronically but fundamental decisions by government about its precise intent in this area have yet to be made. The position has been further complicated by a new UK government whose information policy is currently in its formative stage.

It is perhaps inevitable that what started as a simple proposition - the possibility that government

¹ Dr. Stephen Saxby, Reader in Information Technology Law, Southampton University. He is a Correspondent Member of the European Commission's Legal Advisory Board and a member of its Task Force on access to official information.

I would like to thank the following for their helpful criticism and comment upon an earlier draft of this paper: John Horne, Secretary, Bar Services & IT Committee, The Bar Council; Henry Manisty, Head of Government and Regulatory Affairs, Reuters Ltd; Professor Charles Oppenheim, International Institute for Electronic Library Research, De Monfort University, Milton Keynes; and Carol Tullo, Controller, Her Majesty's Stationery Office.

² *Information Superhighways - Opportunities for Public Sector Applications in the UK*, A Government Consultative Report, (CCTA, May 1994).

might use the new communications medium of the electronic network to deliver access to official information - should have become a more complex issue once detailed choices began to emerge. Was the question merely one of the improved delivery of transactional services between government and citizen or was a wider democratic objective involved *viz.*, using the new electronic media to advance the political dialogue between government and the governed through enhanced access to politicians, Parliamentary proceedings and other official information? Could discussion of these matters take place on its own merits or was a benefit to be gained by co-ordinating action in some form of national information policy? If these issues were important to what extent should policy development be driven so as to promote the UK information market and particularly the prospects for enhanced commercial input into the above? In addition, how did UK approaches towards these questions compare with emerging European Union views on access and tradeable information policy? This article explores these questions and considers the choices that may lie ahead.

2. AGENDA FOR ACTION

When the Internet exploded into the public domain in the early 1990's it was not surprising that public administrations around the world failed, in the first instance, to grasp its implications. As is now well known, the Internet was not a creation of any policy but a scientific advance within the United States defence industry, subsequently brought into the public domain by a combination of technological advance and the production and release of essential software and protocols. For both government and the public at large its emergence was symbolic of the *Information Society*. Whilst this name had been in general use as a societal descriptor since the launch of the personal computer in the late 1970's, the ordinary person lacked a tangible symbol with which to identify with the term. The economic impact of the personal computer was evidence of a shift from industrial to information markets, but it lacked the firepower to convince people that society was irrevocably committed to a market and social environment in which information technology was dominant. The Internet gave it that benchmark as people began to identify with real change in their social and working lives, induced by this transformation in digital communication and information processing.

The United States was first to respond with its National Information Infrastructure (NII) proposal that galvanised a number of policy initiatives within an action plan.³ Fundamental to the plan was the successful economic integration of the telecommunications, hardware, software and information industries to produce a 'universal service' within a 'seamless, interactive, user driven ... network of networks'.⁴ Other nations followed suit, as did the European Union with the

³ *National Information Infrastructure - Agenda for Action*, (1993). See <<http://iitf.doc.gov>>. In February 1993 President Clinton established a Federal inter-agency Information Infrastructure Task Force (IITF) 'to articulate and implement the Administration's vision for the National Information Infrastructure.' The Task Force operates under the aegis of the White House Office of Science and Technology Policy and the National Economic Council.

⁴ *Agenda for Action* specified nine goals. Others included promoting private sector investment, technological innovation, information security and network reliability, protection of intellectual property rights, co-ordination with other levels of government and with other nations, improved management of the radio spectrum and access to government information.

*Bangemann plan*⁵ and the G7 with its discussion of the Global Information Infrastructure.⁶ Perhaps inevitably, the initial pace and excitement of these initiatives gave way to a less dramatic process as governments began to recognise the difficulties of integrating political objectives into practical realities of benefit to their citizens. Work continues today to bring these policy initiatives to fruition.

In the UK, whilst no dramatic initiatives were announced, important policy foundations were nevertheless being laid. During the 1980's Mrs Thatcher began a privatisation process, including civil service reforms, that were part of the Government's *competitiveness* agenda. As early as 1983 a report of the Information Technology Advisory Panel (ITAP) recommended, *inter alia*, that government should use its information gathering and supply activities to stimulate new IT-based information services; that copyright legislation be reformed; that more academic study of this expanding commercial area be encouraged; and that the Government consider instigating an awareness initiative along the lines of an *IT Year* for Britain.⁷ Later on the emphasis on competitiveness embraced 'research and technology *foresight*,' designed to assist long-term strategic decision-making by identifying the markets and technologies likely to surface in the next 10-20 years and the actions required to exploit them.⁸ One aim of the *Foresight* policy was to draw upon the combined expertise of industrialists, scientists, engineers and government to support private sector and academic collaboration in what it defined as priority, intermediate and emerging areas of research.

In the 1990's, the UK Government began to link a successful science, engineering and technology strategy to the need to create an information-rich society offering equal access and opportunity for the individual linked to progress 'across the whole range of human endeavour: educational, intellectual, medical, environmental, social, economic and cultural.'⁹ Despite this

⁵ '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 of Official Publications of the EC, 1995). Martin Bangemann was, at the time, Commissioner for Industry and Telecommunications.

⁶ 'G7 Ministerial Conference on the Global Information Society - Ministerial Conference Summary,' Brussels 25-26 February 1995 (Luxembourg, Office for Official Publications of the EC, 1995). The conference aim was to 'explore the critical issues related to the development of a worldwide information society, as a basis for economic growth and stability, for creating jobs and enhancing living standards.'

⁷ *Making a Business of Information - A Survey of New Opportunities*. A Report by the Information Technology Advisory Panel, Cabinet Office (London: HMSO, 1983). The Report was the catalyst for the formation, in 1984, of the Confederation of Information Communication Industries - CICI.

⁸ *Progress through Partnership*, Report from the Steering Group of the Technology Foresight Programme 1995, Office of Science and Technology (London, HMSO, 1995).

⁹ *Realising our Potential - A Strategy for Science, Engineering and Technology*, Cm 2250

groundwork, it was not until 1996 that the Government considered head-on the policy issues associated with the 'development of the Information Society in the UK.' This occurred as a response to a House of Lords Select Committee Report on the Information Society.¹⁰ In its Report,¹¹ the Select Committee described the digital and communications revolution as one of the most important technological developments of the 20th Century. It pointed out that while there was plenty of UK activity working towards the 'Information Superhighways of the future' a campaign was needed to bring the concept into reality. It recommended that the work of the Cabinet Office in the area be given a higher profile¹² with greater public openness and that a UK Information Society Task Force be set up drawn from government, industry, commerce, consumer and academic interests to identify 'barriers to the development of the UK Information Society, and recommend appropriate remedies.'¹³ The proposal was modelled on the US Advisory Council on the NII which reported to the US Secretary of Commerce.¹⁴

The Select Committee discussed how information policy might be classified. For example, policies could be distinguished according to the audience they were meant to affect (central government, manufacturing industry, citizens *etc.*) or by the method of implementation. Applying the *method* model, policy could be developed by legislation - governing information handling and the information industries; regulation - policies that determined the degree and form of regulation applicable to particular industries *eg.*, telecommunications and broadcasting; infrastructure development - from development of telecommunications infrastructure to fiscal support or direct subsidy of particular information industries; service provision - policies for the development and delivery of government information resources; education policies - to support the market and enhance information literacy; and cultural information policies - for the preservation, dissemination and protection of the nation's culture. It concluded that 'as a nation we have failed to identify our aims and objectives for becoming an Information Society' and

(London, HMSO, 1993).

¹⁰ *Information Society: Agenda for Action in the UK - Government Response to the Report by the House of Lords Select Committee on Science and Technology*, Cm 3450 (London, The Stationery Office Ltd., 1996). Internet address: <<http://www.dti.gov.uk>>.

¹¹ *Information Society: Agenda for Action in the UK*, 5th Report, Select Committee on Science and Technology, HL 77 (1995/96) (London, HMSO, 1996). This was the first Select Committee Report from either House to be published electronically and to identify an E-mail address. The Internet reference is:

<<http://www.hmsoinfo.gov.uk/hmso/document/inforsoc.htm>>.

The E-mail address is: hol.science&tech@parliament.uk

¹² *Ibid.*, para 5.6. The Select Committee was referring to the possibility of raising the profile of GEN 37 - a Cabinet Committee on Information Technology established by John Major.

¹³ *Ibid.*, para 5.13.

¹⁴ *Ibid.*, paras 5.4 and 6.4.

proposed its agenda for action accordingly.¹⁵

While limited in its recommendations, the Select Committee identified some important issues relating to government information resources. It noted that government was probably the largest collector, analyst, provider and disseminator of information in the UK and that the policies it adopted in this respect would impact upon the efficiency of government as a whole.¹⁶ Policies would have to be developed in respect of the delivery of such information to the public; how far and under what conditions such data should be available for third party exploitation and the extent to which the potential of the new technologies for the expansion of electronic democracy might be realised.¹⁷

Referring to the Internet, the Select Committee criticised the lack of a clear policy in respect of electronic publication of official information. Departments were 'free to pick and choose what information they publish' and conflicts existed 'between the need for departments and agencies to maximise revenues and the desire to make government information widely and freely available.' There were also some presentational problems.¹⁸ It recommended that a framework of minimum standards be established for the electronic publication of information. These standards would cover the categories of information involved, the timing of electronic release, the style of presentation and a timetable for implementation of the proposals.¹⁹ In response to criticisms by witnesses that the Crown copyright regime, despite some relaxations, continued to inhibit the availability of official information, the Select Committee recommended the establishment of a Copyright Working Party within the Department of Trade and Industry to report on the issue.²⁰

In its reply, in November 1996, the Government recognised it had an important role to play in researching into and developing public understanding in the UK of the 'potential opportunities and risks of the Information Society.'²¹ It announced the establishment of a cross-departmental Information Society Initiative (ISI) to enhance the UK response. Programmes and activities to be pursued within the ISI would include those in 'support of business, in the field of education, proposals for the electronic delivery of government services, and a major forthcoming initiative *IT for All*, to increase public awareness and use of information and communication technologies.'

²²

¹⁵ *Ibid.*, paras 2.4 and 2.7.

¹⁶ *Ibid.*, para 2.6.

¹⁷ *Ibid.*, paras 2.7-2.9.

¹⁸ *Ibid.*, para 5.59.

¹⁹ *Ibid.*, para 5.61.

²⁰ *Ibid.*, para 5.63.

²¹ *Op. cit.*, n 10 p 1.

²² *Ibid.*, p 1.

With regard to the specific recommendations of the Select Committee, the Government recognised the importance of the work of the Cabinet Committee (GEN 37), which coordinates information technology across government, but declared that constitutional rules forbade the direct release of information relating to its proceedings. However, policy announcements and associated background detail would be published when available in line with the *Code of Practice on Access to Government Information*.²³ On the other hand, the Government opposed, 'on balance,' the formation of a UK Information Society Task Force to identify impediments to 'the development of the UK Information Society.' This suggested a 'top-down culture to the Information Society' and assumed that a master plan, produced by an eminent group of advisers, would be the best way to determine how to harness innovation in the public and private sectors.²⁴ Existing arrangements already ensured a variety of input into the debate.²⁵

Referring to the Select Committee's recommendations on access to official information, the Government agreed that information of general public interest should be available electronically. It noted the progress already made on two sites: <www.open.gov.uk> and <www.parliament.uk>. Between them these sites incorporated information from nearly 400 public sector organisations as well as Official Reports of both Houses of Parliament, Hansard and other House documents.²⁶ The Government agreed that standards should be imposed on the accuracy, timeliness and presentation of electronic publications but it rejected the recommendation that the categories of information to be published electronically be incorporated as well. This was best left to individual departments and agencies to determine. However, it did recognise that on *open government* and *competitiveness* grounds there was a need to consider the future management of Crown copyright.²⁷ The Government's comments on Crown copyright were made shortly after the privatisation of Her Majesty's Stationery Office (HMSO) in 1996.

3. THE GREEN PAPER: *government.direct*

Simultaneous to the publication of *Agenda for Action*, the Government produced a Green Paper setting out a proposed strategy for the electronic delivery of government services.²⁸

²³ *Ibid.*, para 6.1. See: *Open Government Code of Practice on Access to Government Information*, Second Edition (London, The Stationery Office Ltd., 1997).

²⁴ *Ibid.*, paras 6.3-6.5.

²⁵ For example, the Multi-Media Industry Advisory Group, the National Information Infrastructure Task Force of the Federal of Electronics Industry, and the IT, Electronics and Communications Technology Foresight Panel.

²⁶ *Ibid.*, para 6.14.

²⁷ *Ibid.*, para 6.16.

²⁸ *government.direct*, Cm 3438 (London: The Stationery Office Ltd., 1996). The Green Paper was also published on the Government's <www.open.gov.uk> Internet web site and on CD-Rom in order 'to make the process of reviewing the Green Paper simpler and more efficient.'

In announcing it, the then Minister for Public Service, Roger Freeman MP, indicated that it formed part of a series of reforms to the public service that began with the creation of *Next Steps* Executive Agencies and continued with the establishment of a *Citizen's Charter* and the *Deregulation Initiative*.²⁹ The present context of the proposals lay in the Government's *Information Society Initiative* announced in February 1996 by President of the Board of Trade, Ian Lang MP.³⁰ The primary objective of the ISI was to promote awareness, across all sectors, of the business benefits of information and communication technologies.

The thrust of the Green Paper was to seek public reaction to its proposals for the electronic delivery of central government services in the UK. This incorporated new ways of working and sharing information between government departments. The services under consideration included the provision of information, collection of taxes, the grant of licences, administration of regulations, paying of grants and benefits, collecting and analysing statistics, and procuring goods and services. In the Government's view, the gain to be found in pursuing this policy lay in the provision of better and more efficient services to business and to citizens, improved government efficiency and openness of administration and substantial cost savings to the taxpayer.³¹ The Green Paper gave examples of the already extensive use of computers to improve the efficiency of its services, examined best practice around the world and identified the principles that would lead discussion forward. As part of the consultation process it raised a series of questions for comment and established a programme of pilot projects, in partnership with industry, to assess public reaction, risks and costs.³² The Government also declared its interest in securing private sector investment under the *Private Finance Initiative* to develop the ideas further.

In the Green Paper the Government took the opportunity to extend the debate about access policy to official information commenced in *Agenda for Action*:

The strategy should rest on a clear commitment to make information of all kinds available electronically. This should cover the whole range of government information,

²⁹ The *Next Steps* programme began with the Ibbs Report: *Improving Management in Government: The Next Steps*, A Report to the Prime Minister (London, HMSO), 1988). The *Citizen's Charter* was an innovation of John Major introduced in July 1991 as a ten year programme to improve the quality of public services. The aim of the *Deregulation Initiative* is to reduce significantly the level of government regulation of business. See further: The Deregulation and Contracting Out Act 1994 (c 40).

³⁰ See: Department of Trade and Industry Press Notice, P/96/107. The PFI seeks private sector capital for public projects offering the investor the prospect of future returns on the investment.

³¹ *Ibid.*, para 4.1.

³² Three projects were commenced after publication of the Green Paper: the placing of public access terminals in a variety of locations providing tax information; business access to government forms and leaflets via an Internet service; and demonstration of a land and property information service for Scotland.

barring that which needs to be withheld to protect personal or commercial confidentiality or in the public interest. Government should organise its information holding systematically so that publicly-available data is readily accessible electronically in forms which will assist the improvement of UK competitiveness and open government.³³

In determining what digital information services to provide, and the arrangements to go with it, the Government raised questions about the needs of individuals, as citizens and taxpayers, as well as business. The Government suggested that practical information enabling people to find out about public services and to complain if necessary should be placed on the Internet. For the first time the Government also acknowledged the value to the democratic process of giving the public access to the information used in the formation of government policy.³⁴

For the benefit of business, the issue was how to provide an information service to improve UK national competitiveness. Better targeted information, of improved quality and speed of delivery, could contribute to this. For example, a geographical database which organised data from different sources that was relevant to business needs might be advantageous.³⁵ A further aspect involved how to improve the national economy by encouraging new, commercial information products based on government information.³⁶ The forthcoming review of the management of Crown copyright would be conducted with this objective in mind.

4. DISCUSSION

It is clear that, while there is still much to be done in terms of information policy development, the former Government can be given some credit for its attempts to commence the process. In doing so it was supported both within Parliament, in particular through the work of the House of Lords Science and Technology Select Committee and in the Cabinet Office, through the Office of Public Service. Both in the wider discussion on how to promote the Information Society in the UK and more specifically how to deliver central government services to the nation, the Government asserted principles of competitiveness, efficiency and accessibility as potentially central to its strategy.

This predominantly commercial approach is entirely consistent with a Conservative administration which, from 1979, was driven by its ideological belief that market forces were preferable to public sector monopolies. Throughout this period it defined public service reform on this basis while continuing to address the *open government* issue in traditional constitutional

³³ *Ibid.*, para 5.1.

³⁴ *Ibid.*, para 6.17.

³⁵ The Green Paper, at para 6.15, gave as an example the collation of information on transport infrastructure, local labour market conditions, environmental planning guidelines and grants. If this were available electronically in respect of particular locations around the UK it might increase the attractiveness of the UK to inward investment.

³⁶ *Ibid.*, para 6.16.

terms, through creation of codes of practice rather than by grant of enforceable rights and duties. Today these issues converge because, critical both to a successful information economy and to improving efficiency and openness in government administration, is the role of the public and private sector in the delivery of information products and services. Having commenced the debate with the *government.direct* Green Paper, the new Government must now respond to this issue. But if a successful partnership between the public and private sector is to be forged for this purpose, what form should it take and what reforms to Crown copyright are needed? Moreover, how are these changes to be integrated within the European Union where removal of impediments to the development of the information market is central to Commission policy for the Single Market?

5. ELECTRONIC DELIVERY OF GOVERNMENT INFORMATION

Despite the previous Government's economic attraction to market forces and private sector participation, the information industry viewed government actions with suspicion. A spokesperson commented:

In my own country [UK], many in the information marketplace ruefully reflect that the expression *open government* is usually deployed by someone about to propose a new set of rules for the regulation of access to information, and that privatization of information-holding government entities does not mean the release of information so much as the possibility of the creation of new private sector monopolies.³⁷

The historical reasons for this suspicion are evident and relate in part to the absence, in the UK, of any constitutional responsibility on the part of government to guarantee free speech or to promote rights of access to official information.³⁸ The management of Crown and Parliamentary copyright ensured that ministerial supervision was kept over the publication of official information through the administrative control exercised by HMSO. Although a sympathetic licensing regime developed,³⁹ the principle that government was entitled to manage the process was never surrendered. Following the privatization of most of HMSO in 1996, a residual HMSO was retained within government to continue supervision and oversight of certain Queen's printer functions.⁴⁰ But this time the Government went a stage further. Recognising the strong feelings

³⁷ David R Worlock, President of the Council, European Information Industry Association in paper entitled: 'Opportunities and Constraints of Public Data Commercialisation - A Private Company Viewpoint,' presented at the EC Symposium: *Access to Public Information - A Key to Commercial Growth and Electronic Democracy*, Stockholm 27/28 June 1996.

³⁸ This compares with the United States where the First Amendment to the Constitution forbids Congress to enact legislation which abridges freedom of speech or of the press. Comment by Gellman, *Ibid.*, in his paper entitled, 'The American Model of Access to and Dissemination of Public Information.'

³⁹ See Section 7, *post*.

⁴⁰ Residual HMSO remains within government headed by a Controller - Carol Tullo. Her authority derives from Royal Letters Patent which is conferred on each succeeding Controller.

that existed in relation to Crown copyright,⁴¹ it indicated that a review would be established to see 'how Crown copyright can best meet the challenges posed by rapid advances in electronic information systems,'⁴² and, in due course, to publish a Green Paper. Co-ordination of the review would take place within the Office of Public Service.⁴³ Modernisation rather than abolition was envisaged, given the statement, repeated in *government.direct*, that it was the future management of Crown copyright, rather than its root and branch reform, that was under review.⁴⁴

The Government first attempted to define the respective roles of the public and private sector in the delivery of official information in 1986 when it published a set of guidelines through the Department of Trade and Industry. The document, *Government-Held Tradeable Information - Guidelines for Government Departments in Dealing with the Private Sector*,⁴⁵ embodied a recommendation of the earlier ITAP Report⁴⁶ on information policy, that 'Government should recognise the current economic significance of the tradeable information sector.'⁴⁷ The rationale of the *Guidelines* was that information was a commodity which had value. Collaboration with the private sector could promote growth in the development of a UK electronic information services market while fulfilling government objectives in respect of dissemination and access. A key element of the policy required departments to carry out information audits for tradeable information and for those departments to be responsible for any agreements reached with the private sector for its commercial exploitation. In 1996, in its response to *Agenda for Action*, the Government again re-stated its preference for a devolved data selection policy in which departments and agencies would judge what information should be chosen for on-line publication on the Internet.⁴⁸

The latter is also responsible for the administration of Parliamentary copyright under agreement reached with senior House officials. The office now operates as a Division within the Machinery of Government and Standards Group of the Cabinet Office. Day-to-day administration is handled by the Copyright Unit which reports to the Controller.

⁴¹ As reflected in the evidence presented to the House of Lords Science and Technology Select Committee (HL Paper 77-1) and in the responses to the *government.direct* Green Paper.

⁴² Cabinet Office - Office of Public Service News Release, OPS 164/96, 6 November 1996.

⁴³ *Ibid.*

⁴⁴ *Ibid.* The new Government has since indicated its intention to proceed with publication of the Crown copyright Green Paper later in 1997. (source: Cabinet Office correspondence dated 28 May 1997).

⁴⁵ Published by the Information Technology Division of the DTI in September 1986. A second edition appeared in 1990.

⁴⁶ *Op. cit.*, n 7.

⁴⁷ *Ibid.*, para 6.

⁴⁸ *Op. cit.*, n 10 para 6.14.

The *Guidelines* achieved only limited success, in part because the flexibility built into them enabled departments to interpret the *Guidelines* in their own way. Although the recommendation was that, when negotiating with the information industry, 'departments should normally do so on a non-exclusive basis,'⁴⁹ this did not prevent the Inland Revenue, in 1995, from publishing its guidance manuals under an exclusive licence with legal publisher Tolley. Subsequently, when Butterworths, in a joint venture, reproduced portions of the guidance on compact-disk, legal action commenced which led to a private out-of-court accommodation.⁵⁰ In another instance, attempts over a ten year period to establish the first on-line business register of trading entities recorded as paying Value Added Tax, which would have provided information of the number of small and medium sized enterprises operating in the UK, other than limited companies, was consistently turned down by HM Customs & Excise. It did so first on grounds of Crown copyright but, when this was rebutted, argued against on contractual terms (disclosure would breach the implied contract with the taxpayer); secrecy (the data might be subject to the UK's Official Secrets legislation); and finally on privacy and security grounds, despite the fact that the proposed listing would only have contained the names and addresses of the companies currently paying the tax.⁵¹

6. ASSESSMENT OF CROWN COPYRIGHT

Up to now the rationale of government policy towards Crown copyright regulation of official information has been that, in maximizing public access, a return to the taxpayer should be forthcoming. If the information industry wanted to engage in commercial value-added exploitation of that data for profit, a return should be obtained by the Exchequer. The Government has also always considered it right to supervise, albeit through a liberal licensing regime, the use and re-use to which official information is put, to ensure that appropriate standards of authentication and use are met. Until privatization of HMSO in 1996, a subsidiary result of the continued existence of the regime was that HMSO remained in a strong position to seek instructions from a customer department to publish official works, although private sector publishers were sometimes chosen, very often following a market testing exercise.

Although the evident frustrations of the Information Industry about the working of the regime led to some improvement in the licensing arrangements during the 1990's, it is the Internet that now represents the most potent force for reform:

It is ironical, then, that the mechanism most likely to break this ten-year log jam is the Internet. The enthusiasm of politicians for what they are now alone in referring to as the information superhighway has led to the placement of considerable bodies of government

⁴⁹ *Op. cit.*, n 45, Guideline 12.

⁵⁰ See further: Saxby, 'The Development of UK Government Policy towards the Commercialization of Official Information,' (1996) *International Journal of Law and Information Technology*, Vol 4 No 3.

⁵¹ *Op. cit.*, n 37 p 3.

data onto Web sites with, reportedly, much more to come....Doing this in an open way and still seeking to maintain a regulatory regime, poses a major contradiction. And it is clear that once citizens, businesses and value-adding information companies get access to information feeds in this way, they are participating in liberties that they will be loath to give up at any future point. And, of course, they are doing so in a licence-free environment. All previous regimes proposed over the past ten years have sought to create, even for primary source data, some form of licensing environment which allows government to retain a measure of control over re-use. Since this is plainly impossible to enforce in the Internet environment, it is clear that this may be abandoned as well.⁵²

Additional pressure to institute root and branch reform of Crown copyright policy came in the responses to *government.direct* and the Government's announcement of a forthcoming Green Paper on Crown copyright. In his statement announcing the terms of the review Roger Freeman, the then Chancellor of the Duchy of Lancaster, re-affirmed the Government's three-fold policy objective for Crown copyright which was to maximise public access to official information, protect the taxpayer's interest and preserve the integrity of Crown copyright material.⁵³ Proposals for reform must conform with this agenda. The responses of Reuters Ltd and the Bar Council to *government.direct* and to the latest licensing arrangements for Crown copyright illustrate a number of the concerns.

In its analysis of the position, the provider of business information services, Reuters Ltd, challenged the whole basis of Crown copyright arguing that the present policy simply failed to achieve these objectives. Maximising public access required a robust competitive market where large and small publishers could range freely over government information to provide publications their clients wanted. The policy of allowing government departments to determine which material would be released and on what terms, demonstrated a failure to 'understand the difficulties caused to electronic publishers by a lack of uniformity across government departments in tariff arrangements and data standards.'⁵⁴ With regard to the taxpayer's return, Cabinet Office indications were that the income from electronic publishing licences was running at no more than £2 million per annum. Given the immense cost of collecting and processing government information this was a very poor return, not to mention the cost of the bureaucracy to administer the licensing process. On the third point, that of protecting the integrity of government information, this was a legitimate issue but one that could be settled by opening up the activity to full competition. If government information was used in an incorrect, misleading, defamatory or fraudulent manner this was something that could be dealt with in the normal way through civil and criminal remedies.

Reuters called upon the Government to unlock access to official information. It was remarkable that, whereas the UK was ranked second only to the United States in the private electronic

⁵² *Ibid.*, p 5.

⁵³ *Op. cit.*, n 42.

⁵⁴ Presentation entitled: 'The Private Sector and Government Information' by Henry Manisty, Head of Government & Regulatory Affairs, Reuters Ltd to the ICIA, February 1997.

publishing sector, it had failed to establish a significant presence in this important area of information supply, despite the enormous volume of official information potentially available. Outside the specialist world of legal publishing, the private sector 'was almost completely absent from the business of publishing government or parliamentary data.'⁵⁵ Part of the problem was that Crown copyright licencing policy required civil servants to become commercial intellectual property rights managers. Without effective training or guidance they had to judge the value of data to a prospective licensee without a standard price list to work from and on an *ad hoc* basis in which no two licence negotiations were the same. In defence of its position HMSO would likely argue that its Copyright Unit has, for a number of years, operated from a series of standard charges and contract terms to ensure consistency across the board.

These criticisms of the Crown copyright licensing regime have only partly been mitigated as a result of the latest set of guidance notices and licensing arrangements issued to take account of the then imminent privatisation of HMSO's publishing division.⁵⁶ Standard licence terms were issued permitting the holder to reproduce quasi-legislative material in electronic and microform *value added* format,⁵⁷ provided an application was submitted and countersigned by the Controller.⁵⁸ Quasi-legislative materials were those which 'explained the framework within which legislative provisions were administered and the regulatory practices followed by public servants within that framework.'⁵⁹ This included statutory codes of practice, departmental circulars, court rules and forms, but excluded a large number of materials ranging from the Highway Code, the Building Regulations and all statistical data to material originated by NHS Estates, the Building Research Establishment, the Health and Safety Executive, Ordnance Survey and the UK Hydrographic Office.⁶⁰

Obtaining the licence required the applicant to complete a form to be sent to the Controller of HMSO. The licence would be rescinded if material published was illegal, encouraged offensive, immoral or anti-social behaviour or contained out-of-date, misleading or inaccurate information. The grant of the licence was not free. Applicants would be required to meet the costs of

⁵⁵ *Ibid.*, p 2.

⁵⁶ Announced by the Chancellor of the Duchy of Lancaster, Roger Freeman, on 29 October 1996.

⁵⁷ Described as: 'material in which the basic official text reproduced has had value added to it by compilation of and collected editions of related texts, the provision of analysis, commentary, annotations, indexing or cross-referencing or otherwise.'

⁵⁸ Para 5(1)(a), *Notice to Publishers: Reproduction of Crown Copyright Quasi-Legislative Material in Electronic and Micrographic Form* (Reference QLM/3) effective as from 1 November 1996.

⁵⁹ *Ibid.*, para 2.1

⁶⁰ *Ibid.*

obtaining the licensed material and a formula-based royalty would have to be paid.⁶¹ To calculate such payment the applicant would be required to 'keep full records of the electronic publications and services sold by and supplied by him which contain licensed material' and to notify the Controller in writing of any new launches of such services.⁶² If these and other terms were complied with the licence would run for seven years from the date of grant.

Reuters criticised these arrangements as administratively burdensome and impractical. In a large on-line publishing enterprise it would be extremely difficult to keep track of every page of Crown copyright material that found its way onto databases. Moreover, the new electronic publishing licence was limited to quasi-legislative material, thereby excluding a vast sector of government information from its provisions. This would require civil servants and would-be licensees to negotiate on a case by case basis taking weeks, months or even years to negotiate. Such negotiations acted as a 'powerful break on innovation and, therefore, economic activity in the UK,'⁶³ not to mention the financial overhead of administering the present scheme.

Reuters called upon the Government to abandon all controls over this activity. By doing so the skills and resources of the private sector could be brought to bear on government information. In addition, this would lead to a financial return to the taxpayer from the increased economic activity of the electronic publishers. This could contribute towards the 'substantial costs of Government in collecting, processing and distributing government data.'⁶⁴ However, since this seemed unlikely, Reuters proposed that a general as opposed to individual licensing scheme be introduced similar to that which supervised the providers of value-added telecommunications services. This would mean that publishers of Crown copyright material would be automatically subject to the relevant notices. Infringements of the rules could lead to the withdrawal of authorisation under the class licence.

In its response, the General Council of the Bar, as the governing body of the Bar in England and Wales, welcomed *government.direct* for the promise it held of a reorganisation of the way that government provided services to citizens and business. However, it expressed surprise that no mention was made of one of the services which government could and should provide, namely information about the law of the land. This included statutory and secondary legislation, material explaining how government departments interpreted and applied legislation - such as the Inland Revenue's Tax Manuals and Work Manuals, now published by the Patent Office, and legal judgments of the courts. It welcomed the decision to make some of these materials more freely available on the Internet, but noted that the fact remained that the use and publication of this

⁶¹ *Ibid.*, para 6.1. Based on $15\% \times (\text{Licensed Material}^*/\text{Published Material}^*) \times \text{Publisher Revenue}$.

(* Determined by Page Counts).

⁶² *Ibid.*, para 6.6

⁶³ Remarks of Andre Villeneuve, a Board Director of Reuters, in a letter to the Cabinet Secretary, Sir Robin Butler, in March 1996.

⁶⁴ Reuters' response to the Green Paper submitted by letter dated 30 January 1997.

information was not free from restrictions:

The whole point about Crown copyright and Parliamentary copyright, in material of this nature, is that government retains the right to dictate the terms on which the material is made available to citizens. Notwithstanding the increased availability of the material, and the recent relaxations of the enforcement of such copyright, it remains a source of restriction or potential restriction on the availability to the public of information concerning the law of the land. Where copies of statutes or the Manuals, or of the judgments of the Courts are required, the cost remains unacceptably high. Competition with HMSO, from other publishers, would be beneficial from this point of view. The existence of Crown and Parliamentary copyright prevents or restricts any such competition.⁶⁵

In these circumstances the Bar Council expressed its disappointment that there appeared to be no serious discussion as to whether such copyright protection should be retained at all, at least in this area.

Underlying these comments is the continued frustration felt by the Bar that its members are not permitted to develop their own in-house information systems, incorporating both legislative instruments and case law material, without subjecting themselves to Crown and Parliamentary copyright regulation. The Bar Council has believed for some time now that the practice of law in the UK would be strengthened and more efficient if barristers could develop their own on-line systems for accessing the legal instruments and judgments on which the law is grounded. This desire has also been supported by the commercial information industry which believes that the market for value-added legal information would not be hit by the removal of restrictions in respect of primary materials alone.⁶⁶

As things stand, some uncertainty continues to exist over the copyright status of court judgments. Although the Crown no longer appears to argue that the judiciary *en banc* has surrendered their copyright to the Crown, judgments of the Court of Appeal are marked as being Crown copyright, and House of Lords judgments, which have been published on the Internet since 14 November 1996, are declared subject to Parliamentary copyright. A statement on the Stationery Office *Internet page* reserves all Parliamentary copyrights in such judgments.⁶⁷ Individuals are

⁶⁵ *government.direct Green Paper: A Prospectus for the Electronic Delivery of Government Services - Response on behalf of the General Council of the Bar*, February 1997, para 7. The Bar Council asserts that it is no part of its argument that it should have 'a sectional and preferential advantage or right.' It is the Bar's argument that: 'there is a fundamental right of the citizen to know what the Law is and this should, therefore, be generally available to all at large.'

⁶⁶ Worlock, *Op. cit.*, n 37.

⁶⁷ See: House of Lords - Judicial Business at: <<http://www.parliament.the-stationery-office.co.uk>>. The problem of intellectual property rights in judgments and their online availability seems now to be much more a contractual issue of how to accommodate existing court reporting contracts with free public availability. It seems likely that increased online reporting of judgments in decided, rather than unreported cases, will now proceed with the

authorised to download this text to file or printer for their own individual use, but any other proposed reproduction, including commercial exploitation, requires assent.⁶⁸ This effectively means that barristers cannot freely download such materials, or develop customised databases of law reports within chambers, without seeking prior copyright permissions in respect of each judgment.

Support for the resolution of this problem came recently from the Court of Appeal in the comments of Saville LJ in *Bannister v SGB plc & Ors.*⁶⁹ The case involved interpretation of Order 17 Rule 11 of the County Court Rules which deals with 'the steps that must be taken within a prescribed timetable so that actions can progress to trial without undue delay or the need to incur the expense of making applications to the court.'⁷⁰ Commenting at the outset of his judgment, Saville LJ, who was strongly supported by Brooke L.J., reflected on the importance of the decision for the lower courts and the desirability of distributing it and other judgments electronically:

Such is the scale of the difficulties that have been confronting the lower courts that we have asked that a copy of this judgment should be sent immediately to every county court in England and Wales (for distribution to the judges who sit at that court), as well as to all the parties in all the appeals and applications awaiting decisions by this court. The text of this judgment is to be made available immediately on FELIX, the judges' electronic bulletin board and on the Internet (website <http://www.open.gov.uk/lcd/lcdhome.htm>). If this country was in the same happy position as Australia, where the administration of the law is benefiting greatly from the pioneering enterprise of the Australasian Legal Information Institute (AUSTLII), we would have been able to make this judgment immediately available in a very convenient electronic form to every judge and practitioner in the country without the burdensome costs that the distribution of large numbers of hard copies of the judgment will necessarily impose on public funds.⁷¹

Access to the *Austlii* database is free and is used by more than 2000 people each working day downloading 750000 pages per month from a database now in excess of 2.5 gigabytes and about 500000 searchable documents. *Austlii* is operated jointly by the Faculties of Law at the University of Technology, Sydney and the University of New South Wales. The Australian Research Council, the Law Foundation of New South Wales and others fund its operation with grants in excess of A\$1.5 million. An incomparable feature of the *Austlii* database is its technical innovations. These include over 14.5 million automatically inserted hypertext links to the database such as links to statutory definitions and other sections of Acts and cases. Also, using its

agreement of all parties.

⁶⁸ *Ibid.*, paras 4.1 and 4.3.

⁶⁹ Court of Appeal (Civil Division) No. CCRTI 95/1410/G, 25 April 1997.

⁷⁰ *Ibid.*, p 1.

⁷¹ *Ibid.*, p 1.

own developed software, the whole *Austlii* database can be searched in seconds, using the *Sino* search engine, with boolean and proximity operators and relevance ranking. Finally, every section within an Act contains a *note-up* facility which can automatically search for cases or other primary or secondary legislation of relevance to the enquiry.

The position regarding on-line reproduction of statutory publications is different from that of the law reports. Reforms were introduced in February 1997 and announced in one of HMSO's *Dear Publisher* Letters describing the policy in respect of specified Crown copyright material.⁷² This declared, for the first time, that Acts of Parliament, Statutory Instruments and Statutory Rules and Orders reproduced in any media 'was permitted worldwide in all languages without prior permission and free of charge.'⁷³ However, the grant was permitted on condition that any material reproduced had value added to it. This could be 'by compilation with other related text, analysis, commentary, annotation, indexing or cross-referencing (this may be taken as covering both commercially published and in-house databases).'⁷⁴ This meant that straightforward downloading of primary source material into a barrister's information system, which was not processed in this way, would continue to be subject to Crown copyright management and to specific copyright licensing terms,⁷⁵ unless of course copyright 'fair dealing' could be advanced. The position is equally unclear were a barrister's chambers to network the information having added value to it. Would this amount to commercial use, appropriate to charge for under existing terms or, if not for resale, fair dealing in the material. One would sense that the latter is the case.

7. OFFICIAL INFORMATION ON THE INTERNET

There is no doubt that progress has been made in the provision of government information electronically to the public since the initial assessment of the options contained in the consultative report of May 1994.⁷⁶ The range of information now available has already been described⁷⁷ and is in line with a commitment that official information of general public interest should be as widely available as possible.⁷⁸ While the former Government remained broadly sympathetic to calls for widespread access to official information it approached the subject, not in terms of constitutional rights of access, but by considering how services to the citizen might be

⁷² HMSO *Dear Publisher* letter, *Reproduction of Crown Copyright Material*, 21 February 1997, Reference CO(P) 48/1022, section 4.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, para 4.2.

⁷⁵ *Ibid.*, para 7.

⁷⁶ *Information Superhighways - Opportunities for Public Sector Applications in the UK*. A Government Consultative Report (CCTA - The Government Centre for Information Systems, 1994).

⁷⁷ See n 26.

⁷⁸ *Op. cit.*, n 10 para 6.14.

improved if delivered in paperless form. The *government.direct* Green Paper identified a number of transactional services between the citizen and the state that could operate interactively, subject to safeguards for the protection of personal data.⁷⁹ A similar approach was envisaged for service delivery to business.⁸⁰

Although a change of government took place within months of the announcement of the inter-departmental review of Crown copyright, the commitment to pursue the issue and produce a response for public consultation continues.⁸¹ Similar questions remain as to how the strategic direction set by the previous government of a more efficient service to business and to citizens, greater openness of government administration and substantial cost savings to the taxpayer can be met within a framework of continued management of Crown copyright? The policy of devolving responsibility for the selection of on-line material to government departments must also be considered. This is probably inevitable given the new Government's commitment to a *Freedom of Information Act*.⁸² Such legislation is likely to replace administrative discretion in the supply of official information with constitutional rights of access. To what extent this commitment will be met by electronic delivery of the data remains to be seen.

Clarification of the range of official information intended to be provided on-line is only part of what is needed. Government needs to understand that, beyond mere delivery of information, is the question of its use. The Internet offers an inter-active two way medium for communication. While this is likely to be reflected in the transactional service element of the policy, the Government is still inhibited, through the rules of Crown copyright, from being free to relax its grip on the subsequent exploitation of the accessed information. Although risks may arise with the accuracy and authenticity of the information, when third parties are involved, the question is whether government should be responsible for policing these standards. Certainly, its greater availability, within a less restricted regime, would offer advantages in terms of choice, added value and speed of delivery.

At present, the process of preparing material for placement on-line is handled by the Central Computer and Telecommunications Agency (CCTA). CCTA is responsible for promoting the

⁷⁹ For example vehicle licence renewal, electronic delivery of income tax returns, benefit claims, and checking personal information held by government departments. It would also include information for job seekers, remote access to skills training and all the information on public services required by the *Citizen's Charter* to be provided.

⁸⁰ Examples include access to regulatory information, market data and health and safety advice. Eventually, all information passing between departments and businesses should be handled electronically including taxation and customs and excise matters, and the lodging of annual reports and accounts.

⁸¹ Letter from the Cabinet Office (Office of Public Service) to the author in June 1997.

⁸² A Commitment that appeared in the Labour Party's *General Election Manifesto* for the 1997 General Election but left out of the new Government's initial legislative programme pending publication of a White Paper.

'effective use of information systems in central government.'⁸³ Currently it serves 115 public sector organisations and 60 government departments. Material supplied is located on the CCTA maintained government web site: <www.open.gov.uk>. When the Office of Telecommunications (OFTel) published its consultative paper on renumbering area codes, a delay of more than two weeks occurred before the report was available on-line. It was pointed out at the time that 'any one of dozens of small Net consultancies could provide OFTel and other government departments with far swifter service at a very modest cost.'⁸⁴

Similar problems arise with the on-line management of Acts of Parliament and Statutory Instruments. With effect from the first Public General Act of 1996, all new legislation has been published in full-text form via HMSO's Web Pages. However, even the minimum commitment dictates that 10 working days must elapse after the printed version is available, before the Act appears on-line.⁸⁵ In addition, since subsequent amendments are not included, the user could be misled by the lack of accuracy of the material. In the case of Statutory Instruments the gap between the printed and on-line appearance of the instrument is 15 days, the service having taken effect from the first printed Statutory Instrument of 1997. Summaries of a wide range of earlier Acts comprising Long Title, Arrangement of Sections, ISBN, page content and price, are also available.

While commercial exploitation of this material in value-added on-line format is permitted on payment of the standard royalty,⁸⁶ it is inevitable that this and the work involved to enhance the value of the product is likely to incur a charge. Since publication of such material, stripped of any added-value, is not otherwise permitted without specific negotiation with HMSO, this ensures that on-line access to the untouched primary source remains subject to Crown and Parliamentary copyright administration. Under the terms of the current statement on the subject, individuals are free to browse the text of legislation, as provided via HMSO's Web Pages, but may only download the text to file or printer for their own individual use.⁸⁷ For the bulk of official documentation, not presently available on the Internet, if a printed copy is required, this must be purchased from the recently privatised Stationery Office. This also means that organisations and individuals are not free to provide basic on-line access to the primary sources or to load earlier legislation to a Web Site without first obtaining permission to do so from HMSO.

⁸³ *Op. cit.*, n 76.

⁸⁴ Tim Jackson, 'Oftel's Irregularity' *Financial Times*, 1997.

⁸⁵ See: <<http://www.hmso.gov.uk/acts.html>>. Any Act which is especially complex typographically or in terms of its size may, however, take longer to prepare.

⁸⁶ *Op. cit.*, n 72 Clause 4.

⁸⁷ Statement by HMSO at: <<http://www.parliament.the-stationery-office.co.uk/pa/pacopyrt.htm>>. This would, in any case, be permissible to a certain extent in respect of some Crown and Parliamentary copyright material, under the fair dealing provisions of the Copyright, Designs and Patents Act 1988 (c 48).

From the Government's point of view, the reasoning behind this approach is clearly understandable. Having recently sold the bulk of HMSO to the private sector it was important not to reduce the value of the market in official publications by significant relaxations of Crown copyright, which might erode demand for the purchase of printed copies of such material. Similar arguments apply to the output of specialised agencies, such as Ordnance Survey, whose successful future independence is likely to depend on its ability to enforce its copyrights and therefore gain a financial return from the sale of its maps and other products.⁸⁸ Any review of policy in this area must consider whether particular categories of official information, such as the law of the land, should be treated differently from other more specialised forms of official data. If further changes are proposed, the problem of reconciling wider public access to official information, on-line and without charge, with existing licences to supply such material commercially in printed form, must be considered.

Up to this point a picture emerges of a partial shift in policy, whereby the original relaxations of Crown copyright in respect of conventional forms of reproduction have given way to a measured extension of this to electronic formats of specific material under defined circumstances. What is lacking now is a convincing rationale for the continuation of a regime that ensures that the policy of maximising public access to official information is operated under government departmental control. The absence of a constitutional right of access to information is only mitigated by a *Code of Practice on Access to Government Information*,⁸⁹ the interpretation and application of which is subject, not to judicial review, but to investigation by the *Ombudsman*. However, measured improvements in the opportunities for public access to official information are only part of the story. What the Government review must do now is consider why it remains necessary to impose a licensing regime at all that requires a specific application to be made for permission to reproduce the bulk of official information in electronic form. Judicial notice does, of course, require the proving of *definitive* versions of a wide variety of official documents, but this could be arranged, both in printed and electronic media *eg.*, as in the *Statute Law Database* which derives from the same source as that used to print Queen's Printer copies of statutes. This might be organised under contractual arrangements, similar to that already operating with the Stationery Office or the Queen's Printer, oversight of which remains with residual HMSO. Similar provision could also be made in respect of the continuing but declining need to publish, in conventional printed form, a core of official governmental and Parliamentary documentation for those organisations and individuals who want it.

Present policy means that, in most instances, commercial operators are unable to build Crown copyright material into their own sites without first negotiating a licence to do so. This requirement is likely, not only to reduce the quality of subscription information services to commercial clients, but to impinge unnecessarily upon the provision of general public on-line services offered by commercial providers as an alternative, for example, to the Government's own service at: <www.open.gov.uk>. The added-value limitation on the electronic reproduction

⁸⁸ Turnover at Ordnance Survey in 1996/97 was £68.8 million, exceeding its cost recovery objective for the year in question, set by the Secretary of State, by 10%. Source: Ordnance Survey, *Annual Report and Accounts 1996/97* (London, The Stationery Office Ltd., 1997).

⁸⁹ *Op. cit.*, n 23.

of statutory publications and press releases, and the royalty payment regime imposed in respect of quasi-legislative material in electronic form, can only further serve to inhibit choice in the portfolio of official information services available on-line. The freeing up of commercial access to official information would extend choice and reduce cost. Some publishers or organisations might wish to support free access to a range of official information as a shop window to subscription-based services, serving specific client needs, or as a sponsored means of publicising certain causes or activities. Some form of regulatory control could be exercised by HMSO, but only in respect of defending accuracy, authenticity and 'undignified association' on terms similar to those already specified in existing policy statements.⁹⁰

It is submitted that such an approach would enhance rather than damage the prospects of existing commercial official information providers which currently offer subscription services to on-line or CD-ROM data containing law reports, Hansard, or a variety of full-text or abstracted official documentation. Many subscribers will continue to pay for a service that meets their needs, despite the availability, within the public domain, of a wide variety of official information. Clients whose businesses rely on the added-value and regularity of the commercial product, or libraries with a public service interest in accessing the service, will continue to subscribe, notably at reduced cost, beyond existing library subsidies. This can be achieved once government relinquishes the current obligation that requires commercial providers to pay royalties for access to the data, that extends beyond the cost of its supply. A freer market, released from the iniquities of the present licensing regime, would enhance provision and strengthen the domestic information industry. At the same time it would do nothing to prevent the Government from providing whatever information services it chose, including the kind of transactional services outlined in *government.direct*.

8. THE UNITED STATES APPROACH

Up to now it would seem that UK Government has not been persuaded of the merits of developing a full-scale NII policy as the domestic way forward. Significant pockets of development, which include the review of Crown copyright policy and the desire for departments and agencies to embrace the efficiencies of information technology are underway, but it is still far too soon to tell whether the UK Government will strive for an integrated information policy of the kind that is beginning to evolve in the United States.⁹¹ Since the Clinton administration launched its NII programme soon after the start of the President's first term of office in 1992, the pace of investigation, policy development and action has been faster

⁹⁰ HMSO *Dear Publisher Letter - Reproduction of Parliamentary Copyright Material*, 21 February 1997, Reference CO(P) 48/1022, para 6.

⁹¹ *Op. cit.*, n 10 pp 1 and 3. In its response to the House of Lords Report: *The Information Society: Agenda for Action* the former Government indicated that it was not in favour of a *top down* cultural approach to the Information Society. On balance, it was not in favour of an Information Society Task Force 'to identify barriers to the development of the Information Society, and recommend appropriate remedies.' Instead government had an important role 'in researching into, and promoting awareness of, the potential opportunities and risks of the Information Society.'

and more targeted than in either the UK or Europe. Part of the reason for this is that the United States already has in place the underpinnings and cultural expectations for the support of such a policy in the First Amendment to the Constitution - which guarantees free speech,⁹² a Copyright Act⁹³ that denies copyright protection to US Government works, and a Freedom of Information Act⁹⁴ that opens public access to records of most federal agencies.

A further, more recent development within the framework of existing access regulation, has been the Paperwork Reduction Act of 1995 which outlaws restrictive distribution arrangements for government information.⁹⁵ Such data is freed from restrictions concerning its use, resale or dissemination or the fixing of user fees above dissemination cost.⁹⁶ The thinking behind the Act is that government information is a valuable national resource which could maximise the economic benefits to society if such material were to be distributed in a timely and equitable manner from a diversity of sources. It is also implicit within its terms that government agencies cannot be expected 'to match the dynamism and creativity of information providers in transforming government information into valuable consumer information products.'⁹⁷ The wider use of electronic distribution was perceived to be an integral part of the successful management of government information.

A second aspect of this was tackled in October 1996 when the President signed the Electronic Freedom of Information Amendments Act of 1996.⁹⁸ This deals with the delivery of official information in response to specific requests from the public. The aim of the new law is to enhance electronic access to the categories of information that are accessible under the US Freedom of Information Acts 1966-1986.⁹⁹ Its basic objective is to maximise the usefulness of those records and data sought by the public while reducing the need for citizens to use FOIA procedures to access official information. Currently a substantial backlog of requests for data exist. Section 4 of the Act indicates that all records made since 1 November 1996 which an agency must 'make available for public inspection and copying,' must be available on-line or in

⁹² *Op. cit.*, n 38.

⁹³ The Copyright Act of 1976, 17 U.S.C.

⁹⁴ 5 U.S.C. s.552.

⁹⁵ 44 U.S.C. Ch 35, Pub. Law 104-13, 104th Congress - 1st Sess., 109 Stat 163 (22 May, 1995), repealing earlier Paperwork Reduction legislation 1980 and 1986.

⁹⁶ 44 U.S.C. s.3506(d)(1-4) 1994.

⁹⁷ *Electronic Freedom of Information Amendments Act of 1996*, Committee on Government Reform and Oversight, HR 2d Session 104th Congress.

⁹⁸ The Bill, which amends the Freedom of Information Act as it applies to information maintained in electronic format, passed in the House on 17 September - H.R. 3802 and in the Senate on 18 September - S. 1090. It was signed by the President on 2 October 1996.

⁹⁹ 5 U.S.C. s.552 (1988 & Supp. V 1993).

another electronic form within one year of creation. In addition, by 31 December 1999, the index of previously released records will be available on-line, easing access to records on a popular topic that are likely to be subject to multiple requests. Such records must also be available for public inspection and copying. The new Act adds to the range of agency records and information already required, via the Federal Register, to be available on-line.¹⁰⁰

9. A UK FREEDOM OF INFORMATION ACT

The new UK Government has already announced its intention to bring forward a Freedom of Information Bill for Britain.¹⁰¹ This will follow the publication of a White Paper in late 1997 outlining the Government's proposals. To achieve progress on the broader issue of the future of Crown copyright, it will be important not to confuse objectives. The latter is a proprietary right enabling government and Parliament to assert economic and legal interests in official information. An FOIA measure addresses the constitutional issue of rights of access to official records that is currently handled by a *Code of Practice*.¹⁰² If implemented, the FOIA would create rights of access, enforceable by the individual, shifting the centre of gravity in this matter away from the existing discretionary framework embodied in the present Code. Given the Government's intent to consider the review of future management of Crown copyright in the *freedom of information* White Paper, the exact timetable and ordering of any proposed reforms remains uncertain at this time.¹⁰³

However, it cannot ignore the copyright issue entirely because greater private sector involvement in the provision of official information, especially on-line, could mean that the individual's access request is not directed at a government agency but at a private sector information provider instead. Moreover, if the fee structure is based on the market value of the data or the cost of its collection, as opposed to the cost of meeting the particular request, this could dilute the value in access terms of any further relaxations of Crown copyright regulation. This could be a particular problem for the many *Next Steps* agencies,¹⁰⁴ established during the the *post* 1979 years of

¹⁰⁰ Under the Government Printing Office Electronic Information Access Enhancement Act of 1993, 5 U.S.C. 552(a)(1) agencies must provide on-line, through the Federal Register, descriptions of its central and field organization, statements of the general course and method by which its functions are channeled and determined, details of procedural or substantive rules adopted by the agency, and a complete list of statutes relied on by the agency to withhold information.

¹⁰¹ *Op. cit.*, n 82.

¹⁰² *Op. cit.*, n 23.

¹⁰³ In correspondence with the author, the Freedom of Information Unit of the Office of Public Service of the Cabinet Office has made it clear that, 'among many other issues, the question of Crown copyright and the impact of information technology will be covered in the freedom of information White Paper.'

¹⁰⁴ *Op. cit.*, n 29.

Conservative administration, whose operational costs must, to varying degrees according to Treasury targets, be met by selling its services or exploiting its information products.

This kind of problem arose some years ago in the United States over FOIA access to a federal database containing abstracts of medical research articles:

The National Library of Medicine (NLM) is the federal agency that creates and disseminates the database through computer networks and computer tapes. Without any specific statutory mandate, the agency charged a high price for the computer tape and insisted that purchasers sign a license agreement limiting redissemination of the tapes. A company seeking to avoid the high price asked for a copy of the entire database under the FOIA, expecting to pay only copying costs. NLM refused the request. The requesters sued, but lost the case in court.¹⁰⁵ The court permitted the higher charges to protect the agency's business interest in its information product.¹⁰⁶

The writer commented thus on the decision:

The decision was and continues to be controversial. The point of the prohibition against [US] government copyright is to deny government the ability to exploit the economic value of its own data. However, the court failed to see the connection between price, access and control. If information can be restricted for economic reasons, then it can also be controlled for political reasons. The case starkly raises the two competing values, open access to and use of government data versus raising of revenues from the sale of such data. When information is in digital formats, the stakes are higher because the ease of reuse makes the information more valuable.¹⁰⁷

In the United States this problem of *copyright-like* controls was eventually dealt with by the restrictions on such practices imposed by the 1995 Paperwork Reduction Act.¹⁰⁸

Without a clear understanding of these tensions, a UK FOIA will quickly run into trouble. It may be that, until government is in a position to tackle the economic question of how departments and agencies are to secure their operating costs, it cannot provide an enduring framework within which to introduce FOIA legislation. Its impact would certainly be muted if private sector operators, wishing to provide an information service to the public, were disinclined to use the legislation to access material because underlying Crown copyright regulation acted as a disincentive to do so. At the same time the question arises why such operators should need to employ FOIA procedures at all if the economic rights issue, embedded in Crown copyright, is to

¹⁰⁵ *SDC v Mathews*, 542 F.2d 1116 (9th Cir. 1976).

¹⁰⁶ *Op. cit.*, n 38 p 5.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Op. cit.*, n 95.

be resolved by a more open policy on private sector participation.

10. THE EC ACCESS GREEN PAPER

Contrary to expectations, the keenly awaited EC Green Paper on *Access to and Exploitation of Public Sector Information in the Information Society*, did not appear in the first half of 1997 as expected.¹⁰⁹ The likely reason for the apparent delay is that more time was needed to produce an accurate document that raises the appropriate issues. It seems clear that the European Commission has recognised, for some time now, the pivotal role that access policy towards official information is likely to play in the development of a number of specific EU policies. This includes, for example, its role in completing and maintaining the internal market, enhancing openness and transparency in respect of EU institutions and policy and the broader interests connected with preserving Europe's cultural heritage, encouraging diversity and deepening the notion of a *Citizens' Europe*.¹¹⁰

It is clear that, in this matter, the EU must now confront many of the same issues that are currently under consideration in the UK. These include defining public sector information, the delivery and cost mechanisms for distribution and the roles of the public and private sector in the process. In its case, however, the European Commission has the added responsibility of having to act in the best interests of all Member States. Determining what harmonization measures can be taken and, indeed, what is feasible at a time when copyright policy is under broader review in the context of the digital environment, remains an additional problem for the European Commission. It also has to work out its own internal access policies in respect of EC documentation and information. Guidelines have been issued on the specific matter of access to documents,¹¹¹ but the EC still has to sort out future copyright policy for official documentation. Currently, an increasing volume of such material is appearing on the European Union's Web site *Europa*,¹¹² but the rules governing private sector exploitation of EC material remains subject to continued copyright restraints.¹¹³

¹⁰⁹ No firm date has been disclosed for publication but later drafts have been with the EC since February 1997.

¹¹⁰ This has been a theme of the EU since the Treaty of Maastricht.

¹¹¹ *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 No L-340 31.12.93. Also, *Commission Decision of 8 February 1994 on public access to Commission Documents* (94/90/ECSC, EC, Euratom)(includes Code of Conduct as Annex) OJ No L-46 18.2.94.

¹¹² Located at: <<http://europa.eu.int/>>.

¹¹³ The European Commission pursues a similar kind of policy, at present, to that of HMSO. It is primarily concerned with using its copyright as a vehicle for licensing the private sector information industry in its use of EC material.

The British Government awaits the Green Paper with interest. It will no doubt wish to consider the likely direction that the EC will take on access policy when it formulates its own views on the way forward. For the time being, however, the UK remains out of line with many of its European partners on this subject.

11. CONCLUSION

It is submitted that there is much to be done before a coherent policy on the issues surrounding public access to, and private sector exploitation of, official information emerges. The expansive question relates to how successful government will be in exploiting information technology in its own activities so as to offer the electorate a better more efficient service. The core principles of NII policy - competition; universal service; private investment; open access; and flexible government regulation - must be built into the review process, even though government may choose not to deal with all the elements of the policy at one time.¹¹⁴

The rapid growth of the digital network tests the application of many legal rules that were introduced prior to the information age. Some of these impact, to a greater or lesser extent, upon the distribution of official information and may, at some stage, have to be tackled once the basic policy issues have been confronted. One example of a legal rule affected by technological advance is contempt of court.¹¹⁵ This could lead to liability of an information provider for electronic publication of alleged offending material that is accessible in the UK via the commercial provider. The material may have been edited abroad in accordance with foreign law, yet may infringe here, even though the operator remains unaware of the offending material. Such matters must not be overlooked within the wider considerations of policy in relation to electronic publishing of official information in the UK.

One of the most challenging questions that goes to the core of policy development is what the role of the public and private sector should be in the delivery of official information products and services. An important element of the Thatcher years; a policy continued by John Major, was *privatisation* of public sector activities which government decided it no longer had a justification to manage.¹¹⁶ Other activities, that were judged to require continued governmental supervision, were given a framework within which to operate independent of government on a day-to-day basis, but subject to Treasury influence on budgets and revenue targets. In many instances, this

¹¹⁴ See further: Saxby, 'Public Sector Policy and the Information Superhighway,' (1994) *International Journal of Law and Information Technology*, Vol 2 No 3.

¹¹⁵ Under s 1 of the Contempt of Court Act 1981 (c 49), 'publication' is treated as a contempt of court if it interferes with the interests of justice, regardless of intent to do so. Under s 2, publication includes communication in whatever form addressed to the public or a section of the public. S 3(2) contains a defence of 'reasonable care', but the application of this in the on-line network environment has yet to be tested.

¹¹⁶ *Competitiveness Forging Ahead* Cm 2867 (London, HMSO 1995). See further: Saxby, *Public Policy and Legal Regulation of the Information Market in the Digital Network Environment* (Oslo, Tano Press, 1996) p 104 *et seq.*

required agencies to seek revenues from the sale of official information or the provision of services. Such a regime was, of course, supported by Crown copyright regulation, subject only to the occasional demarcation dispute between HMSO and the department concerned as to the terms of publication and the destination of revenues so derived.

Today, the problems associated with this are growing, exacerbated by the challenge to Crown copyright policy initiated by the growth of the digital network. The centre of gravity appears to be shifting subtly away from producer driven justifications for the policy towards a demand that it operate with the consumer's interests to the fore. Evidence of this transition can be found in the 1997 *Dearing Report on Higher Education*¹¹⁷ which raises the broader copyright issue of teacher access and use of copyright materials in digital form. *Dearing* points to the delays in obtaining copyright clearance 'hampering the speed of interaction between student and teacher and making unnecessary demands on staff time.'¹¹⁸ The Report calls for 'free and immediate use by teachers and researchers of copyright digital information,'¹¹⁹ and calls on the Government review existing legislation accordingly.¹²⁰

If this perception is correct, two of the most important criteria for judging the effectiveness of future policy will be constitutional and economic. In the UK, given the absence of a written Constitution, similar to that of the United States, there are no enforceable rights that can be exercised through the courts. Recent moves towards *open government* through the *Code of Practice* and the *Citizen's Charter* have always operated more as a statement of good intent than a fundamental shift in policy.¹²¹ Without further reforms of Crown copyright, however, any moves towards the grant of access rights by *Freedom of Information* legislation may achieve only limited results. This is because what the State gives on the one hand it can restrict on the other by the manner in which it exercises the proprietary rights it asserts through Crown copyright.

The broader constitutional question is how best to ensure that the people have access to official information about their government and its decisions. This immediately extends the debate

¹¹⁷ *Higher Education in the Learning Society*, Report of the national committee of inquiry into higher education (NCIHE), Main Report (London, 1997). Interestingly, although the Report is declared to be Crown copyright, there is no indication on the document that it was published by The Stationery Office Ltd. It appears to be published by NCIHE itself. Confirmation of this is suggested by the fact the Internet Order Form is with NCIHE at: <<http://www.leeds.ac.uk/ncihe/copyrigh.htm>>. Could this be a sign of a future trend whereby the originators of such reports, whether they be linked to departments, agencies or commissioned private sector bodies publish their own reports directly and not via The Stationery Office Ltd.

¹¹⁸

¹¹⁹ *Ibid.*, para 13.34.

¹²⁰ *Ibid.*, Recommendation 43.

¹²¹ *Op. cit.*, n 23 & n 29.

beyond FOIA entitlements towards the economic issue of delivery mechanisms. What role should the public and private sector play in this? It is submitted that the answer will vary according to the type of information product and the public sector agency involved. Two examples illustrate the issues.

First there is the Ordnance Survey (OS) which has, since 1791, developed to become the nation's national mapping agency. Since that time the OS has built up a considerable portfolio of intellectual property protected by Crown copyright.¹²² In recent years the OS has been encouraged, within the framework of *Agency* status, to recover its operational costs through its business activities.¹²³ This has been supervised by the Secretary of State for the Environment as a preparatory step towards further financial and operational independence in the future. In the year 1996/97, the OS engaged in talks with government to determine what the national interest was in mapping and how the organisation could fund this need. It would seem that, in this case, if the OS is to be financially independent of the taxpayer, it has a legitimate entitlement to exploit its intellectual property on behalf of the national interest and thereafter to make its contribution to the Exchequer, as any other business would, through taxation. The issue here is the monopoly question and how to ensure that OS exploits its intellectual property in a manner that does not distort competition. Competition authorities must therefore ensure that information providers, wishing to exploit digital map data as part of a service they may wish to introduce, can have access to OS material by licence on terms judged fair to both parties.¹²⁴

The second example concerns the publication of this year's edition of Science, Engineering and Technology Statistics (SET) by the Department of Trade and Industry's Office of Science and Technology. The SET statistics is the handbook of key science, engineering and technology indicators containing the most up to date information on the UK's public and private sector investment in these areas. This year the Government decided to publish the SET statistics as a separate entity rather than as part of its forward look on government funded SET activities. Such data could prove attractive to a commercial information provider if that operator wanted to enhance its on-line services by integrating the information into its databases. As things stand, such an operator must individually negotiate for permission to do so. This might be both with the Copyright Unit of HMSO and primarily, under delegated authority, with the departments concerned. This conforms with the previous Government's view expressed in *Agenda for Action* that 'decisions on what information should be selected to be placed on-line are best left to individual departments and agencies.'¹²⁵ The position might be even further complicated where *Treasury Rules* dictate elements of negotiating policy and pricing.

¹²² This includes geospatial and topographic data (linking mapping, information and technology); digitised mapping of all scales; educational CD-ROM's; and other products. *Op. cit.*, n 88.

¹²³ *Ibid.*, p 33. In: 1996/97 the OS recovered 93% of its costs for the year.

¹²⁴ For further discussion see: Saxby, *Op. cit.*, n 116 p 73-82 & p 154-156. See also: Saxby, *Op. cit.*, n 50 section 5.

¹²⁵ *Op. cit.*, n 10 para 6.14.

The Government must now ask itself why, in such cases, such processes are required to be gone through before a commercial information provider may access the data. One commentator has described the outgoing Government's position as 'not so much a public information access policy as a business strategy for government information management.'¹²⁶ In the future he believes that the regime of control, which has characterized UK official information publishing and access, will become progressively more relaxed and open:

Politicians and administrators are beginning to see the virtues of the broad view, both in terms of the principles of freedom of information and open government and in those of the economies of the government machine. Competition law considerations are in the ascendant over those of intellectual property ownership. And the technology is carrying us all along towards an open information society whether we like it or not. Even while the debate goes on, the enthusiasm of politicians for communicating is resulting in more and more official information being put onto websites. Those websites represent an environment in which access is open and usage unrestrained by licences which give governments control over re-use. It is difficult to see how governments will be able to sustain licensing regimes in that context. It is not just a contradiction to provide free public access to information in one place and make it subject to formal licensing in another, it is absurd, and it would be daft to try to do so. Official information available on the web is effectively in the public domain, and that is where it is all going to be accessible before very long. When it is, the function of Crown copyright, which we must expect will be retained, will be reduced to the policing and remedy of misrepresentation, fraud and (perhaps) accuracy which in fact provides much of its *raison d'être* now.¹²⁷

In the short-term, there may be some difficulties to be overcome with existing licensing arrangements. Information providers which have purchased re-publication rights for data, now to be made more widely available, may feel aggrieved that their position has been undermined. However, they would be equal beneficiaries of the new regime that would enhance opportunities for value-added services. If the Government moves in the predicted direction then matters will turn towards consideration of the practicalities involved. These include devising the methods for selecting, obtaining and delivering public data to the information industry and making the charging calculation, which should be based on the principle of cost recovery rather than attempting to secure an immediate financial return for the taxpayer.

It is submitted that the conditions created by a competitive information market could play an important role in encouraging subscription-free access to official information delivered by the private sector. The outcome will also be influenced by the services that the public sector provides. In the United States, for example, the *Thomas* service on the World Wide Web,

¹²⁶ Millet, 'Electronic Publications: Rights and Restrictions for Libraries and their Users,' p 5. Paper presented at University of Southampton Conference: *Electronic Publications: Rights and Restrictions for Libraries and their Users*, The Royal College of Physicians, London, 17 July 1997.

¹²⁷ *Ibid.*, p 10-11.

maintained by the Library of Congress, provides global access to information about legislation before Congress. Prior to this, such material was only available from the private sector, which charged for access. A genuine dilemma facing the British Government, that has constitutional overtones, is to what extent the full text of statutes and statutory instruments should be published and how far this might be co-ordinated and inter-related to provide an accurate and up-to-date view of the Statute Book. Should, for example, the raw content of the *Statute Law Database*,¹²⁸ which is an electronic version of *Statutes in Force*, currently being prepared by the Statutory Publications Office of the Lord Chancellor's Department, be available free of charge to the ordinary individual on the constitutional grounds that this represents the basic law of the land.¹²⁹ Could the value-added element, whether consisting of annotated text or the integration of commercially available search engines, used to access and collate searched for material, mark the dividing line between free and subscription based access? It is hoped that any future review of current methods and pricing policies for selecting and placing official information on government web sites will produce selection criteria that take full account of consumer needs as citizens and electors. This will require government to think beyond its present enthusiasm for using the Internet primarily as a means of achieving efficiency gains in the execution of transactional services between itself and the citizen.

On the specific issue of access to the law itself, perhaps the *Austlii paradigm*¹³⁰ is the way forward for the United Kingdom in terms of content, technical excellence, administration and funding. *Austlii's* success in providing, *inter alia*, a comprehensive source database of federal and state law within Australia was achieved by two academic lawyers and a computer specialist with a relatively modest level of funding. If such a project is to be mounted here it will require co-operation from a number of interested parties, not least residual HMSO and the Stationery Office Ltd in easing, respectively, Crown copyright restrictions and in providing access to the material in suitable electronic formats. If this were achieved, perhaps it would also have the knock-on effect of rationalising the number of differing law reports through their provision on the Internet.

These are complex matters that raise important questions about the role and conduct of government, its relations with the private sector and the legitimate expectations of the electorate in the electronic age. The inexorable drive to develop the Internet as an information medium for the masses can only continue the process of marginalising Crown copyright. Its influence will decline through lack of use as increasing amounts of government information are put on the

¹²⁸ See further: R. Horne, 'The Statute Law Database,' at: <<http://www.number7.demon.co.uk/papers/SLD/SLD.htm>>. The database contains in SGML markup coding: 'the law as it was on a particular date in the 1980's together with all Acts and Statutory Instruments which have come into force since that time.'

¹²⁹ On 9 February 1996 the former Chancellor of the Duchy of Lancaster, Mr Roger Freeman said: 'Copyright and charging policy on the *Statute Law Database*, a value-added electronic version of the whole Statute Book, now in preparation by the Statutory Publications Office, will be decided nearer the time of implementation in 1997.' See: <<http://www.hmso.gov.uk/dutchy.htm>>. Source: *Ibid*.

¹³⁰ *op. cit.*, n 71.

Internet at no cost. The commendable relaxation of Crown copyright regulation embodied in the latest licensing regime is a useful step in the right direction, but more thinking needs to be done to establish precisely what the policy is intended to achieve and whether the arguments for that policy hold up to scrutiny. The basic facts need to be acquired including, for example, establishing an accurate figure on licensing income for both digital and paper forms. The largely unregulated dispersal of licensing powers throughout government has made this information hard to get. What is clearly discernible though is the rapidity with which the debate is now moving forward. This is primarily driven by the pace of technological advance which no government can afford to ignore. The issue now is not whether to engage in the process, but how to harness the process to achieve the desired result. It is to that issue that all interested parties must now turn to secure the best way forward.

12. POSTSCRIPT

In July 1997 the Federal Republic of Germany and the European Commission jointly organised a European Ministerial Conference entitled 'Global Information Networks: Realising the Potential.'¹³¹ This event attracted Ministers from the Member States of the European Union, members of the European Free Trade Association, countries from Central and Eastern Europe and others including USA, Canada, Japan and Russia. There were also representatives from industry as well as users and European and international organisations. The objective was to 'broaden the common understanding of the use of Global Information Networks, to identify barriers to their use, to discuss possible solutions and to undertake an open dialogue on further possibilities for European and international co-operation.'¹³²

In their declaration Ministers recognised the powerful influence of global information networks and their value in establishing freedom of expression and access to information. They also contributed to democracy 'by improving communication between citizens and their administrations and facilitating active participation in the democratic process.'¹³³ Ministers also recognised the technological and legal uncertainties produced by the pace of development and the need for businesses, consumers and governments 'to work constructively together to answer these challenges.'¹³⁴ Public sector information represented 'considerable value for citizens and industry,'¹³⁵ and would be a substantial driver of Global Information Networks. Ministers would work together to ensure the wider availability of such material through the use of new technologies.

¹³¹ Bonn, 6-8 July 1997.

¹³² *Global Information Networks - Ministerial Declaration*, Ministerial Conference Bonn, 6-8 July 1997.

¹³³ *ibid.*, p 2.

¹³⁴ *ibid.* p 2.

¹³⁵ *Ibid.*, p 4.

Copyright Stephen Saxby 1997.

14776 words