Commercializing Public Sector Information

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Abstract

This article addresses the question of commercialization of public sector information, exploring freedom of information acts in the U.S. and the EU, where a public sector information directive has been recently adopted and implemented. The article argues that a right to commercialize should be distinguished from the right to know under the freedom of information acts, and that the freedom to commercialize can and should be subject to restrictions. It also considers existing licensing regimes of public sector information and argues that public sector information should be licensed by governments under certain terms where it is licensed for commercial purposes and takes into account the public interest in creating these informational works in the first place. The introduction of such restraints is justified and equitable given the public investment in creating these important informational goods. Possible challenges to this licensing model are also introduced and addressed.

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I. Introduction

Public sector information (PSI) is one of the most significant informational resources in the U.S., Europe and the world at large. In light of its importance, the legal treatment of PSI has been discussed extensively in the U.S., and during the past 15 years it has been explored at length in the European Union.

Public sector information constitutes a large portion of information produced in our society. All branches of the government collect or generate information as part of their daily functions.[1] Public sector information is generated and produced as part of the work of different government agencies and, at times, as a by-product of their activities.

There is tremendous value in PSI- it is necessary for the public to hold governments accountable, to participate in decision-making, and to know about and have access to government services. The use and re-use of this information can benefit society by contributing to the democratic structures of society and to the functioning of governments. This information also has a great commercial value. It can be used to create added-value informational products which can be sold in the market. Examples of government information that can be of commercial value include national statistics, budget information, parliamentary records, data about the location of schools and their performance, information about crimes, election records, financial data, and more.

Until the introduction of information technologies, processing and accessing such information was a challenging task for governments. Since the introduction of information technologies, however, such tasks have become significantly easier and as a result, access to public sector information has grown. New digital technologies enable public bodies to release the data they hold rapidly and in large quantities. They also make it possible to represent this information in innovative ways. The social and commercial potential of opening up public datasets has strengthened calls for full disclosure of information held by public bodies in open formats that facilitate use.

The open government data movement is made of a new generation of activists who are using their skills to advance access to large volumes of data, employing different technical methods. There are also a large number of organizations, projects and campaigns that call for open government information, advancing the release of information for different purposes. Although, to date, the movement has been very successful on many fronts, there exist many barriers to the accessing and re-use of government information, including the charging of fees as a condition to accessibility, licensing government data under very restrictive licenses, as well as other means.

Therefore, this article revisits the bases for current PSI policies in the U.S., EU and elsewhere in order to shed light on the competing interests at stake and to begin to assess how the system is operating in practice and whether it can be improved. This article will explore the scope of the digital right to information and specifically explore whether re-use for commercial purposes should be within its scope. The article proceeds as follows: in Part II different legal issues that affect the access and re-use of PSI are discussed and explored comparatively. Specifically,

[1] Public or governmental bodies are all branches of government, including the executive, legislative, and judicial branches. The category also includes private entities that perform public functions or operate with public funds. This definition is consistent with the one adopted by the Public Sector Information Directive in its definitions. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, Article 2.

copyright and database protection rights regimes, privacy regimes, as well as other important regimes affecting access to PSI are outlined. This part will also discuss the right to information, its theoretical justifications, and its status in different legal regimes and internationally. Next, Part III will compare the right to information in the U.S. and the EU, where re-use of PSI has been examined extensively during the past 20 years. Part IV evaluates different schemes for re-using PSI and methods for its commercialization, offering a model that is sensitive to the theoretical justifications of the right to information as well as the difficulties that PSI commercialization raises. It also addresses possible challenges to the model.

II. Legal Regimes Affecting Access to PSI

There are many legal regimes that affect access to PSI, its regulation and its use. The discussion that follows will comprehensively compare how PSI is regulated in the EU and the U.S., and will suggest that both legal systems chose a very liberal scheme for access and re-use of PSI. However, the discussion will also show that there exist legal regimes that affect access and re-use. Some government data cannot be accessed at all due to applicability of different exceptions that prohibit access. Such exceptions include data protected under privacy laws or for national security considerations. Furthermore, some government information cannot be accessed or re-used because the information is protected either by copyright law or database protection regimes. While copyright-protected data and databases can be accessed, they cannot necessarily be re-used because such re-use might involve infringement of exclusive rights granted to the copyright owner or the database owner. The discussion that follows will shed more light on these different legal regimes, touching mainly upon copyright in government works and database rights, which prevent re-use of works for commercial purposes, and on general instances when exclusive rights are infringed.

Copyright law is one layer of regulation of PSI. Copyright law provides exclusive economic rights to authors of original works in order to incentivize them to create. The Berne Convention gives national governments some leeway to decide whether copyright applies to "official texts of a legislative, administrative and legal nature, and to official translations of such texts."[2] Some countries, such as the United Kingdom, Belgium, and the Netherlands, apply copyright laws to government works, while other countries, such as the United States, do not.

It is important to explore the rationales for granting copyright protection to government works and to assess their strength. Those that support copyright in government works suggest that the central justification for its recognition is to ensure that government documents and materials created for public administrative purposes are disseminated in an accurate and reliable form. This justification, however, does not necessitate full copyright protection for government works. Introducing moral rights such as attribution and a prohibition to distort and change the work can guarantee the values of reliability and accuracy, respectively, without the high price that comes with many exclusive long-term rights. Additionally, another possible justification that can be

[2] Berne Convention for the Protection of Literary and Artistic Works art. 2.4, Sept. 9, 1886, *as last revised at Paris* July 24, 1971, 1161 U.N.T.S. 30.

introduced is the proprietary rationale involved in supporting free access to government information. Copyright protection or some other form of protection can ensure that commercial re-users of government information pay the taxpayer for their investment in creating these works rather than giving it for free. This rationale will be discussed at length below. However, the very same proprietary rationale mainly serves as an objection to limiting government works through copyright law, which suggests that such works should be accessible to all, uninhibited by the restraints of copyright law, because the public sponsors the creation of these works with its tax money. This argument is in line with the proprietary justification to the right to information that will be discussed below.

Thus, protecting government works through copyright law is a practice that inhibits access to and re-use of copyrightable government data. In contrast, however, it also allows control over commercialization of government works and re-use in general.

Additionally, copyright law is not the only regime that protects government works. Many governments create and manage large databases, many of which are factual in nature. Census data, budget information, geographical and meteorological information, and other types of factual information are just few examples of such databases. While United States copyright law does not grant copyright protection to unoriginal factual compilations of data, other countries do provide such protection.[3] For example, the European Union has protected unoriginal databases under the Database Directive since 1998.[4] The Directive protects databases that are the product of substantial investment for a renewable term of 15 years.[5] It provides the database owner with exclusive rights over the data, which prevents others from copying and reutilizing it.[6]

Lastly, even when government data are not protectable under copyright or database rights laws, some public bodies realize the economic value of the information and wish to sell it for profit rather than release it for free. In such instances, the public body will usually release the information only upon payment of a fee.

In all three cases, PSI is not open or accessible. Even when PSI is owned by the governments, governments license their information under certain terms.[7] They grant licenses either under copyright law, which give users permission to re-use information, or under laws governing the re-use of PSI which is not necessarily information protectable by copyright law and which set out the terms and conditions that apply to this re-use, including fees that must be paid.

One of the most important forms of regulation of PSI is freedom of information rights. 90 states on five continents recognize the right of individuals to obtain information held by public agencies.[8] Whether the right is a constitutional one is unclear in some of these countries. However, more than 80 countries have constitutional provisions providing a right to access information.[9]

In thinking about the theoretical foun-

[3]Miriam Bitton, *A New Outlook on the Economic Dimension of the Database Protection Debate*, 47 IDEA 93, 94-96 (2006).

[4]EU Directive No. 96/9/EC

[5]*Id.* art. 10(1)

[6]*Id.* art 5

[7]David Banisar & Privacy International, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Law* (2006).

[8]Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUM. HUMAN RIGHTS L. REV. 357, 357 (2011).

[9]*Freedom of Information Around the World 2006 a Global Survey of Access to Government Information Laws*, 17 (2006).

dations of the right to information, it is important to consider four major reasons that have been raised for constitutionalizing and justifying the right to information.[10] The first is the *political-democratic* justification. Under this rationale, the right to information constitutes a procedural political right because it represents a basic condition for participation in the democratic process. It serves as the basis for the exercise of other rights, such as freedom of expression. The public's ability to participate in political debate is preconditioned on its right to information and its ability to obtain it.[11]

The second justification is an *instrumental* one. Under this rationale, interests that are fundamental to the exercise of constitutional rights are as important as those rights and should therefore be considered constitutional rights themselves. Since the right to information supports basic rights such as freedom of expression it, too, is a fundamental, constitutional right.[12]

The third rationale is the *oversight or transparency* justification. Constitutions are meant to set up governments in such a way that they best protect democratic rights. An essential component of preventing corruption is transparency that allows for administrative oversight. Making information available, gives the public the ability to review governmental actions and protect its democratic rights.[13]

The fourth rationale is the *proprietary* justification. Under this rationale, the fact that citizens sponsored the creation of public sector information gives them a proprietary interest in it. The public should have free access to information whose creation or collection it financed. Public authorities are merely acting as trustees over information created in their capacity as civil servants.[14] [15] While the argument that the public has a property interest is not well-founded, the public's claim to have access to the information and to use it seems fair and right. Though the public sponsors many activities and endeavors, this alone does not necessarily suggest that the public automatically gets a property interest in the products of these activities. Such conclusions are far-reaching and do not seem to be justified by property theories. It should be noted that this rationale is applicable only to citizens or residents of the state. This is important because many PSI requesters are foreign entities.

In addition to these rationales, the open government data movement advanced additional arguments in support of opening up government data, stressing the *economic and social benefits* of such a move. The movement suggests that releasing government data also has the potential to drive the creation of innovative businesses and services that create social and commercial information products.[16] In fact, the most frequent users of PSI made available by freedom of in-

[10] Peled & Rabin, *supra* note 8 at 369.

[11] *Id.* at 360-363. There are many contemporary examples to support this theoretical justification. *See, e.g.*, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Law*, 6-8 (2006).

[12] Peled & Rabid, *supra* note 8 at 363-64.

[13] *Id.* at 366-369.

[14] *Id.* at 365.

[15] The Australian Law Reform Commission's Administrative Review Council adopted advanced the proprietary rationale. *See* Austrl. Law Reform Comm's & Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report 77, art. 4.9, available at: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf.

[16] *Beyond Access: Open Government Data and the Right to (Re)use Public Information*, Access Info Europe and the Open Knowledge Foundation (2011) available at: http://www.access-info.org/documents/Access_Docs/Advancing/Beyond_Access_7_January_2011_web.pdf.

formation laws are private corporations with commercial gain at stake.[17] Furthermore, releasing government data creates a platform for collaborative projects between public bodies, private actors, and the public. It allows the government to use private entities to improve public accessibility to data.

Based on these justifications, some scholars suggested that the right to information should be protected as a constitutional right.[18] Indeed, many legal regimes have recognized the right to information as a constitutional right based on these rationales. Sweden was the first country to legislate a freedom of information act that also provided constitutional protection of this right. Other states have explicitly included the right in their constitutions. [19]

The United States has taken an ambiguous position regarding the right to information. In 1977, the U.S. Supreme Court found that the Constitution did not include the right of access to information.[20] The rationale for this approach is the American approach to individual freedoms, which favors endowment of the broadest protection to negative rights while withholding the recognition of those rights that compel a positive duty by the government.[21]

Exploring the right internationally, there are many international legal channels that recognize the right to information. The UDHR acknowledges the right to seek, receive and impart information.[22] Likewise, the International Covenant on Civil and Political Rights acknowledges the right.[23] The UN Convention Against Corruption has also acknowledged the right, suggesting that the public can only effectively participate in society when it has effective access to information.[24]

Similarly, exploring the right regionally, the European Union has adopted a few legal instruments that acknowledge the right to information. The Charter of Fundamental Rights of the EU,[25] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[26] and the Convention of Access to Official Documents all acknowledge either broad or limited rights of access to certain information.[27] Importantly, in April 2009 the European Court of Human Rights held in the matter of *Társaság a Szabadságjogokért v. Hungary* that withholding of information on matters of public importance may pose a violation of freedom of expression as protected by Arti-

[17] John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 95–109 (2006).

[18] Peled & Rabin, *supra* note 8 at 369-70.

[19] *Id.* at 368-9.

[20] *Id.* at 375-6. *See also* Houchins v. KQED, Inc., 438 U.S. 1 (1978).

[21] 428 U.S. at 14.

[22] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc A/810 (Dec. 12, 1948) at art. 19.

[23] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. I-14668 at art 19.2.

[24] United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, at art 13.

[25] Charter of Fundamental Rights of the European Union, art. 42 2000, O.J. (C 364/01) 19. The Charter suggests that residents of the Union have the right of access to documents held by the Union's institutions.

[26] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998, respectively. Article 10 discusses the freedom of expression and suggests that everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas.

[27] Council of Europe Convention on Access to Official Documents, Council of Europe Treaty Series No. 205, 18 VI 2009. The Convention has been signed by 12 Council of Europe Member States to date.

[28] Társaság a Szabadságjogokért v. Hungary, 37374/05, (Apr. 14, 2009), in which Hungary's Constitutional Court refused to divulge information on a parliamentarian's complaint over amendments to drug legislation. The European Court of Human Rights ruled that withholding the information was a violation of the freedom of expression and information anchored

cle 10 of the convention for the Protection of Human Rights and Fundamental Freedoms.[28]

In the Americas, freedom of information laws have been adopted in many countries. Mexico has a very powerful freedom of information law, and the United States, Canada, Colombia, Jamaica, Trinidad and Tobago, Belize, Panama, Peru, Ecuador, the Dominican Republic, and Antigua and Barbuda all have freedom of information laws and many other countries are in the process of adopting such laws.[29] The Asia-Pacific region is weaker in terms of freedom of information laws.[30]

The right to information has been traditionally construed as a right to have uninhibited access to government information, suggesting that accessibility and reuse of that information is an integral part of the right. However, there has not been a serious discussion of the question of re-use for commercial purposes until the consideration of the PSI Directive in the European Union, which will be discussed below.

Additionally, advancements in information technology have provided governments around the world with advanced tools to provide even greater access to information. This naturally raises a new set of questions regarding the scope of the digital right to information. The most important question is essentially how the digital revolution affects the right to information. Specifically, to what extent does the digital right to information involve an active duty to disclose and share more government information? Additionally, it also raises the question of how governments should respond to requests and to what extent they are subject to new technical requirements in responding to these requests.

It is important to shed some light on the technical dimensions of the open government data debate. In addition to being comprehensive and timely, in order for government data to be considered 'open' it must be accessible to those seeking information. This means that it must be stored in such a way that it is easy to discover, download and re-use. [31] Governments employ different means to advance these goals. In order to promote discoverability of data so that the public can know what information is available for access, governments employ registers of the information they hold, official open government data catalogues, and community-driven data catalogues.[32] Additionally, they employ search engine optimization, proper indexing, metadata management, microformats, and other means.[33]

However, these new technical dimensions, which are integral components to crafting open government data policy, also raise cost considerations. While there is great social and economic benefit to greater transparency and accessibility of government data, governments might have concerns regarding the costs of opening up government data. There are some potential costs that need to be considered. For example, human-resources costs asso-

in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *See also* Kenedy v. Hungary 31475/05, (May 26, 2009), which concerned a case about the withholding of some information about the activities of the state police under communism.

[29] *Freedom of Information Around the World 2006 A Global Survey of Access to Government Information Laws.*

[30] *Id.*

[31] *Beyond Access: Open Government Data and the Right to (Re)use Public Information,* Access Info Europe and the Open Knowledge Foundation (2011), p. 14 available at: http://www.access-info.org/documents/Access_Docs/Advancing/Beyond_Access_7_January_2011_web.pdf.

[32] *Id.* at 14-19.

[33] *Id.* at 19-21.

ciated with organizing and preparing information to be put online. Additionally, converting large volumes of data into reuseable formats can have major cost implications. Of course, as more government activities and documentation are computerized and digitized, the costs of processing and publishing information will decrease significantly over time. The use of open file formats and open source software can significantly reduce the costs. Nevertheless, costs seem to be one of the major hurdles to open government data. This naturally will affect the way that the scope and nature of the right to information and the duties imposed on governments should be designed. This should also affect the way commercialization of PSI is addressed. In considering commercialization, there is great value in private-public partnerships in advancing access to government information. Therefore, private entities might actually play a role in opening data. This consideration can affect the analysis regarding commercialization of PSI.

Given these different legal regimes that affect access to PSI, the next section will move on to compare the commercialization of PSI in the U.S. and the EU. This discussion will serve as a good starting point for consideration of the scope of the right to information and its commercialization dimension. As the discussion has shown, it is debatable whether PSI can be subject to government property rights or subject to any fees in modern democracies given the proprietary rationale to the right to information that suggests that government information has been created with taxpayers' money and as such should be freely available to the public. The next section will discuss American and European perspectives regarding the scope of the right to information.

III. Exploring the Right to Information and PSI Commercialization Comparatively: American and European Perspectives

The following discussion explores the development of the right to information with an emphasis on commercializing PSI in the United States and the EU. It provides an opportunity to explore two important regimes that have debated the issue of commercialization of PSI.

A. PSI in the United States

In 1822 James Madison stated that:

> *"A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives."*[34]

With the increasing complexity and globality of the information market, a clear and distinct government policy regarding the role and re-use of PSI is required for any country that wishes to benefit from this valuable commercial enterprise. In addition to the possible economic incentives to a clear legal framework for PSI, in the United States the role played by PSI reflects the government's own philosophy towards the nature of democracy and its recognition that government information is a valuable public resource whose dissemination can benefit the nation.

PSI in the United States is characterized by "broad rights to electronically

[34] James Madison, Letter to W. T. Barry, Aug. 4, 1822.

access government information and re-use it for commercial purposes, a lack of restrictions on re-use, the limiting of charges to the marginal costs of reproduction and dissemination and the absence of copyright in federal government materials."[35] There is a widely supported legal and administrative basis for the disclosure of U.S. government information. The legally mandated ease in the dissemination of government data not only makes the monetization of this data for the betterment of private citizens possible but also enriches the American democratic experience, enabling and ennobling citizens to keep the government transparent and open.

The main statutory basis for open access to government data is Section 105 of the U.S. Copyright Act of 1976, which excludes works of the federal government from being eligible for copyright protection, though works that are already copyrighted can be transferred to the U.S. Government.[36]

According to 17 U.S.C. § 101, a "work of the United States Government" is a work prepared by an officer or employee of the U.S. Government as part of his or her official duties or duties assigned as a result of employment.[37] Works prepared outside of an employee's official duties may be copyrightable.[38] Additionally, "the specific task need not be individually assigned in order to qualify as part of the official functions of a government employee."[39] The limitations in 17 U.S.C. § 105 only apply on a federal level; state and local governments often do claim copyrights on publications. Colorado even copyrights its statutes.[40]

The reasoning behind 17 U.S.C. § 105 is to ensure that government information remains in the public domain in order to best serve the public interest. A prime example of this policy is the long-standing statutory requirement that the Government Printing Office sell copies of printing plates used to print government publications.[41] This prohibition against government copyright is complementary to the First Amendment's policy against government interference in the marketplace for ideas.[42]

The lack of copyright on the works of the U.S. Government does not create a requirement that all works be made available without restriction.[43] Rather, government agencies may impose specific conditions on access to and re-use of information through legislation. This may only be done so as to ensure that the copyrighted information found within the government product is protected. Furthermore, issues related to joint authorship or sponsorship with non-government authors or organizations would allow agencies to constrain use of certain data.

The Office of Management and Budget's Circular A-130 ("OMB Circular A-130") is one of the most important pieces of legislation regarding PSI as it establishes guidelines for the management of information of executive branch depart-

[35] Anne Fitzgerald, "The United States of America." *Policies and Principles on Access to and re-use of Public Sector Information: A Review of The Literature in Australia and Selected Jurisdictions* (2010).

[36] 17 U.S.C. § 105.

[37] 17 U.S.C. § 101.

[38] S.REP. NO. 473, 94th Cong., 2d Sess. 56-57 (1976).

[39] Herbert. v. United States, 36 Fed. Cl. 299 (Fed. Cl. 1996).

[40] West Colorado Revised Statutes Annotated § § 2-5-115, 2-5-118(b)(II).

[41] 44 U.S.C § 505 (1988).

[42] U.S. Const. amend. I.

[43] Pfeiffer v. Central Intelligence Agency, 60 F.3d 861 (D.C. Cir. 1995).

[44] OMB Circular No. A-130, *Management of Federal Information Resources*, (Nov. 28, 2000).

ments and agencies of the U.S. Federal Government.[44] It is based on the Paperwork Reduction Act 1980 (PRA), as amended by the Paperwork Reduction Act 1995,[45] which requires federal agencies to actively disseminate public information without restrictions or conditions at a cost no greater than the cost of dissemination. Perhaps most importantly, the Freedom of Information Act (FOIA) and its subsequent amendments established a culture of disclosure of government records.[46]

The OMB Circular was originally issued on November 28, 2000 and is reviewable every three years. It offers the conceptual basis of the policy as "the premise that government information is a valuable national resource, and that the economic benefits to society are maximized when government information is available in a timely and equitable manner to all."[47] As such, the Circular requires that improperly restrictive practices, such as exclusive access arrangements or the charging of fees or royalties on the re-use, resale, or dissemination of public sector information be avoided.[48]

According to the OMB, government information is "any communication or representation of knowledge such as facts, data or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual form"[49] that is "created, collected, processed, disseminated, or disposed of by the Federal Government."[50]

The provisions apply to all agencies of the executive branch of the Federal government[51] but do not overcome the individual's right to privacy[52] or national security issues.[53]

Clause 8 of the OMB details how agencies are to provide information to the public. Agencies must provide information "describing agency organization, activities, programs, meetings, systems of records, and other information holdings"[54] as well as "access to agency records under the provisions of the Freedom of Information Act and the Privacy Act."[55] These duties must be discharged in an equitable and timely fashion[56] that best maximizes the usefulness of the information and minimizes costs.[57]

In order to avoid improperly restrictive practices, agencies are prohibited from establishing distribution arrangements that would hinder the information from being disseminated in a timely and equitable fashion,[58] including the charging of fees or royalties.[59] Apart from a few exceptions,[60] costs may not exceed "a level sufficient to recover the cost of dis-

[45] 44 U.S.C. Chapter 35.
[46] 5 U.S.C. § 552.
[47] OMB Circular No. A-130, App. IV, § 9(b).
[48] OMB Circular No. A-130, § 8a(7).
[49] *Id.*, § 6j.
[50] *Id.*, § 6h.
[51] *Id.*, § 4a.
[52] *Id.*, § 7g.
[53] *Id.*, § 4b.
[54] *Id.*, § 8(a).
[55] *Id.*, § 8(b).
[56] *Id.*, § 8(c)(ii).
[57] *Id.*, § 8(c)(i).
[58] 8 *Id.*, § (7)(a).
[59] *Id.*, § 8(7)(b).
[60] The exceptions provided by 8(7)(c) are: (i) where statutory requirements provide otherwise, (ii) where the information only benefits a specific group or (iii) where the Director of the OMB allows for an exception.
[61] *Id.*, § 8(7)(c).

semination."[61]

The Paperwork Reduction Act gives federal agencies similar responsibilities to provide the public with timely and equitable access to information. [62] It also limits arrangements that would interfere with availability or re-use.[63]

Aside from the OMB, one of the cornerstones of the transparency that typifies the federal government's approach to government information is the Freedom of Information Act.[64] Enacted in 1966 and put into effect in 1967, the purpose of the Act was to enable any person or organization, regardless of citizenship or country of origin, to request any record in the possession of a federal agency. The FOIA also requires that government agencies publish material relating to their structures and functions, rules, decisions, procedures, policies, and manuals.[65] There are nine categories of discretionary exemptions: national security, internal agency rules, information protected by other statutes, business information, inter- and intra-agency memos, personal privacy, law enforcement records, financial institutions and oil wells data.[66] Additionally, there are around 140 different statutes that allow for withholding requested information.[67]

The Act was amended and expanded upon in 1996 by the Electronic Freedom of Information Act.[68] Among other expansions, it required any information created after November 1996 to be posted online[69] and that indexes of public records be published online along with the records themselves.[70]

After a written FOIA request is filed, the government must either respond to the request within 20 working days, or prove that the information requested falls within one of the FOIA exemptions.[71]

The government is allowed to charge a reasonable fee[72] for responding to a FOIA request and for the "direct" costs of searching for and copying the records requested, unless there is an option for fee benefits or waivers.[73] The fees are intentionally not meant to recover all of the costs of processing the requests.[74]

The FOIA Reform Act of 1986 set out specific fee provisions for four categories of requesters: commercial requesters, non-commercial requesters from educational or scientific institutions, representatives of the news media, and other requesters.[75] All fees can be waived if disclosure of information is in the public interest.[76]

The federal FOIA also does not apply to state or local governments. All

[62] 44 U.S.C. § 3506(d)(1).
[63] *Id.* § 3506(d)(4).
[64] 5 U.S.C. § 552.
[65] 5 U.S.C. § 552(a).
[66] 5 U.S.C. § 552(b).
[67] *Freedom of Information Around the World 2006 a Global Survey of Access to Government Information Laws*
[68] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).
[69] 5 U.S.C. § 552(a).
[70] *Id.*
[71] *Id.* § 552(a)(6)(A).
[72] "Search fees generally range from $11 to $28 per hour, based on the salary and benefits of the employee doing the search. Fees for computer time, which are described in each agency's FOIA regulations, vary greatly. They may be as high as $270 per hour. Photocopying costs are normally between 3 and 25 cents per page." (Federal Open Government Guide, 10th Edition published by The Reporters Committee For Freedom of the Press).
[73] 5 U.S.C. § 552(a)(4)(A).
[74] *Id.* § 552(a)(4)(A)(iv).
[75] Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § § 1801-1804, 100 Stat. 3248 (1986).
[76] 5 U.S.C. § 552(a)(4)(A)(iii).

states have their own "open records" laws that provide access to state and local records.[77] Most states require that data be purchased for a reasonable fee, which is usually the price of copying the requested documents, though nine states do allow the inclusion of capital and/or maintenance costs in setting the fee.[78] Very few states (4) prohibit any commercial re-use of PSI.[79] Some states provide a fee waiver when a request advances the public interest or when it is filed by an indigent requestor.[80] Seven states distinguish between commercial and non-commercial uses, sometimes exempting non-commercial uses from fee charges.[81] A number of states permit higher prices for commercial users.[82] However, 12 states prohibit any inquiry as to the intended use of the data.[83] A number of states have information commissions or other review bodies that can issue opinions or review decisions.[84]

Some scholars argue that the U.S. approach towards PSI has been shown to be more effective than the European one. Peter Weiss shows that the U.S. approach generates far more social wealth than the European, so-called, 'cost recovery approach'. Weiss notes that "[c]ountries that exercise intellectual property rights over government data…limit the extent to which government-collected data can be used, even in international collaborations. By making it more difficult to integrate global data sets and share knowledge, such a commercialization policy will fail to achieve the maximum benefits provided by international collaboration in the scientific endeavor."[85] Weiss further explains that charging marginal fees of dissemination for public sector information will lead to optimal economic growth in society and will far outweigh the immediate perceived benefits of aggressive cost recovery.[86] Open government information policies foster significant, but not easily quantifiable, economic benefits to society.

B. PSI in the European Union

When reviewing the issues of access to and re-use of PSI in the EU, two major factors must be taken into account. First, the availability of public sector information or documents is dependent upon the scope of the right of access to public information. The right of access to public information stems from the general right to information. If the information is classified or protected by other rights, such as intellectual property law, access to that information will be limited. Moreover, if no law on government transparency exists, citizens or the public at large will generally not have the right to access public information. The second factor that needs to be considered is the procedure a citizen or company must follow in order to ac-

[77] The different states adopt a variety of open access regimes.

[78] Free or Fee: The Governmental Data Ownership Debate Gita White Paper (Aug. 2005) (Alaska, Hawaii, Iowa, Mississippi, Michigan, Nevada, Tennessee, Indiana, and Maryland).

[79] Colorado, C.R.S.A. § 24-72-305.5; Rhode Island, R.I. Gen. Laws § 38-2-6; South Carolina, Code 1976 § 30-2-50; South Dakota, AG. Op. 80-27.

[80] For example: Alaska, AS § 40.25.110(b)-(e); Idaho, IC 9-338(8); Maine, 1 MRSA 408(3)-(5).

[81] For example: Arizona, A.R.S. § 39-121.03, 39-122, 39-127; Minnesota, MS § 13.03.

[82] Arizona, A.R.S. § 39-121.03, 39-122, 39-127; Kentucky, KRS § 61.874l ; Minnesota, MS § 13.03; Mississippi, § 25-61-7; Oklahoma, OS § 24A.5(3).

[83] Texas, Tex Gv. Code § 552.222(a).

[84] For example: Hawaii, Haw. Rev. Stat. § 92F-41; New Jersey, N.J.S.A 47:1A-7.

[85] Peter Weiss, *Borders In Cyberspace: Conflicting Public Sector Information Policies And Their Economic Impacts*, U.S. NAT'L WEATHER SERVICE, (Feb. 2002).

[86] *Id.* at 3-8.

quire access to publicly available information and the conditions applied to the use of such information. If a simple, low-cost procedure is not in place, then once again, access will be limited.

Over the past 15 years, the European Union has recognized that PSI is one of the most valuable resources available in Europe.[87] In order to realize the great potential of PSI, the EU understood that steps had to be taken in order to harmonize the laws of Member States in relation to the access and exploitation of PSI.

Thus, the following discussion will proceed thusly: Part b.1. will describe the economic importance of re-using PSI in the EU. Part b.2. will provide an overview of the development of PSI legislation at the European level and explain the background for the legislation of the PSI Directive.[88] Part b.3. will examine the provisions of the PSI Directive and discuss the manner in which Member States have implemented them. Part b.4. will highlight the beneficial practices that have been evolving in the implementation of the PSI Directive, as well as review a number of "ill" practices that have led to the initiation of infringement proceedings against several EU Member States. Part b.5. will conclude the discussion of the EU policy.

1. The Economic Importance of Re-Using PSI in the EU

According to PIRA's 2000 study,[89] public sector bodies produce the greatest volume of information in Europe. Given the growing value of the information industry, the study determined that the value of PSI, which can be commercially exploited in value-added PSI products, should be maximized by creating a single European PSI market and by establishing fair trade in PSI.

While determining the exact economic value of PSI was difficult because of the lack of data, the potential value of PSI was estimated to reach €68 billion. The PIRA study contended that the EU's cost recovery system was inhibiting market growth, whereas in the United States, where an open approach was taken to PSI, the market was only growing. Moreover, the EU's approach to PSI was causing governments to lose out on the potential revenues that could be gained from tax receipts were the PSI market to expand. Having listed the barriers to commercial exploitation of PSI, the study suggested that the EU invest more money in PSI and human resources and select a different mechanism for cost recovery.

After the legislation of the 2003 PSI Directive, which was intended to establish a framework for the re-use of PSI, the MEPSIR study[90] examined the effect of the Directive on the exploitation of PSI. Surveying the United States, 25 EU countries, and Norway, the study used standards such as availability, accessibility, transparency, accountability, non-discrimination, actual demand, and economic results in order to measure the re-use of six types of information (business information, geographic information, legal information, meteorological information, social data, and transport information). Based on these standards, the study found that the overall EU market size of

[87] See the discussion in the section: "The Economic Importance of Re-Using PSI."

[88] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

[89] Pira International Ltd., *Executive Summary: Commercial Exploitation of Europe's Public Sector Information*, (Sept. 2000) available at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/pira_study/2000_1558_en.pdf.

[90] Helm and Zenc, *Executive Summary: Measuring European Public Sector Information Resources (Final Report of Study on Exploitation of Public Sector Information – benchmarking of EU framework conditions)*, (June 2006) available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/mepsir/executive_summary.pdf.

PSI ranged from €10 to €48 billion, a more modest estimate than that of the PIRA study. According to the study, the goals of the Directive had not been fully realized at the time of the study, and the PSI market would expand when the Directive was fully implemented.

In 2008, MICUS conducted a study[91] on PSI re-use and found that although the EU Directive had yet to be fully implemented, the market for PSI in the geographical information, meteorological information, and legal information sectors was growing. The impact of the EU Directive was greatest in the geographical information sector, where income was increasing for over 66% of the re-users surveyed. The increase in income was attributed to the improvements in data formats, delivery services, and better pricing and licensing models, which were called for by the EU Directive. According to the study, the market for legal information grew by 40% and the implementation of the EU Directive resulted in changes in data policy. However, the study found that re-users were unsatisfied with the availability and accessibility of legal information. In the meteorological information sector, there was little change in PSI policy even though the market for such information was growing. Interestingly enough, the study found that most re-users were not aware of the EU Directive and the rights that the Directive granted them. Thus, while the markets in these information sectors were growing, and the re-use of PSI had increased, the study recommended that public bodies holding PSI continue to improve their PSI policies so that the re-use of PSI could increase.

2. The History of European Union Public Sector Information Legislation

By 1979, the Parliamentary Assembly of the 46-country Council of Europe began calling upon European countries to adopt laws to enable access to government-held information. It was not until 2002 that the Council approved a detailed recommendation for Member States to enact national laws that would provide everyone with access to public information.[92]

At the same time, the EU has been working since 1989 to promote access to PSI. In 1989, the EU Commission published guidelines that were aimed at improving the synergy between the public and private sectors in the information market.[93] These guidelines had little, if any, impact.[94] However, in 1996, the exploitation of PSI began to receive more attention. In September, the EU Parliament requested that new electronic methods for distributing PSI to EU citizens be explored.[95] A month later, the Industry Council of the EU took action and initiated a new policy to incentivize Member States to improve citizens' access to PSI, emphasizing the use of "information so-

[91] *Assessment of the Re-use of PSI in the Geographical Information, Meteorological Information, and Legal Information Sectors*, MICUS, December 2008, available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/micus_report_december2008.pdf.

[92] Freedom of Information Around the World, *supra* note 67 at 20.

[93] Commission of the European Communities, Guidelines for improving the synergy between the public and private sectors in the information market, 1989, available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/brochure/1989_public_sector_guidelines_en.pdf.

[94] Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, June 2002, at 3 (describing the need for legislative action as opposed to mere guidelines in order to initiate actual reforms) available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive_proposal/en.pdf.

[95] European Commission, *Public Sector Information: A Key Resource for Europe; Green Paper on PSI in the Information Society*, Jan. 1999, at 26, available at: ftp://ftp.cordis.europa.eu/pub/econtent/docs/gp_en.pdf.

[96] *Id.* at 26.

ciety tools and partnerships between the public and private sector."[96] In 1998, the Information Society Forum, a group established by the EU Commission in order to research and provide input on the information society[97] in Europe, encouraged PSI access in its Vienna Declaration.[98] Improved access to PSI was advanced in the Amsterdam Treaty,[99] which stipulated that EU citizens be granted the right to access information belonging to the Parliament, Council and the Boards of the Union.[100]

In order to address the need for better exploitation of PSI, the EU Commission issued the "Green Paper on Public Sector Information in the Information Society" in 1999.[101] This green paper stressed the importance the EU Commission attributed to PSI in the EU, described the issues involved in accessing and exploiting PSI, and outlined the current PSI legal frameworks in Member States.[102] The issues described in the green paper would ultimately influence the principles governing the EU Directive on the re-use of PSI.In addition, the document included a list of questions addressed to Member States about the regulation of access and re-use of PSI. The green paper resulted in a discussion that drew 185 written responses from governmental and semi-governmental bodies, industry associations, civil groups, and others.[103] These responses were later used in formulating the PSI Directive.

In 2001, the EU Parliament passed legislation regarding public access to European Parliament, Council and Commission documents. This legislation was the first step in implementing the provisions of the Amsterdam Treaty and the green paper on PSI. The legislation anchored the right of citizens to access information belonging to EU institutions in law.[104] That same year, in a Commission Communication,[105] the EU Commission adopted the "eEurope 2002" action plan, which called for the online publication of public data as well as the development of a coordinated approach to PSI at the European

[97]The information society has been described by the EU as "mobile phones, the internet, high-speed digital delivery systems, which bring together the previously separate worlds of telecommunications and broadcasting." Europa, http://europa.eu/pol/infso/index_en.htm.

[98]*Id.* Vienna declaration available at http://www.epractice.eu/files/media/media_434.pdf.

[99]The Amsterdam Treaty amended previous EU treaties "to create the political and institutional conditions to enable the European Union to meet the challenges of the future such as the rapid evolution of the international situation, the globalisation of the economy and its impact on jobs, the fight against terrorism, international crime and drug trafficking, ecological problems and threats to public health." Europa, The Amsterdam Treaty: Introduction, available at: http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a09000_en.htm.

[100]Section 45 of the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, available at: http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0001010001.

[101]European Commission, *Public Sector Information: A Key Resource for Europe; Green Paper on PSI in the Information Society*, Jan. 1999, available at: ftp://ftp.cordis.europa.eu/pub/econtent/docs/gp_en.pdf.

[102]*Id.*

[103]Yvo Volman, *Exploitation of Public Sector Information in the Context of the eEurope Action Plan, Edward Elgar Publishing Limited*, 2004, at 101, available at: http://books.google.com/books?hl=en&lr=&Id=a0AbDHMb5rAC&oi=fnd&pg=PA93&dq=Yvo+Volman,+Exploitation+of+Public+Sector+Information+in+the+Context+of+the+eEurope+Action+Plan.+&ots=RbebovJD0f&sig=ZH-LXhQ-tYtmCPlcXyYJh4XVkpo#v=onepage&q=Yvo%20Volman%2C%20Exploitation%20of%20Public%20Sector%20Information%20in%20the%20Context%20of%20the%20eEurope%20Action%20Plan.&f=false.

[104]REGULATION (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[105]Commission of the European Communities, Communication, *eEurope 2002: Creating a EU Framework for the Exploitation of Public Sector Information*, Oct. 2001, available at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/eeurope/2001_607_en.pdf.

level.[106] The Commission's Communication on the adoption of the action plan reiterated the economic benefits of exploiting PSI for the information economy and described the challenges faced by companies in trying to use PSI data. For example, since the rules and practices governing re-use of PSI differed or were unclear in different countries, it was unlikely that companies would invest in products that required cross-border exploitation of PSI because the laws in each country were uncertain.[107] The Communication outlined the legal framework necessary to deal with the issues of access and re-use of PSI, describing principles concerning re-use, fair trade, pricing, and procedure that should be implemented through the use of a directive.

In 2002, the Commission published a proposal for a directive on the access and re-use of PSI.[108] Emphasizing the need for more concrete legislative action, the directive proposal aimed to ensure "that in relation to the re-use of public sector information the same basic conditions apply to all players in the European information market, that more transparency is achieved on the conditions for re-use and that unjustified market distortions are removed."[109]

In 2003, the EU Parliament enacted a directive regarding the right of EU citizens to access environmental information.[110]This directive reflected the importance of transparency, freedom of information and easy access to essential information, in this case with regard to environmental information.

Later that year, the European Parliament passed Directive 2003/98/EC on the re-use of PSI.[111] This Directive was the culmination of the many proposals and reports concerning the need to address the barriers to PSI exploitation. In order to establish transparency and fair trade, the Directive established rules governing the re-use of PSI that had already been made accessible when public sector bodies license, sell, disseminate, exchange or give out information.[112] As will be discussed later in the article, the Directive addresses procedures for re-use, places limits on charging fees for re-use, prohibits discrimination, limits exclusive licensing, and requires means for redress.

The Directive required that EU Member States transpose the principles listed in the Directive into national legislation by July 2005.[113] By May 2008, all 27 EU Member States reported that they had implemented the rules of the Directive.[114] In addition, the Directive required that assessments be made on the implementation of the Directive.[115] The EU Commission examined the application of the PSI

[106]Council of the European Union & Commission of the European Communities, *eEurope 2002: An Information Society for All Action Plan*, June 2000, at 23, available at: http://ec.europa.eu/information_society/eeurope/2002/documents/archiv_eEurope2002/actionplan_en.pdf.

[107]Communication, eEurope 2002 at 5.

[108]Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, June 2002, available at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive_proposal/en.pdf.

[109]*Id* at 3.

[110]Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[111]Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

[112]Section 9 of the preface to the PSI Directive.

[113]Article 12 of the PSI Directive.

[114]Implementation of PSI Directive, Europe's Information Society Thematic Portal, http://ec.europa.eu/information_society/policy/psi/actions_ms/implementation/index_en.htm.

[115]Article 13 of the PSI Directive.

Directive from 2005 and on by sending questionnaires to public bodies and private companies in EU Member States. In 2009, the Commission published a report that examined the implementation of the Directive in different states and explored the economic effect of the adoption of the Directive.[116]

Alongside the evolution of general EU legislation concerning the access and re-use of PSI, the legislation in Member States has undergone an unprecedented level of development since the early 1990s.[117] A number of Scandinavian countries[118] and France[119] were the first to introduce public information access lawsThey were followed by Belgium,[120] the Netherlands,[121] southern European countries,[122] Ireland,[123] and the United Kingdom.[124]

There are a number of reasons for the proliferation of access laws during recent years. The constitutions of many newly formed democracies include a specific right of access to public information which has required the adoption of new laws.[125] Special conditions prevailing in certain jurisdictions have also led to the introduction of access laws. For example, in the post-communist states, one of the main motivations behind the introduction of access laws has been the desire to provide access to the files of the former secret police.[126]

One of the main motivations for legislating access laws in Europe and other countries has been the desire to strengthen the democratic process. The freedom granted in information laws is perceived as a valuable tool for the promotion of citizen participation in government activities.[127] Apart from this democratic, human-rights rationale, economic considerations have also played a role in the adoption of PSI legislation. PSI is a valuable informational product that can be commercialized in many ways. Additionally, advancements in information technologies have significantly improved the capability of exploiting this data for economic gain. However, despite its promising potential, only several EU Member States had created laws outlining the *procedure* for accessing PSI. For example,

[116]Communication on the Re-use of Public Sector Information-review of Directive 2003/98/EC, May 2009, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0212:FIN:EN:PDF.

[117]David Banisar, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws*, 2006, at 12, available at: http://www.freedominfo.org/documents/global_survey2006.pdf.

[118]Sweden has had freedom of information legislation since the introduction of the Freedom of the Writing and of the Press Ordinance in 1766; *See* Anders Chydenium Foundation, The World's First Freedom of Information Act, 2006, available at: http://www.access-info.org/documents/Access_Docs/Thinking/Get_Connected/worlds_first_foia.pdf. The Access to Public Administration Files Act was passed in Denmark in 1985 (Act No. 572). In Finland, the Act on Publicity of Official Documents was passed in 1951 (Act 83/9.2.1951).

[119]Law on access to administrative documents: *Loi* no.78-753 *du jillet* 1978 *de la liberte aux documents administrate.*

[120]Law on the right of access to administrative documents held by federal public authorities: *Loi du* 11 avril 1994 *relative a la publicite de l'administration.*

[121]Government Information (Public Access) Act: Act 703 of 31 October 1991.

[122]Greece: Code of Administrative Procedure: Law No.2690/1999; Italy: No. 241 of 7 August 1990; Portugal: Law of Access to Administrative Documents: Law No. 65/93 26 August 1993; Spain: Law on Rules for Public Administration: Law no. 30 of the 26 November 1992.

[123]Freedom of Information Act 1997 No. 13 of 1997.

[124]Freedom of Information Act 2000, c. 36.

[125]Banisar, *supra* note 7, at 8.

[126]*Id.*

[127]Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, at 2.

[128]The Access to Public Administration Files Act, Act No. 572, 1985.

[129]Law on Free Access to Information, Act No. 106, 1999.

states such as Denmark and the Czech Republic had legislated information access laws in 1985[128] and 1999,[129] respectively. However, such laws lacked the unified framework for addressing PSI re-use that was later instituted by the PSI Directive. Consequently, the different developments in the laws encumbered the realization of the potential in PSI on the European level.[130]

3. The PSI Directive

Overview The PSI Directive is geared towards accomplishing a number of objectives.[131] First, it is designed to help facilitate the creation of European information services that make use of PSI. Second, it is meant to increase cross-border re-use of PSI for added-value information products and services. Third, it is intended to limit competition distortions such as monopoly markets and discrimination practices in the market. Fourth, it aims to harmonize legislation in Member States' (this is significant given that up until the legislation of the Directive, each state was moving at a different pace in terms of PSI re-use legislation).

Where a right to re-use PSI already exists, the Directive mandates that the laws regarding the re-use of that information comply with certain standards. Thus, the Directive does not obligate states to permit the re-use of a certain type of document, nor does it demand changes in the legal regimes regarding the right to access that specific information.[132]

As of May 2008, 27 Member States notified the EU Commission that they had implemented the Directive.[133] 12 of those states (Belgium, Germany, Greece, Spain, Ireland, Italy, Cyprus, Luxembourg, Malta, Romania, Sweden, and the United Kingdom) adopted specific PSI re-use measures.[134] Three Member States (Denmark, Austria, and Slovenia) used a combination of legislation that had been in place before the Directive and specific PSI re-use measures.[135] Eight Member States (Bulgaria, the Czech Republic, Finland, France, Latvia, Lithuania, the Netherlands, and Portugal) included the re-use of PSI into their existing legislative frameworks.[136] Four Member States (Estonia, Hungary, Poland, and Slovakia) notified the Commission of measures that had been in place before the Directive, but had not legislated any new re-use provisions.[137]

The following section will provide an overview of the provisions of the PSI Directive and their implementation in the EU Member States, highlighting and comparing important aspects.[138] It must be noted at the outset that this discussion only addresses the implementation of the PSI Directive into Member States' laws or constitutions, and not the existing

[130] Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, at 4.

[131] Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, at 4. *See also* About Public Sector Information Section at http://ec.europa.eu/information_society/policy/psi/what_is_psi/index_en.htm.

[132] Section 9 of the preface to the PSI Directive.

[133] Implementation of the Public Sector Information Directive 2003/98/EC by the Member States, http://ec.europa.eu/information_society/policy/psi/rules/ms/index_en.htm.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] The laws reviewed are those posted on the EU Commission's official PSI Directive Implementation website, as listed in the Commission's official English versions of the Member States' laws. (Implementation of the Public Sector Information Directive 2003/98/EC by the Member States, http://ec.europa.eu/information_society/policy/psi/rules/ms/index_en.htm.)

freedom of information systems in those states.

Provisions, Principles and Implementation As noted above, the Directive mandates that where documents held by public sector bodies are made accessible, those documents must be re-usable for commercial or non-commercial purposes.[139] A document is considered to be made accessible for re-use, and thus, subject to the Directive's provisions, when "public sector bodies license, sell, disseminate, exchange or give out information."[140] Moreover, documents must be made available in their pre-existing formats or language through electronic means when possible.[141]

There are a number of exceptions to the obligation of Member States to facilitate the re-use of PSI. The Directive has to comply with the principles relating to the protection of personal data in other EU directives[142] and cannot affect the level of protection granted to individuals in national laws.[143] The Directive is also only applicable insofar as it is compatible with international agreements on intellectual property rights.[144] Personal rights and public interests can be protected by "defining out" certain classes of information from the scope of the state law[145] or through specific provisions exempting existing privacy or intellectual property rights.[146] Slovenia provides for a "public interest override," in which a document exempted from PSI re-use might lose that protection in light of a public demand.[147] Some states, such as Germany,[148] have additional requirements for accessing PSI, requiring a "demonstrable legal or legitimate interest" in viewing the document.[149] In addition, documents that can inhibit the implementation of administrative procedures have also been excluded from the scope of PSI laws.[150]

Only content that is considered a "document" is subject to the provisions of the PSI Directive.[151] The Directive provides that a **"document"** is "any representation of acts, facts or information - and any compilation of such acts, facts or information - whatever its medium (written on paper, or stored in electronic form or as a sound, visual or audiovisual recording), held by public sector bodies."[152] Excluded from the definition are (1) documents not created within the scope of the agency's public task, (2) documents for which third parties hold intellectual property rights

[139] Section 9 of the preface to the PSI Directive; Article 1, Section 4 of the PSI Directive; Article 3 of the PSI Directive.

[140] Section 9 of the preface to the PSI Directive.

[141] Article 5, Section 1 of the PSI Directive.

[142] Section 21 of the preface to the PSI Directive. *See also* Directive on the protection of individuals with regard to the processing of personal data which is available at http://www.cdt.org/privacy/eudirective/EU_Directive_.html.

[143] Article 1, Section 4 of the PSI Directive.

[144] Article 1, Section 5 of the PSI Directive.

[145] For instance, Section 3(1) of Ireland's European Communities(Re-Use of Public Sector Information) Regulations 2005 S. I. No. 279 of 2005.

[146] Article 1(3) of Germany's Re-Use of Public Sector Information Act (Informationsweiterverwendungsgesetz-IWG) of 13 December 2006.

[147] Article 6, Section 2 of Access to Public Information Act, Official consolidated version, UPB2, Official Gazette of the Republic of Slovenia, No. 51/06.

[148] Article 1, Section 2(2) of the Re-Use of Public Sector Information Act (Informationsweiterverwendungsgesetz-IWG) of 13 December 2006 requires applicants to prove a "demonstrable legal or legitimate interest."

[149] Article 1, Section 2(2) of the Re-Use of Public Sector Information Act (Informationsweiterverwendungsgesetz-IWG) of 13 December 2006.

[150] Slovenia: Article 6 Section 1(11) of the Access to Public Information Act, Official consolidated version, UPB2, Official Gazette of the Republic of Slovenia, No. 51/06.

[151] Article 1, section 2(a) and 2(b) of the PSI Directive.

[152] Section 11 of the preface to the PSI Directive; Article 2, section 2(c) of the PSI Directive.

(3) documents classified as confidential for either national security or commercial reasons (4) documents held by public service broadcasters or by educational, research or cultural institutions.[153] There are few deviations from this basic definition among member states, though some explicitly exclude computer programs[154] and Portugal goes so far as to include personal records like notes or drafts in the definition.[155]

The Directive also describes which bodies must provide for the re-use of information that has been made accessible. "**Public sector bodies**" are defined as "state, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law."[156] **Bodies governed by public law** are bodies with legal personalities that were "established for the specific purpose of meeting needs in the general interest" and which are not commercial or industrial[157] or those that are largely financed by or supervised by the state.[158] Many states have adopted a definition identical to the one found in the Directive,[159] while others use different wording.[160] Some states, such as Lithuania[161] and Slovenia[162] use general definitions that appear to correlate to local law; other states, such as the UK[163] and Portugal, [164] prefer to provide a detailed list of specific bodies rather than a broad definition.

The Directive requires that requests be handled within a "reasonable" timeframe, corresponding with timeframes set by state law.[165] If Member States do not have laws with a specific timeframe, the Directive provides a default timeframe of 20 days,[166] which can be extended for extensive or complex requests. Requirements for reasonable timeframes exist in all Member States' laws, with some minor variations. Many laws even provide for a shorter period such as ten[167] or even five

[153] Article 2, section 2.

[154] Section 3 of the Czech Republic's Act No. 106/1999 on Free Access to Information; Article 2(1)c of Italy's Legislative Decree No. 36 of 24 January 2006, "Implementation of Directive 2003/98/EC on the Re-Use of Public Sector Information"; Section 2 of Malta's L.N. 20 of 2007 European Union Act (CAP.460), Re-Use of Public Sector Information Order, 2007; Article 3(2) of Spain's Law on the Re-Use of Public Sector Information, 37/2007 of 16 November 2007; Article 2 of the United Kingdom's the Re-Use of Public Sector Information Regulations, 2005 No. 1515.

[155] Article 3, Section 2 of the Law governing access to and re-use of administrative documents, No. 46/2007 of 26 August.

[156] Article 1 Section 1 of the PSI Directive.

[157] Article 2, Section 2(a) and 2(b) of the PSI Directive.

[158] Article 2, Section 2(c) of the PSI Directive.

[159] *See* Article 4(1) and (3) of Greece's Law No. 3448 on the re-use of public sector information and the regulation of issues within the competency of the Ministry of Interior, Public Administration and Decentralisation; Section 2 of Cyprus's Re-Use of Public Sector Information Act 2006, Act 132(I)/2006, No 4092, 20.10.2006; Article 3(1) and (2) of Denmark's Act on the Re-Use of Public Sector Information, No. 596 of 24 June 2005.

[160] Section 2(1) of Ireland's European Communities (Re-Use of Public Sector Information) Regulations 2005 S.I. No. 279 of 2005; Article 2(1) of Germany's Re-Use of Public Sector Information Act (Informationsweiterverwendungsgesetz-IWG) of 13 December 2006.

[161] Article 2, Section 10 of the Act on Right of Access to Information from State and Local Authority Bodies, 10 Nov. 2005, NO X-383.

[162] Article 1, Section of the Access to Public Information Act, Official consolidated version, UPB2, Official Gazette of the Republic of Slovenia, No. 51/06.

[163] Article 3 of the Re-Use of Public Sector Information Regulations, 2005 No. 1515.

[164] Article 4, Section 1 of Law governing access to and re-use of administrative documents, No. 46/2007 of 26 August.

[165] Article 4 section 1 of PSI Directive.

[166] Article 4, Section 2 of the PSI Directive.

[167] Article 14, Section 1 and Article 19, Section 1 of Law governing access to and re-use of administrative documents, No. 46/2007 of 26 August.

[168] Section 18(1) of Estonia's Public Information Act 2000 ((RT1 I 2000, 92, 597).

[169] Article 5, Section 3 of Legislative Decree No. 36 of 24 January 2006,"Implementation of Directive 2003/98/EC on the

days.[168] However, in Italy, the time frame is 30 days.[169]

Charging fees is permitted; however, the Directive limits them to "the total costs of collecting, producing, reproducing and disseminating documents."[170] The fee can include not only the costs of recovery but also a reasonable return on the investment.[171] There is no requirement to charge fees.[172] Many states (13) limit the fees in accordance with the Directive but do allow fees that include a reasonable return on investment (for example Lithuania,[173] Slovenia,[174] and the UK[175]). A number do not allow collecting a return on the investment but only allow recovery of costs (such as the Czech Republic,[176] Hungary,[177] and Denmark[178]).

The principle of non-discrimination is incorporated into the Directive.[179] However, information can be exchanged for free between public sector bodies in the exercise of their public tasks, even if other parties are charged for re-using the same information.[180] Distinguishing between commercial and non-commercial uses is not considered discriminatory.[181] Though most states have a provision prohibiting discrimination, in some countries it is worded differently than in the Directive.[182] Moreover, a few states do not have any non-discrimination clauses.[183]

Public sector bodies are required to respect competition rules when establishing the principles for re-use of documents, and must try to avoid exclusive agreements between themselves and private partners.[184] Nonetheless, exclusive licenses can be granted in situations where it is necessitated by public interest.[185] For example, if a commercial publisher will not publish certain information without an exclusive right and the information is of public interest, an exclusive license can be issued.[186]

The use of licenses restricting the re-use of PSI is permitted, although not required.[187] If licenses are issued, they must be based on a standard format and must not restrict competition or possibilities for re-use unnecessarily.[188]

In order to encourage transparency, the Directive states that not only must conditions for re-use of documents be

Re-Use of Public Sector Information."

[170] Article 6 of the PSI Directive.

[171] *Id*.

[172] Section 14 of the preface to the PSI Directive.

[173] Article 8(2) of the Act on Right of Access to Information from State and Local Authority Bodies, 10 Nov. 2005, NO X-383.

[174] Article 34a(2) of the Access to Public Information Act, Official consolidated version, UPB2, Official Gazette of the Republic of Slovenia, No. 51/06.

[175] Section 15(2) of the Re-Use of Public Sector Information Regulations, 2005 No. 1515.

[176] Section 17 of Act No. 106/1999 on Free Access to Information.

[177] Section 5(3) of Act XIX of 2005 on the amendment of the Act on the Protection of Personal Data and the Disclosure of Data of Public Interest, LXIII of 1992.

[178] Article 8, Section 1 and 2 of the Act on the Re-Use of Public Sector Information, No. 596 of 24 June 2005.

[179] Article 10 of the PSI Directive.

[180] Section 19 of the preface to the PSI Directive.

[181] *Id*.

[182] *See* Amendment 7 to the Act on Freedom of Information, (1998); Section 17 of Finland's Act on the Openness of Government Activities (621/1999, amendments up to 1060/2002 included).

[183] For example: Poland, Slovakia, Hungary, Estonia, Czech Republic do not have any non-discrimination clauses.

[184] Section 20 of the preface to the PSI Directive.

[185] *Id*; Article 11, Section 2 of the PSI Directive.

[186] Section 20 of the preface to the PSI Directive.

[187] Article 8, Section 1 of the PSI Directive.

[188] *Id*.

[189] Article 7 of PSI Directive.

pre-established and published,[189] applicants must also be informed of "available means of redress relating to decisions or practices affecting them."[190] Though public sector bodies have the right to deny requests based on various exceptions listed in the law[191] or because of substantial technical flaws[192] in the application,[193] these decisions can be appealed. The Directive leaves provisions concerning the appeal process to the discretion of Member States.[194] Some states, such as Bulgaria and Spain, treat such decisions like any other administrative body appeal,[195] while others, such as the UK,[196] provide a special internal appeal mechanism in their laws.

Another notable phenomenon is the decision of some countries to establish a body in charge of protecting access to information.

4. Beneficial and Detrimental Implementation Practices

Some scholars attempted to offer a scheme of good practices meant to be the best methods for implementing the policies adopted in the PSI Directive. Such practices are critical for achieving economic growth in the PSI market. In a study about PSI policy principles, Christopher Corbin describes the general rules for best practice in implementing PSI principles.[197] Among other things, Corbin points out that in order to successfully implement the Directive, governments must: a) recognize that PSI is a valuable asset that requires overall management and implementation procedures; b) support the transparency of public sector bodies; c) recognize that because of the large number of public sector bodies involved the policies must be simple and easy to implement.[198] The following discussion will examine the best practices for implementing the PSI Directive based on Corbin's framework.

Centralized management and responsibility:[199] "When implementing a PSI policy, Member States must identify one state body that has the responsibility for and the ownership of all PSI policies."[200] This leadership principle was properly implemented by Slovenia in the creation of the "Information Commissioner" position and in the United Kingdom with the cre-

[190] *Id*.

[191] For instance, Section 5(4) of Ireland's European Communities (Re-Use of Public Sector Information) Regulations 2005 S. I. No. 279 of 2005.

[192] The required technical details are found in Member States' laws. They can include the name and address of the applicant, the document requested, as well as the purpose for which the document is to be re-used. (Section 6 of the United Kingdom's Re-Use of Public Sector Information Regulations, 2005 No. 1515).

[193] For instance, Article 10(2) of Spain's Law on the Re-Use of Public Sector Information, 37/2007 of 16 November 2007, which states that if an applicant does not include the required technical information, the public body shall inform him or her that his her request will be considered withdrawn if the information is not provided. Bulgaria's law permits rejecting a request if the requirements of the written application are not met. *See* Article 41i(2)(2) of Bulgaria's Decree No. 184, Chapter Four: Procedure for the Re-use of Public Sector Information (promulgated in the State Gazette, Issue No. 49 Page No. 6).

[194] However, Section 4 of Article 4 of the Directive does mandate that "any negative decision shall contain a reference to the means of redress in case the applicant wishes to appeal the decision."

[195] Article 10(7) of Spain's Law on the Re-Use of Public Sector Information, 37/2007 of 16 November 2007; Article 41j of Bulgaria's Decree No. 184, Chapter Four: Procedure for the Re-use of Public Sector Information (promulgated in the State Gazette, Issue No. 49 Page No. 6).

[196] Section 17 of the United Kingdom's Re-Use of Public Sector Information Regulations, 2005 No. 1515.

[197] Christopher Corbin, *PSI Policy Principles: European Best Practice*, available at http://ses.library.usyd.edu.au/bitstream/2123/6561/1/PSI_vol1_chapter8.pdf.

[198] *Id* at 6.

[199] *Id*.

[200] *Id*.

[201] Article 2 of the Information Commissioner Act, Official Gazette of the Republic of Slovenia, No. 113/2005; The United

ation of the Office for Public Sector Information (OPSI).[201] The United Kingdom's Office for PSI has done extensive work in making decisions regarding PSI re-use.[202] In our opinion, the creation of an independent entity that is entrusted with PSI policy-making is crucial for the proper implementation of the Directive.

Legislation structure:[203] Corbin states that when implementing the PSI re-use framework, there should be a clear separation between the re-use framework and the access framework. According to Corbin, once state constitutions contain the right of access, implementing re-use provisions becomes much simpler.[204] In our view, Corbin is correct. Existing access laws that address what information is open to the public are complemented by separate legislation that explains the procedure for re-using the information. States with separate frameworks include Ireland and Denmark.[205]

Charges:[206] If it is cost-effective, no fees should be charged for access to and re-use of PSI. However, fees can be charged as long as the system for doing so is "open, transparent, pre-disclosed and published, and non-discriminatory."[207] Good practice also involves establishing the criteria for determining the fees charged for re-use of information in a statute instead of leaving it to the discretion of each public sector body. We believe that in order to properly implement the principles regarding charges as described in the Directive, it is important to create legal limitations on the discretion that public bodies have in calculating the appropriate fees. It is our view that the best way to do so is by adopting legislation that reflects precise calculation systems that are general and applicable to all public bodies. The question whether re-use for commercial purposes should be provided for free will be discussed below.

Licensing:[208] The creation of a standard license for all public sector bodies such as a click-use license or a creative commons license is a desirable way to achieve order and efficiency in granting access to PSI. While the Directive does not require the use of licenses,[209] it permits licenses that limit re-use as long as the conditions of the licenses are fair and transparent.[210] Ireland's law permits the re-use of information without licensing,[211] and in the United Kingdom there is no explicit requirement that information be licensed for re-use. Click-use licenses are used in the United Kingdom and, as of June 30, 2009, 17,934 click-use licenses were in use worldwide.[212] In addition, as of June 2009, 1,495 click-use licenses covered

Kingdom Report on the Re-Use of Public Sector Information 2009, "The Office of Public Sector Information: Role And Remit," available at http://www.nationalarchives.gov.uk/documents/uk-report-re-use-psi-2009.pdf.

[202] For example, see the various studies conducted by the OPSI in order to ensure the effective implementation of PSI re-use policies at http://www.nationalarchives.gov.uk/information-management/legislation/directive-and-regulations.htm.

[203] Corbin, at 6-7.

[204] *Id.*

[205] *Ireland:* Freedom of Information Act 1997; European Communities (Re-Use of Public Sector Information) Regulations 2005S.I.No.279of2005. *Denmark:* The Danish Access to Public Administrative Documents Act, No. 572 19 December 1985 and the Act on the Re-Use of Public Sector Information, No. 596 of 24 June 2005 (Act No. 596 of 24th June 2005 was amended by Act No. 551 of 17th June 2008).

[206] Corbin, at 7.

[207] *Id.*

[208] *Id.*

[209] Subsection 17 of preface to PSI Directive.

[210] *Id.*

[211] Section 8(1) of the European Communities (Re-Use of Public Sector Information) Regulations 2005 S. I. No. 279 of 2005.

[212] The 2009 United Kingdom Report on the Re-Use of Public Sector Information, available at http://www.nationalarchives.gov.uk/documents/uk-report-re-use-psi-2009.pdf.

United Kingdom Parliamentary copyright material.[213] A standard license is also in use in Ireland.[214] The discussion in the next Part will shed more light on licensing schemes.

Effective redress:[215] The current redress regime in place in most Member States is not adequate for the proper implementation of the goals of the Directive. According to the ePSIplus Summative Report,[216] re-users claimed that the Directive was ineffective given that "the costs, efforts and time for redress were too high in most countries."[217] According to the report, users were reluctant to bring the cases before redress bodies for fear of the potential deterioration of their relationship with the public sector body with whom they would have to work in the future.[218]

Another major problem is that courts in the EU Member States that are required by law to serve as appellate jurisdictions fail to implement the PSI Directive themselves. For example, in a case decided by the Slovenian Supreme Court, an appeal brought by the Information Commissioner regarding the refusal of a request for the re-use of court data records because it was considered to be a trade secret by the court.[219] The court, however, clearly failed to understand that all court decisions are considered PSI.[220]

According to the report, redress mechanisms should take a "top-down approach," which would involve obligating both re-users and public sector content holders to attempt to resolve conflicts through mediation and only if that fails, allow them to enter into further legal proceedings.[221] Based on the conclusions of the report, we believe that the low-cost system in place in the United Kingdom and Slovenia, where complaints are easy to file and decided upon by regulators rather than judges, is the most preferable redress system.[222]

It should be noted that a number of Member States have failed to properly implement the PSI Directive. As the guardian of the PSI Directive, the EU Commission ensures that its directives and other legal measures are properly implemented.[223] Consequently, it may launch infringement proceedings against Member States who fail to comply with the Directive. To date, there have been three instances in which the incorrect or incomplete transposition of the Directive has resulted in infringement proceedings-Poland, Sweden and Italy.[224] All of the cases ended with the countries' implementation of new complying legisla-

[213] *Id*.

[214] PSI General License, available at http://psi.gov.ie/files/2010/03/PSI-Licence.pdf.

[215] Corbin, at 7.

[216] Marc de Vries, *Towards the 2008 review of the Directive on PSI re-use: ePSIplus Summative Report*, Theme 2: Legal and Regulatory Aspects.

[217] *Id* at 7.

[218] *Id*.

[219] *Id*.

[220] *Id*.

[221] *Id* at 8.

[222] *Id* at 8. *See also Towards the 2008 Review of the Directive on PSI re-use, ePSIplus Thematic Meeting Report, 'Redress of PSI Re-use Disputes: the missing teeth?'* at 11: "The UK and the Slovenian procedures – having similar redress mechanisms in place…stood out as their procedures seem to be the quickest (months instead of years), cheapest (for free instead of hundreds of thousands of Euros) and very easy to access (simple complaint procedures, informal, no mandatory representation by lawyers)."

[223] Infringement procedures, at http://ec.europa.eu/information_society/policy/psi/infringements/index_en.htm.

[224] *Id*.

tion.[225][226] [227]

5. Concluding Discussion

While every Member State has implemented the PSI Directive, much work remains to ensure that the re-use legislation actually facilitates the goals for which the PSI Directive was legislated. The debate surrounding the best practices in implementing PSI re-use policies is an important stepping stone toward realizing the economic potential that PSI has to offer.

Given the rise of PSI re-use legislation in major developed countries it is important to take a step back and consider the subject of re-use and its theoretical underpinnings. Therefore, the next section will move on to consider the question of proper commercialization of PSI.

IV. Should PSI Be Commercialized and How Should It Be Done?

Interestingly, there is very little legal scholarship regarding the scope of the right to information, especially in the digital era. This section aims to begin this discussion in the context of re-use of PSI for commercial purposes. Some of the issues that come to mind when considering PSI commercialization pertain to the scope of the right to information and the digital right to information, the scope of access and re-use of information, whether commercialization is within the scope of access and re-use, and the question of ownership of government data.

As the discussion in Part II showed, there has not been any attempt to seriously consider the scope of the right to information in the digital era and the scope of access and re-use of PSI. These questions deserve elaboration that would go beyond the scope of this article. However, this article wishes to elaborate on one dimension of the debate, namely, the scope of re-use of PSI and whether commercialization should be considered within it.

The scope of the re-use of PSI raises many difficulties. On the one hand, providing PSI for free to commercial entities seems like a counterintuitive policy in a number of respects. By allowing private firms to freely re-use PSI that has been generated at public expense, the public seems to be required to pay twice for the same informational product – once through taxes to support the government's activity that yielded the information in the first place, and then again through what usually amounts to higher monopoly prices and restricted supply when the information product reaches the market. Such private firms usually operate in a very concentrated market, such as the market for electronic databases, and as a result, even in the absence of any form of

[225] Press Release, *Re-use of Public Sector Information: Commission launches infringement proceedings against Poland and Sweden*, October 2008, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1524&type=HTML&aged=0&language=EN&guiLanguage=en.; Dariusz Głażewski, European Public Sector Information Platform, Topic Report No. 24, "*PSI access and re-use in Poland: on the administrative and civic level*," February 2011, at 10. *See also* Case C362/10 available at: http://ec.europa.eu/information_society/policy/psi/archives/news/index_en.htm (where the Court of Justice held that Poland failed to transpose the PSI Directive correctly).

[226] Press Release, *Re-use of Public Sector Information: Commission launches infringement proceedings against Poland and Sweden*, October 2008, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1524&type=HTML&aged=0&language=EN&guiLanguage=en.; Infringement procedures, at http://ec.europa.eu/information_society/policy/psi/infringements/index_en.htm.

[227] Press Release, *Re-use of Public Sector Information: Commission starts infringement against Italy*, March 2010, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/425&format=HTML&aged=0&language=EN&guiLanguage=en.;Infringement procedures, at http://ec.europa.eu/information_society/policy/psi/infringements/index_en.htm.

intellectual property protection, are able to charge monopoly prices. This position is supported by the proprietary rationale of the right to information, which states that information held by public authorities belongs to the public that sponsored its creation. Charging the public for using this information undermines this rationale. This public's equitable claim to information made at public expense resembles the argument raised while considering the Bayh-Dole Act that allows private firms to hold exclusive rights to inventions that have been generated at public expense. Additionally, PSI can also be compared to natural resources, which many legal systems consider public property.[228]

On the other hand, in response to this argument, it can be argued that private appropriation of PSI is a sensible move because the focus should be shifted from the initial costs of creating the information to the subsequent costs of developing workable and useful informational products, which is critical for turning PSI into a commercial product.[229] After PSI is generated by governments, further investment is necessary to turn PSI into informational products that can be accessed and used in better and more useful ways. Thus, allowing free re-use brings about this desirable result. Throughout this development process, a substantial risk of failure remains. These follow-on investments may greatly exceed the value of the initial investment that created the PSI in inchoate form. The government lacks the expertise and facilities to do this development work itself and therefore needs to turn the information over to industry. Firms may only be willing to invest in the development of an informational product if they get the information free of charge from the government. Additionally, such firms will make every effort to prevent access to the underlying data of their products so they can recoup their investment and prevent others from free riding.

Exploring the right to information and its theoretical underpinnings can also lead to ambiguity as to the scope of the right to re-use PSI in a commercial setting. It can be argued that it is difficult to understand why access and re-use can generally encompass commercial uses of information. Access to information and its re-use for purposes advanced by freedom of information acts should be allowed, while those that are not within the goals of these acts should be disallowed. It is very difficult to justify re-use for commercial purposes under freedom of information acts. The public gets taxed twice when information is re-used and offered for sale at potentially high costs. Additionally, while access for the sake of knowledge is within the rationales of the right to information legislation in many countries, commercialization for profit is unjustified under the right to information rationales. Accessing knowledge and re-using it for advancing the stated rationales of freedom of information acts, such as the ability to exercise constitutional rights like freedom of speech, achieving greater transparency, and the proprietary justification, do not seem to be as strong with regard to commercial purposes. While commercial speech is generally protected under many countries' constitutional laws, it is unclear how the general re-use of PSI generally

[228] *See* Australian Government Report (1982) ("The information holdings of the government are a national resource… Government and officials are, in a sense, 'trustees' of that information for the Australian people. The information which public officials … acquire or generate in office is … acquired or generated for purposes related to the discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of Government exists, and who ultimately … fund the institution of government and the salaries of officials.").

[229] Brian N. Larson & Genelle I. Belmas, *Second Class for the Second Time: How the Commercial Speech Doctrine Stigmatizes Commercial Use of Aggregated Public Records*, 58 S.C. L. REV. 935 (2007).

for commercial purposes can be justified. For example, imagine Lexis or Westlaw request access to courts' decisions in order to generate a commercial database. While it is easy to see why granting these companies or anyone else access to decisions is important to advance the different goals of freedom of information, it is harder to see why using these documents to start an online legal database service is within the scope of the acts. There is no doubt that such informational products provide the public with better, more useful and easily available access to information and data than governments themselves provide. However, governments are not expected to provide such advanced comprehensive accessibility, mainly due to cost and feasibility considerations. Government information is for the most part a byproduct of government activities, and states should not be expected to provide advanced access and re-use schemes for information they produce. In *Legi-Tech v. Keiper*,[230] the Court of Appeals for the Second Circuit disagreed with this analysis and ruled that commercial users of PSI are entitled to the same access as non-commercial users. The court held that legislation imposing restrictions on freedom of speech can only be justified if the need to restrict outweighs the constitutional right to freedom of speech. Cost-benefit concerns are not justifiable motives for limiting commercial access to PSI. This approach can be reconciled with the view expressed in this section because access cannot be denied to anyone based on the freedom of information rationales. However, the way in which the information is exploited after it is accessed can be subject to limitations given the aforementioned analysis.

The open government data movement is also calling for very flexible and broad licenses pertaining to government data, encouraging government entities to give members of the public automatic permission to take the information and use it in any way they wish, with no restrictions concerning commercial uses.

In light of this complex view of the right to information and its scope, it is unquestionable that access to information cannot be denied regardless of a characterization as commercial or non-commercial requester. However, restrictions should be imposed regarding re-use of information for commercial purposes while taking into account important free speech concerns.

In crafting commercialization schemes it is important to keep in mind that the legal protection of PSI, including its intellectual property law protection, differs greatly from one state to another. In fact, there is a broad spectrum of national legal solutions regarding licensing and commercialization of PSI. These schemes range from copyright-free models to expansive copyright protection.

In public domain and copyright-free regimes, PSI is not protectable under copyright law at all. As a result, the information is in the public domain, free for use by all, unless it is subject to some exception such as privacy or national security considerations that prevent its disclosure. However, gaining access to the information under freedom of information legislation might introduce costs into the process.

In other legal systems, a mixed model is adopted under which copyright law explicitly addresses which types of PSI are subject to copyright law and which information is not protected. In these regimes, some government information might be subject to licenses. Other countries adopt broad copyright protection laws under

[230] Legi-Tech v. Keiper, 766 F. 2d 728 (2d Cir. 1985).

which most government information is protected. There are also different legal schemes for licensing PSI in these countries. Some adopt licensing schemes that grant permission to re-use PSI on a case-by-case basis, while copyright and other *sui generis* rights are enforced more generally. In other countries, however, automatic licenses are applied to specific content, publishing the license terms and conditions with the specific content subject to it. Usually, Creative Commons licenses or open data commons licenses are employed. Still other countries adopt a free public domain model under which the entire work is placed in the public domain and is dedicated under the Creative Commons Zero licenses or the Public Domain Dedication and License.

Thus, it seems that the road to free government data or PSI is paved with many hurdles. Freedom of information legislation as well as copyright law and database rights and other types of legal protection introduce barriers to free access to government data. Without addressing specific legal system policies in this regard, it seems that the status of PSI should be addressed by the different legal regimes that affect its accessibility and reuse. I suggest that freedom of information acts, copyright law and database rights as well as other legal regimes should address the status of PSI re-use. Given the proprietary rationales for the right to information and copyright in government works, both of which suggest that copyright protection for government works secures the public interest in providing access to the information, it seems that controlling PSI through copyright protection or database rights (where the information is not copyrightable) is a good way to ensure that the public gets a return on its investment in creating the information in the first place. Once PSI becomes property it can be licensed. PSI licensing schemes should be introduced into copyright law, database rights, and freedom of information acts in order to simplify the re-use and commercialization of PSI. Two types of licenses should be introduced, both of which are based on the Creative Commons licensing schemes. The Creative Commons copyright licenses and tools forge a balance within the traditional "all rights reserved" setting that copyright law creates. TheSE tools give everyone, from individual creators to large companies and institutions a simple, standardized way to grant copyright permissions FOR their creative works.

Under freedom of information acts, the public should have free access to government data. Generally, many requesters seek data for non-commercial purposes that do not involve for-profit goals. When this is the case, such data should be licensed under the Creative Commons license. It allows others to use the works for non-commercial purposes, as long as they credit the work's creator and either license the new works under identical terms or do not license them at all (the CC-BY-NC-SA license). Giving credit to the work's creator (i.e., the government) addresses the attribution concern that is generally introduced as a justification for copyrights of government works. Using a license to provide access to information prevents commercial players from using PSI free of charge and undermining the proprietary rationale of the right to information.

Additionally, in order to create a market for PSI, licenses for commercial uses should be introduced. Here, another Creative Commons license can be used (CC-BY) which provides that PSI is licensed to others who can build upon the work, as long as they credit the government for the original work, thus addressing the attribution concern of copyright in govern-

ment works. The licensee also pays deferred royalties to the government at a later phase- when profits are made. Deferral is justified because companies that commercialize PSI generally benefit the public and provide better access to PSI, especially when compared with governments' abilities and economic means to provide improved ways to access and analyze their information. There is often some delay between getting the information from the government and actually commercializing it. Therefore, payment should be deferred. Additionally, under this commercial license scheme, there is no expectation for share-alike provisions because no licensee will necessarily be able to recoup his or her investment under such a scheme.

It is questionable whether exclusive licenses should be allowed. It seems that exclusivity might prevent diversification of informational products. Licensing PSI of any kind does not suggest it can be re-used only in one way. Rather, it can be re-used in many different ways, which can provide better informational products. This diversity of informational products must be preserved.

Naturally, the public interest might call for exceptions under certain circumstances that would require deviation from the commercial license scheme. For example, news media uses of PSI are almost always for commercial purposes, as most newspapers operate for profit purposes. However, the news media plays a major role in free speech in our society; the very purpose of the news media is to advance the same goals that the right to information seeks to advance. Therefore, because of the strong public interest and the role the news media plays in freedom of speech in our society, it should be exempted from paying royalties. Of course, under certain circumstances, governments may use the most permissive licenses (e.g., attribution-only licenses) if they wish to advance the re-use of certain information even in instances where the use is for commercial, for-profit purposes.

This model and its justifications can be challenged on many grounds. Firstly, it can be argued that the private sector, while engaging in commercialization of PSI, is in fact, performing the governments' role by providing valuable information products to consumers. This advances the public's accessibility to information and data and creates better-informed citizens. Therefore, the basis for charging fees for commercial purposes is undermined. However, this argument is flawed for many reasons. Unlike some commercial entities which mainly engage in freedom of expression enhancing activities, such as news media outlets, many entities engage in profit-maximizing endeavors. Additionally, improving accessibility to PSI is usually a byproduct of the news media's activities rather than its goal as a private entity. Additionally, in most countries governments are not subject to very broad digital right to information duties and are definitely not required to produce commercial products. It is therefore difficult to support free re-use by commercial users.

Secondly, and importantly, a move to proprietary schemes for licensing PSI will likely mean that information producers will shift the costs they are charged by the government to their customers, raising the costs of information products and undermining accessibility in a market that is already highly concentrated. This challenge is not unique to PSI markets but rather exists in many markets of many products. Given the ability to license PSI to more than one commercial entity, it is likely that in a competitive market, the pricing will not be monopolistic and that

consumers will find a way around it.

Lastly, such licensing schemes would add yet another layer of bureaucracy to an already cumbersome information-access system. The government would need to apply guidelines and investigate why the requester wants the information, where the line between commercial and non-commercial use should be drawn, as well as enforcement challenges that could be raised given the fee deferral scheme. The response to this challenge is that there are countries, such as the UK, in which such schemes are in place and are workable and efficient. Additionally, we need to keep in mind that most IP systems in place are, in fact, based on licensing and that markets for IP products are functioning overall.