

**The Future Digital Economy
Digital Content – Creation, Distribution and Access**

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**Presentation by Prof. Dr. Herbert Burkert,
University of St. Gallen,
30 January 2006**

**Session 5b: Enhanced access to research and public sector
information. A new growth driver?**

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[1.] Information Innovation needs an information conscious environment. *Innovation*

Information consciousness is the capability *Information Consciousness*

a) to recognize the informational interactions behind any process, and

b) to perceive possible optimizations for such informational interactions, and

c) to be aware of the potential values of information for such optimizations.

[2.] An information conscious environment is an environment where this potential value is recognized in the political, economic and social culture of a society. *Information Conscious Environment*

[3.] One way *among others* to influence such a culture is legislation which reflects the appreciation of information. *Actions: legislation*

[4.] One actor *among others* to direct such action to is the public sector. The public sector is still largely uncharted territory as regards the potential value of information. Information conscious legislation directed at the public sector has therefore a high potential to activate such potentialities. *Actor: Public Sector*

[5.] There is already legislation directed at the value of information in the public sector; in fact there are currently three types of legislation addressing this issue: *Existing legislation*

- a) general freedom of information laws, with the Swedish law as the historical prototype and the Federal US FOI Act as the key reference point;
- b) specific access to information laws either targeting special media or special information subject areas, as e.g. the access to environmental information laws in

the follow up to the Aarhus Convention and the respective EU directive;¹

- c) legislation relating to the place of the public sector between public sector service responsibilities and information market requirements, such as e.g. the recent EU Directive on the reuse of PSI.²

[6.] While such legislation is necessary to enhance information consciousness it is - in its current form - far from sufficient.

Evaluation

a) Freedom of Information laws have set precedents for obtaining public sector information and putting it into useful context, useful for citizens, for the democratic process as a whole, but also occasionally for private sector information enhancement activities. They have deconstructed the myth of "secrecy" and have changed the default rule for accessibility.

general FOI

Still most of these laws - and not counting those laws which wear "freedom of information law" only as a pirated brand name - have fallen behind in having created public administrations attentive and proactive with regard to information needs coming both from the civil society and the information content market.

b) Special sector information laws are often more stringent in securing information demands because they are able to harness the social forces taking an interest in the *specific* information area, as e.g. the globally legitimized interest in the environment.

special FOI

¹ CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 at <http://www.unece.org/env/pp/documents/cep43e.pdf>;
Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission Official Journal L 156 , 25/06/2003 P. 0017 - 0025 Directive 2003/35/EC

² DIRECTIVE 2003/98/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 November 2003 on the re-use of public sector information at http://europa.eu.int/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf

At the same time many of this specific information oriented legislation has only redrawn but not changed demarcation lines between the newly awakened economic self-interest of the public sector and market interests. A good example is the shifting of public information resources into hybrid "executive agencies" as started in the 1980s in the United Kingdom.³

c) In the field of "remarketing" legislation we have but the recent EU Directive already mentioned above, the not always easy efforts of member states to transform such guidance⁴ and, perhaps, the occasional administrative guideline.⁵

*Information Market
Legislation*

The EU directive has e.g. a huge "hole of non-applicability", leaving out such public sector information resources with high value potential: in fact all cultural, research and educational information.⁶ Beyond that this legislation is but - although a useful - restatement of the applicability of competition law on public sector market activities.

[7.] So we have legislation, but the legislation we have is far from optimal. What is needed is a more comprehensive approach which acknowledges the potential of all information in the public sector. While it is acknowledged that the current piecemeal approach is a result of different historical, cultural and political traditions of access and transparency in our societies, time has come, and the OECD seems to be the appropriate forum for such a discussion, to reevaluate such habits of thinking, to start with a more comprehensive set of principles, principles from which we then can move to think about adequate actions.

[8.] Together with the late Peter N. Weiss we have put a set of eight principles into public debate which could help to guide the renovation of public sector information

The Principles

³ See e.g. Companies House at <http://www.companieshouse.gov.uk>.

⁴ See current status at: http://europa.eu.int/information_society/policy/psi/implementation/status/index_en.htm

⁵ E.g. OMB Circular A-76, Performance of Commercial Activities (05/29/2003) (includes technical correction made by OMB Memorandum M-03-20, 08/15/2003) at http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf and to some extent see als: FEDERAL ACTIVITIES INVENTORY REFORM ACT OF 1998 [[Page 112 STAT. 2382]]Public Law 105-270105th Congress.

⁶ Art.1 (2) (d), (e) and (f) of Directive 2003/98/EC.

law.⁷ Not all of these principles are new; what is important is that they belong together; that they form one comprehensive set; it is only in their comprehensiveness that they have the potential to overcome the current situation. Those principles are:

I. Public sector information holdings should be subject to the access principle. Any natural or legal person, across national boundaries and without any further qualifications, has the right to obtain, upon request, information in the possession or under the control of public sector institutions, provided that no legitimate exemptions apply. Legitimate exemptions should be clearly stated in advance, answering pressing social needs and necessary in a democratic society. The application of these should be subject to review by an independent authority providing a right of hearing to any party affected by such a transfer. As a general matter, the decision on such exemptions should be within a prescribed short time span, and should only be based on considerations of personal privacy, or the preservation of significant private commercial interests where explicitly protected by copyright, or legitimate national security concerns.

Access Principle

II. Public Sector Institutions should make an inventory of their information holdings and keep that inventory up-to-date at regular intervals and actively make such an inventory generally and easily accessible.

Inventory Principle

III. Public sector information holdings should be provided in the same quality as they have been kept in the public sector.

Quality Principle

IV. The costs chargeable to *any* requester should not exceed marginal costs of distribution; with the possibility to waive such costs in cases where requesters can show a specific public interest.

Costs Principles

V. Requested information should be provided in the format requested if the information is available in that format or could easily be transformed into that format. The re-

Choice Principle

⁷ See in detail: Burkert, Herbert; Weiss, Peter: Towards a Blueprint for a Policy on Public sector Information. In: Aichholzer, Georg; Burkert, Herbert (ed.): Public sector Information in the Digital Age. Between Markets, Public Management and Citizens' Rights. Edward Elgar: Cheltenham, Northampton 2004, 329-336.

quester may be charged with the transformation costs, provided the administrative costs of recovering them do not exceed the cost of transformation.

VI. Public Sector Information Holdings should be exempted or as the case may be they should not be covered by intellectual property rights, particularly copyright and database protection regimes. The public sector should be entitled to ensure through minimal regulation that responsibilities for any changes to the information after its transfer are made appropriately transparent.

*Intellectual Property Rights
and Control of Origin
Principles*

VII. Public Sector Institutions are entitled to extend and to improve the quality and the format of their information holdings and information activities provided they do so with a public mandate and after a transparent procedure and in order to improve the quality or the extent of their services.

*Legitimate Improvement
Principle*

VIII. Public sector information activities if transferred to the private sector and still kept privileged are subject - to the extent of their privilege - to the same principles as public sector information holdings.

*Continuity of Obligations
Principle*

[9.] We have felt that with a framework set by those eight principles:

- Citizens enjoy to the fullest extent accessibility and transparency of public sector information holdings.
- The private sector is given the opportunity to obtain a broad basis of public sector information holdings, to innovate and add value to these holdings, without reducing the accessibility for citizens.
- The public sector maintains authority over the integrity of its holdings and is able to expand and improve the quality of public sector information should it receive such a mandate from the public.

[10.] In our view, public sector information policies taking into account these principles as a comprehensive set would be able to contribute more comprehensively to an information conscious and information innovation friendly environment./--