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## Recent Attempts to Achieve a U.K. Information Policy, 3 Computer L.J. 147 (1981)

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# RECENT ATTEMPTS TO ACHIEVE A U.K. INFORMATION POLICY

*by* GILLIAN BULL

## INTRODUCTION

Information law is non-existent in the United Kingdom, and no national policy on information has been announced. This Article will be concerned chiefly with speculation about information policy rather than a discussion of information law.

Three of the most interesting subjects of discussion during the last two decades are copyright, data protection and freedom of access to information. Two reports, published in 1980, attempted to survey general aspects of the information problem. The Advisory Council for Applied Research and Development (ACARD) reported on information technology,<sup>1</sup> while the Education, Science and Arts Committee of the House of Commons (ESAC) reported on information storage and retrieval.<sup>2</sup> However, these subjects overlap to some extent. Both reports call for an end to the current distribution of responsibility for information policy among various governmental and nongovernmental organizations. Instead, both reports recommend centralization of responsibility for information policy.

Ironically these two reports, with so much subject matter in common and published within two months of each other, appear to have been written entirely independently. Some possible explanations are (1) the difficulty of defining information, a term used to encompass both information technologies such as electronics, computers, and telecommunications, and the actual data which are stored and retrieved by information technologies; (2) the fragmentation of responsibility for information policy among government departments as evidenced by the fact that one report stems from the

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1. ADVISORY COUNCIL FOR APPLIED RESEARCH AND DEVELOPMENT, INFORMATION TECHNOLOGY (1980) [hereinafter cited as ACARD Report].

2. FOURTH REPORT FROM THE EDUCATION, SCIENCE AND ARTS COMMITTEE, INFORMATION STORAGE AND RETRIEVAL IN THE BRITISH LIBRARY SERVICE (1980) [hereinafter cited as ESAC Report].

executive and the other from the legislature; and (3) a possible conflict of interest between the governmental departments.

Now that these two reports recognize that information is important to the future well-being of the nation, the United Kingdom may be able to look forward to an immediate and decisive debate on information policy followed by legislative and executive action. The ACARD Report has already caused the appointment of a Minister of State for Information Technology and the creation of an Information Technology Division within the Department of Industry. However, this appointment, within an existing department, is not the general focal point of the information technology industry recommended by the ACARD and ESAC Reports.

The new Minister's task is to encourage the information technology industry. National objectives are to be established for the furtherance of the information technology industry in Britain; other countries are viewed as industrial rivals, rather than partners. Needed reform of existing United Kingdom copyright law and the introduction of new law on data protection may result from our information technology industry's lobbying efforts. Optimism about future developments may be unrealistic when data protection law focuses on attempts to achieve freedom of access to information. The Home Office, representing the police view, apparently opposes changes in the law on these issues, and successive governments representing both major political parties have not manifested any interest in reform.

Of course, law reform in other countries, even in the area of data protection, has not been motivated solely by considerations of ethics and constitutional rights, untainted by commercial or nationalistic interests. But only the latter are operating as motivation for change in the United Kingdom. The natural opportunity has not been seized for discussion of the nature of an information policy and the desirability or practicality of adopting one.

#### I. THE ACARD REPORT

The Advisory Council for Applied Research and Development was established in 1976 to advise ministers and to publish reports on research and development of information technology in the public and private sectors in the United Kingdom. The report discussed herein is the seventh prepared by ACARD. The report is a brief pamphlet designed to make an immediate impact on first reading without closer study. Its major recommendations were welcome to the government, as evidenced by the appointment of a Minister for Information Technology within a few weeks of publication. The fate

of ACARD's subsidiary recommendations is less certain. The style and the presentation of the ACARD Report preclude exploration of some of the problems associated with data protection and copyright law.

The foreword of the Report clearly establishes its purposes and goals.

In the knowledge that some of this country's major competitors had well developed plans for promoting information technology by concerted action from their governments and industrial interests, ACARD decided that a Working Group should examine the subject in order to identify the likely directions of development and the constraints to development and application in the United Kingdom.<sup>3</sup>

Later, the Report states: "Certain of our overseas competitors—notably France—have recognized the importance of this subject and have established national programmes to stimulate its development."<sup>4</sup>

The ACARD Report's main recommendations are organizational.<sup>5</sup> One main recommendation is that the government and individual Ministers and officials should emphasize the importance to the United Kingdom of a prosperous and developing information technology industry and should encourage implementation of this policy in both public and private sectors.<sup>6</sup> Current fragmentation of responsibility for aspects of information technology among different

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3. ACARD Report, *supra* note 1, at 3.

4. *Id.* at 7. Both the ACARD and ESAC reports and subsequent press and Ministerial comment make reference to the situation in France, where the French government has given high priority to encouraging national information technology. S. NORA & A. MINC, *THE COMPUTERIZATION OF SOCIETY* (1980) (English version of 1978 French report). French proposals, particularly suggestions that video terminals be installed in place of telephone directories have caught the attention of a British public that perceives British Telecom's Prestel as expensive and of questionable value. The prospect of French leadership in information technology is proving to be a powerful weapon in the hands of the British information policy lobbyists.

5. i. One Minister and Government Department should be responsible for co-ordination of government policies and actions on the promotion and development of information technology . . . .

ii. Responsibility for regulation of communications and broadcasting should be exercised by a single Government Department.

. . . .

iv. The Post Office [now British Telecom] should have the mandate to provide a world-competitive United Kingdom communications network and should have sufficient finance for procurement and installation . . . .

*Id.* at 8.

6. *Id.*

governmental offices is noted.<sup>7</sup> Elsewhere, the roles of the Post Office (British Telecom), the Ministry of Defense and the Science Research Council are identified.<sup>8</sup> Subsidiary recommendations suggest policies for education for information technology, research priorities, coordination between existing funding agencies, regulations, and law reform.<sup>9</sup>

These recommendations for legal reform are designed to remove current legal restraints on the use of information technology.<sup>10</sup> ACARD recommends that the government respond to the report of the Data Protection Committee<sup>11</sup> and legislate on this issue, keeping in mind the precedents set by international conventions on data protection. The recommendation clearly voices the frustration felt by the British information industry over government vacillation on data protection matters. Although the ACARD Report's statement is brief, the list of subjects requiring regulation suggests that the ACARD Working Group paid close attention to prior work by the

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7. Responsibility for these roles [the development of information technology and its applications] is at present split between the Home Office, the Department of Trade, the Department of Industry, the Department of Education and Science, H.M. Stationary Office and the Central Computer and Telecommunications Agency . . . . In addition, public risk capital for IT [Information Technology] ventures is provided by the National Enterprise Board and the National Research Development Corporation.

*Id.* at 48.

8. *Id.* at 46-47.

9. ix. The Government should bring forward proposals for data protection legislation, taking into account the views of the Data Protection Committee, without delay.

x. The Government should put in hand urgently a review of the legal reforms required to aid and expedite the use of information technology in the United Kingdom, and should then legislate to bring about such reforms as fast as possible.

xi. The Government should consider legislation to permit the creation of new organisational forms to aid joint information technology projects, taking into account precedents in France and Belgium.

*Id.* at 9.

10. Power from the use of information, which can now be provided by IT, is great and there is clearly potential for abuse. Justifiable fears of such abuse are a major contribution to resistance to new ways of collecting and handling data by both Government and the private sector. The legitimate interests of citizens and users of IT must therefore be defined and protected.

. . . . In the international sphere the lack of data protection legislation will place the U.K. increasingly at a disadvantage with other countries who have already legislated; British commercial and industrial interests of many kinds will suffer as a result. Without domestic legislation, the U.K. will be unable to ratify the international convention on data protection already produced in draft by the OECD.

*Id.* at 38.

11. COMMITTEE ON DATA PROTECTION REPORT, CMND. NO. 7341 (1978) [hereinafter cited to as Lindop Report].

Lindop Report and the evidence presented to that Committee.<sup>12</sup>

Other reforms recommended by ACARD are reforms of copyright law and the law of evidence. The Report is terse and puzzlingly superficial in its discussion of the copyright law.<sup>13</sup> This area of law is notorious for its complexity. Whereas ACARD's recommendations on data protection are firmly supported by the Lindop Report, the ACARD Working Group apparently ignored a major reconsideration of copyright.<sup>14</sup> The Whitford Report, describing the reconsideration, was presented to the Department of Trade, while ACARD's recommendations clearly are addressed to the Department of Industry, among others. These two departments derive from the old Board of Trade, and are sometimes separated, sometimes reunited, depending on the current government's approval of or opposition to giant executive departments. It seems unlikely that the ACARD Working Group, having recognized copyright problems, could have remained unaware of the existence of the Whitford Report. Since copyright is the concern of the Department of Trade, the ACARD Working Group must have had some contact with the department. One possible explanation is that ACARD wished to point out that U.K. copyright law requires attention and reform but believed this issue was too complex for comment.

The Report's comment upon procedural problems with the British law of evidence is even terser.<sup>15</sup> Reform of the Criminal Evi-

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12. Laws are needed to prescribe such matters as the information to be handled, the uses to which it may be put, its disclosure to the people covered by the data and to third parties, the assurances to be given on collection, the safeguards for ensuring accuracy, relevance, timeliness and completeness, the measures for ensuring security and the circumstances in which users must seek the consent of subjects of data or authorisation from an appropriate authority.

ACARD Report, *supra* note 1, at 38.

13. The copyright laws need to be modified to cover information held in forms other than writing on paper. Developments in IT mean that information will in future be held in electronic, magnetic, or optical forms and so the lack of appropriate copyright law will constitute a hazard for the users of IT and could remove incentives to develop innovative concepts in IT itself. The risks to IT users of inadequate copyright protection will be enhanced by the ease with which copies of documents (whether paper or electronic) will be sent to distant locations.

*Id.* at 39.

14. COMMITTEE TO CONSIDER THE LAW ON COPYRIGHT AND DESIGNS COPYRIGHT AND DESIGNS LAW, CMND. No. 6732 (1977) [hereinafter cited as Whitford Report].

15. The admissibility of information held other than on paper as legal evidence is said to be open to doubt. This and any similar uncertainties relating, for example, to the laws of libel and fraud could constitute a further inhibition to users of IT. If the U.K. is to have a leading position in the supply and use of IT, such inhibitions need to be removed.

ACARD Report, *supra* note 1, at 39.

dence Act of 1965 would probably be referred to the Law Commission.<sup>16</sup> However, the Law Commission is not presently considering anything of relevance to computers, except in the area of breach of confidence.<sup>17</sup>

One ACARD recommendation<sup>18</sup> suggests the concept of the Groupement d'Interest Economique, which would permit such organizations as British Telecom to undertake cooperative ventures with organizations of very different structure and with diverse funding sources. Some international organizations have set up headquarters in France and Belgium, which permit this form of organization, to the possible detriment of the United Kingdom information industry.

One other recommendation is of interest in this context, since it is concerned with the adequacy of the United Kingdom's representation in international discussions of regulations and standards for information technology.<sup>19</sup> The ACARD Report notes that "other countries seem more adept at exploiting such negotiations for their own advantage,"<sup>20</sup> and emphasizes that United Kingdom negotiators should have whatever staff and financial support is necessary to enable them to "argue strongly for our national interests."<sup>21</sup> This suggestion may be a response to criticisms of the quality of United Kingdom representation on international regulatory and standardizing bodies. Some non-governmental representatives believe that their liason with their opposite members in the Civil Service is poor, and that the negotiating powers of both are thereby undermined, because the private sector experts may have more detailed knowledge of specialized areas and the civil servants may be more familiar with policy issues.

The government made a swift but limited response to the ACARD Report by appointing a Minister of State for Information Technology. The extent to which the subsidiary recommendations will be implemented is not known.

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16. Criminal Evidence Act of 1965, c. 20.

17. Telephone inquiry to the Law Commission (December 22, 1980).

18. ACARD Report, *supra* note 1, at 8 (reproduced at note 5 *supra*).

19. The Government should recognize the importance, to the information technology supply and application industries, of United Kingdom strength in international discussions on regulations and standards, and staff and financial support must be available for such activities to ensure that our delegations go to them well prepared technically, commercially and politically, and ready to argue strongly for our national interests. Trade Associations must similarly be prepared to play their part on behalf of their industries.

*Id.* at 9.

20. *Id.* at 37.

21. *Id.* at 9.

## II. THE ESAC REPORT

The Education, Science and Arts Committee is one of a number of new committees of the House of Commons recently created to monitor the activities of specific Civil Service departments. This Committee's assigned task is "to examine the expenditure, administration and policy of the Department of Education and Science and associated public bodies . . ."<sup>22</sup> There are nine Committee members, selected from all the political parties represented in the House, and chaired by Mr. Christopher Price, a Labour M.P. The committee had the power to call for oral and written evidence, and the results are reproduced in the Report. Therefore, in the course of informing themselves, the members have collected and published a large mass of detailed evidence and background material in one document. The sixteen pages of the committee's Final Report are supplemented by ninety-one, double column, verbatim reports of oral questions and answers and such memoranda as were supplied by witnesses appearing before the committee. There are sixty-five more pages of appendices which contain further memoranda from oral witnesses and others.

This ESAC Report differs from the ACARD Report in many respects. Although the text of the committee's Final Report is of approximately the same length as the complete ACARD Report and some of the recommendations are listed with an equal sense of urgency, ESAC Report readers have the opportunity to examine the evidence and discussions which resulted in these recommendations. The ESAC Report is not as attractively presented as the ACARD Report, because the print is small and tightly packed; it is bulkier and its cover is plain. The ACARD Report, in both content and appearance, is intended to be read quickly and to make an immediate impact on certain easily identifiable policy issues. The impact of the ESAC Report is decreased by its formal parliamentary layout and by its subject matter.

The British Library falls under the aegis of the Minister of Arts, acting from the Office of Arts and Libraries, which is part of the Department of Education and Science. The distribution of administrative responsibility explains the ESAC interest in British Library activities. Both of the parties so joined agree that the combination of Arts and Libraries is a strange and awkward partnership. The libraries represented are the British Library and libraries in educational institutions; public and commercial or industrial libraries are not supervised by the Department of Education and Science. The li-

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22. ESAC Report, *supra* note 2, at ii.



brary and information professions have recognized for some years a need for coordination of library and information services in the United Kingdom. Governments have been requested to effect such coordination many times. There has been no effective and positive governmental response. This failure may be a result of reluctance by the Department of Education and Science to cooperate with other departments, such as the Department of Industry, and thus perhaps forego some of its influence.

As the Committee Chairman recently stated in *The Times*:  
 [W]e have no national policy. Part of the Government's difficulty is knowing where to start. "Information" is the responsibility of almost everyone—Industry, Education, Civil Service Department, Cabinet Office, the Central Office of Information . . .<sup>23</sup>

The Committee looked into information storage and retrieval and the impact of new information technology upon these processes. The committee concluded that the United Kingdom would suffer, should the government fail to take a leading role in the formulation of and centralization of responsibility for information policy.<sup>24</sup>

The Report makes six recommendations, of which four are of interest here.

(1) The problem of the implications for copyright of the new technology should be treated with necessary urgency.

. . .

(4) The development and coordination on a national basis, of an automated network system.

(5) As soon as possible the Government should appoint a Minister of Cabinet rank to take responsibility for information policy, and should provide him with the necessary staff, as far as possible by appropriate secondments from within Whitehall departments.

(6) The Government should set up as a matter of urgency a Standing Commission representative of the wide range of interests concerned with the provision of information, particularly by telematic means, to examine on a continuing basis the problems of developing a national information network, to formulate national requirements, to relate them to international developments, to investigate possible solutions, and to make proposals for their implementation

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23. Price, *Wanted a Minister to Give Us the Facts*, *The Times* (London), Nov. 20, 1980, at 6, col. 2.

24. It is more than unsatisfactory that there is no "lead Minister" in the Government on information policy matters, not any competing systems of information transmission. Other countries, for example, the USA and France, have set up organizations to take a grip of this important subject. If Britain is to retain her position as a successful innovator and provider of information by new technological means, an identified point within Government for coordination and policy direction is urgently needed.

ESAC Report, *supra* note 2, at xx.

by appropriate bodies.<sup>25</sup>

Thus, the ACARD and ESAC Reports discuss some common topics: copyright, national information policy, the impact of new information technology, and national and international activities concerned with information. In fact the areas of mutual interest can be charted.

	ESAC	ACARD
Copyright	Recommendation 1 (paragraph 14)	Recommendation x (paragraph 6.19)
National information network	Recommendation 4 (paragraph 72)	Recommendation iv (paragraph 7.5)
Minister for Information	Recommendation 5 (paragraph 74)	Recommendation i (paragraph 9.5)
National and international information activities	Recommendation 6 (paragraph 75)	Recommendation iv (paragraph 7.5) Recommendation vii (paragraph 6.6) Recommendation viii (paragraph 6.14)

Due to the similarity of interest of the two Reports, the close agreement on the threat to British information activities posed by better coordinated efforts elsewhere in Europe, and similarity of the recommendations of both Reports, it is informative to contrast the reception of the ESAC Report with that of the ACARD Report. The ESAC Report appeared in July of 1980, two months before the ACARD Report. In late October, *The Times* reported the appointment of the new Minister for Information Technology with the Department of Industry as a direct result of an ACARD Report recommendation.<sup>26</sup> In November, Mr. Price, the ESAC Chairman, also commenting in *The Times*, had little to report.<sup>27</sup>

Furthermore, it is remarkable that the ESAC Report is not mentioned in the ACARD Report, nor are ESAC recommendations noted in journalistic or ministerial comments on the ACARD Re-

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25. *Id.* at xx-xxi.

26. Owen, *Information: Getting the Message Across*, *The Times* (London), Oct. 31, 1980, at 17, col. 3.

27. Our job is to prod government to take action in areas where it is being slow and dilatory. So far there is no evidence of action to match that of the United States and France; on copyright Mr. St. John-Stevan promised us no more than a Green Paper; and Mr. Nel McFarlane, a junior education minister, in a speech to the Library Association in Sheffield, made no promises whatever about government action.

Price, *supra* note 23, at 14, col. 5.

port. The new Minister for Information Technology is housed within the Department of Industry instead of at Cabinet level as ESAC recommended. Therefore, the activities of the Department of Education and Science must be assumed to fall outside the scope of his responsibilities. The Department of Industry's responses to the ACARD Report make no mention of matters unrelated to actual technologies and industries or the data protection problem.

In effect, two calls for central coordination emanated simultaneously from two organizations asked to study information technology and its use. In response to only one of these calls, the United Kingdom has a new ministerial post. Ignoring the ESAC Report amounts to ignoring one entire section of the United Kingdom's world of information. The natural result is that the new focal point for national information policy is not the all-embracing institution recommended by both reports. The new ministerial post is inadequate to handle the problems of information technology and is tainted with failure *ab initio*. The new scheme preserves the fragmentation of responsibility for information technology which has plagued the industry in the past.

Although the ESAC Report discusses the problems of libraries and information processors, it also contains interesting data on information activities which are not covered by the ACARD Report but are deserving of further study. Many of the organizations submitting memoranda realized that the ESAC Report must consider all aspects of the information technology problem even though only a particular aspect was of interest to the particular organization. A paper submitted by Aslib is of particular interest, since the committee was influenced by Aslib's contribution in drafting the Final Report. However, references to data protection, privacy and access to information made by Aslib were not discussed by the Committee.<sup>28</sup>

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28. The need for a national policy relating to information, provision and supply.

Although many of the policy issues relating to information have emerged because of rapid advances in technology, a distinction should be made between those issues which relate primarily to the technology and the underlying and often distinct information policy issues which they raise. An obvious example is that of privacy of information relating to the individual whether or not that information is in a computer databank.

1. Creation and dissemination of information. Government, itself plays a major role in the creation and dissemination of information, both for its own use and for the use of the general public.

What should be the government's role in encouraging individuals and organizations to create and disseminate information and what mechanisms should be set up to achieve this?

The inherent dilemma of the laws relating to such things as copyright and

Aslib's discussion of these issues indicates that at least some organizations in the U.K. are capable of defining the problems and formulating the questions that must be considered and resolved to create a national information policy. It is less heartening to note that these questions are not being asked within the government. The kind of information policy which has been manifested by the British government, support of the national information technology industry by the appointment of a relevant Minister, appears to have been motivated solely by a conditioned reflex to threats of economic rivalry overseas.

### III. COPYRIGHT

The last major piece of United Kingdom legislation on copyright was the Copyright Act of 1956.<sup>29</sup> Although computers existed at that

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patents is that they encourage individuals to create information by offering some protection against misuse but limit accessibility once it has been created. The fact that advances in technology have made it easier to make use of intellectual property without due recompense does not change the nature of the dilemma for those who seek to optimize dissemination without breaking the law.

2. Availability of and access to information. The issues here are intimately concerned with those relating to creation and dissemination but are more concerned with the mechanics and the legal and economic implications of universal access.

When should an individual's ability to have access to information be enhanced or limited?

Under what circumstances should individuals or organizations (including governments) be required to disclose information which is in the public interest (if that is definable) but not at present available? How much does the individual have a "right to know"?

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#### 5. Privacy of Information.

To what extent and in what manner should information about individuals be collected, disseminated and used?

Whereas many countries have established limitations on the collection and use of personal information to ensure that individuals are protected from misuse of such information, there is no well-defined U.K. policy in this area. No action has yet been taken in even the very limited proposals of the Data Protection Committee.

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#### 7. International aspects.

All the issues mentioned above have an international aspect particularly in relation to the European Communities where the Commission is active on all these fronts.

Do the national information policy options relating to domestic information handling also apply to information transmitted across national boundaries, and what additional limitation or enhancements are needed?

Aslib, *Supplementary Memorandum*, in ESAC Report, *supra* note 2, at 142-44.

29. Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74.

time, neither the Act nor the preceding report<sup>30</sup> made any special provision for computers. Computer programs are probably protected as literary works, under section 2(1) of the Act.

The Whitford Committee, reporting in 1977,<sup>31</sup> addressed itself to the copyright problems posed by new technologies such as microforms, audio and video recordings, reprographic techniques, diffusion services and computers. The Report has been criticized for its failure to specify which technologies should be subject to copyright laws.<sup>32</sup> Slow cumulative revision of copyright law causes great harm.

It is unfortunately the case that, in this and other related fields, changes in legislation are harmfully slow in relation to the pace of technical advancement. The legislation is static between one Act and the next, and each successive Act has to compromise between oversimplifying by considering all new items in terms of those of the preceding Act, and overcomplicating by particularizing to include provisions for all technical advances in new legislation, using new terminology.<sup>33</sup>

The Whitford recommendations tend towards oversimplification, but those concerning computers conform to the current international consensus that programs should be subject to copyright rather than patent law.<sup>34</sup>

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30. Report of the Copyright Committee (1952) (also known as the Gregory Report).

31. See note 14 *supra*.

32. Dworkin, *Whitford Committee Report on Copyright and Design Law*, 40 MOD. L. REV. 685, 687 (1977).

33. Ratcliffe, *Notes on Copyright, Including Reference to the Report of the Whitford Committee*, in 31 ASLIB PROC. 334, 343 (1979).

34. (i) All computer programs and other forms of computer software which have involved a sufficient degree of skill and/or labour to be considered as works in the normal copyright sense and which have been reduced to writing or other material form from which they can be reproduced should be clearly protected under copyright law, under the provisions for literary and (where appropriate) artistic works. In short, items of computer software should be treated as works and enjoy protection as such.

(ii) The storage of computer programs, or of any other copyright material, in a computer state should be a restricted act.

(iii) In relation to ownership and term of protection, computer programs and compilations of data should be treated in exactly the same way as other copyright works.

(iv) In relation to works produced with the aid of a computer, the author of the output should be the person or persons who devised the instructions and originated the data used to control and condition the computer to produce the particular result.

(v) A majority also recommend that the unauthorized "use" of computer programs to control or condition the operation of computers should be an infringement.

Whitford Report, *supra* note 14, at 236.

Professor Dworkin criticizes the Whitford Report for attempting to group computers with all other technological advances identified by the Committee; he would prefer to see the unprecedented copyright problems presented by computers handled separately. In addition, he, along with many other commentators, considers that the usual term of copyright duration, the author's life plus fifty years, is unrealistic in the fast-paced computer industry, where terms of five to twenty years would be more useful.<sup>35</sup>

Three years after the Whitford Committee reported, it is apparent from the library, information and information technology presses that legislative action on copyright is eagerly awaited. Both the ACARD and ESAC Reports advocate immediate reform. The first evidence of governmental activity, however, was a response by the Minister of Arts to a question by the Chairman of ESAC, on July 9, 1980, in which he merely indicated that a Green Paper on the subject would be forthcoming.<sup>36</sup> The promised Green Paper on copyright revision has yet to appear.

A major policy problem facing any United Kingdom government effort to reform copyright law is the task of resolving the conflict between publisher and authors on the one hand and the library and information professions on the other concerning reprographic reproduction of copyright material. The Whitford Committee considered evidence on this issue, and the problem was pointed out to the ESAC committee. Five of the appendices to the ESAC Report discuss this problem as well as many references throughout the Report.<sup>37</sup> The ESAC committee recognized that the matter lay outside the scope of the Minister for Arts' responsibilities, but proposed that the problem be resolved in view of its importance.<sup>38</sup>

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35. Dworkin, *supra* note 32, at 699-700.

36. ESAC Report, *supra* note 2, at 82. Green Papers are policy documents usually issued subsequent to White Papers, such as the Whitford and Lindop Reports, by the executive department charged with responsibility for the subject. After a Green Paper, the next step on the reformatory process is a proposal for new legislation, usually announced in the Queen's Speech at the opening of Parliament.

37. Memoranda from the Publishers' Association, the Society of Authors, the Library Association, The Booksellers' Association and the British Library.

38. The Committee has received much evidence about the unease with which authors, publishers and, to a lesser extent, booksellers, view the implications of the increase of photocopying and of the storage of the material they provide in forms other than the printed page, and the possibility of its transmission by electronic means . . . .

. . . We are concerned to draw attention to the major issues affecting relations between publishers and libraries, issues which if not resolved could seriously hamper the development of information provision in this country. We are also conscious of the international implications of the problem, which must be taken into account.

ESAC Report, *supra* note 2, at vii.

It is impossible to predict what policy the Green Paper will adopt. The Whitford Committee proposed a licensing system to cater to all user requirements for facsimile copies accompanied by the abolition of the right to make single copies for purposes of research or private study. This proposal has not pleased librarians. Publishers and authors have become polarized on this particular issue to such an extent that they now react negatively to other new technical developments, such as computerized storage and retrieval of information. The root of the problem lies, of course, in the dichotomous nature of copyright protection. The problem is that copyright law encourages the creation of copyrightable works by offering protection against misuse, but then must limit accessibility to provide that protection.<sup>39</sup>

The ESAC Chairman, on the other hand, seems to favor the librarians.

Librarians since the nineteenth century have seen information in book form as a free commodity which should be available to all. It is a fine tradition, the spirit of which should animate, as far as possible, any new electronic information service.

Authors, on the other hand, are increasingly proprietorial about their offspring—they have achieved Public Lending Right . . . and will fight for their proper share of income generated out of any new system.<sup>40</sup>

The tone of the conflict before, during and after the Whitford Report has been vitriolic. In view of this unfortunate circumstance and the inherent nature of the dilemma of copyright law, neither camp will be satisfied by any recommendations that the forthcoming Green Paper may make, whatever they are. Both the ESAC and ACARD Reports advocate a quick solution, without venturing to list specific remedies. In this area, a policy decision will have to be made, to the detriment of someone. The three year delay since the publication of the Whitford Report may reflect governmental inability to make such a decision without the guidance of an articulated policy on information.

#### IV. DATA PROTECTION

Data protection in the United Kingdom also has been studied in recent years, and government reaction to a report is anticipated in this area as well.<sup>41</sup> Unlike the Whitford Committee, however, the Lindop Committee had no previous legislation to study because

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39. See note 28 *supra*.

40. Price, *supra* note 23, at 14, col. 1.

41. Lindrop Report, *supra* note 11.

Britain has very little present law on data protection. Unshackled by tradition, the Lindop Committee was able to sketch out a new system of data protection.<sup>42</sup> The Lindop Committee did have some previous studies to rely upon.

In 1972, the Younger Committee on Privacy discussed the problem of information stored in databanks, but pointed out that it is the gathering of the information which may be dangerous, not the method of storage.<sup>43</sup> Two government White Papers, issued in 1975,<sup>44</sup> which repeated many of the points made in the Younger Report. The Lindop Committee was organized as a result of a government decision to introduce new legislation "to protect personal data handled in computers,"<sup>45</sup> whereas the Younger Committee examined all kinds of data stores, either computerized or manual. The Lindop Committee, however, reported on both the public and private sectors, while the Younger Committee's activities were confined to the private sector.

The Lindop Report makes two main recommendations. First, the Committee suggests that "a simple set of rules govern all handling of personal data by computers simply will not do,"<sup>46</sup> and that, in view of the diversity of systems handling personal data, separate codes of practice should be drawn up for different classes of data-handling applications.<sup>47</sup> Second, the Committee recommended the establishment of a data protection authority which would (a) implement a set of principles established by the legislation, and (b) maintain a public register of users and the code of practice to which these users should adhere.<sup>48</sup>

A general right to inspect and to correct personal data held in public or private computer systems is not proposed by the Lindop Report. Instead, the data protection authority would act on behalf of

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42. This area is plagued with terminological problems. English law has found the concept of privacy difficult to define. Although source materials are replete with the word "privacy" this Article will use the term "personal information" as discussed by Wacks in the context of data storage. R. WACKS, *THE PROTECTION OF PRIVACY* (1980). Personal information may be defined as those facts, communications or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or confidential and which he would therefore prefer to withhold or at least to restrict in circulation. *Id.* at 22.

43. COMMITTEE ON PRIVACY REPORT, CMND. NO. 5012 (1972) [hereinafter cited as Younger Report].

44. *COMPUTERS AND PRIVACY* (1975); *COMPUTERS: SAFEGUARDS FOR PRIVACY*, CMND. NO. 6354 (1975).

45. Lindop Report, *supra* note 11, at xix.

46. *Id.* at xx.

47. *Id.* at xxi.

48. *Id.* at xx.



the public to ensure that individuals know what personal information was being stored, for what purpose, for what period of time, and who had right of access to it.

Since the Lindop Report was published, the government has taken little overt action, but the recommendations are apparently being considered. In January of 1979, a spokesman for the outgoing Labour Minister of State declared that his department was unhappy with a number of the Lindop proposals. He noted that the proposed Data Protection Authority would require unprecedented powers, in spite of its disfavored status as a mere quango (quasi-autonomous non-governmental organization), and that implementation would undoubtedly be expensive.<sup>49</sup>

In February of 1980, after a change of government, *The Times* reported that although Britain was far behind other countries in passing legislation to curb abuses, there was no feeling of urgency in government circles to implement the Lindop recommendations.<sup>50</sup> In July, the House of Commons Home Affairs Committee (the equivalent of ESAC for the Home Office) was told that although the Lindop proposals were under consideration, the government "did not attach great priority to implementing them."<sup>51</sup> In September of 1980, the *Transnational Data Reports* reported that:

Press reports from London indicate the Home Office has completed a study of responses to the 1978 Data Protection (Lindop) Report. No policy seems to have been formulated however. Lackluster pursuit of data protection legislation has caused the U.K. difficulties in subscribing to CoE and OECD agreements and prompted British business interests to call for positive action.<sup>52</sup>

In that same month the ACARD Report also recommended governmental action in the data protection problem.

The British delegation to an OECD meeting on the harmonization of legislation concerning privacy protection and transborder data flows was forced to abstain for lack of a national policy.<sup>53</sup> The OECD proposals recommend that every person should have the right to know what data is stored relating to him or her and have access to it. A spokesman for the Home Office announced "[w]e are not prepared to sign this document until we have formulated home

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49. Green, *British Government Responds to Privacy Report*, 1 TRANSNATIONAL DATA REP., 3-4 (1979).

50. *Special Report on Computers*, *The Times* (London), Feb. 18, 1980, § vii at 1, col. 1.

51. *Home Office Accused Over Computer Information Abuse*, *The Manchester Guardian*, July 31, 1980, at 19, col. 1.

52. 3 TRANSNATIONAL DATA REP. 13 (1980).

53. *Computing*, Oct. 16, 1980, at 1.

policy and it has been debated.<sup>54</sup>

Another *Times* report, in late October, 1980, commented on Britain's approaching embarrassment over the Council of Europe's new version of the Convention of Human Rights.<sup>55</sup> If the United Kingdom signs, the country will be committed to data protection legislation. The ACARD Report's advocacy of data protection law is noted, as is the growing notoriety of the U.K. as a dump for "dirty data." The National Council for Civil Liberties, attempted to formulate a Protection of Information Bill which would utilize existing bodies to investigate complaints about data protection. Creation of a Data Protection Authority in the form of a new quango, is not likely to find favor with a government which is attempting to cut down the numbers of these ubiquitous organizations.<sup>56</sup>

Finally in December, 1980, the *Manchester Guardian* identified one reason for the Home Office's continued delay in responding to the Lindop Report.

The Home Office's resistance to the Lindop recommendations of a data protection authority with wide powers of inspection and enforcement is not simply a symptom of Government dislike for quangos. It is rooted in support for the police view that police computer systems should be exempt from privacy laws and not open to inspection, even by data protection officials . . . [A Data Protection Authority] is anathema to the Home Office, but not necessarily to other government departments. Mr. Adam Butler, the Industry Minister responsible for information technology across all of government, is believed to be among those putting pressure on the Home Office.<sup>57</sup>

This is extremely ironic, since the Home Office is responsible for implementing data protection legislation as well as for the police.

This revelation explains Home Office recalcitrance over the past two and a half years, and the apparent dissension within the department. The governmental reaction to conflicting pressure from the information industry to conform to international conventions on data protection and avoid subsequent embarrassment and from the police and other Civil Service departments to resist the rights of inspection, as recommended by the Lindop Committee, is eagerly awaited. The United Kingdom has a long tradition of official secrecy and of restricted access to public sector files, so the public newspa-

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54. *Id.*

55. Gibb, *Falling Into Line at Last on Data Banks*, *The Times*, Oct. 29, 1980, at 17, col. 1.

56. *Id.*

57. *'Halfway House' on Privacy Law*, *The Manchester Guardian*, Dec. 6, 1980, at 1, col. 3.

per revelation reveals that the dissension in the Home Office must be considerable.

#### V. FREEDOM OF ACCESS TO INFORMATION

Effective data protection requires that a right to inspect data be vested in an individual or an organization acting on his behalf. Such a right of inspection has been incorporated into a number of recent freedom of information acts in western countries as a necessary public protection mechanism. These laws usually give individuals the right to inspect data containing personal information and provide safeguards against access by unauthorized third parties. Therefore, this type of legislation supplies access to official information held by government organizations.

Access to official information in the U.K. is regulated by several controls. First, the Official Secrets Act of 1911 provides that communication of information received as a result of holding an official position is a criminal offense.<sup>58</sup> Thus, any conversations by civil servants about their work are technically breaches of the Act.<sup>59</sup> Second, many government and other official documents are kept secret for thirty years, except in Scotland, where official policy favors one hundred year terms. Third, civil servants are not supposed to participate in public discussion of policy, as this would jeopardize the ideal of Civil Service impartiality.

One potential safeguard against this official climate of secrecy is the right of Members of Parliament to question Ministers on the conduct of their departments. However, which MPs may not question Ministers on certain subjects. Furthermore, Ministers may easily give evasive answers, so this procedure is an extremely limited protection. Some legislation requires that particular kinds of official information be disclosed in certain circumstances. The current government has declared an open government policy, which suggests that Civil Service departments should publish background papers and policy documents. This release of documents is a voluntary concession not a right.

It is remarkable that new governments coming into power do not place reform of the Official Secrets Act on their programmes. Executive pressure to retain this convenient piece of legislation has prevailed for many decades. However, in response to the intense disquiet felt by many individual MPs on both sides of the House,

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58. The Official Secrets Act, 1911, 142 Geo. 5, c. 28, § 2.

59. *Id. See, e.g.,* Rex v. Crisp & Homewood, 83 J.P. 121 (1919) (A government clerk was prosecuted under the Official Secrets Act for communicating the particulars of a government clothing contract to a tailor).

there have been four attempts in the past four years to introduce official information legislation by means of the private member's bill, a ballot mechanism by which back-benchers are allotted time to introduce legislation. The last attempt, in 1979, might have succeeded if the Labour government of the day had not been defeated. A fifth attempt is to be made soon, and the draft bill is quite similar to the 1979 proposal.<sup>60</sup>

Section 15 of this proposed Official Information Bill requires that departments supply guidance to the use of catalogues and indices to official documents, so that the public can identify and locate the data desired. These procedures are similar to those suggested for ensuring data protection, and it will be interesting to see how this matter is handled should the bill become an act.

Such legislation, if it becomes law, would substantially change the practices of the British Civil Service. After decades of secrecy, state employees would be required to affirmatively disclose information, except in cases specifically exempted by the Act. This change would be traumatic and costly. For many years, Civil Service departments have found the Official Secrets Act to be a useful screen and have become accustomed to operating without public scrutiny. The reaction of the police, through the Home Office, to the suggestion of investigations by a Data Protection Authority shows how entrenched the habit of operating in secrecy has become.

The current government has made two moves on official information: first, the open government policy noted above, and second, an attempt to introduce a Protection of Information Act even more oppressive than the Official Secrets Act. By great good fortune, this proposed Protection of Information Act disappeared in the throes of a spy scandal. It is, therefore, hard to predict the present government's attitude toward an Official Information Act, particularly if the Act is not government-sponsored. The vigor of executive enforcement is also difficult to predict.

## VI. CONCLUSION

The United Kingdom has now reached a watershed on information law and information policy. The next few months may bring executive response and legislation on copyright, data protection and freedom of access to information. One can only hope that this overdue response to the Whitford and Lindop Reports will not prove harmful, and that the legislation recommended by the ACARD and

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60. See Library Association for the FOIC, *The Freedom of Information Campaign, Secrecy or the Right to Know? A Study of the Feasibility of Freedom of Information for the United Kingdom* (1980) (reproducing the text of the legislation).

ESAC Reports will not be enacted so quickly as to endanger its quality. If the intervening years had been filled with intelligent discussion of the prospective reforms, rather than disputes between private sector interest groups and constant nagging at enigmatic and possibly compromised governments, sophism might be more justified.

The history of the ACARD and ESAC Reports yields insights on the possibility of the United Kingdom developing an information policy. The two Reports make similar, in some instances virtually identical recommendations; they appeared simultaneously, and yet they never coincided, due to separate institutional structure, divergent definitions of information, and the sheer size of the governmental machine which generated them both. In his article in *The Times*, Mr. Price concluded, "[o]ur [ESAC's] job is to prod government to take action . . . ."<sup>61</sup> One immediately imagines an overweight creature, with too many limbs and possibly no head, being slightly disturbed by assaults on its thick hide. The ACARD Report produced one muscle spasm, and sometimes treaty partners provoke others, but these transitory phenomena are not to be mistaken for effective well-planned actions. Prior governmental action in the field of information law appear to be haphazard reflexive reactions, rather than an embodiment of a coherent national policy.

Recent observers have identified a movement in the United Kingdom's political structure away from the old balance between parties towards an alignment of backbenchers against the government. One manifestation of the change is that the new Commons Committees, such as ESAC and the Home Affairs Committee, are far more aggressive than anticipated. Committee members are most resentful of attempts to interfere or divert them in their investigations.

Since this new structuring, backbenchers have attacked the Official Secrets Act, and may even reform that statute, removing the cornerstone of official secrecy. This attack may be coincidence, but it is interesting nonetheless. Perhaps a reformulation of information policy will emerge from this political arena, instead of a government, which is apparently entangled by the conflicting interests of its powerful departments of state. An information policy which is not merely a productivity and marketing exercise seems unlikely to originate from any British government.

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61. Price, *supra* note 23, at 14, col. 5.