

Comments of

REED ELSEVIER

in response to

Gowers Review of Intellectual Property

APPENDIX 1 – Elsevier author copyright agreement

April 2006

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Comments of

REED ELSEVIER

in response to

Gowers Review of Intellectual Property

APPENDIX 2 - Comments on EU database directive

April 2006

Comments of

REED ELSEVIER

in response to

DG Internal Market and Services Working Paper

First Evaluation of Directive 96/9/EC on the legal protection of databases

March 2006

Reed Elsevier, a leading database provider

Reed Elsevier is a world leading Anglo-Dutch publisher and information provider, operating in the Business to Business, Legal, Science and Medical and Educational markets. Its principal operations are in Europe and North America and it is jointly owned by two companies, Reed Elsevier PLC and Reed Elsevier NV. Reed Elsevier's businesses employ over 36,000 people and its global headquarters are situated in London. Reed Elsevier's objective is the delivery of highly valued and demonstrably superior information solutions to professional customers, increasingly via the internet.

Reed Elsevier position

Reed Elsevier welcomes the opportunity to comment on the DG Internal Market and Services working paper ("Working Paper") on Directive 96/9/EC ("Directive"). Reed Elsevier is a major producer of databases, is supportive of the Directive and does not believe it should be repealed, nor the sui generis provisions amended.

Factors affecting investment

It is self evident that commercial producers of information databases will be reluctant to invest significant time and money in compilation and distribution if they do not expect to be able to achieve an acceptable return on capital. Decisions of whether, and where, to build and market databases, are based on many factors. It is an over simplification to focus solely on the legal environment as the key determinant factor. Other key issues will include overall market structure, workforce skillsets, fiscal and economic environment, location of IT and managerial supports and corporate structures. For this reason we would challenge the assumption in the Working Paper that because there may be a differential between the US and EU in Gale Directory of Database statistics, this calls into question the value of the Directive. Correlation is not the same as causation.

The Directive works - it is fit for purpose

The purpose of the Working Paper is stated to be to assess whether the original policy goals have been achieved. Reed Elsevier strongly believes that they have. By giving producers of databases an additional tool with which to protect their investment, the Directive has provided ammunition to deter and prevent parasitic uncompetitive free riding behaviour. Reed Business Information (RBI) is a major producer of commercial directories, in data ranging from bank sort codes to who's who in petrochemicals and plastics. A selection of RBI's European database products is attached. (Appendix I). There have been multiple occasions since the enactment of the Directive where RBI has required other entities to cease and desist from wholesale copying of entries in a product by a competitor seeking to circumvent the significant compilation and verification costs that are involved in producing a legitimate directory. To date, citing the Directive to draw the infringement to the attention of such would be free riders has had the desired effect of stopping attempted misappropriation.

Clarifications do not mean bad law

These episodes do not reach the courts or feature in law reports precisely because the law has worked as it was intended. Much has been written about the cases that have reached national courts or the ECJ. These broadly involved definitional challenges and clarifications. It is submitted that this is not a sign of weakness of the Directive. Rather it is a natural process of clarification of a new concept. In other areas of legislation, such as employment, there are dozens of such clarificatory cases. The Acquired Rights Directive 77/187 for example, when it was enacted, similarly introduced new concepts. These have been gradually clarified and refined both at Member State and ECJ level. The first few cases in the 1980's did not result in widespread calls for the total abandonment of the Directive. Such calls in respect of the sui generis database right are disproportionate.

Dispelling the myth about "locking up facts"

Detractors of the sui generis right seek to claim that it "locks up data" despite specific provisions to the contrary in the Directive¹. This myth needs to be dispelled. Let us take as an example RBI's product, Bankers Almanac, produced from East Grinstead in the UK. This product (see example extract at Appendix II) provides collected worldwide bank information including contact information, national bank codes and standard settlement instructions. This information is freely available from every bank. RBI contact each individual bank branch, ascertain the relevant detailed information and keep it continually updated as banks merge, move or otherwise change their details. None of the raw data is "locked up", every bank will freely share it. Like most directories and databases, the aggregator has provided a service of producing a tool to enhance the user's efficiency and productivity. This will equally apply to a broad range of information in many other RBI products, such as the Railway Directory which alphabetically lists 1400 railways worldwide or Utility Week handbook which identifies 2000 Utility Regulator contact details or Telemat in Italy, a database of public tender information, or Byggefakta in Scandinavian countries containing construction information. All this information is publicly available and anyone has access to it for their own use or to draw up their own compilations. They simply won't be able to steal a database and use it to compete against the original database producer. The publisher has aggregated it in a comprehensive logical, easy to use format for customers' commercial convenience. These efforts deserve protection from misappropriation as acknowledged in the Recitals to the Directive.²

Dispelling the myth about "damaging Science"

In tandem with the flawed argument that the sui generis right locks up fact, it is claimed by some that protecting databases is harmful to the scientific endeavour. This is the converse of the truth. Elsevier in the Netherlands has, for example, invested some €61 m since 2003 in its Scopus abstract and citation database. This database permits easy searching of 27 million scientific abstract records compiled by Elsevier,

¹ Recital 45 "Whereas the right does not in any way constitute an extension of copyright protection to mere facts or data".

² Recital 39 "This Directive seeks to guard the makers of Databases against misappropriation of the financial and professional investment made.

and contains 245 million citation references going back to 1996, covering 15,000 peer reviewed titles. This major tool was developed in conjunction with leading librarians and is already available campus wide in excess of 1,000 institutes, greatly enhancing researchers' productivity by enabling them to locate easily and quickly the key information of interest to them. This new European product, recognised by the UK higher education Joint Information Systems Committee (JISC) as a major new resource discovery tool, is just one of many exciting new developments from European database producers. Strict comparisons of numbers of databases from Gales' Directory of Databases do not tell the whole story. European investments and innovation should be celebrated and encouraged. Concerns about whether Governments are putting adequate resources into scientists' research information needs is a separate debate and should not be confused with providing an appropriate environment protecting the rights of database producers.

An EU safety net

It has been suggested that because the US does not have sui generis protection, this is a reason to repeal it in the EU. This is misconceived. Major US database producers in the US, including Reed Elsevier, have built up leading products such as Lexis Nexis, *despite* the absence of database protection, not because of it. United States law protects databases to a sufficient extent that the industry has not suffered complete market failure, but producers consider the protection to be less than optimal and have supported efforts to strengthen US legal regimes.

US producers do have certain tools at their disposal. Contract - bar none, is the single most important and effective way to protect databases from misappropriation in the US. Courts have routinely enforced licensing restriction on information usage. Note that to protect their investment US producers are compelled to narrowly limit usage by contractual means. In the EU the statutory exceptions in the Directive give users greater rights within a balanced framework. But contracts are only effective against people who assent to them. Pirates are usually unrelated third parties. If a database producer has no contractual relationship with the database pirate, there is no way in the US for the database producer to bring a case against the database pirate for breach of contract. .

In the absence of copyright protection or a contract, electronic database proprietors in the US have also had recourse to laws that prohibit unauthorized access to computers such as the Computer Fraud and Abuse Act (18 U.S.C.1030). Also in some states, a defendant that uses a computer programme to automatically and repeatedly copy information may be liable to the site's owner on the theory that it has trespassed. Other states permit recovery for misappropriation.

In the light of the inadequate protection, US database producers have had to rely on self help mechanisms. These means include encryption, passwords and online only access to data. This limits use of easily copyable formats such as print and CD-Rom, and thereby reduces consumers' choice of medium. However, as stated³ by Dr Laura Tyson, Dean of London Business School, "just as fences or other methods of property

³ Tyson, Laura D'Andrea and Edward F Sherry, *Statutory Protection for Databases, Economic and Public Policy Issues (1997)*.

protection in the physical world do not obviate the need for legal protection against trespass, the existence of technological and contractual means of protecting investments in the database industry do not obviate the need for statutory protection". The EU Directive provides a safety net that US producers do not have.

A highly competitive environment

As has been explained the value of the database to the user resides in the effort of aggregation and selection and updating of data, convenience, ease of use, and search engine functionality. There are always opportunities for new entrants as long as underlying information is available. In most cases a new entrant can get the data from the same source as the incumbent operator so there is no public policy need to allow the new entrant to free ride on the original firms' investment. Most underlying data is replicable.

The distinction between creation of material and obtaining of data in the British Horseracing Board case⁴ is a fine one and may yet have unintended consequences of economic disincentivisation. But as pointed out by the Commission in the Working Paper⁵ it will put to rest any fear of monopoly abuse of a dominant position in respect of single source databases where the primary producer of underlying information is the same entity as the database maker. Thus a previous source of concern about a possible negative effect of the Directive has been removed.

A European success story

The DG Internal Market Working Paper has requested evidence of the economic impact of sui generis protection in stimulating the production of European databases. In practical terms it is impossible to prove a negative, namely, what the position would have been if there had been no protection. All that can be done is to look at the thriving European database sector and its attendant impact on growth and employment. Over the period 2004-2006, Reed Business Information databases in Italy, Finland, Sweden, Denmark, Spain, UK and Netherlands have enjoyed growth in number of records held of up to 30 %, with B2B customer numbers up by some 13%. Revenue growth varied, but in several regions has been in excess of 18%. This indicates a positive trend. As mentioned above, Elsevier has, during the same period, created a widely acclaimed information research tool of considerable value to the research community. It is not claimed that these products were created purely because of the existence of the Directive or that without it they would not have been considered, but it is the case that the Directive provided Reed Elsevier management with a safe legal environment when deciding whether to invest in these products. As noted by 90 % of respondents to the Commission's online survey this core protection against misappropriation is clearly important to database producers.⁶

⁴ The British Horseracing Board Limited and Others v William Hill Organisation Ltd (C-203/02)

⁵ Working Paper p.14

⁶ EC Survey of European database industry September 2005.

A Benefit – not a Burden

The Commission seeks to cut down on burdensome regulation on business and it has been suggested that withdrawal of the Directive would achieve this objective. This idea is misdirected. Sui Generis is a Right - not a Regulation. It is not an administrative provision requiring compliance - it is a benefit, not a burden. This cannot be more persuasively evidenced than by fact that the vast majority of those directly affected by it, the industry it targets, wholeheartedly support it. Were it perceived as a regulatory burden that would not be the case. Repealing or amending the Directive would create major legal uncertainty and cost for a leading European industry.

Conclusion

The Commission should follow option 4 in the Working Paper and maintain the status quo.

Anne J Joseph
Director EU Governmental Affairs
Reed Elsevier Group plc
1-3 Strand
London WC2N 5JR
Tel: +44 (0)20 7166 5720
email: anne.joseph@reedelsevier.com