

My submission deals with the issue of *Coherence between competition policy and Intellectual Property (“IP”) policy.*

You ask the following questions and in advance of my submission I start by including brief replies:

(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?

Yes. I have been involved in several successful businesses which involved licensing IP from third parties. I can cite a number of examples where I believe that unfair competition has arisen from inappropriate use of IP rights and where I believe IP rights should not, as a matter of public policy, have been granted at all.

(b) How did you deal with this problem?

In many different ways including taking the matter up with the organisation that was the cause of the unfair competition, lobbying government and making complaints via the Office of Fair Trading (“OFT”).

(c) Was competition law effective at controlling this behaviour?

It helped but it was far from effective. The OFT did not appear to understand some of our arguments and their interest appeared to be focussed on narrow issues such as whether there was proper accounting separation rather than considering the wider issues and precedents.

(d) Should competition law have a greater role to play in regulating IP?

Yes it provides a useful stop-gap for dealing with flagrant abuses – but the long term object should be a rational IP regime rather than an irrational one (which we have at the moment) of which the worst excesses can be dealt with by competition law.

(e) How would you see the system working?

I do not see there being a single solution and the system would need to take into account that, in my area of interest (datasets), there are three different cases each of which require different treatment:

- by-product datasets which should not be granted any IP rights
- public sector datasets (other than by-product datasets) which should be licensed on a non-exclusive basis to anyone that wants them on an arms length basis with proper separation of functions and accounts.
- Private/voluntary sector datasets (other than by-product datasets) where the underlying principle should be that IP rights should be granted for a sufficient period to ensure creation.

My submission deals with the first of these but I believe it is important to understand the context within which I am making my observations and recommendations. In the long term what needs to happen is a thorough review of IP law and I believe as a general principle the appropriate basis of IP protection is sufficiency to ensure that investment in initial creation of the IP. Thus where there no IP protection is necessary for the creation of the initial IP, then no protection should be granted.

SUBMISSION

Introduction

My submission below sets out my concerns about one specific area - that of datasets created as a by-product of another (usually regulatory or statutory) process by a *de facto* or *de jure* monopoly. My

argument is that such datasets should not be entitled to protection under IP law. This could be achieved by changing intellectual property law; changing competition law or some combination of the two.

My argument applies equally to the public and private sector “owners” and while I welcome the current review by the OFT of the reuse of public sector data by commercial organisations, I believe that your review needs to provide an overarching framework that deals with the underlying problem. In my view it is irrelevant whether such by-product datasets are created or owned by a public or private sector organisation not least because such ownership is contingent and often transient (for example telephone listings). The underlying driver is that the datasets I am concerned about are created as a by-product of a regulatory or statutory function or some other kind of necessarily unique activity such as organising “official” race cards for horse racing.

It is also worth noting that the assertion of IP rights in by-product datasets is at the root of inter-agency conflicts and major government inefficiencies. An example of this is the dispute that has prevented the development of a single national address database, a row that has simmered, with occasional eruptions for almost a decade. The cost of licensing current address data was a central cause of the failure of the 2001 Census in several metropolitan areas (e.g. Manchester). It is self evident that had the Ordnance Survey and the Royal Mail had been privatised, exactly the same problems would have occurred. This example also reinforces the point that the issue is not who “owns” the data but the fact that it is unique and created as a by-product of another process - in this case, delivering letters.

As far as these by-product datasets are concerned, carving out public sector data from the Gowers review therefore misses the point. Likewise for the OFT, viewing the use of by-product datasets as a reuse of public sector data issue and attempting to devise a solution that works for (by way of example) the Ordnance Survey and the Environment Agency may well lead to a “fudge” which fails to deal appropriately with either case.

The key European Court of Justice ruling relates to a non-governmental body - the British Horse Racing Board. In my view this judgement supports my contention that the framework needs to be determined not be who happens to have created in dataset in a particular jurisdiction at a particular time but the underlying economic structure which is that the dataset was created as a by-product of a “regulatory” or statutory function. I am deeply concerned that the implications of the ECJ ruling are not going to be taken properly into account in CUPPI review or in your review. I hope that you will bring some joined up thinking to this problem and urge you to include this issue as a central part of your review.

By-Product Datasets

As noted above our area of interest is IP rights accruing to datasets created as a by-products of typically regulatory or statutory functions. Examples include telephone listings, Companies House data, horse racing data and Environment Agency licences.

Typically the data owners tend to be monopolies or quasi monopolies and such organisations tend to use this status in conjunction with IP law to generate revenues from those datasets.

Some of these monopolies are in the public sector, some are NGO's and some are private commercial operations. It should be noted that the two relevant European Court of Justice cases (horse racing and television listings) related to private sector monopolies. It is also worth noting that in both these cases, millions of pounds were at stake which justified the high legal costs involved in taking the case through the courts.

Many of the problems with which I have been involved are equally flagrant abuses, but those suffering the negative consequences have lacked the resources to take the perpetrators to court.

Context

My argument starts from a utilitarian perspective - that IP protection should be granted only if it can be shown that such protection stimulates economic activity and is not detrimental to consumer choice. I believe that this is the same approach you are adopting in your review.

It is my view that the granting of IP protection to by-product datasets is *a priori* unnecessary because such datasets have to be created for the purposes of fulfilling a statutory/regulatory function.

We need to consider what would be beneficial to the economy. There are two key elements here - first that the products and services created from such datasets tend to be of significant importance for the UK economy. Obvious examples include telephone listings, the collection of financial accounting records by Companies House, which form a key component of credit reports, and data from the Land Registry and Local Authorities which underpin property transactions - and second that in many cases that IP rights are asserted by the monopolies that compile the datasets in ways that substantially limit the development of a market for products and services based on those datasets.

The ECJ Framework

I believe the ECJ ruling on the BHRB provides the right framework for challenging those monopoly suppliers and that all that is needed is to follow through. There are examples (e.g. television and telephone listings) that consumer choice is substantially enhanced by preventing IPR on by-product datasets being (in my view and the courts' view) improperly asserted.

Special Pleading/Practical Solutions

While not directly relevant to my line of reasoning, I have heard a number of holders of such datasets engage in special pleading that they need IP protection in order to ensure quality. In my view this is just plain wrong and much the best way to improve quality is to ensure that the data is used.

The Council for Science and Technology noted in a recent report: 'Large numbers of public-sector databases exist, largely home-grown by department or agency. This has resulted in inconsistent data storage regimes and duplication of data, a general inability to link these different databases, and differing regimes of access and control. *In addition, personal data stored by government is often of low quality – both inaccurate and incomplete – and very expensive to keep up to date.* Processing of personal data amplifies errors, and further contributes to the poor quality. The net result is a largely fragmented, inefficient and sub-optimal system that wastes time and resources.

I recognise that certain regulatory bodies either subsidise or pay for their activities by selling such datasets or by creating products and services from those datasets and then selling those products and services. This has been encouraged by HM Treasury as giving the best deal to the taxpayer. I believe that this:

- grossly underestimates the personal and corporate taxes that would accrue to the Inland Revenue if the monopolists IPR were not protected by the government;
- ignores the rigidities within the public sector that arise from the inappropriate application of IPR to unique data sets; and
- underestimates the unnecessary inconvenience to the citizen that arises from the sub-optimal re-use of these unique datasets.

As far as the public sector is concerned the inappropriate assertion of IP rights by individual government agencies and departments is at the root of many of these problems. Frontier Economics, which undertook a cost benefit analysis of a proposal for a National Address Database, noted in 2004: "There are on-going disputes over the intellectual property rights for particular data. It is important to recognise that [few] of the benefits outlined in this report can be realised unless [these are] resolved."

It is understood that such datasets would have to be funded in another way. However, for most agencies costs now accrue at the point where data is collected and entered into a database, rather than at the point when it is distributed. It is therefore far more logical to fund its collection and maintenance from appropriate registration fees, and not from setting speculative prices for data, and guessing what volume of sales will result.

Indeed, telephone listings, horse racing cards, Land Registry, Companies House and the DVLA are largely funded in this way. Ordnance Survey, at first glance, is something of an anomaly but in reality its core activity is providing data management services to other public sector bodies and its commercial activity is the exploitation of by-product datasets. The OS, too, could be funded on the basis of the data management services it provides to HM Land Registry, Local Government and the Emergency Services, rather than from the speculative sale of by-product datasets.

Conclusion

The logic of the ECJ ruling, if followed through, would deprive by-product datasets of IP protection. The key advantage of this approach is that it would be low maintenance and have a substantial positive economic impact. Here is an opportunity for a quick win which will make a difference for us as citizens and for the UK economy.

Dan Re'em – April 2006