

EUROPEAN ALLIANCE OF NEWS AGENCIES

SECRETARIAT

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RE: Public Consultation on Content Online in the Single Market

Comments submitted by

European Alliance of News Agencies (EANA)

Providing news and other types of content to the media has undergone a dramatic change over the last ten years or so and this is a development that is continuing at an impressive speed. It is our opinion that the huge amount of new platforms for accessing news and other types of content is a development that is to the benefit of the whole society and its citizens relying on traditional and new media to be informed.

It goes without saying that this development of the information society is also a challenge for news agencies developing from traditional text- and picture agencies to multimedia companies providing text-, picture, video- and audio content to all types of traditional and new media. It is also an uncontroversial statement that sometimes this development of the information society has been more rapid than the development of the legal framework and the business models.

Legal framework and business climate

EANA's basic opinion concerning the consultation on Content Online is that re-view of the legal frameworks could for sure be needed to keep up with the rapid development of the information society. However, it is also important to find also other ways of supporting the build-up of business models and a healthy business climate so that all parties active on these markets can secure a persevering access to news and news-related content via a rich variety of media.

A group of organisations including EANA have formed a working group, headed by the World Association of Newspapers (WAN) trying to find solutions for a commercial cooperation with search engines making use of other companies' content. WAN, European Newspaper Publishers Association (ENPA), International Publishers Association (IPA) and European Publishers Council (EPC) in September announced a global industry project to avoid future conflicts between search engines and publishers. This pilot project would be based on an Automated Content Access Protocol (ACAP). It is our opinion that this pilot project can be relevant when discussing content online and future business models.

It is important to stress that news agencies are the providers of a huge bulk of content that includes breaking news, summaries, analysis, backgrounds, various listings and also news and listings that have its value when collected in historical databases. To get paid for multiple use of content is vital for news agencies having invested money and intellectual capacity in the gathering of content for its services.

It is essential that legislation on all levels concerning intellectual property rights and database rights recognises the intellectual and financial efforts invested by news agencies producing all kinds of content. Unauthorised use of news agency services undermines the operations of independent news agencies as providers of news etc that citizens can rely on to be informed on developments in all areas from politics and economics to sports.

Copyright infringements

Many of the news agencies being members of the EANA have in internal market surveys expressed that they suffer from different forms of piracy where search engines, websites etc make use of news agency content without having an agreement with the news agency about this use and thereby also without any economic compensation. Some of these pirates are small operators and some of them are for sure among the world's biggest media companies like successful search engines.

Database protection

In its comments to the EU's review of the Database Directive earlier this year, EANA stressed that news agencies produce a huge variety of searchable databases every day. EANA's experience has been that an increasing amount of its members' output consists also of databases such as sports data, tables and statistics, entertainment listings (cinema, theatre, TV programming), political statistics and polls and financial listings.

EANA's members believe that with many databases it is very difficult to separate out the "creation" of the content from the obtaining, verification and presentation of that content. Unless the data is all clearly obtained from elsewhere the processes are, inevitably, all rolled up into one.

The ECJ has found that in order for the database to be protected by database right, it will have to be possible to separate the process of creating the data in the first place from a subsequent process of obtaining, verifying or presenting the data as well as it being necessary to show that a separate, substantial investment went into the subsequent process. This diminishes the database right and removes the ability of news agencies from making any return on the investment they have put into creating a useful set of data. EANA's members may have to create a rather artificial internal or joint venture sham, at great cost in time and money, to separate the two activities in order to protect their investment.

Further, the current interpretation by the ECJ means that the investment made by businesses such as news agencies is not protected but third parties who copy their data would be protected because that third party would be obtaining, verifying or presenting existing data – data that the news agency has gone to the trouble of creating. This seems an entirely illogical outcome and not one likely to encourage the production of useful databases.

The fact that copyright protection has been harmonized such that only databases that are arranged or selected in a way that “constitutes the author’s own intellectual creation” are afforded copyright protection means that the copyright bar has been raised and many databases may struggle to attract either copyright protection (if they are quite simple arrangements) or database right protection unless they quite clearly compilations of pre-existing data.

EANA does not believe that the Directive’s intention was to leave the creators of any database in a worse position than they were prior to the Directive.

Competition Law

EANA understands that there is a tension between competition law and the monopoly rights granted by intellectual property rights. The Directive notes that the provisions of the Directive “are without prejudice to the application of Community or national competition rules”. However, the 2005 case of BHB (British Horse Racing Board) v Attheraces in the UK illustrates that competition law in member states will “step-in” to remedy any abuse of a dominant position. In the Attheraces case, the Court found that BHB’s pricing structures (regardless of whether it had database right in horse racing data or not) were an abuse of its dominant position.

Infringing Database Right

The ECJ also established that extraction or re-utilisation of any part of the database in relation to which there had not been substantial investment so as to qualify that part of the database for protection, could not be treated as extraction or re-utilisation of a substantial part of the database. So the BHB could not stop the most valuable part of its database, the runner and riders, from being copied.

Most controversially, the “repeated and systematic extraction and/or re-utilisation of insubstantial parts” of database contents means, according to the ECJ, that the repeated extractions have the purpose of reconstituting or making available to the public the whole or a substantial part of the contents of the database. Thus if someone consults a database every day, taking one crucial element of information from the database for re-use this is unlikely to amount to database right infringement.

This appears to undermine the value of the database right further and discourage investment in databases.

Conclusion concerning Database Right

The Directive wanted to stimulate the production of databases. Production was to be encouraged by protecting databases as means to encourage investment. The Directive noted the unsatisfactory position that in this digital age owners of databases were exposed to electronic copying such that an identical copy of a database could be quickly produced whose content does not infringe any copyright in the arrangement of a database. It is EANA’s view that the narrow view of the Directive taken by the ECJ defeats the stated aims of the Directive.

The aims of the Directive are sensible and helpful to European news agencies, which produce a large number of databases and compilations of copyright works. The simplification and harmonization of their protection is to be welcomed. A law protecting the valuable “sweat of the brow” type of database is both logical and beneficial to news agencies – copyright should remain the preserve of more original and creative works.

Reformulate the Database Right?

This seems the most beneficial option. In order to achieve the aims of the Directive:

- the right should be clearly reformulated to cover instances where the creation of the data is concurrent with its collection, verification or presentation;
- there should also be a clarification of the scope of protection of single-source lists or “official” lists; and
- there should be a re-interpretation of the Directive such that there is sufficient protection from the copying of small amounts of valuable data.

For the EANA Bureau (Board)
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