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EURIM Minutes

Committee: Theme 4 – Fair Dealing
Ref: 01-T04-Min 01
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Tabled papers:

- Agenda

Referred papers

- Code of Fair Use and Best Practice for software Owners and Licensees / users (Michele Rennie, Computalaw)
- Best practice case studies (produced by Model Contracts sub-group)

Websites (see also separate attachment)

- www.ieeeusa.org (useful information on UCITA)
- www.simnet.org (Society for Information Management – position statement on UCITA and update)
- www.publishers.org.uk - Publishers Association – some information on Copyright Directive

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Minutes of the Meeting of the EURIM Fair Dealing Group (Theme 4) 10th July 2001, held at CGNU, St Helens, 1 Undershaft, London EC3

Summary and Action Points

Summary

- The Chairman gave an overview of progress to date and reported that he had collated substantial evidence of unfair practice, which could be used to alert parliamentarians and others to the problem.
- The group looked at different ways of effecting leverage on those indulging in unfair practice, and at the scope of ADR as a solution.
- Other instances of uncompetitive practice were assessed, including Microsoft's licence changes and UCITA.
- PV gave an overview of the scope of the group and progress in related topic areas.

Points of agreement

- All agreed that exposure (naming and shaming) was one avenue to clamp down on stiffing, although there were problems of user reticence and non-disclosure agreements.
- Political leverage was another avenue, and the WP must look at following up the Chancellor's statement on competitiveness, obtaining a position statement from Patricia Hewitt, Secretary of State, and alerting EURIM MPs to the situation.
- ADR provided the best solution for addressing problems that arose when contracts were "silent", but would need to operate under a framework agreement that users and suppliers could sign up to.
- Microsoft's proposed licensing change was effectively a major price increase and should be opposed at the highest level.
- UCITA also constituted a potential threat, and its progress should be carefully monitored.

Main Actions agreed

- All to consider the best medium for exposing unfair practice (stiffing).
- A letter to be sent to Patricia Hewitt, Secretary of State, illustrating the scale and nature of the problem and the potential cost to UK plc and asking for a position statement that EURIM could use to progress debate.
- The group to liaise with TIF on the Microsoft licensing issue, and to try and establish the total value of the licence increases.
- The group to keep abreast of UCITA's progress, in co-operation with sister organisations if appropriate.

Detailed Minutes:

Action by

1. Introduction

1.1 The topics for the meeting were outlined as follows:-

- An update on progress, including a review of attributable instances of stifling that could be used as evidence in the campaign.
- A look at the potential for political leverage to address the problem of stifling - the Chancellor's recent statement on competition was being thrown into relief by numerous cases of monopoly suppliers taking advantages of their market position.
- An assessment of whether ADR could be used to lever supplier support.
- An update on uncompetitive practices, including UCITA.
- A proposal to extend the programme to include competition and choice, IPR and Internet Liability.

2 Recent Working Party Progress

2.1 Working party sub-groups and their progress to date was summarised as follows:

2.1.1 Code of Practice

This group had drafted a code of fair practice for software licences, which was admittedly biased towards users, and needed input from suppliers to ensure it was a document that offered benefits to both parties, and to which both could sign up.

2.1.2 Model contracts

Rather than re-invent wheels, this group planned to use pre-existing model contracts, and so had concentrated effort on compiling a collection of model clauses that could be inserted into contracts. To illustrate the applicability of these clauses, they had also produced three case studies documenting attempted stifling, how it had been tackled, and lessons learned.

2.1.3 ADR

A number of meetings had been held at CSSA who retained an active interest in this. Insurers were also participating because of the potential effects on liability – (e.g. suppliers who agreed to adopt ADR could pay reduced PI insurance premiums).

3 Progress on the anti-stifling campaign

3.1 More and more evidence that stifling was alive and well was coming to light. Figures indicated that 1/3 of all companies with more than 500 employees had been either victims or attempted victims of stifling. However, more attributable instances of exploitative practice were needed to convince politicians that there was a problem, and to name and shame the perpetrators. Although this evidence might have to remain under Chatham House Rules and not be fully in the public domain, at least Government could be made aware.

3.2 Two examples were cited - an attempted stiff on a medium sized company (£150 million turnover) by a software supplier, who had taken over their existing supplier, and tried to extract another £250,000 for user licences that had effectively already been purchased. A second example was a manufacturer whose software supplier was also taken over, by a firm who tried to exploit a weak contract to charge extortionate sums for continued maintenance. Other victims were also prepared to go public.

3.3 It emerged that 95% of the attempted stiffls occurred where the contract was silent, which meant that the attempted exploitation was usually legal, and the only course left open was negotiation.

3.4 Although they had not been involved in the group to date, the public sector was probably being stifled very badly. The group agreed to investigate this through links with SOCITM and OGC.

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4 Leverage through threat of exposure

4.1 Being part of EURIM's fair dealing group acted as a disincentive to would-be stiffers, as was the threat of unwelcome publicity in Computer Weekly.

4.2 One member asked how effective the threat of exposure was, since this might be one way to get results. It appeared, however, that although suppliers were loath to have their practices revealed, since they knew they would be considered exploitative, victims were often unwilling to have their poor purchasing practice exposed - so it could be an empty threat.

4.3 It was proposed that exposure and bad publicity were the best methods of stamping out stifling:- pyramid selling had been eradicated by TV exposure, not by court cases. The group agreed to consider the kind of medium best suited to such exposure.

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4.4 Concern that non-disclosure agreements might make this difficult was alleviated by the surprising fact that very few negotiated agreements included non-disclosure clauses:- people

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were just reticent.

5 Legal aspects

- 5.1 Problems did not usually stem from unreasonable clauses in contracts but from the absence of clauses.
- 5.2 Courts of law had only limited scope for interpreting a contract that was silent, and whilst they could try to make it more even-handed, they were restricted to looking at the intention of the parties in the contract.
- 5.3 The CIPS legal committee had been looking at the legal aspects of stiffing and had made some recommendations for users which could be circulated to the group. A

6 Framework agreements and ADR

- 6.1 Framework agreements were needed:- since it was not possible to revisit existing contracts and retrospectively add clauses, parties should agreed to use ADR to resolve dispute in circumstances not covered by the contract.
- 6.2 All agreed that parties should sign up to a framework agreement to use CEDR as a fall-back for all areas not covered by contract terms. This was comparable to the practice of adopting standard clauses to cover such gaps.
- 6.3 The Group's draft "Code of Fair Use and Best Practice for software Owners and Licensees / users" had a "sign-up" section to register both suppliers and users as signatories to the code. Both this code and other framework agreements relied on a critical mass of known users and suppliers signing up before they could be effective. A copy of the latest draft would be circulated to all group members.

7 Political leverage

- 7.1 The Chancellor's recent statement on competitiveness was thrown into sharp relief by the prevalence of unfair practice, and this could be a point of leverage.
- 7.2 Political leverage could help reduce stiffing, it was proposed that the group send a letter to the Secretary of State, Patricia Hewitt, to illustrate how much damage stiffing was doing and open up the issue for public debate in the House. The letter would also ask for a position statement from the Minister, which could be used publicly to illustrate just how out-of-step with the ideals of government some of these exploitative firms were and could also be most helpful in influencing legislation, which was best done in the early stages of preparation.
- 7.3 It was agreed that the group would submit a private letter to the Minister to gauge her response, which would then be followed by an open letter along similar lines (the precise content of which agreed with officials) to which she could respond formally. A
- 7.4 The forthcoming Enterprise Bill would look at fair trade and e-commerce issues and would provide a political arena for this subject. A timetable for the Competition Bill was to be procured, which would be useful in this area.. A

8 Un-competitive practices - Microsoft:- "extortion-commerce"?

- 8.1 Microsoft had recently announced a change in licencing arrangements. The existing upgrade arrangements (where the value of the existing software was taken into account as part of the increased value of the new version, and the fee payable for the upgrade was effectively an increment) would be discontinued. Instead, each issue of software would now have to be purchased as new, at full cost. Effectively the value of the existing licence was no longer recognised, which fundamentally changed the value of perpetual licences. The alternative was to purchase an expensive annual subscription, which incorporated new issues, thereby protecting your existing software asset. However, once you had chosen one of the two alternatives, you were stuck with that choice. Whichever they chose, companies would be paying 90% to 180% more for their Microsoft software. From a fair dealing perspective this might be seen as stiffing on a global scale.
- 8.2 One member compared this situation with IBM who, some time ago, were found guilty of exploiting a monopolistic position by anti-trust laws. Was there scope for prosecuting Microsoft?
- 8.3 It was agreed that this would seriously affect public sector environments where spending limits were set at least a year ahead and supplementary budges severely circumscribed.
- 8.4 Feedback from all quarters was very negative. Most saw it as a 50% price increase. It was deduced that UK plc would be paying MS plc 50% more and this called for a high level intervention.
- 8.5 There might be points of leverage via the debate on the Enterprise Bill and via OGC, and alternatively through MPs. There were several channels for lobbying, and most would benefit from involvement of constituency MPs.

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- 8.6 All agreed that there was scope for concerted action via several lobbying channels. They would ask TIF for details of progress and plans to date, find out from OGC whether action was planned and get feedback from SOCITM on the LA position. If there was sufficient interest EURIM could set up an appropriate political forum to present the issues – possibly a lunch. A
- 8.7 A one day workshop on these issues was being organised by TIF on 9th August for around 40 participants. It was likely they would aim to issue a communiqué shortly afterwards giving an outline position statement.
- 8.8 The group identified a need to raise awareness among global law firms and consultancy groups, many of whom had excellent representation at EU level. An open letter asking for support was suggested, aimed at a number of large law firms such as Clifford Chance, or a communiqué to the Law Society to raise awareness among members. Organisations that were unhappy about Microsoft's proposals should be encouraged to write to parliamentarians.
- 8.9 Microsoft had already relaxed one of its deadlines as a result of pressure from large corporates, who could not authorise unbudgeted expenditure at such short notice. This was a good sign.
- 8.10 A large electronic publisher with a multi-million pound software contract with Microsoft registered very active interest in this issue. This organisation often got better results when negotiating contracts by using their global label and negotiating directly with the Microsoft head office, but this was not an avenue open to smaller companies.
- 8.11 One member asked whether there was any way to establish an approximate value for the outflow of money from the UK to the US that would result from this – effectively an increase in imports. It emerged that this information had been compiled as part of a detailed survey of IT expenditure and could be made available to the group. A
- 8.12 It was agreed that Microsoft was a EURIM member, that there were some positive points in the proposed changes and that they should be actively invited to participate in finding a negotiated way forward.

9 Uncompetitive practice – UCITA

- 9.1 The effects of UCITA – Uniform Computer Information Transaction Act – were outlined, and the heavy weighting of the proposed legislation towards suppliers was illustrated. The act had so far only been implemented in Maryland and Virginia, where many software suppliers were based. There had been much opposition from US user groups and adoption elsewhere in the US had so far been of a watered-down version. Details of recent developments would be provided. A
- 9.2 There was a great deal of published material on this topic which could also be made available. A
- 9.3 All agreed that UCITA was a potential threat, particularly when a corporation with the ubiquity of Microsoft could theoretically decide to apply UCITA laws to all their contracts. All agreed they must keep up to date with developments. URLs of useful sites regarding UCITA would be circulated to the group with the minutes. A
- 9.4 It was noted that UCITA also contained some good legislative proposals, which were going unnoticed because all the attention was focused on the negative aspects of the legislation. The Federal Trade Commission's statement on UCITA should also be located since this was useful. A
- 9.5 One member suggested holding a review session on UCITA with EURIM's MEP members, to establish their views in the context of the e-Commerce Directive. The political point of leverage on UCITA concerned applicable law:- whether you could avoid being made to operate under legislations other than your own. A
- 9.6 EURIM might usefully make contact with an appropriate opposite in the US to track the progress of UCITA. CompTia were in the process of joining EURIM and could probably provide just such a link. Many US suppliers saw UCITA as a threat – contracts under UCITA would not inspire user confidence.

10 Other areas – competition, IPR, ADR, etc

- 10.1 ADR
It was proposed that e-Centre should take the lead on ADR since they had a good legal group and a large number of members wishing to resolve disputes over e-commerce as cheaply and effectively as possible.
- 10.2 Software Patents
Jenny Carlton at FEI was leading a group on that and other aspects of patents – such as the patenting of business methods.
- 10.3 Copyright Directive
10.3.1 This would be implemented next year, and the group must keep up to date with developments. They had held good workshops in the past with the patent office, and were likely to continue focusing on copyright, privacy and internet issues.
- 10.3.2 This Directive was extremely important to publishers, and the Publishers Association might be leading workshops on it, probably through their copyright Council. It was agreed that the A

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website would be checked for information.

10.3.3 Judith O'Sullivan was the appropriate Government official to contact. A meeting was proposed between her and EURIM members such as Frances Lowe of British Music Rights, Anne Joseph, and representatives of BT and Yahoo

10.4 Internet Regulation

Questions of liability were likely to dominate the agenda.

11 Date of next meeting

11.1 It was agreed that the next meeting would be held in early September.