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on

“Market Data: Implications to Investors and Market Transparency of Granting Ownership Rights
over Stock Quotes”

Committee on Financial Services
Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises
United States House of Representatives
July 26, 2001

Introduction

Chairman Baker, Congressman Kanjorski and Members of the Subcommittee, I am Richard P. Bernard, Executive Vice President and General Counsel of the New York Stock Exchange, Inc. (NYSE or Exchange). In this capacity, my responsibilities at the NYSE include the management of the Office of the General Counsel, and Audit/Regulatory Quality Review. I am a member of the NYSE's Management Committee. On behalf of the NYSE and our Chairman, Dick Grasso, I thank you for the opportunity to testify about protecting market data from misappropriation.

In June 1999, I testified before the Subcommittee on Finance and Hazardous Materials regarding Title II of H.R. 1858, the “Consumer and Investor Access to Information Act of 1999.” Title II sought to amend the Federal securities laws and was designed to create a new cause of action prohibiting the misappropriation of real-time securities market data. The NYSE worked with the House Commerce Committee staff in a very constructive manner to assure that Title II accommodated the unique attributes of market data.

Mr. Chairman, you may recall that, four months ago, my colleague Robert G. Britz, NYSE Group Executive Vice President, testified before this Subcommittee regarding more general issues pertaining to market data. We remain keenly interested in this issue, and stand ready to work with this Committee if it decides to consider database protection legislation for financial information in the 107th Congress.

The NYSE supports the principle that all databases, including securities market databases, deserve anti-piracy protections. The NYSE also believes that investors should have access to real-time market data so that they can be empowered to make educated decisions regarding their financial portfolios.¹

Ensuring the widespread distribution of market data is good business for the NYSE; this data “primes the pump” at the market and helps to generate additional volume for the Exchange. The widespread distribution of market data also levels the playing field for all investors and it creates interest, and confidence, in the capital markets. The NYSE believes that meaningful database protection legislation will help to maintain investor confidence in the reliability of market data and the integrity of our capital markets.

The NYSE: America’s Oldest Database

The Exchange has been making market data available for over 200 years, perhaps making it the oldest information distributor in the United States.² While the product has not changed, the means of distribution has. Long before the Internet, technology shaped market data distribution. The first invention that revolutionized the securities information market in the 19th century was the stock ticker, introduced to the Exchange in 1867.³ The NYSE signed its first market data contract in 1869.⁴

¹ “Market data” includes last sale prices, which are the recent reports of prices at which stocks have been traded. Market data also includes bid and ask quotations, which are the highest announced bid price that buyers are willing to pay, and the lowest announced offer price that sellers in our market are willing to accept.

² Marketplace: A Brief History of the New York Stock Exchange at 4.

³ Prior to the introduction of the ticker, messenger boys known as “pad shovers” distributed reports of sales and purchases, who constantly ran between the Trading floor and brokers’ offices. No matter how quick they were, fluctuations in prices often occurred during the fifteen to twenty minutes that it took them to complete their circuit. The speed and accuracy of the ticker’s reports were recognized immediately as assets to trading. Several ticker companies were permitted to station “reporters” on the Trading floor to record sales. Because of the importance of accurate ticker reports, the NYSE was gradually forced to assert control over the information gathering, and in 1885 its own employees began to collect the transaction data to give to the ticker companies. In 1890, the members of the Exchange agreed to establish the New York Quotation Company in order to buy other ticker companies and thereby assure the accurate distribution of market information. Marketplace: A Brief History of the New York Stock Exchange at 14.

⁴ While the stock ticker made market data more readily accessible and thereby made trading more efficient, it also created a new problem: regulation of the quotation services. During the latter part of the 19th century, popular gambling enterprises known as “bucket shops” developed in America. Bucket shops often

Orders In, Prices Out

The Exchange's mission is to provide all investors with a sophisticated, efficient and reliable forum for price discovery of listed securities. Mr. Chairman, when two investors trade, the execution is not only important to them. The price of the trade is important to millions of others around the world – for deciding their next market action, for pricing their portfolios, for valuing their stock options and for providing a report card on how well management is discharging its responsibilities to them as shareholders. Said another way, the NYSE exists to discover fair stock prices and distribute them pervasively. We tell the world what a fine slice of ownership – a single share – of a global enterprise for example, General Electric Co., the most valuable company in the world, is worth on a moment-by-moment basis. Through our auction, we take raw material – orders from investors entrusted to brokers, some with vast distribution capabilities, others with simply a telephone and a workstation on our trading floor – and turn it into a snapshot of a corporation's value. Our "factory" is not merely the NYSE trading floor itself, but a vast, fast, secure and reliable data network to deliver and report prices of 2,800+ of the greatest companies in the world. Moreover, the entire process occurs in a "fishbowl" – literally on national television, as well as through the immediate and broad dissemination of the data by vendors and under the watchful eye of those 550 of my partners that work in our Regulatory Group.

To meet the ever-increasing demands to access our liquidity and price discovery process, the NYSE has invested over \$3 billion in technology. That considerable investment has enabled the Exchange to develop and implement a highly efficient and dependable network of systems that has the

resembled legitimate brokerage offices. The proprietors posted on blackboards current stock quotations—sometimes reliable and sometimes rigged—and bet any comer that the price of a stock would rise or fall to a certain named price. No sales of securities actually occurred, and many bettors were swindled. "Bucket shops" also engaged in unscrupulous and manipulative securities selling practices. Because their activities cast a bad light on all legitimate brokerage, the NYSE deprived such establishments of quotation services. Many bucket shops found unethical ways to procure the market data that they needed to operate. These constituted early examples of market data piracy, a practice that the markets have had to combat ever since. Modern technology only enhances the ability of pirates to pilfer the data. A federal misappropriation law would be a welcome deterrent.

capacity to handle 2000 messages per second.⁵ We currently have the capacity to trade five times our average daily volume. Today, the NYSE has sufficient capacity to handle 2000 messages, or orders, per second. Stated differently, capacity is 6 billion shares per day and the Exchange expects its systems to be able to handle a day in which 10 billion-shares are traded.

The Exchange is also a “self-regulatory organization” or “SRO” with the power to regulate its members. One-third of the NYSE staff is directly devoted to regulation. Every year the Exchange invests substantial resources to improve its regulatory systems. The Exchange monitors every transaction that occurs on the trading floor on a real-time basis. It examines all member firms to ensure compliance with operational, financial and sales practice requirements. It also maintains a rigorous enforcement program that can discipline our member firms and their employees.

Why go through all of the expense and effort? To ensure that we have the most efficient, transparent price discovery mechanism in the world and the best data processing and distribution systems. At its core, that is the Exchange’s business—the discovery and distribution of price information. The Exchange is the primary market for price discovery for most of the great companies of the United States. The world recognizes that the NYSE is the price leader in our stocks – in fact, although scores of other U.S. and foreign exchanges, and ECNs and other broker-dealers trade our stocks, the NYSE is the price leader in our listed stocks 94% of time.

This is no accident. It is a by-product of our commitment to providing a trading platform of unequalled reliability, integrity and liquidity and to provide an efficient forum for the capital raising and allocation process. The NYSE price discovery process is the basis for all other trading activity in NYSE stocks, regardless of whether that trading takes place on the Exchange, or on another exchange, in the over-the-counter market, overseas, through the facilities of an alternative trading system or otherwise.

⁵ A message is any discrete entity of information that has a specific function such as an order, a report, a cancellation or an administrative message

Trading in NYSE listed stocks other than on the Exchange would be far more volatile and less orderly without the NYSE pricing mechanism “discovering” and “validating” current value of listed stocks.

Why Market Data Is So Important

Market data is the beginning and end, and the heart and soul, of every trade. It is the information that investors all over the world rely upon in making their investment decisions. One key reason why the United States equities markets are generally acclaimed as the finest in the world is because those markets excel at making market data available to the investing public. That reliable, widespread distribution creates trust and confidence in our securities markets. It allows investors to witness the open and orderly auction market price discovery process. Investors can witness the agency auction market price discovery process through computer terminals, television screens, personal digital assistants, and pagers or by communicating with their brokers. That process creates investor interest and confidence in our markets and reliable market data is an important component of that trust. Maintaining the public’s trust in the quality and reliability of this data is therefore central to maintain trust in our capital markets. The Exchange believes that a meaningful federal misappropriation standard would strengthen the hand of the SROs in our efforts to ensure that the public’s trust in the validity and accuracy of market data.

Property Rights in Market Data

Mr. Chairman, you may recall from the March 14 hearing, the testimony concerning the work of the SEC’s Federal Advisory Committee on Market Information created by former SEC Chairman Arthur Levitt and chaired by Joel Seligman, Dean of the Washington University School of Law in St. Louis. The Committee has completed its meetings and is now developing its report. While it is premature to comment on the Committee’s emerging recommendations, I should note that, the Committee based its work on the premise that the Securities Exchange Act of 1934 recognizes the right of the Exchange to use market data fees as one of several vehicles by which to equitably allocate its charges.

Nevertheless, some have persisted in trying to shift the debate regarding market data to the question of “who owns the quotes.” The case law regarding the ownership of market data is clear and

supports to this day, the markets' ownership of this data. The Supreme Court long ago recognized exchanges' ownership of market data.⁶ Those trying to shift the debate and focusing on this question are obfuscating the real issues: the apportionment of costs of generating market data among broker-dealers and investors.

Those focusing on "property rights" conveniently ignore the fact that those who approve the Exchange's budget and market data (and other) fees are the ones who pay. They bridle at the administrative burdens of equitable, fair and reasonable allocation of fees without proposing an alternative that is revenue-neutral for the Exchange and does not create "winners" and "losers" among those who pay. Instead, they describe the "root cause" of these necessary burdens as the "exchanges' treatment of market data" as their own "proprietary, licensable, revenue-generating product." Finally, to overcome the well-established case law on proprietary rights, they claim that Congress "nationalized" market data in 1975.

Nothing can be further from the truth. To be sure, Congress began regulating market data in 1975. It mandated that exchanges disseminate market data on fair and reasonable terms and make that data available on terms that are not unreasonably discriminatory. But regulation is not expropriation. These provisions are completely consistent with the Exchange continuing after 1975 to recover a portion of its costs through market data fees – as indeed it has since 1975 under close SEC scrutiny.

Market Data Protection

Four legal theories protect the Exchange from the unauthorized taking and use of the market data:

- The law of torts and, in particular, the tort of misappropriation.
- Contract law, effected through a network of contracts, pursuant to which we authorize the redistribution and use of market data.

⁶ See Board of Trade of the City of Chicago v. Christie Grain and Stock Company, 198 US 236, 1905; Hunt v. New York Cotton Exchange, 205 US 322, 1907, affirming Christie; and Moore v. New York Cotton Exchange, 270 US

- Copyright law.
- Section 11A of the Securities and Exchange Act of 1934 and the rules promulgated thereunder, which, as noted, both explicitly recognizes the Exchange’s right to disseminate market data pursuant to fair and reasonable terms and terms that are not unreasonable discriminatory.

The Database Protection Debate

The debate whether to enact legislation for the protection of databases has been ongoing since 1991 with the Supreme Court decision in Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). The Supreme Court, while eliminating the “sweat of the brow” doctrine, affirmed the copyrightability of a collection of information, so long as the collection demonstrates an adequate quotient of creativity and selectivity.⁷ Since Feist, the source and extent of legal protections for the “valuable contents of collections of information has been uncertain, requiring reliance on a patchwork of different, individual insufficient legal theories.”⁸

Fortunately, several of the unique elements of market data discussed above – most particularly, that the Exchange is the creator, and not merely the collector, of market data and that Congress has explicitly confirmed the Exchange’s right to use market data fees as a component of its equitable allocation of fees – makes market data less vulnerable than other database collections. The NYSE supports the enactment of a national misappropriation statute that will protect securities market data from

593, 1926.

⁷ The “sweat of the brow” doctrine existed in the United States for more than 200 years. Courts developed the “sweat of the brow” doctrine, holding that copyright for a compilation was a reward for the hard work that went into compiling the facts, regardless of originality of selection and arrangement. The courts which followed the “sweat of the brow” test were willing to give the authors of compilations a proprietary interest in facts, and to require later authors to engage in independent research rather than rely upon the facts contained in prior copyrighted works.

⁸ Hearing on H.R. 2652, The Collections of Information Antipiracy Act before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, United States House of Representatives, 105th Congress, Statement of Marybeth Peters, Register of Copyrights at 4 (October 23, 1997). See also H.R. Rep. No. 105-225, at 8 (1998).

piracy. A Federal statute will clarify any ambiguity in the law caused by the Feist decision and will hopefully address the issue of reciprocity with the EU Directive.

While the NYSE was a latecomer to this debate, during the 106th Congress, the NYSE worked with former Chairman Bliley and Congressman Howard Coble on database protection legislation. Both pieces of legislation presented workable starting points and meaningful protection. We hope that any legislation considered by the Financial Services Committee will follow the leads of Congressmen Bliley and Coble in imposing minimal compliance burdens on the markets or vendors and users of market data. Yet, at the same time, any legislation should provide the markets with redress against market data piracy, thereby preserving a revenue stream that our constituents employ to assess themselves in order to finance the markets.

We look forward to working with you, Mr. Chairman, and all of the members of the House Capital Markets Subcommittee, and with your staff to ensure that any legislation regarding the protection of market data strengthens the current protections.

On behalf of the New York Stock Exchange, I hope my statement is helpful to the Capital Market Subcommittee as it considers this issue. Thank you for the opportunity to present this testimony. We look forward to working with the Committee to insure that the U.S. capital markets remain the envy of the rest of the world. Mr. Chairman, I would be happy to answer any questions.