

Using Voluntary EU-Compatible
Certification and Limited IP Protection to
Improve the Financial Index Market:
Avoiding the Next Libor

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- **Index:** Formula or methodology that reduces complex data to a single number
 - **Examples:**
 - Dow Jones Industrial Average,
 - S & P 500
 - Credit score
 - Wind chill

Indices as contract referents

- “Prime + 4%”
- Mortgages
- Student loans
- Credit cards

No one charges money for indices-as-contract-referents

- **No IP**
- **No success at requiring licensing fees** (although it has been attempted, it did not work)
- **No trade secret or similar tort actions** (chosen as referents because index values are publicly available)
- **No state misappropriation** — *some* uses of indices, but not the use of index as contract referent

No one supervises the producers of indices

- **No regulatory protection:** No meaningful regulation of index production (absent serious fraud—if it is detected)
- **No market-based incentive for index producers to self-regulate:** No legal relationship between contract referent users and index producers



The result: unregulated indices that are very attractive to everyone

Result: Index Manipulation

- **Insider knowledge about a widely used index is extremely valuable**
- **Making a decent, accurate index...is not**

Or, in other words...

"FIXINGS AS USUAL
MONSIEUR?"

“its just amazing how libor
fixing can make you that
much money”

“if you aint cheating, you aint
trying”

Manipulation scandals so far:

- **Libor manipulation scandal**
- **Euribor manipulation scandal**
- **Forex** manipulation scandal; **ISDAfix** manipulation scandal...
- ...and many many more?

Manipulation scandals so far:

- For each of these scandals:
 - a handful of traders
 - whose inputs affected the calculation of an index
 - manipulated its value
 - to increase earnings from derivatives, swaps, or other “bets” on the index value

Summary: The Problem

- Some indices are widely used as contract referents
- The administration of those indices is not supervised
- The value of high-quality administration of those indices cannot be internalized
- You can't charge people for using your index as a contract referent...
- ...but if they use your index as a contract referent, you can benefit from exploiting your status as an insider

The solution?: a federal statute

1. A voluntary, opt-in “certification” program
 - Federal certification for indices that meet a high standard for transparency and reliability. (This facilitates use in the Eurozone).
2. A federal intellectual property right
 - Index values and (potentially) methodologies
3. Express federal preemption of state-level IP rights for uncertified indices
 - Prohibit states from expanding “hot news” state misappropriation claims
4. Federal safe harbor for the use of certified indices as contract referents
 - No safe harbor for secondary market uses, e.g. uses in derivatives