EU Leads World Towards Database Protection

Despite US objections, international sui generis system is needed.

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The controversy began when the European Commission first proposed an EU Directive that would protect collections of data. Now that the final text of the Directive has been published, the controversy has moved to a higher level.

The issue is now whether such protections for databases should be created worldwide. Many in the US are strongly opposed to such protections. The idea that the US should learn from Europe and adopt European standards seems to be a heresy for some American politicians. Ideology and nationalism are obscuring the reasonable need for sui generis protections.

Some in the US are particularly annoyed because the EU's Database Directive grants protection on a reciprocal basis and since the US does not provide sui generis database protection, EU companies, US companies cannot receive protection in the EU. This reciprocal requirement creates pressure on the US to adopt sui generis protection.

US patisans object to this type of pressure. However, the US is notorious for aggressively using the threat of trade sanctions to pressure other countries to increase their IP protections and to open their markets to American IP products. The US should not be surprised that a similar strategy is being used by the EU to induce other countries to provide greater protection for databases.

This disagreement between the US and the EU is most unfortunate. There is a clear need to safeguard databases and such safeguards would best be established on a global basis.

Copyright falls short

Existing copyright law does offer some protection for databases, but such protection is insufficient. According to Article 2(5) of the Berne Convention, collections of literary or artistic works such as encyclopedias and anthologies are protected "by reason of the selection and arrangement of their contents." Similar provisions are found in Article 10(2) of TRIPS and Article 9 of the new WIPO Copyright Treaty.

Many fear the EU Directive neglects the interests of users.

Consequently, only the original way of securing a database is protected by copyright. Extracting parts from a database is usually not infringement because it usually does not affect the structure of the database.

National courts have recently made it harder for databases to claim protection under national copyright laws; the courts have raised the level of creativity required for a work to receive copyright protection. For instance, the German Court of Appeal in Frankfurt has promoted the concept that telephonic directories on a CD-ROM cannot be protected against reproduction under copyright or competition law.

In Fact Publications Inc. v. Rural
Three sui generis systems

Databases have received protection outside copyright law, but such legal rights have also proved too flawed and limited. Germany, for example, has used principles of competition law to create sui generis protection for databases. This has only prevented competitors from using substantial parts of a database for commercial purposes — i.e., from reselling large parts of the database. The competition law did not prevent internal use of databases created by others.

Sui generis protection has also been offered under the Catalogue rule, which the Scandinavian states added to their Copyright Acts in the 1960s. For instance, Section 71 of the Danish Copyright Act provides that catalogues, tables, and similar works compiled in a large number of items shall be protected for 10 years after publication. These works are protected only against reproduction and identical imitation.

The Catalogue rule, like the EU directive, recognizes the producer as the right holder, and protection is available even if the collection displays no creativity and no mark of the creator’s individuality. Even collections of addresses and facts (e.g., telephone books) are protected so long as they contain a sufficient amount of data. Because the Catalogue rule protects only collections of large amounts of data, the rule does not protect compilations of music and films.

The EU Directive on database protection was largely the product of Jens Guenther — one of the most brilliant copyright experts in the European Commission ever. The Directive expands upon the protections given by the Scandinavian states’ Catalogue rule.

The Directive protects all collections of data, both electronic and non-electronic, from other than music compilations. It contains no explicit requirement that a protected database contain a large amount of data. Finally, it protects databases against not only reproduction, but against any method of making the work public (such as from public lending or transferring the work or parts thereof) onto another medium.

Too much protection?

Many people fear that the EU Directive creates an artificial monopoly in information and thus neglects the interests of users in having appropriate access to the benefits of global information infrastructure. People with such fears have presumably never read the text of the Directive. The EU authorities intended the Directive to protect a substantial investment — in either obtaining, verifying, or presenting the contents. In Recital 12 of the Directive, the standard of protection is described in more detail as an investment consisting in "the deployment of financial resources and/or the expenditure of time, effort and energy." Thus not every collection is protected, but only those which have been created by the "work of the brain" — i.e., which involve substantial time, effort, or money. It will be up to the national courts to decide which investments are substantial and which are not. The courts will therefore determine the extent of the new sui generis right.

The Directive also grants users a variety of rights. Users are allowed to extract and re-use substantial parts of databases. It is left to national courts to determine how much data will constitute a "substantial" part of the work. One piece of data is clearly insufficient, and it is probable that portions of a database will be deemed insufficient so long as these portions, in themselves, could not qualify for database protection.

Substantial parts of a database can be used for teaching, scientific research, public security, and (in the case of non-electronic data) for private purposes. "Private purposes" means any use made by the user in his own private surroundings for his own private purposes.

Unfortunately, the European Commission failed to clearly indicate whether the traditional national copyright law exceptions also apply to this new sui generis protection. As Jens Guenther stated in oral hearings, this seems to be a kind of regulatory mistake which can lead to problems in implementing the directive. It is now up to the national courts to decide whether existing exceptions can be applied to the new sui generis protection.

The different implementation drafts...
made in France, Germany, and the UK demonstrate that the scope of exceptions are going to be different in each member state. This does not will serve the creators and users of databases. As the European Commission has already stated, there needs to be discussions on establishing a uniform European standard of exceptions.*

**Beyond the EU**

The EU Directive on database protection is not only applicable in the EU. It must also be implemented in the additional states of the European Economic Area (i.e., Iceland, Liechtenstein, and Norway).* Central and Eastern European States have also agreed to provide for an equivalent level of protection by December 31, 1999. Therefore, the Database Directive applies at least indirectly in 10 countries.

Even in the US, some politicians have recognized the need for sui generis protection of databases. The first bill to create such protection was introduced in the US Congress last spring,* and a counterproposal was introduced shortly thereafter.

If the US fails to enact sui generis protection, US database producers will not be able to avoid themselves of the protections of the EU Directives. EU producers that can make use of this Directive will be in a better position to compete and prosper.

These have been calls for the creation of a global system for protecting databases. Delegates to the WIPO Diplomatic Conference in December 1996 clearly expressed their interest in examining the possible implications and benefits of a sui generis system of protection of databases at the international level.*

If the nations of the world hope to create a global information infrastructure, it is essential they create globally harmonized standards for protecting databases. As the Internet continues to grow, cross-border use of information is becoming the rule. Rules governing the local use of information are becoming less important.

If the US were to follow Europe's lead in creating an international standard for protecting databases, American pride might be injured. However, there will be economic and legal benefits for all creators and users of databases—including Americans. These economic and legal benefits should more than compensate for a minor slight to US national pride.


(3) Several representatives of the US Government have expressed great support for the fact that the European Community introduced sui generis database protection on a reciprocal basis. See, e.g., the considerations of Vojtěch Simkovič, "Feist v. Country Music," in: European Copyright: Economic Model for the European Union, 1994, 97. 175.

(4) Sanctions are available under § 101 of the 1988 Trade Act (Special 301).


(7) This new WIPO treaty was adopted on December 20, 1995.


(9) 459 U.S. 540 (1981) to qualify for copyright protection, a work must be the product of a minimal level of creativity; it there is no copyright protection for the mere alphabetical listing of names in the white pages of a telephone directory.


(14) OSCE 1991, B. L. 252.

(15) For instance, databases at NASA and CDs are protected.


(17) Art. 8. Further exceptions to database protection are listed in Article 9 of the Directive.

(18) These traditional exceptions are listed in Article 9(C) of the Directive.

(19) However, the Directive does specify that the Scandinavian countries can make use of such traditional exceptions to the Catalogue in order to limit the extent of the Directive so as not to make use of the Directive.

(20) The Protocol to the 1961 WIPO Copyright Treaty as well as the 1971 WIPO Phonograms Treaty. See, e.g., the Agreement of November 1996, KOM (96) 305 (final text).