

Databases Protection. The Legal Framework

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Introductory Remarks.

What are We Talking About?

1. Notion of Databases.

2. Why Are Databases so Important?

3. How to Ensure the Production of Databases (Enabling the Access to Good Information)?

How Can We Protect Databases?

- ***Via Intellectual Property Rights (IPRs)***, such as:
 - Copyright;
 - (the legal protection of)TPMs/DRM;
 - in EU only, Sui Generis protection.
- ***Via Other Rights***, such as:
 - Property;
 - Data Protection;
 - Cultural Heritage;
 - Contractual Obligations.

What is a Database?

(According to International Rules on IP)

Berne, art. 2.5

Collections of literary and artistic **works** such as encyclopaedias and anthologies which, by reason of the selection **and** arrangements of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

TRIPs, art.10.2

Compilations of **data or other material**, whether in machine readable or other form, which by reason of the selection **or** arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

WCT, art.5

Compilations of **data or other material**, in any form, which by reason of the selection **or** arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

D. 96/9/EC, art.1.2

A database is a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

Copyright protection of Databases

- **The Sources:**
 - Berne, TRIPs, WCT
 - D. 96/9/EC, Chapter II
- **Subject Matter:** form of expression (structure, architecture of databases)
- **Conditions for protection:** creativity - author's OWN creation (organization and selection of data)
- **Content of protection:** exclusive economic and moral rights
- **Internal Limits** to the content of protection:
 - term of protection
 - exceptions and limitations/fair uses/fair dealings
- **External Limits to the content of protection:** Competition Law
- **Subjects:** authors and right owners
- **Management of economic rights:** licenses and other contracts

The Legal Protection of TPMs and DRM

- **The Sources:**
 - WCT, WPPT
 - D. 2001/29/EC, art. 6; DMCA
- **Subject Matter:** technical protection
- **Conditions for protection:** TPMs/DRM protecting copyrighted works (and cultural products protected by related rights)
- **Content of protection:** no circumvention; no availability on the market of some TPMs/DRM
- **Internal Limits** to the content of protection:
 - term of protection
 - exceptions and limitations/fair uses/fair dealings
- **External Limits to the content of protection:** Some Considerations on Competition Law
- **Subjects:** TPMs/DRM producers
- **Management of rights:** licenses and other contracts

The Sui Generis Protection of Databases in the European Union

- **The Sources:** D. 96/9/EC, Chapter III
- **Subject Matter:** investments
- **Conditions for protection:** substantial investments in obtaining, verifying, presenting data
- **Content of protection:** exclusive economic rights
- **Internal Limits** to the content of protection:
 - term of protection
 - exceptions and limitations/fair uses/fair dealings
- **External Limits to the content of protection:**
Competition Law
- **Subjects:** producers
- **Management of economic rights:** licenses and other contracts

The EU Sui Generis Right on Databases

Content of Protection

- ***Exclusive economic right***

- ***Extraction***

The permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form

- ***Re-utilization***

Any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.

Public lending is not an act of extraction or re-utilization

Limits to the Content of Protection

Exceptions and Limitations

- **Art. 9 of D. 96/9/EC**
- (a) **extraction** for **private** purposes of the contents of a non-electronic database;
- (b) **extraction** for the purposes of **illustration for teaching** or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) **extraction and/or re-utilization** for the purposes of **public security** or an administrative or judicial procedure.
- Such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not be commercial.
- Only a **lawful user** is entitled, for specified purposes, to extract or re-utilise a substantial part of the database without the authorisation of the maker.

Limits to the Content of Protection

The Term of Protection

- **Art. 10** Term of the *sui generis* right expires 15 years “from the first of January of the year following the date of completion” or “following the date when the database was first made available to the public”.
- **Art. 10.3** Any substantial change [...] which would result in the database being considered to be a substantial new investment [...] shall qualify the database resulting from that investment for its own term of protection.

First Conclusive Remarks

- Functional works of art – cultural products
- Cumulative protections, often exclusive rights
- Has the production of databases increased?
- Is the current protection facilitating the circulation of data?
- Are the creators and producers satisfied with the current protection?

Databases Protection. Case Law.

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Copyright Issues

(Essential Facilities and Creativity)

- The European Court of Justice applied the essential facilities doctrine to protected databases

- Traditional approach in the Common Law world:
 - Sweat of the brow
- Civil Law world + US after the *Feist* decision:
 - Creativity

- Canada Federal Court: Stronger creativity
- **UK:** Before and after the Directive 96/9/EC

Sui Generis Issues

Decisions of the European Court of Justice

9.11.2004 (4 decisions)

C-338/02, Fixtures Marketing Ltd c. Svenska AB (*Svenska*);

C-444/02, Fixtures Marketing Ltd c. Organismos Prognostikon Agonon Podosfairou EG (*OPAP*);

C-46/02, Fixtures Marketing Ltd c. Oy Veikkaus Ab (*Oy Veikkaus*); .

C-203/02, British Horseracing Board Ltd c. William Hill Organization Ltd, (*BHB*).

- *concept of investment;*
- *no protection for data created ad hoc;*
- *no spin-off theory.*

9.10.2008

C-304/07, Directmedia Publishing GmbH c. Albert-Ludwigs-Universität Freiburg,.

- interpretation of extraction

5.03.2009

C-545/07, Apis-Hristovich EOOD c. Lakorda AD.

- qualitative substantial investment.

Sui Generis Issues

Decisions of National Courts

Public Sector Databases

ITA Decision 09: is there a sui generis right on public sector databases?

NL Decision 09: who is the right owner of the sui generis right in public sector databases?

...how should PSBs manage the sui generis right on public sector databases?

First Conclusive Remarks

- The big issues are related to the sui generis protection and not to copyright
- No much case law at the EU level (but the few cases are favouring a strong protection)
- A few cases at the national level deal with Public Sector Databases (currently under the spotlight in EU – no same issue in the US).

Specific Bibliographical References on Databases

- E. DERCLAYE, *Legal Protection of Databases*, EE, Cheltenham, 2008.
- J.H. REICHMAN - P. SAMUELSON, *Intellectual Property Rights in Data?*, *Vanderbilt LR* 1997, 51.
- C. SAPPA, *Public Sector Databases*, *CTLR* nov. 2011.

SHOUKRAN!

THANK YOU!

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