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CONTRACTUAL AND INTELLECTUAL PROPERTY PROTECTION OF DATABASES

by

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CONTRACTUAL AND INTELLECTUAL PROPERTY PROTECTION OF DATABASES (1)

Introduction

1. The combination of computer technology and telecommunications has made the information market a potential enormous business. All sorts of information (economical, financial, scientific, etc.) can be available instantly from computerized databases through telecommunications networks. However, "at present, the European information market is fragmented and underdeveloped" (2). According to the E.C. Commission, this situation is partially due to legal factors :

> "Electronic information distribution creates new technical possibilities for breach of copyright. It is technically easy for users to appropriate information and integrate it into their own information handling systems, and very difficult to police this. Without adequate guarantees for those with property rights with respect to information subject to copyright and supplied to users through electronic information systems, the economic incentive to supply information commercially will be severely blunted." (3)

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(1) This paper is based on a publication of the Research Center for Computer Law of the University of Namur in which the legal protection of databases is discussed in more details ("Quelle protection juridique pour les banques de données?", Cahiers du Centre de Recherches Informatique et Droit, N° 2, 1988 par S. Denis, Y. Poullet et X. Thunis).

(2) Commission of the European Communities, Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, Communication from the Commission to the Council, June 1987, p. 141.

(3) Ibidem at p. 143; see also E.C. Commission Work Programme for Creating a Common Information Market, Document COM (85) 658 final of 29 November 1985, approved by the E.C. Council on 18 March 1986.

2. Producers and providers of information need to know whether the information they collect is protected by copyright law (and, therefore, whether they need the consent of the author for the marketing of such information) but also whether their own information product does itself enjoy copyright protection. In the context of this paper, only this last question will be examined.

3. As discussed under paras. 4 to 11 hereafter, copyright laws do not afford sufficient protection to information products. Therefore, information producers and providers should supplement copyright protection with contractual protection. Appropriate contractual provisions to this effect are examined under paras. 12 to 20.

Copyright Protection for Information Products

4. Copyright gives to the author of a work an exclusive right of exploitation of such work. Therefore, if it applies to information products, it can be a valuable means of protection of the investment made by an information producer. The question we should examine is whether information products such as databases are copyrightable. We will limit our discussion to the situation in the legal systems of Continental Europe with emphasis on the French and Belgian legal systems.

5. As in the United States, under copyright laws of the European countries, copyright protection is provided to original works i.e. works being the result of the author's own intellectual efforts. This presupposes the author's freedom to exercise his independent creative judgement. Also, the work must be fixed in a tangible means of expression (e.g. paper). Unlike in the United States copyright protection is not subject to any formalities like deposit or indication of copyright signs (such as ©) (1). The protection normally lasts for 50 years (in Germany, it is 70 years) from the death of the author if he is a natural person or from its creation if he is a legal person. Under Continental laws, copyright does not only provide pecuniary rights on the work (e.g. right to exploit it through publication) but also include "moral rights" giving to the author the right to divulgate his work only when he desires to do so and to repeal or withdraw it after divulgation. The copyright owner is normally the natural person being the author of the work unless copyright has been assigned by contract e.g. to his employer. Under Belgian law, employee's pecuniary rights in any copyrightable material produced in the course of

(1) However, in order to secure international protection by virtue of international copyright conventions, there must sometimes be shown the © symbol followed immediately by the year in which the work was first published and the name of the copyright owner. Failure to put these indications in a country which has adhered to the Universal Copyright Convention but not to the Berne Copyright Convention may result in losing copyright protection in the states of the former category.

his employment are generally deemed to have been assigned automatically to the employer. On the other hand, it is generally accepted that an author may freely assign his "moral rights" on his works. Copyright laws generally provides for rapid remedies in the event of infringement of copyright such as conservatory seizure of infringing materials and criminal action against a fraudulent or malicious infringer. Copying for private use is generally not considered as infringement of copyright.

6. Pursuant to Article 2 of the Berne Convention of September 9, 1886 (1) copyright applies to literary and artistic works but those words should be interpreted extensively and they include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression".

7. The application of these general principles of copyright law to databases does not raise particular problems with regard to the legal protection of the pieces of information stored in a database, taken individually. Copyright protection will apply to them if the originality test is satisfied. Therefore, the

(1) Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. All E.E.C. Member States have adhered to the Berne Convention.

full reproduction of a document which is in the public domain or which is itself protected by copyright will not entitle the database's owner to copyright. If the database contains summaries of such documents they will very likely be protected by copyright. On the other hand, indexations and abstracts generally do not meet the originality test for lack of expression of the author's personality.

8. An information producer is generally more interested in the legal protection of its database as a whole rather than any of its particular elements. However, this issue is much more complex. The questions to be examined in this respect are the following :

(i) Is a database a "work" in the meaning of copyright law?
(ii) Can a database meet the originality test? and
(iii) Who is the owner of the copyright (if any) on a database?
Those three questions are examined hereafter.

9. There is no legal provision in Belgian and French law stating that databases may be a copyrightable work nor a provision on the protection of "compilations" similar to Article 101 of the 1970 U.S. Copyright Act or Section 48 of the 1956 U.K. Copyright Act which have been interpreted as including databases. However, the issue was addressed by the French Supreme Court in a recent well-known case. In the Microfor - Le Monde case (1),

(1) Cass. fr., 9 November 1983, D. 1984, p. 129 and Cass. fr., 30 October 1987, D. 1988, p. 28.

the French Supreme Court held that a database can be "an information work" ("oeuvre d'information") as long as the data are sufficiently structured and organized in the database. The Supreme Court has not elaborated on this concept since it was not the issue at stake in this case (1). However, this statement might be considered as the recognition of the qualification of databases as "works" under French copyright law. Finally, one should note that Art. 2 para. 5 of the Berne Convention which sets forth that "collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement 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" could be claimed as including databases since they are also "collections of works" (2).

10. Assuming a database is a "work", it needs to pass the "originality" test in order to qualify for copyright protection. French and Belgian copyright legislations (like Copyright Acts in most other countries) do not contain a definition of this criteria. Traditionnally, authors and courts have interpreted this concept very strictly, requiring that a work bears the personal and creative mark of its author. If applied in a

(1) The major issue of the case was the need of the author's consent for storing documents in a database.
(2) See M. Vivant and C. Le Stanc, Lamy - Droit de l'Informatique, 1987, No 1461.

similar way to databases, very few of them would pass the test since the creative and personal input in a database is rather limited. However, over the last few years, some courts, supported by some authors, (1) have given a new interpretation to the concept of originality including therein the "personal intellectual effort" notably in view of granting copyright protection to software. Under this interpretation, works for which the author's creativity is limited by technical and/or logical constraints (such as the constitution of a database) could be deemed to be "original".

11. Since copyright protection may be available for databases, it is important to determine who will benefit from such protection when different persons have been involved in its constitution. Under French law, only an individual (but not a legal person) can, in principle, be the "author" of a work. Therefore, when a database is set up by employees of a company, the latter will not be the owner of the copyright unless it has been assigned by the former (see para. 5 above). Under French law, a database would probably be deemed as a "collective work" under Art. 9 para. 3 of the 1957 Copyright Act, and therefore it can be argued that the copyright would be owned by the employer.

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(1) See on this issue A. Berenboom, Le droit d'auteur, Larcier, Brussels, 1984, at p. 168 *et seq*.

Contractual Protection of Information Products

12. Since the copyright protection afforded to information products is still rather weak and uncertain, it is advisable for information providers to lay down contractual clauses in their agreements with customers and/or distributors affording additional protection to their investment. Hereafter we will examine the contents of such clauses (paras. 13 to 19) and some specific problems associated with their enforcement (para. 20) (1).

13. There are numerous types of restrictions which can be imposed by information providers to their customers and/or distributors. Generally, such contractual clauses deal with the following issues : (i) type of carrier media on which the information can be used or copied, (ii) data which can be reproduced, (iii) use of such data, (iv) reference to copyright ownership, (v) information to be given by the customer, (vi) lenght of use of the data.

(i) Type of carrier media which can be used for copying

14. The use of certain types of carrier media by the customer for copying data can be prohibited or limited in order to reduce the risk of downloading. For example, one can prohibit the storage of information in machine readable form or limit such

(1) A very useful document for guidance in drafting clauses of this type is the EUSIDIC (European Association of Information Services) Code of Practice.

storage for printing on a specified number of hard copies combined with the obligation on the part of the customer to identify the computer in which the data is stored.

(ii) Restrictions on the data which can be reproduced

15. Since it is in principle easy for a customer to copy the entirety of a database to which he has access, the customer agreement should contain a prohibition of full copy of the database and limiting copying to an unsubstantial portion of the data.

(iii) Restrictions on the use of data

16. Generally, there is a clause providing that the information is for the sole use of the customer and a prohibition on the latter from the latter communicating such information to third parties even if it is free of charge. In order to be effective such obligation should survive after the termination of the agreement. It is also recommended to provide that only the customer and its own employees can use the database. In the event downloading is authorized, one can prevent the customer to build up its own database by storing the data received from the information provider in agreeing on a clause reading as follows : "The stored data may not be changed, repackaged, merged with other data or otherwise manipulated with a purpose of creating a database".

(iv) Reference to copyright ownership

17. To the extent that a database (or a part thereof) enjoys copyright protection, the customers, when doing citations of such database, should, pursuant to copyright laws, refer to the latter as the source of information. A contractual clause to this effect is recommended particularly in view of securing international protection (see para. 5 above).

(v) Information to be provided by the customer

18. In order to determine the potential risk of unauthorized distribution of the data by the customer, the information producer (or its distributor) can require the customer to keep him informed of its hardware and software, the number of terminals, the security measures preventing access to the information by third parties, the identity of the people who have access to the data etc.

(vi) Lenght of storage of information

19. To the extent that storage of data by the customer is authorized, it is recommended to impose a time limitation corresponding to the time necessary to complete the processing of the search. Any storage beyond such period could be subjected to additional charge.

20. Obviously, the enforcement of the above-mentioned contractual provisions is not an easy task for the information provider. There might be technical means permitting the detection of some types of violations such as full copy but most of the violations will remain difficult to detect. On the other hand, the sanctions in case of discovery of violations are easy to apply e.g. the immediate termination of the agreement or the suspension of the access to the database. It should be noted that a simple reference to the sanctions provided for in copyright laws seems inappropriate due to the uncertainty of the eligibility of certain databases to the copyright protection. Since there is often one (or more) intermediary between the information provider and the end customer, the information provider should provide in its agreement with its distributor or other intermediary an obligation on the part of the latter to impose protective provisions on the end customer.

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