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Legal Framework for Electronic Information

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Publication date:
1988

Document Version
Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (HARVARD):
Denis, S & Poulet, Y 1988, *Legal Framework for Electronic Information..*

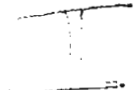
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LEGAL FRAMEWORK FOR ELECTRONIC INFORMATION

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Eusidic Conference 1988, Heidelberg

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THE LEGAL FRAMEWORK OF ELECTRONIC INFORMATION¹

INTRODUCTION

1. The combination of computer technology and telecommunications has made the information market a potentially enormous business. All sorts of information (economical, financial, scientific, etc.) can be available instantly from computerized data bases 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.

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, the first question will be examined by referring to the Microfor-Le Monde case. The second part explores the questions concerning the application of copyright protection to data bases.

We will limit our discussion to the situation in the legal systems of continental Europe with emphasis on the French and

¹This paper is based on a publication of the Research Center for Computer Law of the University of Namur in which the legal protection of data bases 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.

Belgian legal systems. However, reference will be made, when useful, to the approaches prevailing in foreign legal systems, i.e. the anglo-american systems.

3. As discussed under paras. 4 to 15 herein, 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. 16 to 23.

PART 1. COPYRIGHT PROTECTION FOR INFORMATION PRODUCTS.

A. Copyright law : general principles.

4. Copyright gives to the author of a "literary and artistic work" an exclusive right of exploitation of such work. Most countries have similar copyright legislation and there are international conventions ensuring minimum protection on an international level (the Convention of Berne of september 9, 1886 and the Geneva Universal Copyright Convention of september 6, 1952).

As in the United States, the copyright laws of Europe provides copyright protection to original works i.e. works resulting from the author's own intellectual efforts. This presupposes the author's freedom to exercise his independent creative judgment. Also, the work must be fixed in a tangible means of expression (e.g. papers). Unlike in the United States copyright protection in Europe is not subject to any formalities like deposit or indication of copyright signs (such as c)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 includes "moral rights" granting 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 who is the author of the work unless copyright has

¹However, in order to secure international protection by virtue of international copyright conventions, there must sometimes be shown the c 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.

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 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" in his works. Copyright laws generally provide for rapid remedies in the event of infringement of copyright such as the seizure of infringing materials and criminal action against a fraudulent or malicious infringer. Copying for private user is¹ generally not considered as infringement of copyright.

B. Copyright protection of the primary information.

5. When the information collected and exploited by a data base producer is protected by copyright law, the producer will need the prior consent of the author to store and process his work. Authorization is needed for almost every reproduction of an ordinary work, although some copyright laws provide for certain restrictions with respect to reproduction for personal use, fair dealing etc.

6. The methods of reproduction of an original work may vary. The producers may copy the text of the original work literally (text in full or quotations) or they may summarize or translate it. If an authorization is undoubtedly needed to reproduce a text in full, the problem is more complex when the data base producer only quotes certain passages of a text or summarizes in his own words. In the famous "Microfor-Le Monde" case², the French Supreme Court examined whether such treatment of the information infringes the owner's copyright.

7. The facts of the case are the following : Microfor, a company incorporated in Quebec, reproduced a list of articles published in the french newspaper Le Monde, the periodical Le Monde Diplomatique and other papers of the french press. This stock of information was processed in a directly accessible data base. Moreover, the company Microfor published a descriptive index entitled "France Actualités" consisting of an analytical section in which each published article was indicated by descriptive key words and a chronological section which provided a summary of the contents, sometimes limited to a short quotation. Le Monde

¹ It is generally accepted, however that the private-use exception does not allow a company to divulgate the information to all its subsidiaries. This would not be considered as "private use" anymore.

² Cass.fr., 9 november 1983, D. 1984, p. 129 and Cass. fr., 30 october 1987, D. 1988, p.

did not authorize Microfor to reproduce the articles and argued consequently that Microfor had infringed its moral and pecuniary rights. The French Supreme Court reversed the position of the Court of Appeal and decided that the use of "key words" did not constitute a violation of the author's rights, nor did the use of summaries if it did not offer a substantial account of a work nor permitted the reader to do without any resort for the original work. The court used a new criterion, namely substitutability, in order to determine whether the consent of the author is needed. Hence, if the summary can be substituted to the original work, the authorization of the author of the primary work would be needed to store and process the summary. If the summary, on the other hand, only provides a fair indication of what the content of the original work might be, without encouraging the reader to discuss with to the original work, one will not need any authorization.

C. Application of copyright law to data bases.

8. If copyright protection 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 data bases are copyrightable. One may therefore refer to an interesting and related precedent, namely the principle of copyright protection of software, which is now generally accepted. French and American legislations provided expressed protection of software products, but did not solve the problem of database protection.

9. Pursuant to Article 2 of the Berne Convention of September 9, 1886¹ copyright applies to literary and artistic works. Those words should be interpreted broadly to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". On the basis of this liberal interpretation of what is copyrightable, one can say that prima facie, data base products are entitled to copyright protection.

One should, however, distinguish the particular pieces of information stored in a data base and copyright on the data base as such, as a whole.

10. The application of the general principles of copyright law to data bases does not raise particular problems with regard to 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.

legal protection of the pieces of information stored in a data base, taken individually. Copyright protection will apply to them if the originality test is satisfied. Therefore, the full reproduction of a document which is in the public domain or which is itself protected by copyright will not entitle the data base owner to copyright. If the data base contains summaries of such documents they will very likely be protected by copyright. On the other hand, indexes and abstracts generally do not meet the originality test for lack of expression of the author's personality.

11. An information producer is generally more interested in the legal protection of its data base 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 data base a "work" in the meaning of copyright law ?
- (ii) Can a data base satisfy the originality test ? and
- (iii) Who is the owner of the copyright (if any) in a data base ?

Those three question will now be examined.

12. There is no legal provision in Belgian and French law stating that data bases are copyrightable nor is there a provision on the protection of "compilations" similar to section 101 of the 1970 U.S. Copyright Act or Section 48 of the 1956 U.K. Copyright Act which have been interpreted as including data bases. However, the issue was addressed by the French Supreme Court in a recent well-known case. In the *Microfor-Le Monde* case, 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 case¹. However, this statement might be considered as the recognition under French copyright law of the qualification of databases as "works" . 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 data bases since they are also "collections of works"².

¹ The major issue of the case was the need for the author's consent for storing documents in a data base.

² See M. VIVANT and C. LE STANC, *Lamy - Droit de l'Informatique*, 1987, n° 1461.

13. Assuming that a data base is a "work", it needs to pass the "originality" test in order to qualify for copyright protection. French and Belgian copyright legislation (like Copyright Acts in most other countries) do not contain a definition of this criterion. In the U.S. and the U.K. where a significant portion of litigation involved the definition of "originality" the courts have traditionally considered that a very low level of originality is necessary for compilations¹. Some courts consider the selection of data sufficiently creative to merit protection. The compiler's particular selection and arrangement of data may be protected. But, as M. Ginsburg² quite rightly pointed out, the selection principle fails to provide protection to data bases. If it is the quality of the selection which determines whether protection will be granted an exhaustive data base, which offers all information in a specific area, will not be protected for lack of selection, even though it has a much larger economic value than the selected database, which offers only part of the information. Other American jurisdictions³ have therefore considered that the compilation, arrangement and coordination of the facts is a protectable expression in itself, even without a selection. In Belgium and France on the other hand, the courts have traditionally interpreted this concept very strictly, requiring that a work bears the personal and creative mark of its author. If applied in a similar way to data bases, very few of them would pass the test since the creative and personal input in a data base is rather limited. However, over the last few years, some courts, supported by some authors⁴, have given a new interpretation to the concept of originality, requiring "personal intellectual effort" with respect to 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 data base) could be deemed to be "original".

14. Since copyright protection may be available for data bases, 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,

¹ A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

² J.C. GINSBURG, *Banques de données et droit d'auteur aux Etats Unis*, in "Banque de données et droit d'auteur", I.R.P.I., Litec, 1987, p. 104.

³ See... case opposing the West Publishing Co v. Mead Data Central, 230 SPQ 801 (8th 1986).

⁴ See on this issues A. BERENBOOM, *Le droit d'auteur*, Larcier, Bruxelles, 1984, at p. 168 et seq.

in principle, be the "author" of a work. Therefore, when a data base 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 data base 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 directly by the employer.

PART II. CONTRACTUAL PROTECTION OF INFORMATION PRODUCTS

15. 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. 16 to 22) and some specific problems associated with their enforcement (para. 23)¹.

16. 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.

17. The main concern of data base producers in practice is to ensure the financial profitability of his data base by prohibiting the end user from become a competitor. In this respect the new downloading practices have been of great concern to the data base producers and information providers. Downloading is the term used to describe the practice by which the end user stores the information from a data base in his own computer facility. This storage gives the user the opportunity to multiply the uses of the information: he may store the information indefinitely; he may disseminate the information stored outside the company; he may create and propose to third parties a new information product, by merging the information received with own information.

To face this new problem, many data base producers have developed what they call "downloading policies", which are very useful documents used for guidance in drafting clauses to prohibit or limit downloading practices².

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

² See the Eusidic Code of Practice on downloading.

18. Most downloading policies, as the Eusidic guidelines on downloading, do consider that the most significant issue is the use to which the downloaded information is put. Therefore, they do advise the information providers to prohibit certain uses of informations or to submit these uses to a differentiated financial treatment (see section 13 of the Eusidic Code of Practice)¹.

19. 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) length of use of the data.

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

20. The use of certain type 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 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. However, most downloading policies are based on the principle that the mechanism used for the downloading is not a significant issue as information products can be downloaded either to magnetic storage or to paper. What is of concern, is the use to which downloaded information is put (Eusidic Code). Therefore, rather than prohibit the storage of information in machine readable form or limit such storage for printing on a specified number of hard copies, the producer will prefer to restrict certain types of uses of the data (see iii).

(ii) Restriction on the data which can be reproduced

21. Since it is in principle easy for a customer to copy entirely a data base to which he has access the appropriate query language and DB program, the customer agreement should contain a prohibition of full copy of the data base and limit copying to an unsubstantial portion of the data base.

¹On the other hand, section 86 of the EEC Treaty only authorizes a differentiated financial treatment if it is based on objective criteria.

(iii) Restrictions on the use of data

22. In most contracts, there are clauses providing that the information is for the sole use of the customer and that the customer is prohibited from 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 the only the customer and its own employees can use the data base. In the event downloading is authorized, one can prevent the customer from building up its own data bases by storing the data received from the information provider by providing a clause such as the following : "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

23. To the extent that a data base (or a part thereof) enjoys copyright protection, the customers, when making citations such data bases, 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.

(v) Information to be provided by the customer

24. 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 his hardware and software, the number of terminals connected, the security measures preventing access to the information by third parties, the identity of the people who have access to the data etc.

(vi) Length of storage of information

25. 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.

26. 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 data base. 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 data bases for the copyright protection.

CONCLUSION

27. Only two means of protecting information have been considered here. There are other legal means (unfair competition, criminal law) offering an efficient protection to database producers, which have not been developed her. In sum, one might even say that the information providers do not suffer of lack of information but, on the contrary, enjoy "multiprotection" by various legal means.