Legal Protection of Databases

Intellectual Property Law in the Information Society, Lecture 6
Professor Ole-Andreas Rognstad
What is a database?

• Compilation of information

• EU Database Directive (96/9/EC) Article 1(1)
  – "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means"

• In principle technology neutral
  – E.g. EU Database Directive Article 1(1): "any form"; recital 17: includes literary, artistic, musical or other material such as texts, sound, images, numbers, facts and data"
Why protection of databases?

• Incentive theory: Compilations of data are valuable to a modern society. Protection of databases stimulates the creation of new databases
  – E.g. EU Database Directive Recital 12: ”Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases”
Database protection under international treaties

• Only copyright protection

• Berne Convention (BC) Article 2(5): Protects "collections of literary or artistic works"
  – Qualification of what kind of data the database must contain (literary or artistic works)
  – Originality requirement: “which, by reason of the selection and arrangement of their contents, constitute intellectual creations”

• TRIPs Article 10(2) and WCT Article 5: Protects "compilations of data or other material, whether in machine readable or other form"
  – No qualification of data
  – The same “originality requirement” as in BC
EU Database Directive (Dir. 96/9/EC)

- See Mac Queen et al, paras. 2.56-2.63; 6.4-6.20

- Database definition (Article 1(1))
  - ”Data or other materials”, etc.
  - ”Systematic or methodical arrangement”
  - ”Individually accessible”

- Two-fold protection for databases
  - (i) The copyright model – Article 3
  - (ii) The ”sui generis” model – Article 7

- Other criteria for protection: Substantial investment, not originality
EU Database Directive

• Copyright protection

  – For "databases which by reason of the selection or arrangement of their contents, constitute the author’s own *intellectual creation*"

  – What is protected is the *selection or arrangement* of the contents of the database. The originality (the author’s own intellectual creatine) must relate to that

  – Threshold and concept of originality, cf. case C-5/08

  – Cf. Recital 19
EU Database Directive

• "Sui generis" protection (Article 7) – if database =
  – Result of "substantial investment"
  – Quantitatively or qualitatively
  – In "obtaining, verification or presentation" of the contents of the database
EC Database Directive

- The substantial investment criterion
  - ECJ: Draws a distinction between investments in the *creation* of data on the one hand and the obtaining of *existing* data on the other
    - Case C-203/02, *British Horseracing Board vs. William Hill*
    - Cases C-46/02; C-338/02; C-444/02, *Fixtures Marketing*
  - Background: The ”spin off doctrine”
  - The distinction creation/obtaining of data is not equivalent to the ”spin off doctrine”. But the doctrine explains the reasoning behind the distinction. Solving problems with ”sole source databases”
  - Investments in obtaining, verification and presentation of created data will be protected if they are *independent* from investments in the creation of data
  - Difficult implications. E.g. Natural phenomena: Created or existing data?
EC Database Directive

• The substantial investment criterion (cont.)
  – How substantial is substantial?
  – Substantial in relation to what?
    • Quantitatively
    • Qualitatively

• Infringement acts (Article 7(2))
  – Extraction
    • See William Hill case; case C-304/07 (Directmedia)
  – Re-utilization
EC Database Directive

• Infringement criteria

  – Extraction or re-utilization of *substantial parts*, evaluated quantatively or qualitatively of the contents of the database (Article 7(1))
  
  – The *repeated and systematic extraction* and/or re-utilization of *insubstantial parts* of the contents of the database … which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database (Article 7(5))
EC Database Directive

• Exceptions/limitations (Articles 6 and 9)

• Term of protection (Term Directive and Article 10(1))

• Criticism of the Directive (in particular the sui generis right)
  – European Commission, ‘First evaluation of Directive 96/9 on the legal protection of databases’ (Working Paper, 12 December) 15–20,
Approaches outside EU

• Point of departure
  – No sui generis regime for database protection in USA, Australia, Canada or Japan
  – Various attempts in USA, but rejected
  – No international obligations in this respect

• Copyright protection for compilations
  – USCA §§ 101 and 103
  – Australia’s Copyright Act Sec 10
  – Japan’s Copyright Act Art. 12
US leading case: *Feist*

  - Rejects the ”sweat of the brow doctrine” (cf. *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Circuit 1937))
  - No copyright protection for a ”white page” telephone directory
  - Requirement of more than ”a de minimis quantity of creativity”
  - Subsequent case law: Not a high level of creativity
Other possible avenues of protection

• Contract
  – E.g. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)
    • ”Shrink wrap-”license

• Passing off

• Trespass to chattels

• Unjust enrichment

• Unfair competition /misappropriation

• Etc.