Databases and libraries

The European Union Directive and its implementation

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In 1996 the European Union (EU) introduced legislation to harmonise the copyright status of databases throughout the Union [*Directive 96/9 on the legal protection of databases*]. This was necessary because not all countries protected databases (whether electronic or otherwise) as they were not considered original enough to warrant copyright protection — originality is a crucial test of whether a work can be protected. Some EU countries conceded something as mundane as a database outside the scope of copyright protection altogether whereas the United Kingdom, Ireland and one or two others took a different view. Therefore a database was protected in these countries as a copyright work but in other EU states it was not protected as all, thus undermining the concept of a 'single market'. Cases in the United States of America and Europe have tended to raise the threshold for eligibility for copyright protection. This caused the EU to introduce new legislation to cover, especially, those works which would not otherwise be protected. The user commune was very anxious about this legislation as it seemed to be giving a form of copyright protection for information rather than the expression of information. However, it is also of significance for creators of information sources, many of which take the form of lists, compilations of data which, in themselves, are not copyright. The doubt surrounding the protection given in some laws to bibliographies, lists of organisations or individuals has been clarified under this new round of legislation.

In the United Kingdom a database was already recognised as a literary work, protected by copyright as a 'compilation', but this is a peculiarity of United Kingdom law. The new law on databases recognises that a database, regardless of the content, shall be regarded as a work eligible for protection (but not copyright protection) provided that substantial investment has been made in it by the creator in terms of data collection, verification or arrangement of the material to make it a new work. These three conditions are very important as it is these which prevent database right from giving a monopoly over facts. Anyone can collect a series of facts and turn them into a database. What you cannot do is use someone else's efforts in creating their database to make one yourself. Ten different people could provide a list of pubs and bars in Sydney: each would enjoy database right so long as they had each compiled the database from scratch. Competition is allowed: plagiarism is not. Exactly what constitutes 'substantial' is not defined. As copyright is not available, a new *sui generis* right called, appropriately, Database Right, has been introduced. Analogous to copyright it is distinct from it and relates to the database itself.

The content of the database is a quite separate issue. Thus, even if the content is not subject to copyright, the database itself can be protected. An obvious example is the telephone directory where each entry is not a copyright item because it is a statement of fact but the compilation is regarded as a copyright work. For the first time there is a legal definition of a database which itself can be the subject of some interesting interpretations: a database is 'a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means'. A quick look through the words shows that they encompass the telephone directory, trade directories generally, bibliographies, lists of members of professional bodies — none of them unexpected. But what about the family photo album? Photos arranged by date, subject, topic or place, each individually accessible would also qualify as a database under this definition. The important thing to note is that even where a series of documents is old and probably out of copyright, turning them into some sort of compilation, whether in paper or electronic form, will mean that the publisher of this collection has copyright in the overall total package even though not of individual items within it. Items must be individually accessible which excludes sound recordings from being also databases.

As databases are seen as being primarily of current value, the Union has given the protection of fifteen years for such databases. However, each time there is substantial investment in change to the content by addition, deletion or amendment, then the fifteen year copyright clock begins to tick all over again, thus giving virtually perpetual protection to databases until they cease to be dynamic.

Whereas copyright gives the owner exclusive rights to *do* certain actions, database right gives the owner the right to *prevent* the extraction or re-utilisation of all or a substantial part of the database. The ploy of extracting insubstantial amounts over a period of time is prevented because the law specifically says that repeated extraction of insubstantial parts qualifies as extracting substantial parts! Substantial is evaluated in terms of

quality as well as quantity. Re-utilisation is defined as making the contents available to the public by any means.

Having set out the fairly extensive rights of database right owners, the law then gives limited privileges to users as well. A lawful user of a database (a term not defined — does it/should it include any library patron for example?) may extract amounts which are fair (not defined) for the purposes of illustrating teaching or research provided that this is for a non-commercial purpose and the source is acknowledged. There are also extensive exceptions for public administration and legal procedures. In addition, some databases may also be eligible for copyright but to do this they must be the work of human intellect such as a scholarly annotated bibliography. These attract both database right and copyright, the latter being interpreted in the normal way.

The new law is quite untested in the courts so far but there are all kinds of potential issues to be raised. The whole question of whether a website is a broadcast or a cable program service has been argued without determining the outcome. This argument can now be enhanced with another: is a website a database? It is made up of individual items which can be separately accessed and are organised in a systematic and methodical way. But how many electronic database really are organised in this way? My technical friends tell me that my neatly organised data on the screen sits on the disk in complete disarray and becomes organised only when I access it. When then is a database not a database? Finally, where a database *was* eligible for copyright but now qualifies only for database right, then the existing rules must apply, not the new ones. Also, and most bizarre of all, some compilations which do not qualify for database right (because they are not systematically organised) will continue to qualify for copyright. Therefore the lower type of material will end up protected better than the higher.

We await the first cases in this field with interest. In the meantime the government has established a Database Marketing Group to monitor how the new legislation works and whether it has any anti-competitive elements in it. ■

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