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THE LEGAL PROTECTION OF DATABASES

Submitted by the European Community and its member States

I. THE ECONOMIC IMPORTANCE OF DATABASES

Compilations of works or other material have always been an important component in economies world-wide. Such databases were traditionally put on paper or other forms of tangible support. With the advent of the digital services of the Information Society, electronic databases have become indispensable platforms for the distribution of arranged and edited content of any kind. As was confirmed in the two International Conferences on Electronic Commerce organized by WIPO in 1999 and 2001, databases are the basis for electronic commerce–be it for the direct electronic delivery of on-line services, or for electronic ordering followed by the delivery of goods. Databases are at the origin of, and the heart of, electronic commerce. Electronic newspapers, remote health care, tourism services, distance shopping, electronic betting, interactive games, video-on-demand or music-on-demand services are only examples. Most of the new commercial electronic services as well as an increasing number of public services originate from electronic databases–they are an essential building block for the Information Society.

II. THE NEED FOR INTELLECTUAL PROPERTY PROTECTION OF DATABASES

Under the Berne Convention, the WTO/TRIPS Agreement and under the WCT, databases, which constitute creative compilations, enjoy protection under copyright as literary works. As the level of creativity required for such copyright protection is not defined at international level, different interpretations apply and in some countries also so-called “sweat of the brow” databases, which are not creative but are based on a certain level of effort or investment, are protected under copyright.

In the view of the European Community and its member States, “sweat of the brow” databases should also enjoy, under certain conditions, protection as intellectual property–with the same logic that calls for using the potential of intellectual property rights for job creation, growth, prosperity and for the dissemination of information and know how in other areas. Intellectual property protection is a mechanism for the distribution of quality content on appropriate terms. As such, it has demonstrated its benefits for music, literature, films, software, or industrial products of many kinds in the traditional environment during the last century as well as today. It appears to be essential that electronic databases also benefit from this mechanism. Electronic commerce would be a contradiction in terms without a level playing field for intellectual property protection for those databases which are crucial for its operation.

Meaningful intellectual property protection for databases is needed in our view to promote innovation and investment in information products. It provides the incentive for disseminating a large variety of new on-line and off-line compilations, many of which have an important cultural dimension. Legal certainty allows the healthy development of the database sector with beneficial effects on society as a whole. In fact, only clearly defined intellectual property protection can provide for sufficient legal certainty for the benefit of investors and users and for access on appropriate terms.

III. THE APPROACH FOLLOWED IN THE EUROPEAN COMMUNITY

In 1991, the level of creativity and originality required for protecting computer programs as literary works within the meaning of the Berne Convention was harmonized in the European Community: a computer program to be protected as a literary work is sufficiently "original if it is the author's own intellectual creation." From 1996 onwards, the same criterion was also applied to databases. Regarding the latter, an important consequence of this harmonized originality test was that in the European Community, "sweat of the brow" databases no longer qualified for copyright protection as literary works.

Because of this, many non-creative databases which were economically important and which were based on, and put together with considerable entrepreneurial effort and investment, would have remained unprotected despite the fact that they used to enjoy copyright protection over decades in some European Community member States, just as they enjoyed–and still enjoy–copyright protection in some other parts of the world. Apparently, such copyright protection has never caused any problems of principle to users or consumers.

Consequently, the European Community Database Directive 96/9/EC, adopted on March 11, 1996, follows a two-tier-approach for the protection of databases: original and creative databases enjoy copyright protection as literary works, while other databases may enjoy, under certain conditions, intellectual property protection in the form of a *sui generis* right, notably if they were made with substantial investment. The main features of the Database Directive have been outlined in the submissions of the European Community and its member States of 1997 and 1998, referred to in documents DB/IM/3 Add. and SCCR/1/INF/2 respectively.

IV. EXPERIENCE WITH THE *SUI GENERIS* PROTECTION

Today, all member States of the European Community have transposed the Directive into their national legislation and have acquired considerable positive experience with the functioning of the *sui generis* right.

Firstly, the *sui generis* protection of databases has proven to fulfil the economic expectations. Since the entry into force of the Database Directive, the European CD-ROM and on-line-markets have grown at enormous rates. A large number of new database products have been made available in Europe, many of which have been produced by small and medium-sized enterprises. Many of these databases are only made available in the European Community, as the *sui generis* protection provides database makers with a safe legal environment for the marketing of their products; they are reluctant to market them without this legal security.

Secondly, the application in practice of the *sui generis* right has demonstrated that the protection is operational in the markets, that Courts have already shown their ability to address issues arising under the Directive (such as the interpretation of "substantial investment," "substantial part of the content," or "substantial new investment"), and that the protection does not interfere with research or with the exchange of information. In general, judgements by the Courts in European Community member States show that the *sui generis* protection constitutes a balanced approach, adequately protecting the rightholder's investment whilst safeguarding the legitimate interests of others in access to data contained in databases.

Examples: the German Supreme Court held that telephone directories are not protected by copyright, but are covered by the *sui generis* right. The Austrian Supreme Court granted *sui generis* protection to a substantial part of the Austrian "Yellow Pages." The French Court of Appeal of Versailles ruled that a company may not oppose the extraction of a (quantitatively and qualitatively) non-substantial part of a database. In a decision of the Supreme Court of the Netherlands it was held that substantial investment in the database is the valid criterion for protection, rather than the reasons for such investment.

V. THE NEED FOR DATABASE PROTECTION AT INTERNATIONAL LEVEL

The need for a protection of so called "sweat of the brow" databases at international level has been identified since the mid 1990s. Since then, a possible international instrument on the protection of databases has formed part of WIPO's "digital agenda" with a view to fostering the potential of electronic commerce and of the Information Society based on legal certainty.

It should be recalled that, at the February and May 1996 sessions of the Committee of Experts, proposals for an international treaty for the protection of databases were discussed and many delegations expressed a positive interest in the *sui generis* right. In preparation of the Diplomatic Conference of December 1996, a "Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in respect of Databases to be considered by the Diplomatic Conference" was issued. However, the work on such an international treaty could not be concluded at the 1996 Diplomatic Conference.

The European Community and its member States are grateful for the work of the International Bureau with respect to updating the existing documentation on the legal protection of databases. They have read with interest the five studies on the economic impact of database protection, which were presented during the seventh session of the Standing Committee on Copyright and Related Rights.

All existing documentation amply demonstrates that database protection is a global issue. The *sui generis* protection operates successfully in the fifteen member States of the European Community. Moreover, more than twenty-seven other countries associated with the European Community apply it as well. We will have to find a common approach to the protection of databases also at international level if all our economies are to benefit from electronic databases and a world-wide exchange of data on appropriate terms and conditions. Indeed, all benefits of a meaningful intellectual property protection of databases as outlined above also apply world-wide.

In our view, the time is now ripe for reactivating our discussions on this topic. The European Community and its member States would be happy to share their experience in this field with all other delegations.

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