The legal protection of databases: current situation of the international harmonisation process

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The requisite of creativity set down by copyright laws does not fit well into the context of digital databases. The risk of being unprotected increases in the case of factual compilations, as simple facts or data are not copyrightable, meaning that their contents can easily be copied and/or used by others without infringing copyright. After more than a decade of intense debate about the need to give or not give additional protection to non-original databases, and about the most appropriate model to follow, international consensus is still far away. This paper analyses the situation at the present point of the long, heated process of harmonising the legal protection of databases. The European directive is first examined, as well as attempts to extrapolate it to other countries. Then the paper looks at some proposals from the USA, and finally at the treaties and projects of an international nature.

Introduction

New technologies facilitate the production of databases. Huge amounts of data can be created in a digital format or converted to it from printed sources. This increased capacity to generate and store data is accompanied by a greater ease of access and use, which leads to an exponential increase in the production of digital databases. However, technological advancement does not only make creating databases simpler, but it also augments the risk of unauthorised uses of their contents. Copying, manipulation and diffusion are now an inexpensive everyday reality. It is no wonder that in recent years the legal protection of databases has moved directly under the spotlight.

The protection conferred by copyright to compilations is actually nothing new, as the most important international treaty concerned with copyright – the Berne Convention (WIPO, 1971) – and national copyright laws protect a compilation if it fulfils the conditions needed to be considered an original work of authorship, that is, if the selection and/or arrangement of contents can be considered original. Thus, encyclopaedias, anthologies, legal repertoires, dictionaries, etc., have earned protection under copyright if they entail sufficient creativity. Compilations may involve the works of others (an anthology of short stories, for example) with their own copyright, or simple facts or data (for example, stock prices, sports scores or statistical information), which in themselves are not copyrightable, as they pertain to the public domain. In the case of factual compilations, then, even if the selection and/or arrangement entail sufficient originality, copyright protection would not cover the data contained therein, which could be freely copied.

The requisite of creativity hardly seems appropriate in the specific context of databases, which, as Ginsburg (1990) puts it, are works of “low authorial presence”. For one thing, few compilations are truly original in their arrangement. Most obey criteria we could refer to as “mundane”, which depend essentially on computer capacity and the sophistication of software in retrieving information. In addition, the concept of selection is problematic in that it cannot be applied to comprehensive compilations, whose contents are predetermined to a certain extent (Baron, 2001).

The flexible format of digital databases – as opposed to the functional rigidity of traditional databases of printed material – facilitates extracting and ordering data from a compilation to
suit user needs (Hunsucker, 1997). This novelty has two main consequences. In the first place, it blurs the distinction between the functions of “collection” and “application”, and in turn attenuates the distinction between the use of an existing database and the creation of a new one. Second, it heightens the capacity to create new database products with an added value. Once the databases are available to the public, second comers can easily and cheaply copy or manipulate the contents and disseminate the resulting products. They may also use technology to make different selections and arrangements of the information contained in the databases, thereby allowing them to avoid infringing copyright; in fact, the resulting products may even qualify for copyrights of their own (Reichman and Samuelson, 1997). The free rider that purchases the originator’s product may electronically extract and recompile the data in question at a much lower cost than that invested in the original collection, which allows him/her to compete on the market with a much cheaper product (Austin, 1997).

Such problems were first detected in the early 1990s in the USA and the European Union (EU), where most databases are produced. In the case of the USA, the real point of inflection was the Feist Publications Inc. v. Rural Telephone Service Co. (1991) case[1], which put the “sweat of the brow” criterion to rest. Until then, the protection of simple factual compilations had been permitted if it meant enough investment and effort on the part of the producer, even when he or she did not afford sufficient creativity. This Supreme Court decision left it clear that raw facts in a compilation or database were not covered by the Copyright Act, which merely protected the creative element of the compilation, its organisation or selectivity, for example, but could not protect the facts compiled (Benkler, 2000). Successive attempts in the USA legally to protect unoriginal databases have not been successful to date. In the EU, however, after several years of debate, a directive (European Union, 1996) established for the first time a sui generis right to protect the mere investment put into creating a database, even if it does not present enough originality to be protected by copyright.

The approval of the European directive of 1996 and its later implementation in national laws of the member states spurred the idea of trying to harmonise the legal protection of databases on an international level. This quest for harmonisation did not stem only from the global and transnational nature of everything related with digital works. It also has roots in the reciprocity clause of the European directive, which requires other countries to have a similar law so that their databases might benefit from the protection afforded in the EU.

Logically, any attempt to harmonise this area had some impact on the activity of the World Intellectual Property Organisation (WIPO). In their December 1996 conference, the so-called “internet treaties” were approved, and a project for a treaty about the protection of databases was presented, although in the end the matter was discarded as not mature enough for discussion. This stumbling block did not undermine the objective of harmonisation, however. Ever since, studies, reports and meetings have aspired to reach some consensus on the issue, although without definite results to date.

After more than a decade of intense discussion about whether to provide additional protection to non-original databases, and if so, about the best model to follow, we are still very far from international agreement. The objective of the present paper is to appraise the current status of this long and complex process of trying to harmonise the legal protection of databases. We shall first look at the European directive and its attempts to expand to other lands and then look over the different proposals from the USA, to comment finally on the various treaties and projects of an international nature.

The EU directive

Until the late 1980s, the EU gave no serious consideration to the possibility of incorporating a sui generis right to protect the investment behind databases that were not protected by copyright, on the basis that they lacked creativity. Yet certain countries had legislation that was similar in its effects. In the UK and Ireland, such databases were protected by means of a copyright for which hardly any original creativity was required. It was understood that the criterion of skill and labour – tantamount to “the sweat of the brow” of US law until 1991 – was sufficient. The Nordic countries had provided protection similar to the sui generis right since 1960, under the so-called Catalogue Rule. The laws on intellectual property of Denmark, Finland, Iceland, Norway and Sweden included a nearly identical precept by virtue of which “a catalogue, table or another similar product in which a large number of information items have been compiled”, could not be reproduced without the consent of the producer until ten years had transpired since publication. The exceptions foreseen for copyright also applied to this right concerning catalogues (Karnell, 2003). In sum, these laws did not establish criteria of originality and the protection granted was only
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against reproduction. That is, parasitic copies were prohibited, but not other uses or unauthorised extractions of the information.

These differences in the protection of database copyright, along with an irregular conception of unfair competition — lacking entirely in some countries, and varying from one country to the next insofar as legislation or jurisprudence — were detected by the first Green Paper on copyright (European Commission, 1988). It addressed the pros and cons of protecting simple compilations of data. Although it did not arrive at firm conclusions, the Green Paper set up a work programme that emerged in the directive of 1996, after eight years of consultation and study, and two significantly different proposals for this directive. The aim was twofold: to harmonise the rules of the member states with regard to copyrightable databases, and to protect data compilations from market-destructive appropriations.

The first proposal of the European Commission (1992) was based on unfair competition principles, in the hope of restricting data extraction and re-utilisation for commercial purposes. In other words, only parasitic behaviour on the part of competitors was prohibited. Unfortunately, this first initiative was not successful, and the directive finally approved in 1996 had a different focus, going way beyond the needs at hand and conceding excessive rights to database owners.

This directive began by defining in overly broad terms what was understood by database: “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means” (European Commission, 1992, Art. 1.2). This wording leaves no doubt that factual compilations can be protected by copyright.

The essential contents are divided clearly into two parts, one focusing on the protection provided by copyright and the other on the new sui generis right. Through copyright, the structure of a database entailing creativity in the selection or arrangement of its contents is protected (European Commission, 1992, Art. 3.1). Article 5 deals with the rights usually included in copyright (reproduction, translation, adaptation, distribution, communication, public performance), whereas Article 6 describes the exceptions to these rights (reproduction for private purposes of a non-electronic database, illustration for teaching or scientific research, public security, administrative or judicial procedure . . .).

Moreover, mention is made of the possibility that member states take into account exceptions to copyright traditionally authorised by national law, as long as they respect the Berne three-step test.

The most important contribution, however, is the creation of a new right of intellectual property, denoted sui generis, to safeguard the contents of databases that do not fulfil the requirement of originality. It consists of the possibility of the maker of a database “to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database [whenever] there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents” (European Commission, 1992, Art. 7). In short, the criterion of originality is replaced by that of the substantial investment in the compilation and elaboration of the data contained therein. This “right of extraction” is very broad, with extraction defined as “the permanent or temporary transfer of all or a substantial part of the contents of a database” to another medium by any means. Therefore, even temporary transfers to online recipients would be included in this provision (Baron, 2001). Furthermore, it defines “re-utilisation” in Article 7(2)(b) as “any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online, or other forms of transmission” (European Commission, 1992), so that online transmission or use of data would be covered, including the data in value added or derivative formats (Reichman and Samuelson, 1997). The exceptions to this right, put forth in Article 9, are nearly identical to those established in the aforementioned Article 6 (the difference being there is no mention of a country’s traditional exceptions to copyright). The duration of the new sui generis right is set at 15 years (European Commission, 1992, Art. 10). However, any substantial change, evaluated qualitatively or quantitatively, paves the way for a new and identical period of protection, so that certain databases can be perpetually protected.

This directive, and in particular its sui generis right, has been harshly criticised by the vast majority of experts. The main reason is the scarce or non-existent interest in preserving the public domain. This is normally protected through three measures:

1. the distinction between ideas and expression, with copyright protecting only expression, leaving ideas and data at public disposal;
2. a limited duration, so that when the period of protection has transpired, the work becomes part of the public domain;
3. the exceptions and limitations to copyright, such as private copying or fair dealing/use, which permit certain uses that are considered beneficial to the general citizen.
In effect, the new directive eliminates these three instruments of balance, however: it protects data per se, it gives rise to potentially perpetual protection, and leaves the exceptions and limitations reduced to nothing. Private copying is only possible for non-electronic databases, fair dealing does not apply to news reporting, and the main exception of “extraction for the purposes of illustration for teaching or scientific research”, is not even obligatory (indeed, France, Ireland and Italy have not introduced it into their national laws). Lastly, it does not include the right of re-utilisation, so that information can be copied, but not redistributed (Colston, 2001; Davison, 2003).

This essential invalidation of the exceptions is reinforced if we bear in mind that the two rights – copyright and sui generis right – act together. That is, they can be applied in unison to the same data, thereby eliminating the benefits of the traditional exceptions to copyright, as the simultaneous sui generis right does not include these exceptions. As if this were not enough, these two cumulative layers of protection are topped off by the legal protection granted by the EU directive on copyright in the information society (European Union, 2001) to technological systems that control database access and use. Specifically, paragraph 4 of its Article 6.4 makes it very clear that the exceptions to copyright and sui generis right are not relevant when the work is protected technologically, and the user has been obliged by contract to not take advantage of such exceptions (Fernández-Molina, 2003).

There is also good reason to criticise the effects of this directive on the market competition of databases, as it creates a de facto monopoly over data. In sole-source databases, no competitor has access to the data, and the owners have no obligation to license third parties for their use in other products (Davison, 1999). The problem persists in the case of data that can be freely obtained, as the cost of an independent re-generation of the data can be prohibitive in light of the earnings anticipated from the compilation. Thus, it is virtually impossible to create value-added products and services. A fine example is the British Horseracing Board Limited and Others v. William Hill Organisation Limited (2001) case[2], which reinforces the right to control the follow-on applications of an original database against a value-adding second comer. This position is adopted even if the owner was the only source of these data, and it was not feasible to create them in any independent manner. It is interesting to recall that the first proposal of the directive (back in 1992) included a system of compulsory licences when data could not be created, gathered or obtained from any other source in an independent way, and when the producer of the databases were a public organism created or authorised for the collection and diffusion of information, or a private entity in a situation of monopoly in view of its exclusive concession by a public organisation (Eisenschitz, 1993). Yet these provisions disappeared from the text of the directive that was finally approved.

Further criticism is due to the imprecision and vagueness of some of the basic concepts, which are still not clear years after their approval (Hugenholtz, 2001, 2003). For instance, what is an “insubstantial” part of a database? Users cannot extract information if they have no guidelines to tell them how much is too much. It is likewise surprising that for something involving effort and investment, qualitative criteria are applied, opening the door to claims that even small bits of information are qualitatively important (Davison, 2002). Finally, the excessive breadth of the definition of a database leaves just about anything under its regulation: telephone directories, course syllabi, horse racing results, television programme guides, meteorological records, digital libraries, company brochures, medicinal vademecums, compilations of natural or experimental observations in any scientific field, and indexes made by internet search engines.

Given the novelty of the sui generis right and the polemics arising from its implementation, the directive itself foresees, in its Article 16.3, a process of analysis and review of its application. Every three years, the European Commission is to write up a report evaluating the effects of the sui generis right and the exceptions set for it, and as well as any abuse of a dominant position or other interferences with free competition, “which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements”. The European Commission put Nauta Dutilh, a Dutch legal firm, in charge of the first of these reports, scheduled for the end of 2001. However, plagued by delays on the part of many member States in their implementing the directive, the Dutch firm only began to collect information in 2002, and has still not presented a definitive report. It is curious that, even while lacking solid data on the subject, in May of 2001 the report of the Delegation of the European Community at the Standing Committee on Copyright and Related Rights (WIPO, 2001) expressed great satisfaction with regard to the positive effects of the directive, both on the database industry and for users, who enjoy “unhindered access to information”.

Although this directive limits its realm of application to the countries of the EU, it also clearly aspires to creating an international de facto...
model for the protection of databases. It includes a reciprocity clause, instead of the usual mention of “national treatment”, whose intent is to pressure other countries, particularly the USA, into adopting a similar system. Thus, Art. 11.3, together with recital 56, establish the possibility of arriving at agreements to extend the *sui generis* right to databases manufactured in third countries, as long as these other countries offer comparable protection.

**The US proposals**

A cross-examination of US legislation in this context is crucial, as the USA is the main producer and distributor of databases worldwide. The US Copyright Act bases its protection on the concept of originality and includes as protectable works compilations, including those of a factual nature, whose selection or arrangement of material is creative. The federal courts have developed, by jurisprudence, what should be understood as “original” in a work, and in order to protect the merely factual databases, they apply the “sweat of the brow” criterion: it is not a question of creativity, but rather of investment or effort in making the database.

This situation changed drastically in 1991, with the aforementioned *Feist* case[1]. Here, the Supreme Court denied copyright to the white pages of a telephone directory, thus reinstating the legal criterion of originality in the compilations because of their selection or arrangement, which previous judicial decisions had reduced and rectified through the “sweat of the brow” doctrine. The plaintiff, “Rural Telephone Service Co.”, was a local phone company from Kansas that distributed its own telephone book, in alphabetic order, to cover its area of service. Meanwhile, “Feist Publications”, the defendant, published a telephone book that covered a larger area, and asked for licence to use the “Rural” guide to concoct the larger directory, but permission was denied. As a result, as it was later shown, Feist copied the listing without permission. The Supreme Court deemed that originality was lacking in the directory of the plaintiff: the selection of listings was “obvious” and its arrangement “inevitable”.

With the exception of cases where some database producers began to add “creative” artificial elements – abstracts, opinions and other non-factual information – to more easily pass the test of originality (Ginsburg, 1992), the impact of *Feist*[1] on the database industry was not very strong at first. The number and size of published databases continued to grow. Indeed, the US database industry did not actively lobby the Congress for legislation to resurrect the “sweat of the brow” doctrine (Band, 1999). The turning point came with the approval of the European directive and its reciprocity clause. The possible vulnerability of the US databases within the EU, together with the pressure generated by the WIPO work toward a possible international treaty on the subject, gave rise to a long series of legislative proposals over recent years, so far fruitless.

The first of these was presented in 1996 under the title Database Investment and Intellectual Property Antipiracy Act (HR 3531). This text closely follows the rules of the European directive and establishes a similar *sui generis* right, even a bit broader in scope (for example, the period of protection was set at 25 years). It secured very little support and was replaced, a year later, by the Collections of Information Antipiracy Act (HR 2652). The latter project was a slight improvement over its antecedent, and included some exemptions for government data and for scientific uses; but it harvested its share of criticism as well, and was not adopted in the end.

Two years later, in 1999, two distinct proposals were presented. The first, known as the Collections of Information Antipiracy Act (HR 354), was geared to protect the interests of database producers, and prohibited uses that might harm the primary or the related database markets. Its support came from a small but powerful group of database producers, including Reed-Elsevier, Thomson, American Medical Association and the New York Stock Exchange – institutions with a special control over or access to the sources of information that they diffuse. The polemics teemed, including accusations of giving perpetual protection to just about any dynamic database, and creating a monopoly of control over huge amounts of information, which could make it unconstitutional (Benkler, 2000; Heald, 2001).

The second proposal, the Consumer and Investor Access to Information Act (HR 1858), leaned more toward database users, allowing all uses of databases except commercial exploitation meant to compete directly with the original database; and featured a broader range of exceptions than HR 354 (Linn, 2000). For these reasons, HR 1858 earned the backing of scientific organisations, libraries, value-added database producers, internet service providers, and telecommunications companies. The conflicting interests of the two proposals led, however, to dead ends for both.

After a period of rest, the topic resurfaced with vigour in October of 2003, when a new proposal was introduced: HR 3261, the Database and Collections of Information Misappropriation Act (United States House of Representatives, 2003). It
is founded on misappropriation in a commercial setting that results in economic loss, and imposes liability only if a series of specific elements exists: the plaintiff’s database was the result of a “substantial expenditure of financial resources and time”; the defendant had made available “in commerce to others” a “quantitatively substantial part” of the database in a “functionally equivalent” manner; the defendant knew that this act was unauthorised; his actions were “time sensitive”; his act had caused an “actual loss of revenue” on the same market, and had “reduced the incentive” of the plaintiff to continue serving that market.

This proposal was supported by the heavyweights of the information industry, represented by the Software and Information Industry Association (SIIA) and grouped as the “Coalition Against Database Piracy”. Their arguments were not only founded on the familiar difficulty of protecting factual compilations under copyright, but also on the shortcomings of alternative forms of protection. Thus, they point to the limited practicality of the technological protection of databases and the norms prohibiting their circumvention, as section 1201 of the Digital Millennium Copyright Act only prohibits unauthorised access if the work is copyrighted; and even so, it only applies to initial access, but not any later distribution to third parties. They also deem inadequate the protection afforded by various state laws, such as misappropriation, trespass or contract (licensing agreement), on the grounds that these vary from state to state and only reach the initial offender.

The above proposal has three interesting features: the fact that it focuses on misappropriation in commerce and not the use of information per se (Strickland, 2004); that it ties liability to direct competition on the market shared with the existing database; and the elimination of qualitative substantiality as a requisite. Its overall appraisal, however, cannot be positive, as it continues to allow the danger of growing monopolisation of the marketplace for information, and impedes the freedom of individuals to search, gather and exchange information over the internet. For this reason it was opposed by a strong coalition (the NetCoalition) of users and producers of online databases, including the National Academies of Science, the Association of American Universities, the American Civil Liberties Union, the American Libraries Association, Amazon, Google, Verizon, Yahoo, Bloomberg LP, and the US Chamber of Commerce.

Criticism was launched not only at problems already detected in anterior proposals that were once again left unresolved (the problem of sole-source databases, inclusion/exclusion of government information, permission to copyright facts, potentially perpetual rights for database producers to a wide variety of information), but also at some novel aspects. For one, some of the glaring ambiguities of the wording would have added uncertainty to the law and increased the likelihood of litigation. A good example can be seen in the exemption for non-profit educational, scientific or research institutions: use is permitted if it is “reasonable under the circumstances, taking into consideration the customary practices associated with such uses of such databases”. Moreover, this exemption could be overridden by terms in “shrink-wrap” or non-negotiated contracts, rendering it almost useless (Ebbinghouse, 2004).

This proposal began its parliamentary stroll on the right foot, passing review by the House Judiciary Committee on 12 February. Yet just a few days later (2 March) it was tripped up by the House Energy and Commerce Committee, who reported the Judiciary Bill to have “an unfavorable recommendation”. In turn, Representative Stearns introduced a narrower version of database protection legislation, HR 3872, the Consumer Access to Information Act of 2004 (United States House of Representatives, 2004). Under this new Bill, the term “misappropriation of a database” generally means a person’s use of information from a database generated by another person without proper authorisation when:

- the database was generated at some cost or expense;
- the value of the information on the database is highly time-sensitive;
- the use constitutes “free-riding” on the originator’s costly efforts to generate or collect the data;
- the use is in direct competition with a product or service offered by the originator; and
- such use might eliminate the incentive to produce the product or service.

It is also interesting to note that the Federal Trade Commission was put in charge of its supervision and enforcement, and that it was prohibited that private parties sue. Although library associations continue to believe that no additional legislation on databases is needed, they have received this alternative proposal with satisfaction, as it corrects some of the deep flaws in HR 3261 (ALA, 2004).

International treaties and agreements

Even before the digital era, collections of information with sufficient originality were protected by copyright under the main
international treaties and agreements. The Berne Convention includes as protected works in its Article 2(5):

... 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.

The realm of protection, then, is limited to original collections of literary and artistic works, and databases fulfilling these conditions would no doubt be included. However, this does not mean that the Convention is too slippery to guarantee the protection of original collections of other materials, such as simple data; in this sense, the reference to literary and artistic works is generally understood to embrace original databases with material that does not qualify as “work” on its own.

It is also now clear that databases or factual compilations entailing sufficient originality are protected under the TRIPS Agreement of the World Trade Organisation (WTO, 1994, Art. 10.2), which states that:

... compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Likewise deserving mention is the WIPO Copyright Treaty (WIPO, 1996), whose Article 5 is practically identical in content to the TRIPS Agreement. In short, all these treaties and agreements protect databases by means of copyright if sufficient originality exists, but none offers protection for non-original databases through a system similar to the sui generis right of the EU.

At this stage of analysis, we should take a closer look at the attempts – all unsuccessful thus far – within WIPO to implement a system similar to that of the European directive. The process was initiated in February of 1996, when the EU presented a treaty project with this finality. It had been formulated based on the pattern of the directive, but in a language more appropriate for a multilateral treaty. It was discussed, and declared to be of interest, by the Committee of experts who met from 5–9 February. In the following Committee meeting, in May 1996, the USA presented an alternative proposal. In the end, on 30 August 1996, the WIPO distributed a treaty project on databases with a combination of the ingredients suggested by the EU and the USA.

The proposed treaty awakened vivid controversy in the USA, where a number of reports and commentaries against its conclusion were formulated. Along with the USA, other countries gradually opposed its adoption, claiming that regulation on the matter was premature (Band and Gowdy, 1997). For this reason, the project was rejected without any deep discussion theehreabouts at the Diplomatic Conference of the WIPO in December of 1996. The WIPO did not, however, renounce its intention to continue working on the subject, and since then several meetings and studies have aimed to obtain information from all the sectors involved, and try to reach some consensus. A key role is played by organisations related with research and education – UNESCO, the World Meteorological Organisation (WMO) or the International Council for Science (ICSU), which even created an international committee (ICSU/CODATA Committee on Data and Information) specifically dedicated to this subject matter. The past few years have involved much review and discussion, but with no conclusive results in favour of the treaty. The studies of its potential impact on developing countries are particularly interesting (Braunstein, 2002; El-Kassas, 2002; López, 2002; Riis, 2002; Vandrevala, 2002; Zheng, 2002). Their conclusions, while somewhat contradictory, are unfavourable to the implementation of a sui generis right in the laws of these countries.

Although WIPO continues discussing this matter, and it is not clear whether there will eventually be a treaty to regulate it, the action of the EU over recent years has led a considerable number of countries whose laws include a sui generis right to protect non-original databases (WIPO, 2002). Such is the case of the brand new EU member states (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia), as well as others who are economically linked to the EU (Iceland, Liechtenstein and Norway).

Most experts coincide in that the final push for this treaty would be the approval of legislation proposed in the USA. If this happens, the pressure for the approval of a WIPO treaty would be practically irresistible. In this context, we should highlight some interesting details of the Draft Agreement of the Free Trade Area of the Americas (FTAA, 2003), which takes in 34 countries, including the USA. This agreement includes a section dedicated to copyright (FTAA, 2003, Ch. XX, Subsection B.2.c), with an Article 2.1 that gives a finite list of items that are not subject to copyright protection. It is thereby implied that the copyrighting of everything not on the narrow list is permitted. The organisation IP Justice (Gross, 2003) warns that this expansive “reverse-definition” allows a vast universe of technical and scientific data to be roped off from the public, and
large classes of facts such as compilations would also fall into this broad category of works subject to copyright protection.

**Conclusions**

It is risky to make predictions about the possibility of an international harmonisation of the legal protection of non-original databases. Only the EU and certain sectors of the USA seem to detect a clear need for it. Meanwhile, nagging doubts and even obstinate opposition prevail in many other parts of the world. It is not really clear whether it is advantageous from a purely economic perspective, and much less from the standpoint of access to information by citizens, particularly among the research and educational communities.

From an economic perspective, in the developed countries we lack proof of the need for additional protection. There is no hard-core proof of problems for the industry (Williams, 2003), or of significant improvement in the EU (Maurer et al., 2001). As to the developing countries, which import rather than export these products, the short-term negative effects are evident. Moreover, the long-term advantages for these countries are not at all clear, as a strong system of protection to stimulate local innovation calls for adequate technological infrastructure, and this would be easier to attain with a flexible protection of intellectual property (Riis, 2002).

At the same time, in the interests of public access to information and especially to scientific and educational information, the benefits are non-existent. Although we still lack conclusive data, it would seem that serious damage is being done. As if the growing imbalance in favour of right-holders in the regulation of copyright were not enough already, we will be accentuating it by granting additional control over simple facts or data. Instead of contributing even more to the trend of commodification of information, there is a dire need for information policies that once again reconcile copyright protection and information availability.

If there is not a crystal clear need for new legislation, it should not be attempted. Its later elimination would be very difficult, even if the original justification were shown to be questionable. It is often argued that the technological measures for protecting databases, along with licensing agreements, are also effective means of protecting databases against improper use. Actually, we could say that they are too effective, as these contracts and technologies are increasingly employed to limit uses of data and information that would otherwise be permitted by law (Fernández-Molina, 2004).

In the case that it is one day demonstrated that there is a true need for additional protection to be given to non-original databases, and that it should be harmonised on an international level as well, the model to follow should not be the European directive with its *sui generis* right. Rather, we should support a minimalistic approach, proceeding with caution, with a likely base in the law of unfair competition. In this way, only those commercial actions of a parasitic nature would be prevented, but no unnecessary obstacles would be laid down to those who wish to enter the information marketplace, much less to the users of information. A final option would be to heed the suggestion of Australia, Russia or Switzerland, in that the international instrument should provide a certain degree of flexibility for member states, allowing them to choose the specific way they wished to implement the agreement (WIPO, 1998). Particularly interesting is the case of Australia, whose reforms of intellectual property laws are managing to find a balance between the interests of right-holders and citizens, avoiding overprotection, and thus departing from the path laid by the USA and the EU.

**Notes**


**References**


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