

European Commission Proposes New Law for Protection of Databases

by
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The European Commission this past winter issued a greatly anticipated proposed directive on the legal protection to be provided computer databases within the European Community. The proposed directive essentially limits the protection provided under the copyright laws to the selection or arrangement of materials utilized in a database. At the same time, the proposal introduces a unique “unfair extraction right,” which would prohibit the “extraction or re-utilization” of the content of a database for commercial purposes.

The proposed directive, if implemented, would require a fundamental change in the copyright law of the United Kingdom. Under current UK law, the facts compiled and published in copyrighted databases and other factual works may be protected against “unfair use.” This principle, often labeled the “sweat of the brow” standard, has been established for over a century. The sweat of the brow standard, at least as applied to computerized databases, cannot be reconciled with the proposed directive’s limitation of copyright protection to the selection or arrangement of data.

The protection afforded by the *sui generis* unfair extraction right, however, corresponds closely to the protection provided by the sweat of the brow standard. Both the unfair extraction right and sweat of the brow standard prohibit the copying of a “substantial part” of the factual content in a database, regardless of whether the originality expressed in the work is also taken. One difference introduced in the proposed directive is that the unfair extraction right is subject to compulsory licensing on nondiscriminatory terms if the material in the database cannot be obtained from any other source. This provision apparently was included in response to decisions of UK and Irish courts, which protected television programming information under copyright law despite the fact the information was unavailable from any other source.

In addition to displacing the sweat of the brow standard, adoption of the unfair extraction right would substantially broaden the protection available in EC member states other than the United Kingdom. The UK approach to copyright protection was rejected by courts in several EC member states, most notably France and Germany. These countries, however, would have to adopt the sweat of the brow approach insofar as it is incorporated into the unfair extraction right.

Database proprietors should thus receive significant benefits from implementation of the unfair extraction right. The term of protection afforded under the new right should be more than sufficient to allow many database publishers to exploit their products. Protection begins at the time of creation and lasts ten years after January 1 of the year following the date the database is first made publicly available. Databases valued for timely information become effectively obsolete well before that time.

There is some ambiguity, however, regarding the application of the ten-year term to databases constantly updated and revised. The only provision on extension of the term of protection in the proposed directive states, "(i)nsubstantial changes to the contents of a database shall not extend the original period of protection." The phrase "insubstantial change" is defined in a manner applicable to copyright, rather than the unfair extraction right: "additions, deletions or alterations to the selection or arrangement of the contents of a database which are necessary for the database to continue to function in the way it was intended by its maker to function." (emphasis added) Changes in the data itself apparently should fall outside this provision. If the contents of a database undergo substantial revision, the net effect could be perpetual protection of a database, unless courts engage in a pain-staking inventory of data over ten years old.

The proposed directive also raises a potential inconsistency concerning the protection of compilations of facts outside the computer field. The proposed directive covers only databases stored and accessed electronically, not databases in printed form. Compilations in printed form, however, invariably are created and stored in a computer. Theoretically, at least, courts in the United Kingdom could continue providing "sweat of the brow" protection under the copyright law to printed compilations of facts, while applying the unfair extraction right to the same compilations as stored in computer memory. At the same time, courts in other European countries could withhold protection under the unfair extraction right from hard-copy compilations printed from a computer database that would be protected.

Another major area of concern is the conflict the proposed law would pose with the laws of the United States, under which more than half of the world database market operates. In March of last year, the US Supreme Court in Feist Publications Inc. v. Rural Telephone Service Company rejected the sweat of the brow standard and held that only the elements of original selection and arrangement used in a compilation are eligible for copyright protection. This decision brought US law into direct conflict with UK law. Final adoption of the unfair extraction right by the European Commission would present essentially the same conflict on a larger scale, as US law has no precise counterpart to the unfair extraction right.

Uncertainties over the effect of the proposed directive therefore remain for international publishers of databases. While computer database proprietors operating within the EC will enjoy substantial protection if the proposed directive is implemented, they could not exercise their rights against unfair extraction in the United States. In addition, the unfair extraction right applies to databases created outside the EC only if the country of origin provides "comparable" protection to databases of EC origin. US database proprietors would therefore not receive the protection within the EC which its European competitors would enjoy. This scenario has most likely already raised fears concerning the effect on free trade between the US and EC in the database area. The questions and concerns raised by the proposed directive, which probably will not be finalized until after the European Commission's scheduled date of January 1, 1993, will likely remain unresolved for some time to come.

*For background on this law and comparisons with United States copyright law, see Arden, "[The Conflicting Treatments of Compilations of Facts under the United States and United Kingdom Copyright Laws](#)"