

February 19, 1999



PROTECTION OF DATABASES

Legislation is pending in the U.S. Congress that would protect uncopyrightable collections of data (including uncopyrightable electronic databases) from information piracy. According to congressional staff and press reports, database bills are expected to be acted on in March 1999.

Compilations of Facts Have “Thin” Copyright Protection.

Facts are generally not copyrightable and are free for all to use. But the manner in which collections of facts are arranged may be protected under U.S. copyright law if the arrangement or coordination of facts demonstrates “authorship.” In 1991, the Supreme Court made clear that mere “sweat of the brow” collections of facts — collections that may have been very expensive to create but that include no spark of creativity in their selection or coordination — are unprotected by copyright.

What protection exists for digital databases that are not coordinated in a particularly creative manner? Contractual protections may help, and “clickwrap” licenses are increasingly accepted. See *ProCD, Inc. v. Zeidenberg*. What if a database is pirated by someone with

whom the database owner has no contractual relationship?

Protection for Commercial Databases.

In 1996, the European Commission

databases providing a non-copyright, non-contractual shield: even if a collection of data

will be protected under a *sui generis* rule that grants protection against unfair copying. Member states of the EU are required to provide database makers (who establish that they have made a substantial investment in obtaining, verifying, or presenting the contents of their database) with a right to prevent “extraction” and/or “re-utilization” of the database or of a substantial part of its contents. The EU directive requires that EU nations protect only databases owned by people or companies (1) located in the EU or (2) located in a country that has comparable database protection laws.

The U.S. Is Considering *Sui Generis* Database Protection.

The U.S. information industry is an important segment of the U.S. economy. Some American companies within this industry are concerned that they do not have a uniform,

federal statute offering protection from database piracy — the “comparable” database protection required for EU protection of U.S. databases. On the other hand, other U.S. companies are concerned that, should *sui generis* protection exist for computerized databases, facts will no longer be free — facts will be “owned,” and the non-owner will have to pay for access to them. The concept of “fair use” under U.S. copyright law (under which infringers can raise the affirmative defense that their use was justified) would probably not exist under a non-copyright database protection regime. Particularly where databases contain information that is not available elsewhere, *sui generis* database protection may pose thorny issues.

During the last Congress, legislation aimed at strengthening protection for commercial databases failed. As expected, efforts to pass commercial database protection have been renewed in the 106th Congress. Earlier this year, Rep. Howard Coble (R-NC) introduced H.R. 354, the *Collections of Information Antipiracy Act*. This proposal is aimed at creating a federal statute protecting commercial databases, including real-time market databases. On the Senate side, Sen. Orrin Hatch (R-UT) is circulating draft legislation that mirrors Rep. Coble’s proposal. Consideration of both proposals will probably occur in March. Both of these bills will be followed closely in the e-commerce world.

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