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World Information Technology Contacts Handbook 2001

INFORMATION IN THE DIGITAL AGE.

Information is essential nowadays as it means value and wealth in terms of culture and economics. People now think of Information as a principal asset in their businesses, and devote their time, money and effort to developing, processing and transferring it. Businesses seek control of the information that they produce, whether it is subject matter protected by intellectual property law (such as works, inventions, trade secrets and the like) or simple data not entitled to protection of any sort per se.

The Importance of information has still increased as people have learned to process and control it by using digital means. E-commerce as well as other expressions in a digital environment are centered in the idea of information. And what digital technology adds is the possibility of storing and retrieving selected data, and disposing them by having them arranged, managed and presented as the compiler may wish.

Collecting and compiling data is not a new idea. Traditionally, people have made collections of works such as anthologies and encyclopedias and have published them in as many different forms as technology has permitted. Now is the turn of multimedia and computer networks, which as the newest technologies known, they have changed the way information can be compiled and displayed. That of course has meant a great challenge for the law in general, and intellectual property, in particular.

THE LEGAL PROTECTION OF DATABASES

Database protection has been in the process of development for at least one decade. It was perhaps US courts that first dealt with issues relating to databases. Special mention should be given to the telephone directory cases, which were resolved prior to the Feist case, following a sweat of the brow analysis. However, in Feist the US Supreme Court imposed a higher standard based on the selection, arrangement or disposal of the information that was

compiled — again a telephone directory. But it is perhaps in Europe where database protection has developed into a better structured system and where a major consolidation and level of maturity has been reached. That can be certainly true as the European Union did undertake the great effort and task of harmonizing the countries national laws, by implementing a Directive specially dealing with the subject.

The first cases in Europe, Van Damme, in the Netherlands and Le Monde, in France, reflected the need of harmonizing the concept of originality in databases, as it had been viewed differently in each of the countries. Anglo-saxons had generally structured their laws over the criterion of skill and labor, where originality is triggered from the effort and investment made by compiler, regardless as to whether an artistic result has been achieved. On the other hand, Continental Europeans followed much higher standards as it is Schöpfungshöhe or imprint of author's personality, according to which any compilation would definitively require serving an artistic purpose.

The Directive on Databases became a vehicle for the balancing of equities. It placed databases in an Intermediate position of the originality scale, requiring it to be the compiler's own Intellectual creation that would attend to his or her personal contribution. This standard of originality had previously proven to fit into other forms of creativity such as software. Accordingly, as Jens Gaster has said, in order to achieve harmonization Anglo-Saxons would have to lift the bar and Continentals lower It.
Notwithstanding the foregoing, considering the thin protection that copyright law grants to databases, and the need of a more flexible approach that would in some way enlarge its scope of protection, the Directive incorporated a sui generis right to protect databases not complying with the levels of originality required by Copyright Law. As applicable standard the Directive relied on the concept of sweat of the brow analysis.
On the International field, a right on databases was first stated in article 10 (2) of TRIPS. However, article 2 (5) of the revised Berne Convention can be regarded as precedent as it considers collection of works as expressions of creativity, entitled to copyright protection, when they result from the “selection and arrangement” of their contents. Berne did not make reference to the broader notion of data base, which admits not only works of authorship, but non copyrightable material and information as well. However, TRIPS relied on the

same concept of “selection and arrangement”, making it extensive to data bases. Article 10 (2) of TRIPS thus requires that compiler makes a personal contribution to the process of collecting or compiling, which merits copyright protection. WCT later confirmed the foregoing by adding difference: used the expression “selection or arrangement” instead of “selection and arrangement”. The approach taken was alternative rather than cumulative.

DATABASE PROTECTION IN MEXICO

The Mexican law of 1996 contemplates some provisions regarding to the protection of databases. A principal rule states that bases of data or of other material perceptible by means of machines or any other form, which by reason of the selection and disposal of their content represent “Intellectual creations”, shall be protected as compilations. In addition the statute regards as compilations those consisting of collections of works, such as encyclopedias, anthologies, works or other elements such as databases, provided that such collections constitute an intellectual creation by the selection or arrangement of their content or matter. The two provisions are consistent excepting for the fact that there is no definition as to whether the alternative or cumulative criterion should prevail in case of a conflict.

Accordingly, by being considered as compilations the law is affording copyright protection to databases if they are original. On the other hand, data bases which are not original can be nevertheless protected, but for the lesser term of five years.
It can be obtained that by having been inspired on the EU Directive on Data Base Protection, and naturally on articles 10 (2) of TRIPS and 2 (5) of the Stockholm Act of the Berne Convention, Mexican law has recognized protection of electronic and non-electronic databases on two different levels. The difference of course responds to the need of a flexible treatment of the standard of originality, as it happens in Europe.
Concerning the first level, the law has imposed the higher standard of originality virtually equal as for computer software. Although perhaps not as far reaching as the “imprint of the author's personae”, it does also not fall down to skill and

labour. And although not expressly referred in the statute, from interpretation can be obtained that the standard points out the middle of the scale, again, as it has happened in the case of computer software.

Pursuant to the second level, which considers a rather low standard of protection, Mexican law would still offer sui generis type of protection for databases not meeting the requirements of Copyright law as original compilations. Under this category the law refers to non-original data bases. This may be an unfortunate concept, as it very well may be thought that it admits any possible form by which data are put together, without a minimum finding of selection or disposal. As there is nothing in the statute to define the meaning of non-original, the notion in the Mexican law may be understood as confirming empty shells, which naturally would go beyond to any reasonable notion as it would be sweat of the brow, followed by the EC Directive.

As to the bundle of rights, in a special chapter devoted for software and databases, the Copyright Law grants a right to make or authorize:

i) its permanent or temporary reproduction, in all or in part and by any means or form;
ii) its translation, adaptation, rearrangement or any other modification;
iii) the distribution of the original or copies of the data base;
iv) the public communication; and
v) the reproduction, distribution or public communication of a translated, adapted , rearranged or modified database.

From the provision, it cannot be inferred whether distribution rights do exhaust and if among distribution rights a more specific rental right is available. A question can be raised as to whether rental rights in other type of works, such as computer programs, could be extended to databases. However, there is not an easy response as databases have their own bundle of rights, which is silent as to rental rights, but also as to exhaustion of the distribution right. The statute is also silent as to compulsory licenses as well as to fair use. What can be regarded as true is that, with the exception of the bundle of rights provision, titleholder of an original database is entitled to any of the copyright rights afforded by the law, including moral rights, term of patrimonial rights of life plus 75 years and many others.

Yet a more difficult question triggers from the fact that there is no identification of the law as to the rights on non-original data bases. Would the copyright rights of original databases applicable thereto as well? While from a technical standpoint appears to be the case. It would sound pretty awkward, as there is no reason why, original and non-original databases should be granted with the same rights if they are inherently different.