

THE LEGAL PROTECTION OF DATABASES

A COMPARATIVE ANALYSIS

Estelle Derclaye

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Published by
Edward Elgar Publishing Limited
Glensanda House
Montpellier Parade
Cheltenham
Glos GL50 1UA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Cataloguing in Publication Data

Derclaye, Estelle, 1974–

The legal protection of databases : a comparative analysis / by Estelle Derclaye.

p. cm.

Includes bibliographical references and index.

1. Databases—Law and legislation—United States. 2.

Copyright—Databases—United States. 3. Databases—Law and legislation—European Union countries. 4. Copyright—Databases—European Union countries. I. Title.

K1443.D37D47 2008

346.04'82—dc22

2007038607

ISBN 978 1 84720 133 1

Typeset by Manton Typesetters, Louth, Lincolnshire, UK
Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall

The Legal Protection of Databases

For Barbara

Preface

This book examines and compares the several types of protection available for the protection of investment in database creation. The protection of investment in making databases is not harmonized internationally. In some countries, database contents are insufficiently protected and, in others, there is too much protection. While database producers deserve protection to recoup their investment, excessive protection can create easily abused monopolies and restrict the public domain. The book is concerned with finding adequate legal protection for investment in collecting, verifying or presenting database contents. The laws of the European Union and the United States, which differ in their protection of databases, are compared. Four types of laws which can protect database contents are chosen: intellectual property, unfair competition, contract and technological protection measures ('TPMs') along with TPMs' anti-circumvention provisions. The book examines whether in isolation and in combination these laws over-protect, under-protect or adequately protect databases' contents. To do so, it uses a criterion based on the economics of information goods, the human rights to intellectual property and to information and the public interest.

In Europe, a specific intellectual property right was enacted to protect database contents (the *sui generis* right). In isolation, most aspects of the *sui generis* right over-protect databases. The possibility in certain Member States to prevent the copying of databases by the tort of parasitism in addition or instead of the *sui generis* right is over-protective as well. This also proves that harmonization is not fully achieved. Additional contractual protection of databases by way of circumventing the limits of the *sui generis* right also over-protects certain databases. The same goes for most TPMs and anti-circumvention provisions. Therefore in Europe, databases are over-protected in many respects. In the United States, no specific intellectual property right to protect database contents exists. While misappropriation's shield is far too weak, contracts, TPMs and anti-circumvention provisions are either over- or under-protective.

Remedies to over- and under-protection are proposed along with an adequate model for the protection of investment in database creation based on an intellectual property approach and which can be adopted internationally. The model is then applied to old case law to show the different outcomes arrived at under the new form of protection.

This book is based on my doctoral thesis. Throughout the years, I have been helped enormously by a long list of institutions and persons and I hope that those I may have forgotten in this preface will forgive me. My thanks go to the 'Fondation Camille Hela' of the University of Liège, the directors of the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich, Professors Michael Blakeney, Bill Cornish, Paul Demaret, Damien Geradin, Peter Maggs, Fiona Macmillan, Paul Torremans, Alain Strowel and Adrian Sterling, the many doctoral students of the Max Planck Institute I met while spending time there, as well as the library staff of the Queen Mary Intellectual Property Research Institute, Max Planck Institute and University of Nottingham. Last, but not least, I am grateful to my parents and to Meyrick for their unfailing moral support and patience. I am also forever indebted to Barbara, who unfortunately did not live to see my achievement. This book is dedicated to her.

I have attempted to state the law as it stands at the beginning of May 2007.

E.D.

Nottingham, May 2007

Abbreviations

AC	Administrative Court
<i>aff'd</i>	Affirmed
AfP	Archiv für Presserecht
AGO	Advocate General Opinion
AJT	Algemeen Juridisch Tijdschrift
All ER	All England Law Reports
A&M	Auteurs & Media
Ann. Prop. Ind.	Annales de la Propriété Industrielle
BGH	Bundesgerichtshof
Bull. Civ.	Bulletin Civil
CA	Court of Appeal
Cass.	Cour de Cassation
CC	Civil Code
CCC	Contrats Concurrence Consommation
CCE	Communication Commerce Electronique
CDPA	Copyright, Patents and Designs Act 1988, as amended
CFI	Court of First Instance of the European Communities
Ch	Chancery
Ch.D	Chancery Division
CLSR	Computer Law and Security Report
CMLR	Common Market Law Review
Comm.	Commercial
CR	Computer und Recht
D	Recueil Dalloz hebdomadaire, partie jurisprudence
D. Aff.	Recueil Dalloz Affaires
DC	District Court
DIT	Droit de l'informatique et des Télécoms
ECDR	European Copyright and Design Reports
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	European Community Treaty
EHRR	European Human Rights Reports
EIPR	European Intellectual Property Review
ELR	European Law Review

Ent. LR	Entertainment Law Review
Fn	Footnote
FOIA	Freedom of Information Act
FSR	Fleet Street Reports
Gaz. Pal.	Gazette du Palais
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
HL	House of Lords
HR	Hoge Raad der Nederlanden
IER	Intellectuele Eigendom & Reclamerecht
IIC	International Review of Intellectual Property and Competition Law
IPC	Intellectual Property Code
IPQ	Intellectual Property Quarterly
IPR	Intellectual Property Reports
IR	Informations rapides
IRDI	Intellectuele rechten – Droits intellectuels
JCP	Juris-Classeur Périodique
JCP E	Juris-Classeur Périodique, Entreprise et Affaires
JILT	The Journal of Information, Law and Technology
JO	Journal Officiel
JT	Journal des Tribunaux
M.B.	Moniteur Belge
MMR	Multimedia und Recht
n.	Number
NJ	Nederlandse Jurisprudentie
NMa	Nederlandse Mededinging Autoriteit (Dutch competition authority)
OJ	Official Journal
OLG	Oberlandesgericht
PIBD	Propriété Intellectuelle Bulletin Documentaire
Pres. Arr.	President van de Arrondissementsrechtbank
Prop. Int.	Propriétés Intellectuelles
RBC	Revised Berne Convention
RDPI	Revue du droit de la propriété intellectuelle
Réf.	Référé
RG	Rôle général
RIDA	Revue internationale du droit d’auteur
RIPIA	Revue internationale de la propriété industrielle et artistique
RJDA	Revue de Jurisprudence de Droit des Affaires
RPC	Reports of Patent Cases

RTD com.	Revue trimestrielle de droit commercial
Somm.	Sommaire
T.	Tribunal
TGI	Tribunal de Grande Instance
TLR	Times Law Reports
TPI	Tribunal de Première Instance
TRIPs	Agreement on Trade-related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty 1996
WIPO	World Intellectual Property Organization
WLR	Weekly Law Reports
WTO	World Trade Organization
ZUM	Zeitschrift für Urheber- und Medienrecht

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