Legal Protection for Databases

William Fisher
What is a Database?

• WIPO Draft Treaty Definition: “‘database’ means a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means”

• Examples:
  – nationwide telephone directory
  – compilation of financial data on companies
  – Lexis/Nexis compilation of public-domain materials
  – PABAT
Possible Sources of Legal Protection

• Copyright
• Contract
• Misappropriation Doctrine
• Encryption/Anti-Circumvention Legislation
• Branding
• Trespass to Chattels
• Sui Generis Legislation or Treaty
Possible Sources of Legal Protection

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Contract

• Use Restrictions in Ordinary Contracts or Licenses

• Shrink-wrap licenses
  – ProCD v. Zeidenberg
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Limitations of Contractual Protection

Creator

contract with
valid restraints
on use and
alienation

Purchaser
Limitations of Contractual Protection

Creator

contract with valid restraints on use and alienation

Purchaser

Rival

conveyance without restrictions
Limitations of Contractual Protection

Creator

- contract with valid restraints on use and alienation

Purchaser

- conveyance without restrictions

Rival

- distribution --e.g., over internet

Public

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Limitations of Contractual Protection

- Creator
  - contract with valid restraints on use and alienation

- Purchaser

- Rival
  - conveyance without restrictions

- Public
  - distribution --e.g., over internet

breach of contract (damages and injunction)
Limitations of Contractual Protection

Creator

Purchaser

contract with valid restraints on use and alienation

Rival

conveyance without restrictions
distribution --e.g., over internet

Public

claim for tortious interference with contractual relations?
Limitations of Contractual Protection

- Creator
  - contract with valid restraints on use and alienation
- Purchaser
- Rival
  - conveyance without restrictions
- Public
  - distribution --e.g., over internet

No practical remedy
Possible Sources of Legal Protection

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INS v. AP (1918)

Constriction
• Cheney Bros. (CA2 1929)
• Erie RR (1938)
• NFL v. Del. (1977)
• NBA (1997)
• Alcatel (1999)

Expansion
• Radio broadcast cases (1932-1955)
• Metropolitan Opera (NY 1950)
• Pottstown News (PA 1963)
• Bond Buyer (NY 1966)
• Dow Jones (Ill 1983)
• US Sporting Products (Tex 1993)
• Lynch, Jones (NY 1998)
• Internet “framing” cases?
Facts of NBA (1997)

NBA game

→ Live audience

→ TV audience

→ Radio Audience
Facts of NBA (1997)

- NBA game
  - Live audience
  - TV audience (STATS reporters)
  - Radio Audience (STATS reporters)
Facts of NBA (1997)

- NBA game
  - Live audience
  - TV audience (STATS reporters)
  - Radio Audience (STATS reporters)
  - STATS computer
Facts of NBA (1997)

NBA game
  → Live audience
  ↓ TV audience (STATS reporters)
    ↓ Radio Audience (STATS reporters)
        ↓ STATS computer
            ↓ Satellite
Facts of NBA (1997)

- NBA game
  - Live audience
  - TV audience (STATS reporters)
  - Radio Audience (STATS reporters)
  - Motorola pagers
  - STATS computer

Satellite
Facts of NBA (1997)

- NBA game
  - Live audience
  - TV audience (STATS reporters)
  - Radio Audience (STATS reporters)
- Users
  - Motorola pagers
- STATS computer
- Satellite

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A “hot news” misappropriation claim survives preemption iff:

- P generates or creates information at some cost
- Information is highly time-sensitive
- D “free rides” on P’s efforts
- D competes directly with P
- such free-riding would threaten the existence or quality of the service P provides

NBA (CA2 1997)
Application of NBA to Databases

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- P generates or creates information at some cost
- Information is highly time-sensitive
- D “free rides” on P’s efforts
- D competes directly with P
- such free-riding would threaten the existence or quality of the service P provides
Application of NBA to Databases

A misappropriation claim survives preemption iff:

- P generates or creates information at some cost: Yes
- Information is highly time-sensitive: Sometimes
- D “free rides” on P’s efforts: Yes
- D competes directly with P: Sometimes
- such free-riding would threaten the existence or quality of the service P provides: Doubtful
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Efforts to Secure Sui Generis Protection

- EC Directive 96/9
- Federal legislation in the United States
EEC Directive 96/9 -- Coverage

• Applies to any “collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."

• Plaintiff must prove: “that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents”
EC Directive 96/9 -- Entitlements

- No unauthorized extraction or reutilization of any part of the database
EC Directive 96/9 -- Entitlements

- No unauthorized extraction or reutilization of any part of the database
EC Directive 96/9 -- Entitlements

• “Extraction” = “the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form”

• “Reutilization” = “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 on-line or other forms of transmission.”
EC Directive 96/9 -- Entitlements

• No unauthorized extraction or reutilization of any part of the database
• No first-sale doctrine
• No compulsory licenses
EC Directive 96/9 -- Privileges

• Copying of “insubstantial” portions for any purpose
  – unless it conflicts with the “normal exploitation” of the DB

• Member states may permit extraction or reutilization for noncommercial teaching or scientific research if credit is given

• Member states may permit extraction or reutilization of “substantial” portions for “private purposes”
EC Directive 96/9 -- Duration

• 15 years
• additional 15 years each time the database is “substantially modified”
Proposals for American Sui-Generis Legislation

• 104th Congress: Database Investment and Intellectual Property Antipiracy Act of 1996

• 105th Congress: HR 2652 passed the House; S 2291 died in Senate

• 106th Congress: Two House bills pending:
  – HR 354: Collections of Information Antipiracy Act, introduced 1/19/99; approved by House Judiciary Comm.
H.R. 354

• Protected databases include: information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that users may access them
  – specific exception for works of narrative literary prose, but inclusion of collections of such works
H.R. 1858

• Protected databases include: a collection of discrete items of information that have been collected and organized in a single place, or in such a way as to be accessible through a single source, through the investment of substantial monetary or other resources, for the purpose of providing access to those discrete items of information by users of the database.
  – However, a discrete section of a database that contains multiple discrete items of information may also be treated as a database.
H.R. 354

- **Information**: facts, data, works of authorship or any other intangible material capable of being gathered and organized in a systematic way.
  - specifically includes works of authorship in definition, but states that it does not provide any greater protection than copyright to works of authorship included in collections, other than a work that is itself a collection.
H.R. 1858

• **Information**: facts, data, or any other intangible material capable of being collected or organized in a systematic way, with the exception of works of authorship
H.R. 354

• Exclusions:
  – Government databases
  – real-time market information
  – computer programs
  – databases for facilitating digital online communications
H.R. 1858

• Exclusions:
  – Government databases
  – computer programs
  – databases to facilitate internet communications
  – Nonprotectable subject matter: individual ideas, facts, procedures, systems, methods of operation, concepts, principles or discoveries
  – Preexisting databases
  – Works of authorship
H.R. 354

• Prohibitions:
  – Making available or extracting to make available all or a substantial part of a collection of information, causing material harm to the primary or related market for the product of the other party or a successor in interest
  – Extraction of a substantial part of a collection of information so as to cause material harm to the primary market
H.R. 354

• Prohibitions:
  – Making available or extracting to make available all or a substantial part of a collection of information, causing material harm to the primary or related market for the product of the other party or a successor in interest
  – Extraction of a substantial part of a collection of information so as to cause material harm to the primary market
H.R. 354

- **Primary market**: all markets in which the product is offered or in which the party derives or reasonably expects to derive direct or indirect revenue

- **Related market**: [1] any market in which similar products are offered and in which the parties offering similar products derive or expect to derive direct or indirect revenue or [2] any market in which the protected party has taken demonstrable steps to offer a product within a short period of time and with the reasonable expectation to derive direct or indirect revenue
H.R. 1858

• Prohibition:
  – Distribution of duplicates: sale or distribution to the public of a database that is the duplicate of a database (substantially the same database made by extracting the information from the original) collected and organized by another person, in competition with that other database.
H.R. 1858

• Prohibition:
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H.R. 1858

• **In competition with**: the duplicate database displaces substantial sales or licenses of the original database and significantly threatens the opportunity to recover a return on the investment in the collecting and organizing of the database.
H.R. 354

• Privileges:
  – Use of Individual items of information or insubstantial portions of the compilation
  – The lawful owner of a copy of the original collection may sell or transfer that copy
  – News reporting
  – Nonprofit educational, scientific or research purposes that do not materially harm the primary market
H.R. 354

• Privileges:
  – Reasonable use for illustration, explanation, example, comment, criticism, teaching, research or analysis
    ➢ commercial or nonprofit purpose
    ➢ amount extracted appropriate to purpose
    ➢ good faith
    ➢ extent of incorporation into an independent work and degree of difference between independent and original works
    ➢ development for and marketing in the same field as the original
H.R. 1858

• Privileges:
  – News reporting  (except time-sensitive material collected by a news reporting entity when use is part of a consistent pattern of activity engaged in for the purpose of direct competition)
  – Scientific, educational or research purposes, if not a consistent pattern engaged in for the purposes of direct commercial competition
H.R. 354

• Term: Protection of information ends 15 years after original collection was first offered in commerce, with no extension for later changes to collection; burden of proof is on plaintiff to show that portion of collection to be protected is no more than 15 years old
H.R. 1858

• Term: No term of protection specified
Lobbying for H.R. 354

Pro
• NYSE
• Real Estate Agents
• AMA
• EBay

Anti
• Chamber of Commerce
• Consumers Union
• Research Libraries
• Charles Schwab
• Yahoo
End