Spain
Espagne
Spanien

Report Q182
in the name of the Spanish Group
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Database protection at national and international level

Questions

1. Analysis of Current Legal Situation

1.1 Legislation
Is there any legislation in your country dealing specifically with databases? If so, please describe it.

The transposition amended a series of articles in the Copyright Act; Royal Decree No. 1/1996 of 12 April 1996 had approved the consolidated version of the Copyright Act, Law No. 1987/2440, regularizing, clarifying, and harmonizing the legal provisions in effect on the subject and was in turn amended by Law No. 5/1998. The specific articles amended were Articles 12, 20, 21, Book I Title III, Articles 31, 34, 35, 40bis, Article 40ter of Title III, Chapter III. Provisions specifically regulating sui generis protection were added to Title VII (Articles 131 and 132) and Title VIII, entitled “Sui generis right in databases” (Articles 133, 134, 135, 136, and 137 and such other related articles as Article 138 and Articles 139 to 141, which were renumbered).
The Law took effect on 1 April 1998.

1.2 Definition of Database
Is there any definition of the term “database” in your country’s legislation or case law? If so, does it extend both to electronic and non-electronic databases?
The Copyright Act defines the term database as “databases shall mean collections of independent works, data or other matter arranged in a systematic or methodical way and individually accessible by electronic or other means”, the definition covering both electronic databases as well as other forms of database.

1.3 Copyright Protection of Databases

1.3.1 Subject Matter
Does your country’s law provide for copyright protection of compilations? If so, does it only cover collections of literary and artistic works or does it also cover compilations of data or material other than literary and artistic works?
Copyright protection for compilations does exist in Spain, extending solely to their structure as a means of expression of the selection or arrangement of their content. Protection covers
not only compilations of literary or artistic works but also all other collections of data or other matter that are systematically arranged.

1.3.2 Criteria of Protection
If your country’s law provides for copyright protection of compilations is the protection limited to compilations which “by reason of the selection or arrangement of their contents constitute intellectual creations”? Are there any supplementary criteria to selection and arrangement? What is the level of originality required for a compilation to be considered a work? Does hard work in gathering data, known alternatively as “sweat of the brow”, qualify a compilation as original?

Protection of compilations in Spain requires the selection or arrangement of content to constitute an intellectual creation, with no other supplementary criteria.

The level of originality (in the sense of an intellectual creation) required for a compilation to be deemed to be an intellectual creation is the same general level required for qualification by any intellectual work, hard work or “sweat of the brow” in gathering the data being of no bearing.

1.3.3 Scope of Protection
What is the scope of copyright protection of a compilation? To which extent can a compilation be copied without infringing the copyright in the compilation?

Protection extends only to the structure of the database as a means of expressing the selection or arrangement of the content, not to the content itself, which may be entitled to other rights held by the database owner or by third parties.

The data may be used by lawful users subject only to the condition that the structure of the database shall not be reproduced and/or copied in full or in part (i.e., neither the whole nor a substantial part).

1.4 Sui generis Protection of Databases

1.4.1 System of Protection and Subject Matter
Does your country’s law provide for sui generis protection of compilations of data such as databases? If so, is registration of the database required to secure sui generis protection? Does your country’s sui generis system only cover databases which do not meet the criterion of originality or is there cumulative sui generis protection also for original databases protected by copyright?

Sui generis protection of databases does exist in Spain, and registration is not a requirement for protection.

Registration is solely declaratory (and hence voluntary), not a constituent element of the right, though registration is particularly useful for demonstrating completion of a database, one of the legal requirements for sui generis protection, thereby shifting the onus of proving that no rights are enjoyed in the database onto the adversary.

Registration of databases is carried out according to the procedure laid down in Royal Decree No. 281/2003 of 7 March 2003 approving the Regulation governing the Copyright Office. The Regulation provides for registration of databases irrespective of their originality.

The sui generis right in a database protects the substantial investment - evaluated qualitatively or quantitatively - made by the database maker, be it in terms of financial resources or the time, effort, energy, or the like employed in obtaining, verifying, and presenting the content of the database.

All databases are entitled to protection, irrespective of their level of originality.
Sui generis protection of a database applies irrespective of the database’s eligibility for copyright protection of the selection and arrangement of its content.

1.4.2 Criteria of Protection

If your country’s law provides for sui generis protection of databases what are the criteria of protection? If “substantial investment” is one of the criteria of protection, what is the level of investment required for an investment to be considered substantial?

The criterion used in Spanish law is substantial investment.

Substantial investment may be evaluated qualitatively or quantitatively and expressed in terms of the financial resources needed or the amount of time or the nature and amount of effort and energy, or the like, that have had to be put into creating the database and into obtaining, verifying, and presenting its content.

The adjective “substantial” modifying the investment to be effected by the database maker to qualify for protection constitutes an undefined legal concept. The term “substantial” is not defined in the legislation, which likewise does not classify, explain, or specify levels of investment needed to be eligible for sui generis protection. Apparently the term “substantial” has to be understood in relation to the whole in view of the purpose of the protection granted and the object of the sui generis right. We have already seen that a database’s originality is an entirely moot issue.

One basis for establishing whether an investment is substantial is to consider the investment actually employed in making the database. Accordingly, investment will be substantial only when it represents a considerable effort and is sufficiently large to make the database in question in terms of seeking out, culling, collecting, compiling, verifying, and presenting the content, information, and data contained in the database over and above the minimum effort that might be expected.

In short, the law does contemplate objective evaluation of the extent to which an investment is “substantial”, either qualitatively or quantitatively, in measurable terms based on the information supplied by the author or maker of the database.

1.4.3 Rights granted and Scope of Protection

If your country’s law provides for sui generis protection of databases what are the rights granted to the database maker? If “extraction” and “re-utilisation” are covered by any right, how are these notions defined? What is the scope of the sui generis protection? If “substantial part” is relevant in determining the scope of protection, how is this concept defined?

The sui generis right entitles the maker to prevent extraction and re-utilization of the whole or of a substantial part of the content of the database.

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

“Re-utilization” means any form of making available to the public all or a substantial part of the content of a database by the distribution of copies, by renting, or by on-line or other forms of transmission.

No definition of a substantial part of the content of a database exists, but in any case for extraction and re-utilization to be prohibited, the maker must have made a substantial investment, evaluated qualitatively or quantitatively, in obtaining, verifying, and presenting that part of the content which may not be extracted or re-utilized.

Systematic extraction and re-utilization of insubstantial parts of the content of a database may also be prevented when they conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the database maker.
1.4.4 Limitations and Exceptions

If your country’s law provides for sui generis protection of databases are there any limitations or exceptions? If so, what are they (e.g. private use, scientific research, education, public security, government purposes)? Are there any compulsory licensing provisions under your country’s sui generis protection regime?

The sui generis right is not absolute but is instead a special attribute and hence, in accordance with Article 33 of the Spanish Constitution, is subject to “limitations” or “exceptions”.

In point of fact, the limitations or exceptions are not actually exceptions to the right but rather cases in which, even though the right exists, a lawful user - but only a lawful user - of a database is exempted from having to request authorization from the right holder. Therefore, the first requirement for an exception is that it is a lawful user who is performing one of the operations expressly stipulated as an exception. Other types of users (users of pirated copies, etc.) are not entitled to the exceptions stipulated by law.

The cases provided for are:

a) extractions of the content of a non-electronic database for private purposes;

b) extractions for purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

c) extractions or re-utilization for purposes of public security or an administrative or judicial procedure.

However, there is a limitation on the aforesaid exceptions, in that they may not unreasonably prejudice the legitimate interests of the right holder or that the use may not conflict with normal exploitation of the database.

a) Extractions of the content of a non-electronic database for private purposes.

Private copies have traditionally been exempted from copyright protection. This is not the only instance in which private use for non-commercial purposes has been exempted from having to request the right holder’s authorization. By way of example, reference can be made to Article 52.a) of the Patent Act, Law No. 11/86. It seems reasonable to think that private copies are unlikely to damage the author’s interests.

Lawmakers have seen fit to limit this type of database use to NON-electronic databases, hence electronic databases would appear to have been excluded from the exception contemplated in Article 135.a) precisely because of the ease of reproduction and extraction they allow.

b) Extractions for purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.

It should be borne in mind that Article 27 of the Spanish Constitution elevates education to the category of a fundamental right, hence the limitation provided for by the law in this respect seems both reasonable and sound.

The law stipulates a series of requirements:

1) Extraction for purposes of illustration for teaching: purposes of illustration for teaching are those which, in the field of teaching, are intended to clarify or explain a point, demonstrate solutions to a given problem, or exhibit in different ways various interrelated elements.

2) Extraction for purposes of illustration for scientific research: this exception encompasses cases that show the results of research performed separately from the natural technical or social context.
3) To the extent justified by the non-commercial purpose: the law does not specify that lawful extractions are to be carried out by a public administration or institution, hence it has to be understood that this exception applies equally to private entities, but in this case the extraction must be justified by the non-commercial purpose to be achieved.

4) Indication of the source: this is to be understood as the obligation to identify the right holder, such that sufficient details as to whom to approach to request authorization will be available to anyone wanting to use the extracted database.

c) Extractions or re-utilization for purposes of public security or an administrative or judicial procedure.

Each of these three types of limitation merits a separate discussion, besides which here, unlike the previous exceptions, re-utilization is allowed in addition to extraction.

1) For purposes of public security: since what is being protected is the normal development of activities in society, the exception appears reasonable and furthermore is not subject to use being made by a public or a private entity as long as it complies with the stated purpose.

2) For purposes of an administrative or judicial procedure: this exception needs to be understood, on the one hand, as not encompassing all administrative activity but only those cases in which there is a proceedings or conflict; and on the other hand, since citizens - i.e., private individuals or entities - are usually parties to administrative proceedings, it seems reasonable to consider this exception as also extending to the private individual or entity that is a party to a proceedings.

3) For purposes of a judicial procedure: the same comment as for administrative procedures applies.

The law makes no mention of arbitration or canon law proceedings, but looking at this exception in light of its underlying purpose, namely, to aid in dispute resolution, it seems reasonable to hold them to be included.

At the present time Spanish legislation makes no provision for compulsory licensing under the system of sui generis protection.

1.4.5 Duration of Protection

How long is the duration of the sui generis protection?

The duration is 15 years, counting from 1 January of the year following either the date on which the database is completed or, in those cases in which can be accessed by the public before completion, the date on which it is first made publicly available.

There are, thus, two terms of protection, one from the date of completion or initial public availability to the last day of that same year, and then another 15 years from 1 January of the following year.

The law also provides for the possibility of extending the term of protection of the sui generis right or of creating a new right. In this respect the law holds that any substantial change, evaluated qualitatively or quantitatively, to the content of a database, in particular any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

This means that to be entitled to a new right of protection there must be:

1) A qualitatively or quantitatively substantial change.

2) A change to the content.
The article in question prescribes that such changes qualify for a new term of protection, and hence the letter of the law indicates that it is not an extension to the previous right but that there is a new duration on a new basis, separate from the right enjoyed by the original database.

The law specifies no limitation as to who may make the changes, though it seems reasonable to expect it to be only the lawful owner or an authorized person, except in cases where the term of protection of the original database has expired.

Attention needs to be drawn specifically to Transitional Provisions Sixteen and Eighteen, which expressly stipulate the terms of protection for databases made before 1 January 1998 and between that date and 1 April 1998, respectively.

Transitional Provision Sixteen provides for a term of protection for databases produced before 1 January 1998 lasting 15 years from that date, provided that on that date they satisfy the requirements for eligibility for the right laid down in Article 133 of the law.

Transitional Provision Eighteen stipulates that databases completed between 1 January 1998 and 1 April 1998 shall also be entitled to copyright and sui generis protection.

1.5 Possible Alternatives for a sui generis System

1.5.1 Unfair Competition Law

Does your country have a law of unfair competition? If so, does it have a role in the protection of databases? If so, to what extent?

Unfair competition in Spain is regulated under the Unfair Competition Act, Law No. 3/91 of 10 January 1991. The general provision set out in Article 5 holds as unfair any conduct which is objectively contrary to the dictates of good faith.

The Act also stipulates that imitation of third parties’ renderings shall be free, unless they are protected by an exclusive right recognized by law. A sensu contrario, upon conclusion of the exclusive term established in the law, imitation of the rendering of a database maker will be free, in that there is no longer any restriction on use. This general principle might suggest that the Unfair Competition Act has nothing to add in the case of the sui generis right, which is a right expressly recognized by law.

However, the Unfair Competition Act states that imitation of third parties’ renderings shall be deemed unfair when it entails misappropriation of another party’s reputation or efforts. Considering the object of sui generis protection as stated in the Copyright Act, what is protected will in fact be seen to be substantial investment - evaluated qualitatively or quantitatively - made by the database maker, be it in terms of financial resources or the time, effort, energy, or the like. In other words, what is protected is precisely the effort made by the database maker.

It therefore seems clear that the database protection contemplated here could come within the scope of the types of remedies afforded by the Unfair Competition Act both when brought together with those available under the Copyright Act itself during the term of exclusive protection and when brought separately after the said term has expired, provided that misappropriation of another party’s reputation or efforts can be said to exist and always, of course, provided that a competitive relationship also exists. This route could be used to halt acts by a competitor aimed at benefiting from a database that has already been made which might otherwise sometimes fit at best only awkwardly under the protection provided by either copyright or sui generis protection.

1.5.2 Other Means of Protection

Does your country provide for any other means of protecting databases? If so, in which legal areas and by which mechanisms (e.g. contract law)?
Civil actions:

The Copyright Act prescribes the civil actions available to parties whose copyright or sui generis right has been infringed. Along these same lines, as just explained above, the actions expressly provided for in the Unfair Competition Act would also be available where unfair competition can be claimed.

Criminal actions:

The law has made it a criminal offence to “reproduce, plagiarize, distribute, or publicly disclose, in whole or in part, a literary, artistic, or scientific work, or an alteration, interpretation, or artistic rendering thereof on any medium or released by any means, for profit and to the detriment of a third party” without the consent of the owners or their assigns.

For a work to be acknowledged as such it must satisfy the originality requirement, hence it seems clear that those databases that cannot fulfil this requirement will not be entitled to the same protection under criminal law as that enjoyed by other types of work considered in the Copyright Act, even where they represent an effort or investment on the part of the maker.

Since under criminal law there can be no penalty without law (nulla poena sine lege), there would appear to be no scope for bringing any category of offence to bear here until such time as express provision is made.

Contract law:

A priori Spain’s Civil Code lays down (in Article 1255) the principle of contract freedom, provided the contracts do not infringe the law, accepted moral standards, or public policy. However, contracts exert their effects only between the parties or, where appropriate, their successors (Article 1257), hence the erga omnes force that underlies all exclusive contractual rights will not be available without recourse to adhesion contracts.

Any attempt to extend the exclusive rights beyond what is allowed by law would injure one of the contracting parties, i.e., the user, and hence a contract containing such stipulations would be null and void in whole or in part pursuant to the General Contracting Terms Act, Law No. 7/1998 of 13 April 1998.

It is therefore our view that exclusive rights of the kind that concern us here that go beyond the scope provided for by law are quite unlikely to be obtainable by contract, apart from business exclusives that might be agreed for certain specific objectives or distribution purposes.

Therefore, although generally speaking the Spanish government has not made specific provision for other means of protecting databases, applicable law holds that the database protection stipulated in the law is to be construed without prejudice to any other provisions of the law bearing on the structure or content of databases and to be supplementary to the provisions of legislation regulating copyright or other intellectual property rights, industrial property rights, competition, contract law, trade secrets, protection of personal data, protection of national treasures, and access to public documents, thereby suggesting that legislation in all these different areas may play a role in protecting the rights of a database maker.

2. Proposals for Adoption of Uniform Rules

2.1 Legislation

Should legislation be enacted to deal specifically with databases? If so, should national legislation be enacted or is there a need for an international treaty on the protection of databases?

Databases are a valuable economic asset to all companies, and for that reason it was decided to accord them the protection afforded under copyright and sui generis rights as a means of regulating them under Spanish law. In view of the difficulties surrounding the pro-
tection of databases posed under copyright and sui generis rights, legislation dealing specifically with databases would appear to be advisable.

Protection by means of sui generis rights is quite foreign to copyright, the sole purpose being to protect an investment right, something quite far removed from the object of protection under the consolidated version of the Copyright Act. Thus, copyright can be said to be a right of real discretionary powers for the purpose of protecting rights in the act of creation, without prejudice to its bearing on investment, provided that it ensues from a creative act having creative force. This is not the case for sui generis rights, according to which protection is based solely on the investment carried out. We therefore think the best thing would be to establish an international treaty on this subject.

The European Union’s efforts have taken this very tack, which is the underlying reason for the need for harmonization and the rationale for EC Directive No. 96/9, which states, in the preamble, that differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and that there is a need for harmonization because these differences could intensify and have the effect of preventing the free movement of goods or services within the Community.

2.2 Definition of Database
If you think that legislation should be enacted to deal specifically with databases what should the definition of “database” be? Should it extend to both electronic and non-electronic databases?

The following definition of a database could be in conformity with EC Directive No. 96/9: “a collection of independent works, data, or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”. Under this definition both electronic databases and other forms of database would all be entitled to protection.

2.3 Copyright Protection of Databases
Do you think that copyright protection should be granted to databases? If so, what should the criteria of protection be? Do you think that the level of originality required for a database to be copyrightable should be low, so that “sweat of the brow” databases qualify as copyrightable? What should the scope of copyright protection be?

According to the Copyright Act, the subject matter of intellectual property is all original literary, artistic or scientific creations expressed in any manner or medium, whether tangible or intangible, presently known or which may be invented in the future. Originality of the database is an express requirement for copyright protection. Thus, protection is afforded to the structure, data arrangement, and data selection, not to the database content.

The criteria employed in making a database and subsequently using it arise from the nature of the data to be classified and include alphabetical order, quantity, number, distance, measurements, weight, colour, and so on. Databases are well known to seek effectiveness and inclusiveness as opposed to originality of selection. It also needs to be borne in mind that a highly original database that fails to fulfil the requirements for effectiveness and inclusiveness will have no reason for being.

Accordingly, copyright protection of databases is intended to prevent some parties from taking advantage of other parties’ work. For this reason database protection via copyright might not be the best solution, in that a database is a company asset which by its very nature is unsuited to copyright. In any event, the basis for copyright protection should be originality of the structure of data presentation, with a low threshold of required originality. Still, protection should only cover the original structure itself.
2.4  Sui generis Protection of Databases

2.4.1 System of Protection and Subject Matter
Do you think that sui generis legislation should be enacted to protect databases? If so, should there be a registration system to secure sui generis protection? Should the sui generis system only cover un-original databases or should there be the possibility to obtain cumulative sui generis protection also for original databases protected by copyright?

Legislation of this kind is needed because in most cases databases will not qualify as intellectual creations based on the selection or arrangement of their content and hence will not be eligible for protection by copyright. This will make sui generis protection the only form of protection available for an object that merits protection by reason of the effort, costs, etc. expended by the maker. Otherwise, not only would the maker’s investment not be protected, there would be no incentive to produce databases.

Where databases protected by a sui generis right are unable to gain access to the Copyright Register on the same terms as creations protected by copyright, including databases that might be eligible for copyright protection, sui generis protection would not be effective. For that reason, we would consider it appropriate for the Regulation governing the Copyright Office to include databases among the types of rights eligible for entry on the Register, without making any distinction between those that may be deemed to be intellectual creations and those that are not. In any case, all that should be required is disclosure following creation or production, not registration.

With regard to cumulative protection, the Preamble to the Community Directive states that in addition to protecting the copyright in the original selection or arrangement of the content of a database, the Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collecting the content by protecting the whole or substantial parts of a database against certain acts by a user or competitor and thus comes out in favour of cumulative protection. This has been taken up in the Spanish legislation regulating this subject matter.

2.4.2 Criteria of Protection
If you think that sui generis legislation should be enacted to protect databases, what should be the criteria of protection? If you think “substantial investment” should be one of the criteria of protection what should be the level of investment required for an investment to be considered substantial?

The basic criterion should be the investment, evaluated qualitatively or quantitatively, made by the database maker, be it in terms of financial resources or of the time, effort, energy, or the like employed in obtaining, verifying, and presenting the content of the database, as this will determine whether or not the maker’s rights in the database are deserving of protection under the law where the database lacks originality and does not meet other standards for being deemed an intellectual creation.

The distinction between a “substantial” investment and one that is not “substantial” is quite complicated, because investment refers not only to financial aspects but also to the time, effort, energy, or the like expended by the database maker, evaluated qualitatively or quantitatively. This makes it extremely difficult to come up with generally applicable objective criteria. Setting an amount of money, a number of hours worked, or measures for effort expended or energy consumed would in all cases be arbitrary, even if everything were reduced to monetary terms (i.e., placing a monetary value on each hour of work, the number of persons who have worked on the project, etc.). Therefore, parties applying for protection should have to submit evidence attesting to the amount of money, time, effort, etc. employed. Unless the investment made is clearly not particularly noteworthy in relation to the applicants’ circumstances, the criterion used should be discretionary in accordance with the
rules of reasoned judgement based on the overall financial and private conditions of the maker, but flexible. Investment should be presumed to be substantial unless not borne out by the evidence.

2.4.3 Rights granted and Scope of protection
What rights should be granted to the database maker? If you think that “extraction” and “re-utilisation” should be covered by the rights to be granted how should these notions be defined? If you think that “substantial part” should be relevant in determining the scope of protection, how should this concept be defined?

The database maker should be entitled to prohibit third parties from extracting and/or re-utilizing, without his consent, the whole or a substantial part of the database content evaluated qualitatively or quantitatively, provided that obtaining, verifying, and presenting the content of the database represents a substantial investment from a quantitative or qualitative standpoint. The database maker should also be entitled to transfer, assign, or license the database.

Extraction and re-utilization are defined in the Directive and have been transposed into Spanish law as discussed under question 1.4.3 above.

A substantial part may be defined as a set of elements in a database which, without making up the whole of the database, requires substantial investment to obtain, evaluated qualitatively or quantitatively, in terms of financial resources or of time, effort, or energy.

2.4.4 Limitations and Exceptions
Should limitations or exceptions be granted? If so, which ones (e.g. private use, scientific research, education, public security, government purposes)? Should there be any compulsory licensing provisions?

Yes, as for all other intellectual property rights, pursuant to the general principle holding all property rights, subordinate to the general welfare. The limitations and exceptions already extant in Spain as discussed under question 1.4.4. would appear to be reasonable.

Compulsory licenses are not a part of the copyright system and hence there should likewise be no provision for such licenses in relation to sui generis rights in databases. Furthermore, a compulsory licensing system would not appear to be useful, inasmuch as such systems have on the whole been unsuccessful for other industrial property rights.

2.4.5 Duration of Protection
How long should the sui generis protection be?

The duration should not be so long as to give rise to unwarranted monopolies on information or so short as to prevent recovery of the substantial investment required to produce the database.

A minimum of 10 years and a maximum of 15 years would appear reasonable.

2.4.6 Assessment of existing sui generis systems
If your country already provides for sui generis protection of databases, do you think the system should be revised? If so, why and in what ways?

Until such time as case law by the courts becomes available in Spain, setting down interpretations of this novel system transposing the Directive, it would seem reasonable to leave the system as it is for the time being, without prejudice to revision should amendment become necessary at some future time.

2.5 Possible Alternatives for a sui generis system
If your country does not have unfair competition rules or if your country’s unfair competition
law does not have a role in the protection of databases do you think your law should be changed, so as to provide database protection on the basis of unfair competition law? Should there be any other means of protecting databases which your country does not offer or not fully take into account? If so, which ones?

Please refer to question 1.5.1 concerning this point.

No additional measures are deemed necessary.

3. Miscellaneous

We would merely suggest considering an exception reversing the burden of proof in proceedings in which the database owner claims unauthorized extraction or re-utilization, providing that the party that must show how the data were obtained shall be the defendant accused of unlawful extraction or re-utilization.

Résumé


En Espagne, les bases de données sont protégées par le droit d’auteur lorsque le choix ou la disposition des contenus constitue une création intellectuelle et la protection vise la structure de la base de données quant à la forme d’expression du choix ou la disposition de son contenu.

Par le droit “sui generis” sur une base de données, on protège en Espagne l’investissement substantiel, évalué qualitativement ou quantitativement, que réalise le fabricant de la base de données, soit de moyens financiers, d’emploi du temps, d’efforts, d’énergie, soit encore d’autres moyens de nature similaire, pour l’obtention, la vérification ou la présentation du contenu de la base de données. En Espagne, il existe une protection accumulatrice “sui generis” au droit d’auteur sur une base de données.

Le droit “sui generis” accorde au titulaire la possibilité d’interdire l’extraction et la réutilisation de la totalité ou d’une partie substantielle du contenu de la base de données.

Le droit “sui generis” a une série de limitations ou d’exceptions telles que: a) les extractions à des fins privées d’une base de données non électronique, b) les extractions à des fins d’illustration de l’enseignement ou de recherche scientifique dans un but non-commercial et sous réserve d’indiquer la source, c) les extractions effectuées à des fins de sécurité publique ou aux fins d’une procédure administrative judiciaire.

La durée du droit “sui generis” est de 15 ans auxquels s’ajoute une autre période de protection, à savoir: celle comprise entre la date d’achèvement de la fabrication de la base de données ou sa première mise à disposition du public et le dernier jour de cette même année; puis quinze ans à partir du 1er janvier de l’année qui suit cette date de première mise à la disposition du public. Lorsqu’on pourra considérer toute modification comme un nouvel investissement substantiel évalué qualitativement et quantitativement, on pourra attribuer à la base de données qui en résultera une durée de protection propre. Indépendamment de la protection que la Loi accorde, le Groupe Espagnol juge adéquat d’accorder une durée de protection de 10 à 15 ans pour le droit “sui generis”.

Les actions que prévoit la Loi de Concurrence Déloyale en Espagne pourraient être appliquées à la protection de la base de données à condition que l’on puisse interpréter qu’il existe un profit indu de l’effort ou de la réputation d’autrui et qu’il existe un rapport de concurrence. Des actions civiles prévues par la Loi de Propriété Intellectuelle seraient également applicables; quant aux actions pénales, les bases de données “sui generis” ne jouiront pas de protection pénale de par leur défaut d’originalité. Pour ce qui est du domaine contractuel, on pourra difficilement obtenir des
droits d’exclusivité "erga omnes" car les contrats produisent leur effet entre les parties, bien que la protection que prévoit la Loi pour une base de données doive s’entendre sans préjudice de toute autre disposition légale ainsi que compatible et susceptible d’accumulation avec celles pouvant se dériver d’autres droits tels que le droit contractuel.

Vu les problèmes de la protection des bases de données à travers le droit d’auteur et le droit "sui generis", nous estimons recommandable une Législation spécifique sur les bases de données, et il serait souhaitable de promulguer un Traité à niveau international en la matière.

Pour la protection effective des bases de données, la condition de l’enregistrement ne doit pas être nécessaire, mais par contre celle de la divulgation après la création.

Le créateur de la base de données doit avoir le droit d’interdire à tout tiers non autorisé l’extraction et/ou la réutilisation de la totalité ou d’une partie substantielle du contenu de celle-ci, évaluée qualitativement ou quantitativement, à condition que l’obtention, la vérification ou la présentation de ce contenu représentent un investissement substantiel au point de vue quantitatif ou qualitatif. Le créateur doit avoir la faculté de transférer, céder ou licencier le droit sur la base de données.

Le Groupe Espagnol suggère la possibilité d’établir une exception au principe de la preuve dans les procédures où le titulaire réclamerait contre l’extraction ou la réutilisation sans autorisation, afin que la partie demandée démontre la façon dont elle a obtenu les données qui font l’objet de l’extraction ou réutilisation illégitime dont on l’accuse.

Zusammenfassung


In Spanien sind Datenbanken durch die Bestimmungen des Urheberrechts geschützt, das in den Fällen zur Anwendung kommt, in denen die Auswahl oder Anordnung von Inhalten eine geistige Schöpfung darstellt, wobei der Schutz die Struktur der Datenbank als Ausdrucksform der Auswahl oder Anordnung der Inhalte umfasst.

Durch das Recht "sui generis" umfasst in Spanien der Schutz an einer Datenbank die durch den Hersteller einer Datenbank vorgenommene qualitativ und quantitativ bewertete substantielle Investition, sei es in Form von finanziellen Mitteln, Zeitaufwand, Anstrengung, Energie oder ähnliche Investitionen, die für die Beschaffung, Überprüfung oder Präsentation der Inhalte der Datenbank vorgenommen wurden. In Spanien gibt es bezüglich des Rechts des Verfassers an einer Datenbank den kumulativen Schutz "sui generis".

Das Recht “sui generis” verleiht dem Verfasser die Möglichkeit, die auszugsweise, teilweise oder vollständige Wiederverwendung des Inhalts einer Datenbank zu verbieten.

Das Recht “sui generis” weist eine Reihe von Beschränkungen oder Ausnahmen auf, wie zum Beispiel a) die auszugsweise Verwendung für private nicht elektronische Zwecke, b) die auszugsweise Verwendung zu Unterrichts- oder wissenschaftlichen Zwecken, sofern kein gewerbliches Ziel verfolgt und nur, sofern der Urheber genannt wird, c) die Verwendung im Interesse der öffentlichen Sicherheit oder im Rahmen eines Verwaltungsverfahrens.

Die Dauer des “sui generis” Schutzes beträgt 15 Jahre, wobei zwei verschiedene Schutzarten zusammen treffen: einerseits der Schutz ab der Fertigstellung oder ersten Verfügbarmachung bis zum letzten Tag desselben Jahres sowie andererseits fünfzehn Jahre ab dem 1. Januar des Folgejahres. Wenn davon ausgegangen werden kann, dass es sich bei einer beliebigen Änderung um eine unter qualitativen wie quantitativen Kriterien als substantiell einzuschätzende Investition handelt, ist es möglich, der daraus resultierenden Datenbank eine eigene Schutzfrist zuzusprechen. Unabhängig von dem Schutz, der einer Datenbank nach spanischem Recht zusteht,
hält die spanische Gruppe einen Schutzzeitraum von 10 bis 15 für das Recht “sui generis” für angemessen.


Unter Berücksichtigung der Problematik des Schutzes von Datenbanken durch das Urheberrecht und das Recht “sui generis”, glauben wir, dass eine spezifische Gesetzgebung für Datenbank empfehlenswert ist und in dieser Materie ein internationaler Vertrag verabschiedet werden sollte.

Für den effektiven Schutz von Datenbanken sollte es nicht erforderlich sein, dass diese eingetragen ist, sondern dass sie nach ihrer Schaffung verbreitet worden ist.

Der Urheber einer Datenbank muss das Recht haben, unbefugten Dritten die auszugsweise oder vollständige Wiederverwertung der qualitativ oder quantitativ bewerteten Inhalte der Datenbank zu verbieten, sofern die Beschaffung, Überprüfung oder Darstellung des besagten Inhalts eine unter qualitativen oder quantitativen Kriterien substantielle Investition darstellt. Der Urheber muss die Befugnis haben, das Recht an der Datenbank zu übertragen, abzutreten oder zu lizenzieren. Die spanische Gruppe schlägt vor, in denjenigen Verfahren, in denen der Inhaber gegen die nicht genehmigte auszugsweise oder vollständige Wiederverwertung der Datenbank klagt, bezüglich des Beweislastgrundsatzes die Möglichkeit einer Ausnahme zu schaffen, damit der Beklagte die Art und Weise darzulegen, in der er die Daten erlangt hat, dessen unerlaubter auszugsweiser oder vollständiger Wiederverwendung er beschuldigt wird.