

Submission to U.S. WIPO delegation concerning webcast rights

This paper calls for Congress to take up the question of broadcast ownership rights on the Internet, before they are proposed to the World Intellectual Property Organization by a United States delegation.

The proposed extension of broadcast ownership to the Internet represent a new feature in the dissemination of information, and a potentially disruptive change. Such a far-reaching grant of ownership should be subjected to particular scrutiny and diligently checked for ripple effects, because it consists of a *sui generis* right that can profoundly change the creation and distribution of content. Therefore, Congress should be the body in the U.S. to make the decision whether to request such an ownership change.

To show the value of legislative deliberation, this paper will examine the history of another recent, *sui generis* right: laws restricting collections of information, also known as database protection.

As with broadcasting and the Internet, laws restricting collections of information were proposed by large companies with a valuable resource (CD-ROMs and other data listings used in many research areas), and were accompanied by claims that the current legal framework would eliminate the incentive to produce more such databases.

The first victory for collections of information was in a directive discussed in the European Community in the early 1990s and formalized in a March 11, 1996 directive. It was subsequently made law in a dozen European countries.

The scope and power of collections-of-information restrictions grew as the directive went through EC deliberations. (Nowadays, because the public interest sector in Europe is more organized and can make itself heard better within the EU, this directive might not have passed at all.) The original proposal was not a *sui generis* right, but a modest reinterpretation of unfair competition to cover commercial reuse of collections of information.

But seeing an unobstructed road ahead of them, database manufacturers managed to extend the collections-of-information concept to the point where it gave them control over the reuse of facts in their databases, which no other law or treaty had done. The new right made it risky for users of databases to extract large amounts of information from a database, which frequently has to be done to generate statistics, check results reported in papers, and do other forms of research.

Database manufacturers simultaneously pressed for collections-of-information laws in the United States. During the 1990s and early 2000s, laws regarding collections of information were introduced four or five times into Congress, and defeated every time. WIPO noted the loss of support for database protection and refused to take up the issue.

What happened to the momentum? Congress listened to both sides, and realized that every ownership right in information represents a trade-off. Restricting access and reuse of information must be considered in light of the potential brake it puts on the research required to produce the next information breakthrough.

This restriction could be justified only by evidence that there is widespread copying, and that it is inadequately prevented by other laws such as copyright and unfair competition. However, there is no evidence that such widespread copying has taken place.

As reported by James Boyle, the European Commission recently conducted a study and reported that the presence of collections-of-information laws had no measurable impact on the production of databases. So the economic argument for collections-of-information laws is weak. And this result is easily to explain, because the most obvious kinds of copying (burning a CD-ROM, for instance) are prohibited by copyright law.

Thus we can draw our first lesson from the collections-of-information history: when a new and far-reaching change concerning information rights is considered by a national legislative body, this puts the change through valuable scrutiny and allows, more than in non-elected international bodies, the true interests of both information producers and the general public to be heard. The national body provides more transparency in deliberations, more time and opportunity for key players such as non-governmental organizations and small, competitive producers to express their points of view, and more of a sense of responsibility toward constituents.

Another valuable lesson can be gleaned from the history of collections-of-information laws: the danger of basing a legal framework on the exigencies of a particular industry at a particular time, especially in a fast-changing technological environment.

Essentially, collections-of-information laws were conceived at a time when most databases were distributed by CD-ROM. A few services such as Lexis were online, but they had very restricted audiences. The model for a collection of information was a fixed set of data, sold as a tangible item.

By the time the first European countries passed their collections-of-information laws, it was becoming apparent that this model was obsolete. Very few people get information nowadays by popping a CD-ROM into a computer; instead they visit a Web site and enter a search term.

There are several important impacts of this change on collections-of-information laws:

- Copying becomes more difficult (rendering the laws even less relevant).
- In regard to determining how much copying is too much, the new structure of information makes it hard to determine how much of the total collection was copied.
- The frequent updating of information renders copies less valuable, reducing the incentive for someone to profit by making extensive copies.
- Expiration times, which were designed to protect the public by placing deadlines on the restrictions imposed by database manufacturers, become moot because the manufacturers keep updating the data.

Thus, technological and social change calls into question the value and relevance of collections-of-information laws.

We can apply the same criteria to broadcasting laws on the Internet. These are narrowly tailored to particular uses of information made by large news and portal Web sites, just as the collections-of-information laws were tailored to the distribution of data on CD-ROM.

But what new technologies will come along after the Web? Could broadcast laws hamper their development and adoption? Who will be the information providers and distributors in the next generation of new media, and will they need or benefit from broadcast protection? How will the locking up of content in a broadcast treaty affect the dynamic and free-flowing innovation currently represented by weblogs, wikis, podcasts, and other media yet to be invented?

And what about the assumptions behind the broadcast treaty? Is putting up a web page comparable to broadcasting a program over television or satellite? Few people redistribute Web content; instead, they make a link to it.

However, useful applications exist for reducing the strains on servers by sending data hop by hop between user systems, piggy-backing on intermediate nodes to distribute streams and large data transfers. This is just one example of potential innovations that might be squelched by over-reaching laws on webcasting.

This issue calls for careful consideration and views from all sides. Congress is the body most suited to undertake this examination in the U.S.

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