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Legally Speaking-Hands Across the Water

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The flow of intellectual property and the laws protecting that property are becoming undeniably more international. Not only must we be aware on international agreements concerning intellectual property, such as GATT/TRIPS, but we need to pay attention to what is happening legislatively and judicially in other countries and regions. This year, two major developments in the European Union, one a judicial decision and the other a legislative initiative, are worth noting. Each could ultimately impact U.S. publishers and users of information.

**MAGILL**

In **RTE and ITP v. Commission** (better known as the **Magill** case), decided by the European Court of Justice on 6 April 1995, competition (antitrust) law and copyright law met head on, with competition law winning out in the eyes of some. The case arose when three broadcasting companies, two in the U.K. and one in Ireland, refused to license their programming information to **Magill TV Guide** for inclusion in a comprehensive weekly television guide. The broadcasters were the only source for this information and each held legitimate copyright in the information under the “sweat of the brow” doctrine, which is still followed in the U.K. and Ireland. The broadcasters, Independent Television Programs, Ltd. (“ITP”), the BBC, and Raidion Telefis Eireann (“RTE”), published their own weekly program listings and allowed newspapers to publish their program information on a daily basis. A comprehensive weekly guide, though, including all available programs, was not available in the U.K. and Ireland.

The publisher brought action under Article 86 of the Treaty of Rome, alleging that the broadcasters’ refusal to license the information constituted the abuse of a dominant position and thus violated EU competition law. The European Commission in 1989 found that the refusal of the broadcasters to license their program information did violate Article 86 and ordered the broadcasters to license the information to third parties for reasonable royalties. The European Court of First Instance in 1991 and the European Court of Justice in 1995 upheld this ruling.

This was not a copyright decision, which is in part what makes the case so interesting and so potentially important for intellectual property owners. The EU courts imposed a compulsory license on the broadcasters, essentially finding that the anti-competitive nature of the broadcasters’ actions overrode their intellectual property rights. The courts, not surprisingly, did not set forth bright line rules of when Article 86 will supersede legitimate intellectual property rights. Copyrights are monopolistic by nature, so the potential for friction between copyright and competition law is huge. It remains to be seen how future “refusal to license” cases will be decided, but most commentators seem to think that the **Magill** decision will be construed narrowly. The circumstances in **Magill** were that the defendant broadcasters were the only source for the information and no competing information or product could be independently developed. Further, there seemed to be some recognition that a comprehensive weekly television guide would be beneficial to consumers.

But **Magill** does open the door to the application of Article 86 and the granting of compulsory licenses in future cases. Copyright holders will have to consider their market positions as they make decisions to license or refuse to license their properties in the EU.

**THE EU DATABASE DIRECTIVE**

The European Commission has put forth a controversial directive for the legal protection of databases. The final proposal, which needs only the approval of the European Parliament to become law, includes the following major provisions:

1. harmonization among EU members of copyright protection for databases and
2. a new right, giving 15-year protection, for those aspects of databases which cannot be copyrighted.

On the harmonization front, the Directive would do away with the “sweat of the brow” doctrine, which, as noted above, is still followed in the U.K. and Ireland. Copyright protection would require a level of originality in selection or arrangement, similar to U.S. law post **Feist** and to the database provisions of the GATT/TRIPS agreement.

For those databases or elements of databases not eligible for copyright protection, the Directive would establish a new sui generis extraction and re-utilization right. This means, for instance, that the factual components of databases, which are not copyrightable, would be protected from unauthorized extraction and reuse. The right would last for 15 years, but the 15-year term would be automatically renewed every time the database is substantially changed or updated. Databases which are substantially updated on a constant or periodic basis, with allowance for insubstantial updates to accumulate and constitute a substantial update, could thus be protected in perpetuity under this new right.

The law would allow extraction and re-utilization which is either insubstantial (relative to the whole of the database) or non-commercial. Compulsory licensing provisions, which had been included in previous drafts of the Directive, were dropped in the final proposal. It is expected that Article 86, as interpreted in **Magill**, will be used to curb any monopolistic abuses.

Perhaps the most controversial aspect of the Directive is that the sui generis right will be available to foreign database owners only if the owners’ home country provides a similar right. Since the U.S., for example, provides no similar right for non-copyrightable databases, databases owned by U.S. nationals would not be eligible for protection under the new right. This requirement of reciprocity runs contrary to the standard of “national treatment” which is at the heart of the Berne Convention and GATT/TRIPS. National treatment requires that a foreigner be given the same rights as domestic nationals, so long as the foreigner’s home country is a signatory to the treaty. National treatment does not require, for example, that the U.S. law contain the same protections as German law in order for U.S. nationals to enjoy the protection of German law in Germany. Where the 15-year sui generis protection is not among the intellectual property rights enumerated by GATT/TRIPS, the EU is free to discriminate with this right.

This discrimination could have potentially serious implications for U.S. database owners. U.S. officials have already indicated that the U.S. may add a similar right before the EU Database Directive becomes effective in 1998, proving once again the international nature of intellectual property laws.