Module 7: Sui generis regimes of protection, sui generis rights and unfair competition

Objectives

When you complete this module, you should be able to:

- explain the meaning of the definition of database in the European Union Directive on the legal protection of databases (Database Directive);
- describe, in about 100 words, the purpose of the sui generis rights in relation to a system of copyright and related rights;
- describe, in around 100 words, the protection offered by the European Union Database Directive and state its duration;
- give an example of a typical infringement of the European Union Database Directive and explain how the various concepts of the Directive have been interpreted to determine what exactly amounts to an infringement;
- describe, in about 100 words, the potential influence of unfair competition law on copyright and related rights; and
- describe, in 50 words, the relationship of the WIPO Development Agenda with sui generis regimes of protection.

Study note

This module should take you about eight hours to complete.

1.0 Introduction to sui generis regimes of protection and sui generis rights

Up to this point, this course has dealt with copyright and related rights. Original literary and artistic works are protected by copyright, and related rights are, as the term indicates, in some respects similar to copyright, but different in other aspects. It is important to note that related rights deal with something that is one step away from the creation of an original copyright work. They deal with the performance, the bringing to life of such works, with their recordings and broadcasts. While broadcasting and recording technology already represent an important departure from the state of the technology as it stood when copyright proper was designed, recent technological developments have confronted copyright with the challenge of offering protection for works of a very different nature from those originally envisaged by the term literary and artistic works. Some aspects of these works cannot be protected adequately by copyright proper and a special sui generis regime for protection has been designed for them. Protection for non-original databases introduced in the European Union is one good example. However, it is fair to say at the outset that the sui generis approach to databases has not yet led to a globally accepted model and that a large number of states do not operate such a sui generis approach. It is nevertheless interesting to look at such an approach as it shows the limitations of copyright. It is then up to each state to decide whether there is a policy need to go beyond these limitations by putting in place a sui generis system of protection for databases.

Unfair competition law may be helpful in a copyright related context. Some materials may fall outside the scope of the works that are protected by copyright law, for example because they lack originality. The slavish copying of such materials for commercial purposes may therefore not be an infringement under copyright law, but it may amount to an act of unfair competition under certain domestic laws.

1.1 Non-original databases

The most valuable element in a database is often the collection of data. However, most of these, such as lists of names and addresses or any kind of facts and data, may arguably not meet the originality standard of copyright, and often the maker of the database will also not be the owner of any right that may exist in the separate data. For example, the maker of a database containing a selection of twentieth century poetry will hardly ever own the copyright for the poems contained in the database. This makes it very difficult for copyright to offer protection to the maker of the database for the content of the database. All that can be envisaged in terms of copyright protection is protection for the selection and/or arrangement of the database. Such a database structure will, in some cases, meet the originality requirement for copyright, but even the most useful and comprehensive databases will often have a commonplace non-original structure. To continue our earlier example, they may, for example, be structured alphabetically by surname and contain all of the surnames of published twentieth century poets from a given country. This structure can hardly be called original.

In other words, there may be a case for an entirely separate regime of protection for the content of databases if they are to be protected effectively. From a policy point of view, one could, in the absence of copyright protection, fear that companies will not invest in the creation of databases and, if the creation of such databases is considered economically valuable, one could create a sui generis regime of protection to overcome this perceived market failure. Alternatively, one can make the policy decision not to intervene in the market and to rely on

existing tools, such as contract and unfair competition principles, to regulate the market for databases.

If there is to be one, this kind of sui generis regime can coexist with any copyright that may exist in the structure of the database. As this is the approach that has been taken by the European Union, let us use the European Union Database Directive as an example in the next section.

1.2 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases ([1996] OJ L 77/20)

1.2.1 Introduction: what is a database?

It is, first of all, important to define the concept of a database that is used by Directive 96/9/EC (commonly referred to as the 'Database Directive') if we are to understand what exactly the sui generis right will protect.

The term 'database' has been defined by the Directive as a collection of independent works, data or other materials, which are arranged in a systematic or methodical way, and are individually accessible by electronic or other means.

Audio 1 ***What does this definition mean?***

First of all, a database has to be a collection of independent material. In practice, this means that separate items that do not interact with each other are stored in a database. The non-interaction rule excludes items such as films in which the script, music and other elements interact to form the final work.

Secondly, the works in a database can be works that are protected by copyright, as well as non-copyrightable data or any other materials. Copyright protection for these items as such is not required, and a database can contain a mixture of different items, e.g. a combination of copyright works and other data.

Thirdly, the items in a database must be accessible on an individual basis. One must be able to retrieve them individually. This excludes numerous multimedia works in which the user necessarily gets access to a combination of works in different media at any one time during the use of the work.

Fourthly, both electronic and non-electronic collections and databases are included in the scope of the definition.

Lastly, the independent works must be arranged in a systematic or methodical way. Putting random information and items in a box will therefore not create a database. However, it can be argued that a newspaper is a database because the articles in it (independent and individually accessible works) are arranged in a systematic way (home news pages, overseas news pages, sports pages, etc.). This final requirement creates specific problems in relation to electronic databases. In their case, information is often fed into the system in a random way, while the software of the database organizes the information afterwards. The physical storage of the information in the memory of the computer (or on a USB stick or in the Cloud) is not even necessarily in the same or another systematic way. It is submitted that these collections meet the arrangement criterion nevertheless. A systematic or methodical arrangement exists and is provided by an element of the database itself. The technical way in which this is achieved is irrelevant in this context. The conclusion must be different when the arrangement is provided by an element outside the database itself. A clear example is the

Internet, which forms a collection of independent and individually accessible materials. A systematic arrangement is missing, however, and the presence of search engines cannot change that. These search engines are external to the collection of materials and so is the arrangement of the materials that they provide. A collection such as the Internet is therefore not a database even though particular web pages may qualify as databases.

SAQ 1

How does one define a database and what are its characteristics?

Type your answer here

SAQ 2

Using the definition of a database given in the European Union Directive, indicate which of the following are true statements:

1. A paper-based filing system cannot be considered a database.
2. A film can be considered a database as it is a collection of images and sounds joined together.
3. The works in a database can be works that are protected by copyright, as well as non-copyrightable data or any other materials. Copyright protection for these items as such is not required, and a database can contain a mixture of different items, e.g. a combination of copyright works and other data.
4. The independent works, etc., must be arranged in a systematic or methodical way.

Type your answer here

1.2.2 The sui generis database right

The new sui generis right has been created to protect databases and operates irrespective of whether the database, or any of its contents, attracts copyright protection. The creation of this right was perceived to be necessary in the European Union because copyright was not the appropriate instrument to protect non-original databases, which are nevertheless valuable and have required a substantial investment. Electronic databases, in particular, are extremely vulnerable in such a situation and it was felt that some form of protection was needed to protect the valuable investment in these databases.

The new database right has been defined as a property right and it is granted if there has been a substantial investment in obtaining, verifying or presenting the contents of the database. Once again, this right does not interfere with any of the existing materials and the rights in them and neither does it cover the creation of data for the purposes of a database. This is an important point. We are concerned with the selection and organization of existing material, rather than with the creation of new material or content. As a right in the database, it comes on top of any existing rights and its existence rewards, and is conditional on, a substantial or sizeable investment in collecting, verifying or presenting the contents of the database. For example, the substantial investment requirement will not be met by simply putting different works together on a single medium, such as musical works on a USB stick. The database right will not protect such a collection.

The Court of Justice of the European Union in *British Horseracing Board Ltd and Others v. William Hill Organization Ltd.* [case C-203/02, (2004)] examined the requirement of substantial investment. In this case, the British Horseracing Board collected and combined relevant information regarding horseracing in their databases and made it available to users on license. William Hill, which subscribed to the databases, extracted information and made it available on their internet platform, facilitating betting from the users. In an infringement suit for violation of sui generis rights, one of the arguments was that the requirement of the substantial investment under Article 7 of the Database Directive must be interpreted to include the investment in the collection of the material as well. After examining the requirements of the provision, the Court concluded thus:

> "The expression 'investment in … the obtaining … of the contents' of a database in Article 7(1) of Directive 96/9 on the legal protection of databases must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.
>
> The expression 'investment in … the … verification … of the contents' of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition."

The right provided under the sui generis system is to prevent the unauthorized extraction and reutilization of the all or a substantial part of the content of the database.

The first owner of the database right has been identified as the maker of the database. The maker of the database is, in turn, the person who takes the initiative in obtaining, verifying or presenting the contents of the database and assumes the risk of investing in that obtaining, verification or presentation. Making a database may involve more than one person. If several people act together in relation to the activities that have to be undertaken by the maker, they will be the joint makers of the database and the joint first owners of the right. A database made

by an employee in the course of their employment will be considered to have been made by the employer of the employee, subject to any agreement to the contrary.

Audio 2 ***How is the sui generis right different from copyright in a database?***

In practice, the sui generis right protects the content of the database. It is concerned with the data that go into the database. These data are often not original in the copyright sense. Copyright could therefore not be used in a reliable way to protect the content of the database. On the other hand, copyright can be used to protect the structure of the database. If the selection and/or the arrangement of the database are original, copyright protection will be available for that aspect of the database. Even then, this will apply only to a limited number of databases and it will still leave the content of the database unprotected against acts of extraction and reutilization that do not interfere with the structure of the database.

The database right exists for a 15-year term. That term starts from the end of the calendar year in which the database was completed, but that rule is displaced if the database is made available to the public before the end of that period. In that case, the right expires 15 years from the end of the calendar year in which the database was first made available to the public. A substantial change to the contents of the database that can be considered to be a substantial new investment will lead to the grant of a new 15-year term of protection. Such a change may be the result of the accumulation of successive additions, deletions or alterations to the database. Any sustained effort and investment to keep the database up to date will therefore automatically lead to permanent protection through the continually renewed database right in the latest version of the database.

Audio 3 ***Can you give an example of a typical infringement of this right***

The owner of the database right is granted the right to object to the extraction or reutilization of all or a substantial part of the contents of the database. The right in the investment clearly covers the use of the contents of the database. The right will be infringed by the unauthorized extraction or reutilization of all or a substantial part of the contents of the database. The threshold of a substantial part of the contents of the database can be passed through the repeated and systematic extraction or reutilization of insubstantial parts of these contents. A typical example of an infringement would consist of taking out a substantial part of the contents of the database and rearranging them using a computer into a different organization and a prima facie different database.

This concept of infringement by means of extraction and reutilization is a key concept of this sui generis approach. The Database Directive defines it as follows:

> Article 7
>
> Object of protection
>
> 1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.
>
> 2. For the purposes of this Chapter:
>
> (a) 'extraction` shall mean 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;
>
> (b) 're-utilization` shall mean 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. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

Despite these clarifications, the concept gave rise to many questions and it remains a difficult one. The Court of Justice of the European Union in the *British Horseracing Board* case examined whether the rights of "extraction and re-utilization" are infringed if an insubstantial part of the content of the database is made available to the public after making rearrangements. The defendant in this case collected the content from the British Horseracing Board database, which was made available to the public through newspapers and subscription. It was argued that if the extraction is from the databases made available to the public, then there is no violation of rights. The Court clarified thus:

> "It follows from the foregoing that acts of extraction, in other words, the transfer of the contents of the database to another medium, and acts of re-utilisation, in other words, the making available to the public of the contents of a database, which affect the whole or a substantial part of the contents of a database require the authorisation of the maker of the database, even where he has made his database, as a whole or in part, accessible to the public or authorised a specific third party or specific third parties to distribute it to the public."

Article 8 of the Directive then sets out how the normal use of a database is supposed to take place and refers to the rights and obligations of lawful users. There is a sense here of exceptions and limitations to the sui generis right, but we are not quite there yet:

Article 8

Rights and obligations of lawful users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.

Article 9, on the other hand, deals with exceptions and limitations, but the list is rather shorter than one could have expected coming from a copyright background. The exceptions to the database right are not numerous and are also narrower in scope than their copyright counterparts. Some form of fair dealing exception exists, but not for the purpose of criticism, review or news reporting.

> Article 9
>
> Exceptions to the sui generis right
>
> Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:
>
> (a) in the case of extraction for private purposes of the contents of a non-electronic database;
>
> (b) in the case of extraction for the 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) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

The clear idea behind this is that normal exploitation will require users to take out a license (at least for electronic databases in the digital age) as otherwise the database may not be commercially viable. One could, of course, also argue that little damage is done to the user through the lack of broad exceptions and limitations, as the data themselves are not covered and are available from alternative sources. That is, however, less and less correct in a digital era, and increasingly effective access to the information and the data is only feasible through the portal of the database. Information is increasingly effectively locked away in databases. This has also a clear impact on development. Developing countries find it hard to have access to the (in theory not protected) information, as they cannot afford the database for its average citizens.

There is also a qualification requirement that has to be met before the database right can be granted. The main principle here is that an attempt has been made to require reciprocity in the sense that persons from outside the European Economic Area will only be granted the right if their country offers a similar level of protection to European makers of databases. Qualification is made dependent on the fact that, when the database was made, at least one of the makers of the database at the material time was

- an individual who was a national of a European Economic Area state or habitually resident within the European Economic Area,
- a body that was incorporated under the law of a European Economic Area state and that, at that time, satisfied one of the additional conditions, or
- a partnership or other unincorporated body, which was formed under the law of a European Economic Area state and which, at that time, satisfied the first additional condition.

These additional conditions are

- that the body has its central administration or principal place of business within the European Economic Area, or

- that the body has its registered office within the European Economic Area and the body's operations are linked on an ongoing basis with the economy of a European Economic Area state.

This right to control extraction and/or re-utilization is a clear example of a sui generis right that operates in a copyright context to remedy some of the lacks or lacunas in the protection offered by copyright.

SAQ 3

Why was there a need for the European Union to create a sui generis database right? Which need does it meet and when does it apply?

Type your answer here

Certain experts will argue that the move towards more sui generis rights is inevitable as copyright is not able to adapt to all the specific aspects of new technology works. Others will argue against the creation of more sui generis rights. They argue that copyright is flexible enough to offer adequate protection to most types of works and that sui generis regimes lack the important asset of international coverage and applicability that copyright has. Whatever the outcome of this debate may be, it is important to avoid the risk of overprotection. Ever increasing protection can unduly restrict the freedom of the individual consumer to have access to data and information. Further cultural developments may be blocked. Industry may lobby for increasing protection, but this needs to be balanced with the interests of individual consumers and society in general. That balancing exercise is not an easy one, but it is one with which lawmakers in the copyright field have already long been familiar.

The different opinions in this respect are also reflected in the fact that only few countries outside Europe have adopted sui generis database protection, and many have expressed their doubt concerning its merits. A review of the right in Europe has even indicated that there are few, if any, real benefits from the right in its current form.

The United States of America has, for example, never adopted a sui generis regime for database protection. One could indeed limit protection to the copyright regime for 'original' databases and argue that those databases that do not meet the copyright standard are merely entitled to unfair competition protection. The (blatant) copying of any database will amount to an act of unfair competition in that logic. Aspects of this approach were also found in a United States legislative proposal that would have prohibited the unauthorized 'making available of substantial portions' of the database where such uses "cause material harm to the primary market or a related market" for the original database. That roughly covers reutilization, but

mere extraction by users cannot be covered by principles of unfair competition. This is where the balancing exercise and policy considerations come in.

Under the section on further reading, you will find additional detail on how the Court of Justice of the European Union and national courts have implemented the Database Directive. It is again of particular interest to see how some of the new concepts in the Directive have been defined.

SAQ 4

What is the protection given to the maker of a database by the European Union Database Directive and how long does it last?

Type your answer here

2.0 Unfair competition

Most domestic laws also have provisions that prohibit various forms of unfair competition. These are generally competition law related provisions that are not specifically oriented towards copyright or related rights. Many are inspired by the general principle that competitors should not be 'parasites' that try to compete on the back of each other's efforts. They should add, at least, some investment in time, effort, money or creativity. In other words, the very concept of unfair competition is concerned with fair play in commerce and honest commercial practices.

At the Brussels diplomatic conference for the revision of the Paris Convention for the Protection of Industrial Property in 1900, Article 10bis was added to the Convention to try to prevent unfair competition. This insertion also brought the law of unfair competition within the traditional ambit of intellectual property law. Let us look in a bit more detail at the international basis for the law of unfair competition.

Article 10bis reads as follows:

> "(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
>
> (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
>
> (3) The following in particular shall be prohibited:
>
> (1) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
>
> (2) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
>
> (3) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

The Paris Convention, with which all World Trade Organization member states are required to comply under Article 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), therefore imposes a general obligation to offer protection against unfair competition and it does so on the basis of the broad concept of honest practices in industrial or commercial matters. It does, however, offer a bit more detail and classifies three types of behavior as unfair competition.

The first type of behavior revolves around acts that cause confusion. An act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another's enterprise or its activities, in particular the products or services offered by such an enterprise, constitutes an act of unfair competition. The inclusion of the likelihood of confusion strengthens this provision enormously.

Acts damaging goodwill or reputation are a second type of act of unfair competition. By reducing the distinctive character, appearance, value or reputation attached to a product, one could damage another's goodwill or reputation. Other acts that could be classified as causing unfair competition include discrediting another's enterprise or its activities, industrial or commercial espionage, and acting unfairly with respect to confidential information, such as a breach of contract or breach of confidence.

Thirdly, there are misleading acts. These can create a false impression of a competitor's product or services leading to the consumer, acting on false information, suffering financial damage. Misleading acts can take the form of a statement giving incorrect indications or allegations about an enterprise or its products or services. For example, misleading statements concerning the manufacturing process of a product may relate to a product's safety and create a false impression.

Unfair competition law may be helpful in a copyright related context. Some materials may fall outside the scope of the works that are protected by copyright law, for example because they lack originality. The slavish copying of such materials for commercial purposes may therefore not be an infringement under copyright law, but it may amount to an act of unfair competition under certain domestic laws.

One of the most celebrated cases, though an old one, where protection was given to news which is not protected under copyright, is *International News Service v. Associated Press* [248 U.S. 215 (1918)]. In this case, the parties were competitors gathering and distributing news and its publication for profit in the United States of America. It was alleged that International News Service had used unfair means to collect the news gathered by Associated Press to distribute it to its customers and sought an injunction restraining them. One of the specific allegations was that International News Service had copied the news from the bulletin board and news published in the early editions of newspapers of the members of Associated Press to distribute the same to its members. It was argued that news is not protected under copyright law since it is *publici juris* and once it is published it becomes free for all to use, and thus is not entitled for any remedy under equity. The Supreme Court used the principles of unfair competition and gave judgment in favor of Associated Press and observed thus:

> "Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own".

The Court affirmed the decision of the Court of Appeal preventing the use of the news "until its commercial value as news to the complainant and all of its members has passed away."

It may be noted that the recent trend among courts shows more caution in order to ensure that what is not protected under copyright is not converted into property using remedies under common law and equity. For example, in *Akuate Internet Services Pvt. ... vs Star India Pvt. Ltd. & Anr.* [on August 30, 2013; see: https://indiankanoon.org/doc/66104323/], the Division Bench of the Delhi High Court (India) refused to apply the unfair competition principles to prevent the distribution of live test scores through an SMS service by the defendant under the "hot news" doctrine based on the *International News Service* case. The observation of the Court is quite pertinent:

> "Creating property (or quasi-property) rights in information - which is what the plaintiffs (Star and BCCI) request the Court to do in this case - stands to upset the statutory balance carefully created by the legislature through the Copyright Act. In a domain where Parliament has stepped into create a statutory regime, an exercise of creating "supplementary" rights in common law would well result in obstructing the legislative scheme, as would be the case here..... In fact, the recent trend internationally to accord protection to rights in information - in varying degrees - or to accept the doctrine of "unfair competition", especially in the European Union, is pursuant to legislative

action by the European Council, and not as a judicial extension. To the contrary, similar proposals for extending the scope of protection judicially was rejected in a line of cases, most notably, *Cadbury-Schweppes Pvt. Ltd. v. Pub Squash*, [1981] 1 WLR 193."

The European Union decided, in the end, not to base its database right on unfair competition law, but it is worth noting that the original draft referred to a prohibition of the unfair extraction and of the reutilization of data contained in a database. This would have amounted to an unfair competition protection for databases. In the end, this negative method of protection was replaced by a positive exclusive right to control, i.e. to authorize or to prohibit any substantial extraction or reutilization of data contained in the database.

Unfair competition law can also be used in a different way in relation to copyright. Copyright in certain works can be used for inappropriate purposes. For example, copyright may exist in pieces of information that are vital for a third party to start a business that would not compete directly with the main activity of the right holder. An arbitrary refusal to grant a license in such a case may amount to an abuse of right and an offense under competition laws if the right holder is in a dominant position and the information cannot be obtained otherwise. In this sense, unfair competition rules may restrict the unlimited use (or abuse) of the exclusive right granted by copyright.

Another instance where unfair competition rules become relevant is where licenses are granted by dominant copyright holders on a discriminatory basis. In most cases, copyright will be subject to unfair competition law rules as any other product or service.

SAQ 5

Which of the following ways of exercising copyright could amount to a breach of competition law?

1. A refusal by an author and his publisher to let a competitor reprint the first edition of a guide to a popular tourist destination if the refusal is based on the fact that the right holders plan the launch of an updated second edition later in the year;
2. An unmotivated refusal to license the copyright for pieces of information that are vital to start a business that would not compete directly with the main activity of the right holder if the right holder is in a dominant position, the information cannot be obtained otherwise and a license has already been granted to a third party.
3. A refusal by a painter of a license to include her work in a CD ROM collection of modern art, if the refusal is based on the fact that, in her opinion, her huge works cannot be represented adequately on the flat and relatively small screen of a computer.

Type your answer here

3.0 Limitations of copyright and developmental issues

We already referred above to the fact that the discussion concerning databases rather helpfully shows the limitations of copyright. Not everything is covered and whether or not other tools such as sui generis protection should be used to go beyond these limitations depends on policy considerations, as we have seen.

Developing and least developed countries who would be net importers of these products with additional layers of protection might therefore not find it in their interest to go beyond the limitations of copyright by establishing sui generis regimes of protection. It would merely impose additional costs if national enterprises cannot (yet) benefit from the additional protection.

However, even inside copyright and beyond the limitations of copyright, these developing and least developed countries may find it very expensive to afford imported copyright protected works, such as textbooks that are in use in primary schools. In this example, large volumes are needed and parents often cannot contribute to the cost, which aggravates matters. In this respect, one should refer to the flexibilities that are built into the copyright system and that should be put to maximal use by these developing and least developed countries. Merely copying the approach of the developed world to deal with very different needs may not be the best way forward.

It would go off-topic to go into much detail here, but there is flexibility in defining the (categories of) works that are protected, the three-step test allows for tailor-made exceptions within its three parameters. There is also the under-used Appendix to the Berne Convention for the Protection of Literary and Artistic Works, which can specifically allow for compulsory licenses to make copyright protected works available in the local language, e.g. for educational purposes. Its procedure and rules are perhaps not the simplest and can be seen as time-consuming and cumbersome, but it remains a useful tool that can add flexibility to the copyright system.

4.0 Relationship of the WIPO Development Agenda with sui generis rights and unfair competition

Both sui generis rights and unfair competition are based on the principle of protecting the investment rather than on the creativity. It therefore goes against the basic principles of copyright law. In this context, extending these remedies to protect information kept out of protection from copyright needs to be carefully examined from the perspective of the World Intellectual Property Organization (WIPO) Development Agenda. One of the main objectives of the Agenda is to facilitate access by creating a robust public domain. What we have seen in this module is creating more restrictions in access to information, which goes against the developmental needs of countries. This seems to be one of the reasons why many jurisdictions have not extended sui generis protection for non-original databases and courts are increasingly skeptical of using unfair competition law to protect information. Based on the experience of the European Union, it is not advisable for countries, in particular developing and least developed countries, to opt for sui generis protection for non-original databases. Given the speed at which the content of non-original databases is changing, there seems very little incentive to copy non-original databases. Experience from countries such as the United

States of America shows that copyright law is adequate to protect majority of the databases that are vulnerable to unauthorized copying.

5.0 Summary of sui generis regimes of protection, sui generis rights and unfair competition

Sui generis rights are separate specific rights that differ from copyright and related rights. They are drafted specially to protect valuable aspects of works that cannot be protected effectively by means of copyright and related rights. They are used primarily to protect new technology works, such as databases, the most valuable aspect of which is often the collection of data that they contain. These sui generis rights often draw on copyright for their inspiration, but other influences are also found. The end result is inevitably a special regime of protection that is specifically tailored to the needs of these new technology works. The European Union's database right is a prime example of such a sui generis right.

Certain experts will argue that the move towards more sui generis rights is inevitable, as copyright is not able to adapt to all of the specific aspects of new technology works. Others will argue against the creation of more sui generis rights. They argue that copyright is flexible enough to offer adequate protection to most types of works and that sui generis regimes lack the important asset of international coverage and applicability that copyright has. Whatever the outcome of this debate may be, it is important to avoid the risk of overprotection. Ever increasing protection can unduly restrict the freedom of the individual consumer to have access to data and information, and further cultural developments may be blocked. Industry may lobby for increasing protection, but this needs to be balanced with the interests of individual consumers and society in general. That balancing exercise is not an easy one, but it is one with which lawmakers in the copyright field have been familiar for a long time. However, the matter is not helped by the absence of evidence of success of the European Union sui generis right for databases.

Unfair competition law may also be helpful in a copyright related context. This is especially the case where works fall outside the scope of copyright protection, for example because of a lack of originality. The slavish copying of these works for commercial purposes may therefore not be a copyright infringement, but it may amount to an act of unfair competition under certain domestic laws.

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