



MAX-PLANCK-GESELLSCHAFT

# Two Tier Protection – Designs and Databases as Models?

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## Where's the 'model'?

**Protection of databases and of designs doesn't have too much in common.**

**a) Objectives and requirements:**

- **copyright/sui generis protection of databases differ in both aspects**
- **for designs (registered and UCD), both aspects are the same**

**b) Level on which protection is granted:**

- **Database protection is only granted on the basis of (harmonized) national law**
- **Design protection exists on the national and the Community level (with UCD protection being restricted to the latter)**



## But still...

- Nevertheless, there is one obvious commonality:
- The relevant instruments (CDR and database dir.) comprise two different types of protection:
  - Traditional (full) copyright resp. design protection
  - De-facto harmonisation (plus reification) of an area usually considered as part of „unfair competition“ law
- Viewed that way, extended protection of trade marks (“marks having a reputation“) offers another example of “two tier“ protection



## Other candidates?

- **Theoretically, a two tier protection of the kind found in the database and design legislations might also operate with regard to patents/undisclosed knowledge**
- **More realistically, European trademark law in its present form might be complemented further by adding provisions on protection of non registered marks**



## Another understanding of the model...

- From another viewpoint, sui generis and UCD protection appear as the “second tier“ vis-à-vis unfair competition or other, typically very disparate rules on the national level
- Under that view, more and other candidates for application of the “model“ come in sight, in particular
  - Personality rights
  - Sports rights(cf. Ohly, writings in honour of G. Schricker).



## Does the model fit?

- **Again, the existence of commonalities may be questioned – UCD is about protecting “achievement“; while sui generis database protection is about “investment“ (R. Hilty).**
- **However, the difference may not be so crucial after all...**
- **Economically speaking, both issues alike have inspired the creation of new property rules, thereby opening a market, allowing parties to bargain (H. Ullrich; cf. also Calabresi & Melamed)**



## Points to clarify

- **Before such rules are created, some points must be clarified**
  - **whether there is a need for allocation of an entitlement to a specific party;**
  - **whether a property rule or a liability rule (or inalienability) is more efficient (or „just“) for the purpose to be achieved**



## Other reasons to extend the model...

- **Motivation for adapting the two tier model to novel fields may also be found in the desire to harmonize, where the situation at present appears as seriously detrimental for cross-border business**
- **But that does not necessarily have to occur by way of “reification“ – and if it does, care must be taken to avoid a one-sided approach**
- **(Another) task for a European fair use clause?**

**We'll see and listen.....**