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…..