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The EU Database Right and University Teaching Materials

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Abstract

There has been much criticism of the relatively new *sui generis* database protection right in the European Union because it potentially creates over-broad proprietary protection for information and ideas, with insufficient safeguards to protect certain commercial, personal, scientific and other uses of the information in question. The debate has revolved around computerised databases, although the new database laws extend to physical (or paper based) databases. This article focuses on potential applications of the new laws in relation to particular collections of information that have traditionally been paper-based although they are increasingly available electronically - that is, university teaching materials. It examines the potential to 'propertise' university teaching materials under these laws. This is a timely discussion in an era when universities are becoming more commercial in their outlook than previously, in relation to both teaching and research activities.

Keywords: Database Directive, Database, Teaching Materials, Copyright, University, Intellectual Property.

1. Introduction: Database Protection in the 21st Century

In the latter part of the 20th century, concerns began to be raised about how best to create appropriate legal protections for those who expend significant time, effort, and/or finances in creating commercially valuable compilations of information. These concerns have been exacerbated by factors such as:

(a) the lack of international consensus in the past on the extent to which copyright law should apply to databases and compilations; and,

(b) the changing nature of databases with the advent of computerised databases.

With respect to the first point about copyright law, it should be noted that the copyright laws of most jurisdictions extend to protect compilations and databases, but technically only in terms of their originality of expression. This tends to be measured by reference to the degree of originality in the selection, arrangement and/or organisation of database contents. It is beyond the scope of this article to address this point in any detail other than to note that this copyright standard for databases and compilations has been applied by courts in a manner that is far from uniform across different jurisdictions.

In no jurisdiction is copyright law supposed to apply to protect information and ideas that underlie databases; for example, copyright *may* be applied to protect the original selection or arrangement of a database as a matter of *expression*, but cannot protect the underlying contents of a database in terms of *information and ideas*. This is the result of the application of the idea-expression dichotomy from copyright jurisprudence. Copyright is about protecting expression, and not ideas.

This fact has proved extremely unhelpful to a number of database producers in recent years, particularly large scale commercial database producers who deal in computerised databases. Part of the reason for this relates to the second point made above about the changing nature of databases in the information age. The commercial value in electronic databases tends to be in their comprehensiveness and easy searchability through queries input by a user.

Thus, the traditional criteria for attaching copyright protection to a database are no longer particularly useful or relevant in relation to many electronic databases because:

(a) a comprehensive database is unlikely to show a sufficient degree of creativity in selection or arrangement to attract copyright because, by definition, the more selective the contents, the less commercially valuable and useful the end-product; and,

(b) where the selection and arrangement of output is more a function of the search facility provided than the initial compilation (and is now driven by the user's input request), it is difficult to argue that the database-maker's efforts show sufficient originality in these areas to attract copyright protection.

Concerns such as these led to an aborted attempt at a new internationally uniform database protection right under a WIPO draft treaty which was never finalised or implemented, and to an EU Database Directive which has been implemented throughout the Member States of the European Union. The idea has been to create a specific *sui generis* form of protection for databases outside the realm of traditional copyright law. The Directive and resulting legislation have attracted some of the following criticisms:

a) the protection given to databases is too broad and too strong;

b) the law potentially commodifies information *per se* as opposed to protecting it as part of a database;

c) insufficient protections have been built in for 'fair dealings' with protected database contents (eg commercial uses in secondary markets, scientific and educational uses, private uses etc); and,

d) there are no strong incentives under the laws for database makers to grant licences to others to use protected database contents in either competing or non-competing markets.

There have been concerns, particularly in the United States, that the EU laws will become a model that other jurisdictions are forced to follow, for reasons of international harmonisation and reciprocity, despite the fact that they are arguably not the best model for database protection legislation.

Most of the discussion to date, however, has revolved around the role of the new database laws, and failure of traditional copyright laws, in protecting database contents in the

context of computerised databases. Little attention has been paid to the application of database law in the physical arena in areas where copyright law may also have had a limited role to play previously. The following discussion will examine the potential application of the EU database protection model to a case study involving predominantly physical databases (which are, however, increasingly available electronically) comprising university teaching materials.

This case study has been chosen because of the importance of database protection in the scientific and research communities generally and because the focus of that debate has been on databases important to research, rather than teaching, activities. It is certainly worth at least examining the other side of the coin and, in doing so, maybe drawing out some new criticisms of the laws.

Additionally, exceptions in the database laws relating both to scientific *and teaching* uses of database contents do not apply to commercial uses of information and, in an age where at least public academic institutions face increasing pressures to raise money and commercialise their activities, the boundaries of 'commercial uses' may be more blurry than they once were in this context (see below).

The following discussion commences with a brief survey of the main provisions of the EU Database Directive as implemented in the United Kingdom (by way of example) under the Copyright and Rights in Databases Regulations 1997 ('CRDR') made under the Copyright Designs and Patents Act 1988 ('CDPA'). It then considers the potential application of those provisions to aspects of university teaching materials which were likely outside the thinking of those who drafted the Directive and the implementing legislation, but which could arguably be dramatically impacted by the legislation at a time when many universities are seeking to keep teaching materials 'proprietary'. Finally, it concludes with some suggestions for clarifying underlying policies behind database protection as it may relate to university teaching materials, whether in hard copy or electronic format, and it suggests some law reform alternatives for future consideration.

2. An Introduction to the EU Database Protection Model

The first thing to note about the new EU laws relating to *sui generis* protection of databases is the way in which 'database' is defined. Following the requirements of Article 1(2) of the Database Directive, section 3A(1) of the CDPA in the United Kingdom defines 'database' for the purposes of the CDPA and the CRDR as:

> a collection of independent works, data or other materials which -
>
> (a) are arranged in a systematic or methodical way, and
>
> (b) are individually accessible by electronic or other means.

This is clearly a very broad definition and includes both electronic and paper-based databases, despite the fact that early EU proposals contemplated covering electronic

databases only. The fact that *physical* databases are also included in the final Directive and implementing legislation has not attracted much attention in the debate about the current EU legislative scheme, but it is on this aspect of the laws that much of the following discussion focuses.

Section 3A(2) of the CDPA sets out the level of originality required for a database to attract *copyright* protection in the United Kingdom (as distinct from protection under the new 'database right'):

> For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation.

This can be distinguished from the new 'database right' established in rule 13(1) of the CRDR which sets out the level of effort required for a database to attract the new *sui generis* protection:

> A property right ('database right') subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

This is how the United Kingdom parliament has implemented the definition of 'database', and the distinction between databases protected by copyright and those protected by the database right, in line with the requirements of the EU Database Directive. It should be noted that one database (or aspects thereof) may attract both rights simultaneously. This is expressly contemplated in rule 13(2) of the CRDR which follows the scheme of Article 7 (4) of the Database Directive. Article 7(4) provides that the database right shall apply irrespective of the eligibility of the database for protection by copyright or other rights and irrespective of the eligibility of the contents of the database for protection by copyright or other rights.

Where the database right differs materially from copyright is in the duration and scope of what it protects, and in the kinds of exceptions it allows to that protection. In terms of scope, the database right protects a database right owner against persons who, without his or her consent, extract or re-utilise all or a substantial part of the contents of a database. The repeated or systematic extraction or re-utilisation of insubstantial parts of the contents of a database may also amount to the extraction or re-utilisation of a substantial part of the contents under Rule 16(2) of the CRDR which follows the provisions of Article 7(5) of the Database Directive although in slightly different terms.

In terms of *duration* of the right, the database right is expressed to expire 15 years from the end of the calendar year in which the making of the database was first completed under Rule 17(1) of the CRDR which follows the provisions of Article 10(1) of the Directive. Rule 17(2), following Article 10(2), provides that:

> Where a database is made available to the public before the end of the period referred to in [Rule 17(1)], database right in the database shall expire fifteen

> years from the end of the calendar year in which the database was first made available to the public.

An interesting and problematic aspect of the duration provisions for the database right is found in Rule 17(3) which mirrors the requirements of Article 10(3) of the Directive. Rule 17(3) provides that:

> Any substantial change to the contents of a database, including a substantial change resulting from an accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment shall qualify the database resulting from that investment for its own term of protection.

As noted by a number of commentators, this provision can have the effect, particularly with continually updated electronic databases, that they receive indefinite protection under the database laws. This is problematic if the database right is supposed to be a 'lesser right' than copyright or patent, but the database right actually has the potential to endure for a longer period than either of these traditional intellectual property rights.

This concern may be less likely to arise in the case of physical or paper-based databases. It may be easier to ascertain the exact point in time at which a 'substantial change' has occurred in relation to a physical database of which new editions may be published periodically (eg annually) rather than continually as with an electronic database. At least there will be more obvious evidence of the point in time at which certain alterations took place with a physical database. However, the question of substantial change will always depend on the nature of a database, how often it is updated, and how material any additions, deletions, or alterations actually are in practice, regardless of whether it is in electronic or hard copy form.

The final point to make about the EU database laws in the context of this discussion is the nature and extent of exceptions to the database right provided in the relevant legislation. The Database Directive provides for some exceptions to the database right in Articles 6, 8 and 9. Basically the concerns are with:

a) 'lawful users' of a database;

b) uses for private purposes;

c) uses for the purpose of illustration for teaching or scientific research with a non-commercial purpose;

d) uses for public security;

e) uses for administrative or judicial procedure; and

f) the types of exceptions to copyright usually authorised under national law.

Some of the provisions of the Directive relating to exceptions are mandatory and some are discretionary at the option of each implementing Member State.

As enacted into the law of the United Kingdom, the relevant provisions relating to exceptions to the database right are found in Rules 19, 20 and 21 of the CRDR. Rule 19 relates to *insubstantial* extraction or re-utilisation of database contents by a 'lawful user' of the database in circumstances where the database has been made available to the public in any manner. 'Lawful user' is defined rather unhelpfully in Rule 12(1) as:

> any person who (whether under a licence to do any of the acts restricted by any database right in the database or otherwise) has a right to use the database.

Rule 20 is more relevant to the current discussion. It provides that a database right in a database that has been made available to the public in any manner is not infringed by fair dealing with a *substantial* part of its contents if:

> (a) that part is extracted from the database by a person who is a lawful user of the database (see above definition of 'lawful user');
>
> (b) it is extracted for the purpose of illustration for teaching or research and not for any commercial purpose; **and**,
>
> (c) the source is indicated.

There have been some criticisms that this exception is too limited to meet the reasonable needs of the educational and scientific communities and it is on these criticisms that much of the following discussion focuses.

Finally, Rule 21 provides that there will be no infringement of a database right by substantial extraction or re-utilisation of contents at a time when it is not possible by reasonable inquiry to ascertain the identity of the database maker and it is reasonable to assume that the right has expired.

Having identified the basic structure of the United Kingdom database laws, following the EU Database Directive, this discussion now turns to a consideration of the potential application of those laws to databases largely existing in the physical world, as opposed to computerised databases. The discussion commences with an examination of the question as to exactly how broadly the definition of 'database' may be interpreted in the case of physical databases, and what implications this may have for the future of database law in the European Union and elsewhere. It then turns to a case study relating to university teaching materials which tend to exist largely as physical compilations although they are increasingly also accessible electronically from subject websites maintained on university servers.

3. Databases in the Physical World

As noted above, the need for special *sui generis* protection for databases was generated

initially by the exponential increase of the use of computerised databases in electronic commerce in recent years. The inclusion of physical databases in the legislative scheme was something of an afterthought:

> Although there might be pragmatic reasons for limiting the scope of [database] legislation, there is no reason in principle why more traditional forms of data storage, such as a card index file, should not also be classed as a database.

The inclusion of physical databases in the legislation was probably thought unlikely to have any major impact on the operation of the legislation. The drafting of most of the provisions of the Directive and the implementing legislation appear to be aimed at electronic databases, particularly in relation to issues such as incremental alterations to databases over time attracting new terms of protection. Probably not much thought was given to how the provisions might apply to physical databases in practice.

Copyright cases in the past relating to the protection of the original expression of databases has revolved around items such as calendars, diaries, telephone books, train timetables etc. These would have been the kinds of things the drafters of the Directive had in mind when deciding not to limit the operation of the Directive to electronic databases.

However, as Professor Lloyd notes, the types of physical things that could be classed as databases under the actual EU definition of a database are very broad indeed. He suggests that not only could a card index file used to classify library materials be regarded as a database under the broad legislative definition, but that perhaps the library itself could be classified as a database. This is presumably because the definition of database contemplates a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. Libraries are full of literary works and other materials that are arranged systematically and accessible by electronic or other means. There is certainly no doubt that an *electronic* library such as LEXIS or Westlaw would be regarded as a database for these reasons.

If this is the case for libraries, why not art galleries and museums? Why not any physical collection of works or other materials that are stored together in an organised way? It may well be that all of these things are indeed databases under the current definition, but that there is no practical objection to this, as no other provisions of the database laws are likely to apply. In what circumstances, for example, could there be said to be an unauthorised extraction or re-utilisation of a substantial part of the contents of a physical library or art gallery? The problem is not likely ever to arise in practice in such a context.

However, there may be situations in which the broad definition of database does have a significant impact on collections of works, data and other materials in the physical world. An example might be information about business methods within a particular organisation. Where such information is reduced to writing and kept systematically in filing cabinets or staff training manuals, it may now attract database protection. If a training manual is continually updated, it might attract indefinite protection. Perhaps the ultimate result is similar to the copyright protection such manuals would receive anyway

under traditional law, but database right protection is potentially for a longer duration and may have less 'fair dealing' exceptions attached to it than traditional copyright law. Database laws are also more likely to be regarded as protecting the content (underlying information and ideas) inherent in the material, as opposed to the copyright-protected *expression* of that information. These may prove to be valuable arguments that a business could raise if trying to prevent competitors from stealing its ideas and / or business methods, or if seeking compensation in the wake of such a misappropriation.

4.University Teaching Materials and the Database Laws: A Case Study

4.1 The Nature and Commercial Value of Teaching Materials

The following discussion takes a case study of a collection of teaching materials that may be used within a university by way of example to discuss the potential reach of EU database law in the predominantly physical world. The reason for selecting this case study is twofold:

(a) it focuses on one of the communities that has been particularly troubled by the potential reach of database law in the electronic context - the university community; and,

(b) it emphasises the problems with the concept in Rule 20(1)(b) of the CRDR in distinguishing between fair dealing with database contents for *teaching* purposes versus *commercial* purposes.

Obviously the first thing to do in any case study is to define the key terms. Here, the question is whether certain teaching materials (as opposed to research materials which have been discussed elsewhere) might comprise a database for the purpose of the new laws. In the context of university teaching, clearly some courses are more standard within a particular discipline and some are more innovative. Within a law faculty, for example, it is necessary to teach basic courses such as tort, contract, property, crime etc. However, a particular school or department may be able to distinguish itself by teaching certain innovative courses that other schools are not teaching at all, or as much, or by teaching standard courses in a new way (eg seminar style, Socratic method, casebook method, flexible learning, online learning, distance learning etc).

Just as a school can distinguish itself with a new subject or new group of subjects, it can also distinguish itself with a new 'concentration' or 'specialisation'; for example, within English and Australian LLM programs, it is becoming increasingly common for schools to offer specialist LLM concentrations in things like e-commerce law, business law, international law, intellectual property law, criminal law and justice etc.

One of the reasons that law schools choose to do this is that it enables them to compete more effectively in the marketplace. The idea is that offering tailored specialist curricula will attract students to that school rather than to another school that does not offer such choices. Thus, as well as having an *educational* rationale, the development of certain

types of curricula and associated teaching materials also have a *commercial* purpose.

Universities are increasingly becoming more business-like with increased pressures to attract students who can maintain academic standards and who can attract finance to the relevant school either through fees or through indirect government assistance relating to the numbers of students within a particular program of study. Thus *academic* matters often go hand in hand with *commercial* matters in planning the curriculum. If it is difficult to separate these motivations for course planning in general, it will certainly be difficult to separate them if arguing the exception under Rule 20(1)(b) of the CRDR. This point is taken up below.

Because aspects of university teaching within particular faculties and programs are becoming more commercialised, there may well be an increased desire for a faculty not only to offer the first program of a particular type in a particular market with the best academic standards possible, but also to maintain some proprietary rights in that program. Clearly, copyright may have a role to play in relation to documents detailing the curriculum, including marketing brochures, course descriptions and actual teaching materials (class handouts, PowerPoint slides etc). As a university will generally own copyright in materials generated by its employees (in this case, faculty members) in the course of their employment, the university may assert this copyright against any competing universities whose faculty members copy the literal expression of such materials.

However, copyright will not protect against competing university faculties that copy the underlying ideas of a particular curriculum without copying the literal expression of the teaching and marketing materials used by the copyright-holding university. This may be of particular concern to universities whose faculties have developed valuable curricular materials, particularly in circumstances where one of the faculty members has moved to another institution and wants to offer a program of study at the new institution similar to that which (s)he developed at the first institution.

Some obvious issues should be raised in this context:

(a) There can presumably be no objection to a competing university faculty that independently derives a similar curriculum to another university. What perhaps needs to be addressed in the current academic climate is a second university circumventing the need to do the work done by the first university in researching and compiling the relevant curriculum without giving any credit (or perhaps paying any royalties) to the original developing faculty.

(b) This issue becomes even more confusing when a faculty member moves from one university to a competitor and wants to recycle a subject (s)he has developed while in the employ of the first university. Even if that first university holds intellectual property rights (ie copyright and / or database right) in the relevant materials, should it be able to prevent its ex-employee from pursing ideas (s)he developed herself / himself whilst in its employ? If one accepts that the competitor university has the right to *independently*

develop a set of teaching materials similar to those of the first university (as suggested in item (a) above), how can this test ever be meaningfully satisfied if the same faculty member has moved from that university to the competitor and wants to pursue materials (s)he previously developed herself / himself? It is clearly artificial to suggest a true 'independent derivation' of teaching materials where the same faculty member is involved with developing the same subject at a competing institution. It may be possible to estimate a reasonable development period that the competitor university should wait before launching the competing subject in such a scenario, but this seems to inhibit, rather than promote, the advance of new ideas amongst educational institutions. It would certainly be a difficult task to estimate an appropriate time period in any event, and there would likely be a negative impact on the objective 'market value' of the faculty member in question in terms of the type / level of offers that competing institutions would be prepared to make for his / her services. This could also have a consequential negative impact on the free flow of people and ideas between universities which is presumably an undesirable outcome.

(c) The question also arises as to whether the economic considerations raised in item (a) above should *ever* apply to universities. Should university faculties see themselves as 'competing' in a 'market', or should the idea behind a university be to share both teaching and research ideas with others freely? In an ideal world, perhaps many would want free sharing of all academic information related to teaching and research, with faculty members able to move freely from institution to institution, and to continue to develop their ideas and teaching materials. However, the reality in the modern world is that the economic considerations cannot be avoided, particularly in relation to the teaching of things that are closely related to commerce such as business law, business management, computer science etc. Additionally, in the modern world with the advent of paper-based and electronic distance learning, university faculties are no longer just competing with other institutions within a particular geographical area such as a specific city. They may be competing with institutions in neighbouring cities, states, or even countries. Even without the increase in distance learning, many students (particularly graduate students) were always mobile and would often choose between courses in different cities, states or countries depending on their appeal.

Assuming, then, that university faculties have some morally justifiable right and some commercial reason to protect at least some of their curricular materials through the use of intellectual property laws, might the *sui generis* database right be relevant in this context? In particular, would it give universities stronger or more useful protection than copyright law? It is to these questions that the following discussion turns.

4.2 University Curricula and the Database Laws

As noted above, it is possible that copyright law may protect the literal expression of certain teaching materials as literary or artistic works. However, copyright will not protect

the underlying expression or ideas behind those materials. It is possible that the database right could protect underlying information and ideas if the CRDR / EU Database Directive provisions are interpreted broadly enough. Recent case law in the United Kingdom, although currently on appeal to the European Court of Justice, suggests that the database right may indeed have the effect of commodifying the underlying information and ideas in this way, even where the defendant has come by the information indirectly and not directly from a source controlled by the database maker.

Assuming, then, that there is a possibility that the database laws are broad enough to protect aspects of the valuable ideas behind specific university teaching materials, it is necessary to consider how, and indeed whether, the individual elements of the legislation might apply in this context.

Starting with the definition of 'database', we need to determine whether particular teaching materials could be considered as a collection of independent works, data or other materials that are arranged in a systematic or methodical way and are individually accessible by electronic or other means. It would seem that a collection of documents relating to a particular curriculum would meet this definition. Taking for example, say, a curriculum for a specialist LLM in 'international commercial law', the documents in question might include things like:

a) course descriptions for the subjects students could take as part of the curriculum;

b) lists of prerequisites and co-requisites for relevant subjects;

c) course planning diagrams to assist students choosing subjects, etc.

If gathered together in a graduate studies office or student information brochure, such materials may well meet the definition of a 'database' if arranged in a 'methodical' or 'systematic' way (see below). They may also attract copyright protection as literary and/or artistic works, a point which is also taken up below.

More importantly perhaps the course materials related to a particular subject within the curriculum may be considered to be a database in their own right. Taking, for example, the teaching materials for the hypothetical subject 'Comparative Business Law', the database could consist of a collection of a set of works, data and materials such as the following:

a) subject description;

b) list of prescribed and recommended texts;

c) lecture and seminar plan;

d) details of assessment tasks;

e) seminar question and answer sheets;

f) reading guides;

g) copies of certain reading materials;

h) PowerPoint slides used in class etc.

These documents may be collected together by the professor and distributed to students physically in hard copy, as was traditionally the case and which continues to be the case in many institutions. Additionally, much teaching material is now available electronically via subject websites at many universities.

However these materials are distributed they would appear to meet the definition of database in section 3A(1) of the CDPA. In both examples (curricular and individual subject materials) the question may arise as to whether the relevant materials are 'arranged in a systematic or methodical way' for the purposes of the database right. The answer to this question will depend on the meaning ultimately attributed to the concepts of 'systematic' and 'methodical'.

Teaching materials for a specific subject arguably will meet this test if, for example, they are arranged:

a) chronologically in relation to the order in which various topics are to be covered in the course; and/or

b) by topic (eg all materials relating to a particular topic including readings, questions, PowerPoint slides etc are gathered together).

Even the more general 'curricular' material relating to, say, the general arrangement of all subjects within a particular specialist LLM concentration may meet the 'systematic or methodical arrangement' test. For example, materials arranged to assist a student interested in enrolling in a specialist LLM in criminal law to plan a course by showing the order in which subjects may be taken by a student and the pre-requisites and co-requisites required for each subject may be seen as showing sufficient 'systematic or methodical' organisation to achieve database protection.

Such materials may also attract copyright protection as a 'literary work' under the CDPA. However, as noted above, copyright will only protect the literal expression of the teaching and curricular materials whereas database protection could possibly protect the actual underlying information, or certain aspects of it.

It should be emphasized that there may also be copyright in the individual items involved in any of these 'databases' where they are the product of a professor's own intellectual creation. Things like reading guides, PowerPoint slides etc may well be literary and/or artistic works in their own right for copyright purposes. However, if they are not literally copied by a competing institution, but their underlying organisation and ideas are copied,

database protection may be more relevant to the originating institution than copyright.

Of course, database protection will only apply if there has been a substantial investment, either qualitatively or quantitatively, in obtaining, verifying or presenting the contents of the database. This may or may not be the case depending on the teaching materials in question. However, where one or more faculty members have expended time and effort in developing course materials, even if they have not expended any significant financial resources in so doing (other than the resources of the employer institution in paying their salary), it is likely that this criterion for database protection would be satisfied.

In the case of curricula and general teaching materials developed by university faculty members in the course of their employment, it is likely that the university itself would be the actual owner of any resulting database right by virtue of Rule 14(2) of the CRDR unless there has been any agreement to the contrary.

The university could assert the database right for fifteen years from the end of the calendar year in which the making of the relevant database was first completed under Rule 17(1) of the CRDR. Depending on the nature of the information in the relevant database, this period may be extendable for further fifteen year periods under Rule 17(3). For example, where a curriculum is changing and developing rapidly from year to year, chances are it will be regarded as a new database during some portion of the original period of protection. However, some curricula (and some individual subjects) are relatively stable over time in terms of content and they may thus lose any database protection after the initial fifteen year period. For example, an innovative curriculum plan for a specialist LLM in e-commerce law may be more likely to change substantially within a fifteen year period than a subject plan for a individual course in, say, real property law. By the same token, a curriculum plan for a specialist LLM in business law may be less likely to change substantially within a fifteen year period than a collection of teaching materials for an individual subject in, say, ‘cyberlaw’.

Having established the possibility that a database right could be asserted in particular collections of faculty materials relating to teaching, the question remains as to how likely that right is to be infringed in practice and whether any statutory exceptions to infringement could be asserted by the defendant. As noted above, infringement of a database right in the EU involves the unauthorised extraction and/or re-utilisation of a substantial portion of the database contents. Thus, if faculty members at a competing institution established a competing subject or curriculum plan that has obviously drawn on the work of the original institution, the question would be whether they had ‘extracted’ or ‘re-utilised’ the contents of the database in question. This would obviously be a question of fact to be decided on the basis of the surrounding circumstances, and may be much more complicated in situations where the faculty member who originally developed the teaching materials has moved to a competing institution and wants to re-utilize his/her earlier work at the new institution.

The current case law in the United Kingdom suggests that the concepts of ‘extraction’ and ‘re-utilisation’ in this context may be interpreted rather broadly. It certainly seems possible that if a professor at a competing institution has somehow obtained copies of the

original institution's course materials and has reworked the ideas in a different form that is not literally the same as the original work, but that follows the same basic structure and ideas, this could possibly amount to an unauthorised re-utilisation of the materials in question. This may be the case even though it would not be a breach of copyright in the materials in question because they may not have been literally copied. Of course, if the competing university had independently developed its competing course materials without recourse to the materials of the original university, there would be no extraction or re-utilisation and therefore no infringement of any database right subsisting in the relevant materials.

As suggested above, the situation is even more complex when the same professor wants to re-utilize materials (s)he developed at one university after moving to another. In such a case, the first university may well own a database right in the relevant materials, and it would be virtually inconceivable that the competing university would be able to show independent development of similar material where the same faculty member is involved in that development. Yet, that faculty member must have some rights to continue to develop his / her teaching ideas after moving to a new institution.

The possibility of a database right infringement in the situations described above could be very worrying in the university sector. Until now it has been relatively common for academic staff in similar fields but at different institutions to share ideas on teaching as well as research. This has always been a part of the university culture. It is difficult to debate how to improve teaching practices without divulging and sharing the contents of teaching materials. It has also been relatively standard practice, at least in some fields, for academic staff to move from one institution to another, and to teach similar courses from their own previously developed materials.

Additionally, most academic staff would expect that if they develop an interesting and marketable subject and / or mode of teaching it, others may want to emulate it. The same is true of curriculum development. Further, in an age where details of curriculum development and individual subject content and materials are increasingly available on websites, it must be expected that teachers in competing institutions will access that material and make use of it on some level in their own teaching.

Taking law teachers as an example, there really does seem to be a serious divide at the moment between those who want to keep teaching materials proprietary and those who are happy to share them freely. Some law teachers and/or their employer universities seem to want to disseminate their ideas about teaching and curriculum development, and their teaching materials, as widely as possible (notably on the Internet) to encourage debate about content and methods, and to allow others to make use of what they have developed. Others want to 'propertise' their materials as best they can; for example, by using technological encryption measures on subject websites so no unauthorised students or competitors can access course materials.

Given that opinions on the extent to which subject and curriculum materials should be able to be 'commodified' as a matter of policy, it is difficult to make any definitive comments on whether the database right should have a role to play in this context on

policy grounds. This is an area that certainly may require some thought in coming years.

Additionally, there is the issue that even if the database laws do apply to teaching materials developed and disseminated throughout the EU, the question is still open as to how/whether they would apply to a defendant university in an outside jurisdiction that somehow accessed and re-utilised such materials (either electronically or in hard copy). This is, in fact, a general problem with having significant database protection law throughout the EU, but nowhere else in the world to date. Lack of international harmonisation leading to potential private international law complications is already problematic with the laws in their current state, regardless of whether or not EU laws are applicable to university teaching materials.

4.3 'Fair Dealing' Exceptions to Database Right and Teaching Materials

Assuming, then, that in some of the above mentioned circumstances, it would be possible for a university to assert a database right in teaching materials, and an infringement of that right by a competing institution who had extracted or re-utilised a substantial portion of those materials, will any statutory exceptions apply? In the United Kingdom, it seems that the only statutory exception likely to be relevant is that set out in Rule 20 of the CRDR.

Rule 19 is unlikely to apply because the competing institution is unlikely to be regarded as a 'lawful user' of the materials in question and, even if it was a lawful user, the rule only relates to an *insubstantial* re-utilisation of contents. A competing institution that used a significant portion of the contents of a database in setting up competing courses would not be likely to meet this requirement. Presumably, this would be the result even when the faculty member who developed the materials in question moved from one institution to another. At the second (competing) institution, the faculty member would not be a 'lawful user' of any materials (s)he had developed at the first institution in circumstances where the first institution held all relevant intellectual property rights in those materials.

Rule 21 is also unlikely to be relevant unless it is not possible to ascertain the maker of the database by reasonable inquiry and it is reasonable to assume that the right has expired. This is clearly unlikely to cover a situation where a competing institution is looking at recently developed teaching materials of the first institution either on a website or in hard copy. The source of the materials in question is likely to be obvious from the website or from the nature of the documents in question. This should automatically give a good indication of the identity of the 'database maker'. With recently developed materials, it will certainly be unlikely that the right has expired in any event. Additionally, in the situation where a faculty member who developed the teaching materials in the first place has moved to another university and wants to teach a similar course at the new institution, the source and duration (as well as presumably the ownership) of the database right will be well known.

Rule 20, on the other hand, does allow for fair dealing uses with a *substantial* part of database contents where:

> (a) the database in question has been made available to the public;
>
> (b) if the extraction is made by a person who is a lawful user;
>
> (c) the extraction is for the purposes of *illustration for teaching or research and not for any commercial purpose*; and,
>
> (d) the source is indicated.

Each of these elements needs to be considered in turn in any case of the type under discussion here to establish whether the exception to infringement might apply.

As noted above, some teachers and universities are much more amenable to making their teaching materials available to the public than others. A useful guide to a particular university's policy in this area may be whether its subject websites, where available, are technologically protected against unauthorised access. Thus, it may be that where an institution allows its materials to be made generally available on a website or otherwise, this criterion of Rule 20 is satisfied, but *not* where the institution tries to protect its materials from general circulation. On the other hand, it may be that simply releasing materials to students would satisfy the 'availability to the public' criterion, particularly in a jurisdiction where classes are not 'closed'; that is, where anyone can audit a particular class without paying a fee. Thus, the nature of 'available to the public' needs to be clarified in this context in order to work out when, and whether, the Rule 20 exception might apply.

Rule 20 will also only apply if the extraction of material in question was made by a person who was a 'lawful user'. As noted above, the CRDR do not give much useful guidance as to who is, and who is not, a lawful user for these purposes. It seems clear that students enrolled in particular curricula and subjects are lawful users of the material in question, but it is less likely that faculty at a competing institution are lawful users - unless they are or have been students enrolled in the relevant course. It is often the case that a previous student later teaches a subject and utilises course materials that he or she has received as a student so this 'lawful user' criterion in Rule 20 could also be difficult to interpret and apply in the types of situations under discussion here.

The Rule 20 criterion about extraction for the purpose of illustration for teaching or research and not for any commercial purpose is also difficult to apply here. On their face, the words 'illustration for teaching or research' have the potential to be quite limited. They may only apply to illustration of particular propositions inherent in existing teaching or research, and not to the actual development of new teaching or research materials.

Additionally, the proviso that Rule 20 will not apply if the teaching or research purpose is commercial is problematic here. As noted above, much of what universities do now by way of teaching is just as commercial as it is academic. It may be very difficult to

separate the two in practice. If many teaching activities of a university are characterised as commercial, particularly where they relate to the development of subjects and curricula intended to compete with other universities, the Rule 20 exception is unlikely to apply to potential database right infringements in this context.

The final part of Rule 20 is clearly the easiest to apply. If the source is indicated on the new materials developed by the competing university, this criterion is satisfied. However, with so much doubt over the application of the other elements of Rule 20 in such situations, this is of little practical comfort.

5. Conclusions and Suggestions for Future Development

There may be some who say that the above discussion is far-fetched, that the database laws clearly are not intended to apply to collections of university teaching materials, and that there are points in this discussion where the arguments for potential applicability of the CRDR to such materials are weaker than others. However, the point of the discussion is to show that, given the potentially broad reach of the database right, such results are at least possible. Additionally, the above discussion evidences the potential of the database right to apply equally to paper-based compilations of information as to those available electronically (although as is also evident from the above, much university teaching material that is available in hard copy is also increasingly available electronically on university websites).

More importantly, the point of the above discussion is to bring some new ideas about the potential operation of the database right into the existing debate about the nature and scope of its application, and to suggest that some of these ideas should be taken into account in future debate as to whether, and how, the Directive should be modified. As the Directive is to be reviewed probably sometime in 2002, this seems an opportune time to raise some of these issues.

It may be that the re-introduction of the compulsory licensing system that was dropped from early drafts of the Directive could alleviate some of the problems discussed above, although if compulsory licensing was limited to sole source providers of information it may well have limited application in relation to university teaching materials. It is unlikely that the institution to first develop a course in, say, ‘financing e-commerce’ would be the sole source of the relevant information, so a licensing regime limited in this way would be of little use in such circumstances.

Other alternatives for reform of the Directive with university teaching materials in mind could include:

a) a compulsory licensing regime not limited to sole source information providers that could either operate generally or be limited to university teaching materials (and perhaps other classes of databases that are found to raise similar policy considerations);

b) exempting university teaching materials from the scope of the Directive altogether

and expressly relegating them to copyright protection where appropriate; or

c) allowing database right protection for university teaching materials but clarifying the extent to which 'fair dealing' exceptions might apply to second-comer universities that make use of teaching materials originally developed by another institution.

Whatever path is ultimately taken, it will be necessary first to clarify the underlying policy objectives to be achieved by any new legislative developments in this area. In this context, discussions would need to take place to attract input from university teaching communities as well as university administrators throughout the EU (and possibly even internationally). This would be necessary in order to ascertain the appropriate policy objectives here. Do universities in the 21st century favour sharing teaching materials, possibly for a fee, or is increased 'propertisation' and exclusivity of such material the desired end? Differing views are evident to date on this question and it may be a good idea to address the reasons for this divergence in any law reform debate that may impact on the ability of universities to commodify their teaching materials to a greater extent than was possible under previous intellectual property laws.

Additionally, it would be a good idea to clarify what rights academic faculty members have to bring their teaching ideas and materials with them to new universities. This may be more of a problem with the database right than with existing copyright law because it is probably easier for a faculty member to re-design the *expression* of many teaching materials (which is protected by copyright) to avoid an infringing use at the new institution, than it is to re-design the underlying content and concepts, some of which may be protected by the database right in the hands of the first employer institution. This issue should be given some thought in future reviews of the operation of the EU Database Directive.

Clearly there are more basic and pressing problems evident in relation to the operation of the EU database laws that have been identified in previous literature. However, if a broad debate about law reform is going to be opened up in the near future, it is certainly worth looking at the problems from as many angles as possible, and inviting input from the various communities who may be affected by the outcome of any such debate.