

WIPO TREATY TO MONOPOLISE DATA

Dr. SUMAN SAHAI

In all the hoopla surrounding the World Trade Organisation (WTO) ministerial meeting in Singapore and its unbidden agenda of labour standards and investment guarantees, what is going unnoticed is a treacherous little treaty on protecting databases. Discussions on what is called the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions have started on 2 December in Geneva and will continue till the 20th. Formulated under the aegis of the World Intellectual Property Organisation, (WIPO), the much sidelined organisation after GATT/ WTO snatched away its mantle of Intellectual Property Rights (IPRs), this ambitious and little understood treaty deals with the protection of databases. These databases could be compiled on any subject under the sun. They could be about health care statistics or scientific results pertaining to agriculture, biology or chemistry . They could also be about folklore, songs and films.

The new database treaty seeks to lay down conditions that would allow the protection of “any database that represents a SUBSTANTIAL INVESTMENT (author’s emphasis) in the collection, assembly, verification organisation or presentation of the contents of the database”. The treaty defines the term database to include “collections of literary, musical or audiovisual works, or collections of other materials such as texts, sounds, images, numbers, facts, or data representing any other matter or substance. This protection will be afforded to databases in electronic or non-electronic forms so that books, catalogues and lists would also come under the purview of this form of protection. This means that even databases that are generally made available to the public, commercially or otherwise, can be brought under the monopoly of the registered owner.

The WIPO treaty is designed to severely restrict the access of the public to information and data that has been generated in the public domain and that is therefore information belonging to the public. Once these data are compiled in the form of a database, they are to become the property of the people or person who registers himself as the owner of such a bank.

The impetus to control access to information has come from the large publishing houses in America. James Love, director of the US based Consumer Project on Technology in a publication has traced how an adverse US Supreme Court judgement on copyrighting data led to the publishing industry ganging up to create instruments that would enable them to monopolise data in any form. The Supreme Court decision in *Feist Publications, Inc. v. Rural telephone Services* was to reject the claim of the Feist Company to copyright data compiled from a telephone directory. The American Court ruled that facts cannot be copyrighted and that such obvious items as listing names, addresses and telephone numbers in alphabetical order are not sufficiently creative to qualify for copyright protection. The decision, Love says, rejected the “sweat of the brow” theory of copy right, meaning that the compilation was not created by the labour of the company but was simply lifted from somewhere else. Under copyright law, compilations of data or documents, even when the material is from the public domain, can be protected only if ascertain originality can be shown in the selection and arrangement of the data.

Publishing houses thwarted by the US Supreme Court ruling went on to create an international forum that would serve their interests. In their search for stronger, more exclusive protection for data, they are lobbying to create the now immensely fashionable form of *sui generis* protection for databases. The effort is to bypass the constraints imposed by the Copyright law and link to the Berne Convention only in certain selective and advantageous ways so that the Convention cannot interfere in the *sui generis* protection that is being pushed through the WIPO treaty. The advantage of this newly discovered form of *sui generis* protection for Intellectual Property Rights is that one can create *de novo* conditions for the protection of whatever one is seeking a monopoly on. The *sui generis* form has been created so that globally accepted forms of IPRs like patents, trademarks and copyrights can be overtaken by stringent, ad hoc forms of monopolies dreamed up by this or that lobby. In the case of seeds, the *sui generis* protection has been dreamed up by the American biotechnology industry, in the case of databases, it is the American publishing industry.

Publishing houses in the US were able to garner support from their European counterparts and finally succeeded in making this new *sui generis* form of, protection an amendment to the Berne Convention on Copyrights. With this step, the *sui generis* mechanism for databases has been brought onto a global forum and all members of the Berne Convention will be required to consider accepting it. It is obnoxious enough that public information should be brought under monopolies, it is worse that the system is trying to build in mechanisms for practically protecting the database in perpetuity.

Although the WIPO treaty considers two alternative durations of protection, 15 years according to the European convention and 25 years according to American practise, several other possibilities are opened up within the treaty itself. Owing to the linkage with the Berne Convention, control over the database could be demanded along the lines of Copyright protection which is protection for the duration of the author's life plus an additional 50 years. Another clause in the WIPO treaty stipulates that after any alteration to the database, the database would be considered to be a new one and the period of protection (15 or 25 years) would begin afresh from the date of alteration. Changes to the database donot have to be qualitative or substantial. According to Article 8 of the WIPO treaty, ' additions, deletions, verifications, modifications in organisation or presentation or other alterations ' will all be valid changes that will give the databse a new term of protection..

What is perhaps the most worrisome aspect of the WIPO treaty, from the point of developing countries like India, is the conditions that have been defined for eligibility to protect data. Who is eligible to bring their data under protection and who cannot and therefore whose data collections will be open to scavenging? Articles 1 and 2 are very clear on this. According to their provisions, parties can only then qualify to protect a database when they have made a „substantial investment in the collection, assembly, verification, organisation or presentation of the contents of the database“. In the WIPO treaty it is clearly stated that „ the protection of a database does not, however depend on innovation or quality, mere investment is sufficient...the investment must be sufficient or 'substantial' to qualify the database for protection“. Knowledge in the hands of money bags!

This means that those parties that can show an investment of a say 10 million US \$ in creating a database will be eligible to apply for protection under WIPO. Data that they have collected from the public domain will become theirs and they can regulate access to it. Other parties like universities, research institutions, municipal corporations, NGOs, development agencies and others in that dimension, will not be eligible to control the data that they perform collect as part of their work. Take an Indian university. With its modest budget, it can and does put together impressive compilations of data. How would it ever enter this big time league of 10 and 20 million dollars so that it can stop others using its data? In today's age of sophisticated software and the trends in informatics, accessing unprotected data is no big thing.

The WIPO treaty on data has been called by American legal experts to be „ the least balanced and most potentially anticompetitive intellectual property rights ever created „. It has been conceived as a rich man's club where only the privileged elite can traffic. This is not where scientists and universities, NGOs and development workers can access data. This data is only for those who were rich and powerful to begin with.. If investment is the sole criterion of protection, access fees will be appropriately horrendous, cutting off all but the corporate sector and wealthy entrepreneurs from reaching the data. The great disadvantages of not being able to protect ones own data if one cannot show huge investments is obvious in this scheme. Few organisations in India and other developing countries will qualify on the criterion of investment.

Indian negotiators from the ministry of Human Resource Development have gone to Geneva to participate in the Diplomatic Conference. None of them understand the complications and intricacies of this treaty. Neither for that matter do many other people. American activists admit that most officials in the American administration are quite clueless about the actual implications of the treaty and its impact. Under the circumstances, the best strategy for India would be to completely refuse to accede to any demands of the treaty even provisionally. It should ask for several rounds of preparatory meetings of all members of the WIPO and members of the Berne Convention. . India should take the lead in bringing to the fore that not many people have understood the ramifications of this crazy treaty and it is much too premature to start a diplomatic conference on it. India should also expose the blatant involvement of the publishing industry in this and mobilise support in universities and public sector institutions of all countries to oppose the treaty.

Finally, India must start learning some lessons of its own. It is becoming apparent in every international forum that the global economy is technology driven. The issues of international trade are not any more about how much tea and leather to sell and how much steel to buy. The issues are now about biotechnology, informatics, computer software and databases. These subjects are far beyond the ken of deputy secretaries, additional secretaries and secretaries who float around from ministry to ministry. These subjects can only be handled by well trained experts. If India does not want to reduce itself to a joke, it will have to jettison the bureaucrats from its negotiating teams and bring in experts, like most other countries have done.