

re-utilisation of a substantial part of the database. This is an important provision because the typical use of a database involves this very type of access.⁴⁴⁹

Exclusions

Several exceptions are allowed, such as the extraction and/or utilisation of insubstantial parts of a database, or the use of the database for any purpose that does not conflict with normal exploitation of the database or unreasonably prejudice the legitimate interest of the maker.⁴⁵⁰ These exceptions are narrower in nature than the similar fair-use exceptions under copyright law. For example, the *sui generis* right has no exceptions regarding use for criticism or review, news reporting, or library use.

In addition to these mandatory exceptions, member States may limit the *sui generis* right in certain ways. They may allow the extraction or re-utilisation of a substantial part of the contents of a database, without the authorisation of the database's maker, provided that such extraction or re-utilisation is for non-commercial purposes, when

- ☐ the extraction is from a non-electronic database, for private purposes⁴⁵¹
- ☐ the extraction is reasonable and for the purpose of illustration for teaching or scientific research, as long as the source is indicated,⁴⁵² or
- ☐ the extraction and/or re-utilisation is for the purpose of public security or an administrative or judicial procedure.⁴⁵³

Duration of the *sui generis* right

In terms of article 10(1) of the Database Directive, the *sui generis* right protects a qualifying database from the moment it is completed. Protection expires 15 years from the first day of January following the date of completion. More significantly, if any "substantial change" is made to the database, or if a series of successive changes, which constitutes a "substantial new investment" in the database, accumulates, a further term of protection of 15 years can be obtained.⁴⁵⁴ Renewal of protection by way of substantial new investment may perpetuate protection of dynamic databases.

Reciprocity

The principle of reciprocity has been incorporated in the Directive. The *sui generis* right does not apply to databases made by persons outside the European Union unless they reside in a jurisdiction which provides comparable protection to European Union citizens.⁴⁵⁵

Court cases

The precise meaning of the term "substantial investment" in article 7 of the Directive has become the focal point of the textual ambiguities of the *sui generis* right. On the one hand, the district court of The Hague held the cost of collecting and maintaining up-to-date information about several thousand real-estate properties to be a

⁴⁴⁹ See Brown, Bryan and Conley "Database protection in a digital world" 1999 *Richmond Journal of Law and Technology* text at n. 159.

⁴⁵⁰ Arts 7(2) and 8(1)-(2).

⁴⁵¹ Art. 9(a).

⁴⁵² Art. 9(b).

⁴⁵³ Art. 9(c).

⁴⁵⁴ Art. 10(3).

⁴⁵⁵ Recital 56.

"substantial investment".⁴⁵⁶ On the other hand, the district court of Rotterdam regarded newspaper headlines as a mere spin-off of newspaper publishing and held that they did not reflect a "substantial investment".⁴⁵⁷

"Spin-off" databases are databases that are by-products of a main or principal activity. A single-source database⁴⁵⁸ is normally regarded as a spin-off database. In certain member States of the European Union, notably the Netherlands, the spin-off theory forms a bar against *sui generis* protection for spin-off databases.⁴⁵⁹

"Deep linking" through search engines has also become relevant to the protection of the database right. In *Danish Newspaper Publishers' Association v Newshooter.com*,⁴⁶⁰ the court held that deep linking is a breach of copyright. This case was brought by the Danish Newspaper Organisation (DNO) against the Newsbooster service because the latter had "linked" to articles on 28 of the plaintiff's news websites without going through their home pages. The court held that the newspaper articles were copy-rightable works:

The text collections of headlines and articles, which make up some Internet media, are thus found to constitute databases enjoying copyright protection pursuant to section 71 of the Danish Copyright Act. Under section 71(1) of the Act, the makers of the databases, i.e. the Principals, have the exclusive right protected by the said provision.

Four cases concerning single-source databases of sports information in the areas of football and horse racing have been referred to the European Court of Justice (ECJ) from national courts in Greece, Finland, Sweden and the United Kingdom.⁴⁶¹

In *The British Horseracing Board Ltd and Others v William Hill Organization Ltd*,⁴⁶² with respect to the extensive lists of runners and riders drawn up by the British Horseracing Board (BHB) as the governing body for the British horse-racing industry, the ECJ simply stated that "The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears".⁴⁶³

Obtaining or creating data for a database

The ECJ thus distinguishes between the resources used in the "creation" of materials that make up the contents of a database and the obtaining of such data to assemble

456 *NVM v De Telegraaf* roll no. KG 00/949, 12 September 2000, available at www.linksandlaw.com/decisions-90.htm (accessed August 2008).

457 *Algemeen Dagblad BV et al v Eureka Internetdiensten* case no. 139609/KG ZA 00-846, District Court of Rotterdam, 22 August 2000 (unofficial translation available at www.ivir.nl/rechtspraak/kranten.com.html).

458 A database the data of which originate from a single source.

459 See Commission of the European Communities "First evaluation of Directive 96/9/EC on the Legal Protection of Databases" DG Internal Market And Services Working Paper, 12 December 2005, 12, available at http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_cn.pdf (accessed 23 April 2008).

460 *ApS Copenhagen Court*, 24 June 2002; Court Journal No. F1-8703/2002.

461 *Fixtures Marketing Ltd v Oy Veikkaus Ab* case no. C-46/02, 9 November 2004; *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* case no. C-203/02; *Fixtures Marketing Limited v AB Svenska Spel* case no. C-338/02; *Fixtures Marketing Ltd v Organismos Prognostikon Agnon Podosfairou AE* case no. C-444/02. The ECJ gave its judgments in these cases on 9 November 2004. The judgments are available at www.curia.eu.int (accessed 23 April 2008).

462 Case no. C-203/02.

463 *Ibid.* paras 39-41.

the contents of a database. Only substantial investment in obtaining data is protected under the *sui generis* right. This leaves little protection for bodies like the BHB which "create" the data that make up the contents of their databases. Arguably other entities, like the publishers of directories, listings or maps, remain protected as long as they do not "create" their own data but *obtain* these data from others. The ECJ distinction between creating and obtaining data means that sports bodies such as the BHB cannot claim that they obtained the data within the meaning of the Directive. Therefore, such bodies cannot license their own data to third parties.⁴⁶⁴

While going against the European Commission's original intention of protecting "non-original" databases in a wide sense, these four ECJ judgments have the merit of pointing to the serious difficulties raised by attempting to harmonise national laws by recourse to untested and ambiguous legal concepts ("qualitatively or quantitatively substantial investments in either the obtaining, verification or presentation of contents"⁴⁶⁵).

The ECJ's reasoning would probably apply to databases created by broadcasting organisations for the purposes of scheduling programmes: broadcasters would not be able to assert a *sui generis* right in the contents of such databases. In addition, the ECJ ruled that betting companies' use of the scheduling of football matches and horse races for online betting services in respect of those events did not constitute copyright infringement.⁴⁶⁶ The court noted that such use of schedules of races and matches did not affect the whole or a substantial part of the contents of the plaintiffs' databases and therefore did not prejudice the plaintiffs' substantial investment in the creation of their databases.

In *The British Horseracing Board Ltd and Others v William Hill Organization Ltd*⁴⁶⁷ the British Court of Appeal dismissed the Board's arguments aimed at showing that its database was protectable by the *sui generis* right under article 7(1) of the Directive. The court held that the scope of the *sui generis* protection does not include the creation of the underlying data.⁴⁶⁸ A soccer-fixture list would similarly not be protected under the *sui generis* right.

Conclusion

The *sui generis* right provided by the Database Directive creates an intellectual-property right that goes much further than the copyright law of most countries. This right is not subject to compulsory licensing arrangements, even if the database compiler is the sole source of the database's contents. In effect, the Directive has created an "easy-to-protect/easy-to-infringe" system to protect non-creative databases.⁴⁶⁹ Bastian

464 Müller and Munz "Recent case law from Germany concerning the database right" 2007 (2) *Communications Law* 60, 66–67.

465 Art. 7(1).

466 See fn. 464 above.

467 *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* [2005] EWCA (Civ) 863.

468 Ibid. paras 35–36. For example, the national football bodies establish the annual football calendar by pairing the teams, and setting up home and away matches. These organising activities amount to organising soccer tournaments, which involves the creation of data. The collection and verification of the data in setting up the fixture list is a by-product of these basic activities that requires relatively little investment.

469 See Bastian "Protection of 'noncreative' databases" 1999 *Boston College Environmental Affairs LR* 445.