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LEGAL PROTECTION OF DATABASES

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Etienne WERY
Associé
Avocat au Barreau de Bruxelles
Avocat au Barreau de Paris (toque R 296)
etienne.wery@uly.net

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Legal framework

- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases;
- National laws transposing the directive.

BRUSSELS

224, av. de la Couronne
1050 Brussels
Tel. + 32 (0)2 340 88 10
Fax + 32 (0)2 345 35 80

Société civile à forme de SCRL
RPM Bruxelles
VAT : BE 0476.702.936

Double protection

Before the directive, national disparities were numerous. At most, one could see a general trend, under the influence of the case-law, to apply copyright to some elements of databases. This approach has been confirmed in the directive : "copyright remains an appropriate form of exclusive right for authors who have created databases".

Nevertheless, in the absence of a harmonized system of unfair-competition legislation or of case-law, it has been decided that other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database.

PARIS (succursale)

33, rue Galilée
75116 Paris
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However, the situation of the producer remains without effective solution. The making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently. Such unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences.

What is a database ?

For the purpose of the directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

Collections, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or electro-optical processes or analogous processes, are included in this definition.

Protection is extended to cover non-electronic databases.

However, the protection shall not apply to computer programs used in the making or operation of databases accessible by electronic means. Computer programs are indeed protected by a separate specific legal framework.

In the Fixtore Marketing case (C-444/02), the Court of Justice of the European Union has ruled that The term 'database' refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials.

Protection via copyright

Databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

The copyright protection of databases shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves. En ce qui concerne le contenu, c'est essentiellement le droit sui generis qui s'applique (voir ci-dessous).

The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.





In terms of ownership there is an important similarity with the legal regime applicable to computer programs; this is not surprising since both have the same legal basis: copyright. The structure is similar but not identical. Notably, there is nothing in the database directive concerning the situation of employees. The general scheme which will apply, hence the importance of drawing up contracts.

In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

- a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- b) translation, adaptation, arrangement and any other alteration;
- c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
- d) any communication, display or performance to the public;
- e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

In the Football Dataco case, the Court has ruled that a database is protected by the copyright provided that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author, which is a matter for the national court to determine.

As a consequence:

- the intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right;
- it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data, and
- the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains.





Protection via the sui generis right

a) Main principle

The sui generis right is the complement set by the Directive to protect the producer of the database. Copyright is indeed not always efficient: how could protection be sought via copyright in a situation in which a database containing data that are not protected by copyright (a telephone directory for example), is copied?

Under the sui generis right, the directive provides that “Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database”.

b) The substantial investment

The sui generis right is only assigned if the producer can prove a substantial investment. This requirement gave rise to several decisions from the Court of Justice of the European Union:

- In the *Fixtures Marketing* cases (C-46/02; C-338/02), the Court has ruled that the expression ‘investment in ... the obtaining ... of the contents’ of a database must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. The court has repeated the same sentence in the *British Horseracing Board* case.
- In the *British Horseracing Board* case, the Court has ruled that the expression ‘investment in ... the ... verification ... of the contents’ of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition.
- As regards the public sector, the Court has ruled in the *Compass-Datenbank* case that the activity of a public authority consisting in the storing, in a database, of data which undertakings are obliged to report on the basis of statutory obligations, in permitting interested persons to search for that data and/or in providing them with print-outs thereof does not constitute an economic activity, and that public authority is not, therefore, to be regarded, in the course of that activity, as an undertaking, within the meaning of Article 102 TFEU. The fact that those searches and/or that provision of print-



outs are carried out in consideration for remuneration provided for by law and not determined, directly or indirectly, by the entity concerned, is not such as to alter the legal classification of that activity.

c) The rights of the producer

Once the substantial investment condition is met, the producer has the right to oppose to the extraction and the re-utilization of the content of the database:

- a) 'extraction` mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form¹;
- b) 're-utilization` mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community.

In the British Horseracing Board case, the Court has ruled that the terms 'extraction' and 're-utilisation' must be interpreted as referring to any unauthorised act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned. The fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database.

¹ Please note that in the Direct Marketing case, the Court has ruled that the transfer of material from a protected database to another database following an on-screen consultation of the first database and an individual assessment of the material contained in that first database is capable of constituting an 'extraction', to the extent that – which it is for the referring court to ascertain – that operation amounts to the transfer of a substantial part, evaluated qualitatively or quantitatively, of the contents of the protected database, or to transfers of insubstantial parts which, by their repeated or systematic nature, would have resulted in the reconstruction of a substantial part of those contents.

In addition, in the Apis case, the Court has ruled that the delimitation of the concepts of "permanent transfer" and "temporary transfer" is based on the criterion of the length of time during which materials extracted from a protected database are stored in a medium other than that database. The time at which there is an extraction, from a protected database, accessible electronically, is when the materials which are the subject of the act of transfer are stored in a medium other than that database. The concept of extraction is independent of the objective pursued by the perpetrator of the act at issue, of any modifications he may make to the contents of the materials thus transferred, and of any differences in the structural organisation of the databases concerned. The fact that the physical and technical characteristics present in the contents of a protected database made by a particular person also appear in the contents of a database made by another person may be interpreted as evidence of extraction, unless that coincidence can be explained by factors other than a transfer between the two databases concerned. The fact that materials obtained by the maker of a database from sources not accessible to the public also appear in a database made by another person is not sufficient, in itself, to prove the existence of such extraction but can constitute circumstantial evidence thereof.





In addition the Court has ruled that :

- The expression 'substantial part, evaluated ... quantitatively, of the contents of [a] database' refers to the volume of data extracted from the database and/or re-utilised and must be assessed in relation to the total volume of the contents of the database.
- The expression 'substantial part, evaluated qualitatively ... of the contents of [a] database' refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.

As regards to search engines and more specifically to meta search engines, the Court has ruled in the Innoweb case that an operator who makes available on the Internet a dedicated meta search engine re-utilises the whole or a substantial part of the contents of a database, where that dedicated meta engine:

- provides the end user with a search form which essentially offers the same range of functionality as the search form on the database site;
- 'translates' queries from end users into the search engine for the database site 'in real time', so that all the information on that database is searched through; and
- presents the results to the end user using the format of its website, grouping duplications together into a single block item but in an order that reflects criteria comparable to those used by the search engine of the database site concerned for presenting results.

The sui generis right shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

It should be stressed that the sui generis right apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community. It also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its opera-



tions must be genuinely linked on an ongoing basis with the economy of a Member State.

General exceptions to the right of the author

The performance by the lawful user of a database or of a copy thereof of any of the acts listed here above which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part. Any contractual provision to the contrary is null and void.

General exceptions to the sui generis right

The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part. Any contractual provision to the contrary is null and void.

However, the repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database are not permitted. In the British Horseracing Board case, the Court has ruled that this refers to unauthorised acts of extraction or re-utilisation the cumulative effect of which is to reconstitute and/or make available to the public, without the authorisation of the maker of the database, the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker.

In addition, the lawful user of a database which is made available to the public in whatever manner :

- may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.
- may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.





National exceptions to the rights of the author

As already mentioned, before harmonization, national practices were extremely varied. As a result, the directive is a compromise allowing states, under some conditions, to keep special schemes whose importance is explained by national considerations. This is why the directive allows member states to limit the prerogatives of the author in the following situations:

- a) in the case of reproduction for private purposes of a non-electronic database;
- b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
- d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

In relation to these four exceptions, it is therefore necessary to refer to national law, to see if an exception was actually introduced and if so under which terms and conditions it was introduced.

National exceptions to the sui generis right

As with copyright, the compromise allows states some flexibility. Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- a) in the case of extraction for private purposes of the contents of a non-electronic database;
- b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

