

# Databases: sui generis protection and copyright protection

Kluwer Copyright Blog  
December 20, 2011

Tatiana Synodinou (University of Cyprus)

Please refer to this post as: Tatiana Synodinou, "Databases: sui generis protection and copyright protection", *Kluwer Copyright Blog*, December 20, 2011, <http://copyrightblog.kluweriplaw.com/2011/12/20/databases-sui-generis-protection-and-copyright-protection/>



*Data creation, intellectual creation and creativity in the world of databases: The Advocate's General Opinion in the Football Dataco Ltd v. Yahoo! UK Limited Case and its potential impact in database copyright.*

What is a database? Are database copyright protection and database sui generis protection completely independent? What is the creativity level for asserting that the selection of the disposition of a database contents is the «author's own intellectual creation» or is creativity not a prerequisite for database copyright protection? Fifteen years after the adoption of the Database Directive, this odd creature in the copyright world, these questions are far from being resolved. Even more surprisingly, the riddle of database protection seems to be even more darker for common law jurisdictions, and we refer mostly to the UK, where the protection of a database from copyright law appeared to be an *acquis* (see for example the classic case of *Football League Ltd v Littlewoods*) contrary to the experience of other EU member states or even far beyond the Atlantic ocean.

The ECJ demonstrated a genuine activism when it was called to enlighten the obscure concepts of the Database Directive. In this context, it seriously restricted the scope of the sui generis protection in 2004 when admitting that the investments in the creation of the database's contents cannot count as investment for the obtaining of the contents for the purposes of the award of database sui generis right in a series of sport's database cases (Judgments of the Court in Cases C-46/02, C-203/02, C-338/02 and C-444/02). The British Horseracing Board Ltd and Others v William Hill Organisation Ltd, Fixtures Marketing Ltd v Oy Veikkaus Ab, Fixtures Marketing Ltd v Svenska Spel AB, Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou (OPAP). In the 2008's Directmedia Publishing decision the Court opted for a broad interpretation of the term of "extraction" that covers the transfer of contents from a database to another database, even if there is no technical process of copying. The 2009's *Apis* decision clarified the concept of a "temporary transfer" of the database's contents and redefined the concept of the "substantial part" from a quantitative point of view in a way that covers modules of databases if the modules themselves do not constitute a database, but also qualitatively by confirming that sui generis protection of a database's substantial part may cover the investment in obtaining the data even if the data come from the public domain. Indeed, there has been established a rich case law concerning the Database Directive compared to other Directives, such as for example the Software Directive. Nevertheless, it shall not be neglected that the scope of Directive is far more ambitious than it seems at first sight, since it aims to regulate proprietary interests in the information market.

After the ruling in the sport's database cases in 2004, the organizers of professional football matches in England and Scotland sought to prevent the use of their football fixture lists by companies which provide information and/or organize betting activities on the basis of copyright law, since it was far from clear that their investment in the production of the lists could be taken into account for the award of sui generis protection.

In the *Football Dataco Ltd v Yahoo! UK Limited* and others the ECJ is called to rule this time on the criteria for protection of a database by copyright law and more precisely on the protection of fixture lists by database copyright.

The two questions posed to the Court are the following:

- 1) In Article 3(1) of Directive 96/9/EC ... what is meant by "databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation" and in particular:
  - (a) should the intellectual effort and skill of creating data be excluded?
  - (b) does "selection or arrangement" include adding important significance to a pre-existing item of data (as in fixing the date of a football match)?
  - (c) does "author's own intellectual creation" require more than significant labour and skill from the author, if so what?
- 2) Does the Directive preclude national rights in the nature of copyright in databases other than those provided for by the Directive?

The Advocate General made an overview of the basic legal rules of the database protection regime as the latter has been clarified and enriched by the ECJ. His argumentation is in line with a general attitude of the Court prompting for the restriction of the scope of the application of database sui generis right. Indeed, the ECJ's rulings until now reveal a tendency for the adoption of more stringent rules as regards the award of the proprietary database protection in order to guarantee competition in the information market. Nonetheless, the Court seems to have opted for a strong proprietary protection after the criteria for the award of the protection are met, mainly through the promotion of a broad definition of the concept of extraction of the database's contents.

As regards the first preliminary question the Advocate General concludes that the effort expended in the creation of the data cannot be taken into account for the purposes of accessing eligibility under copyright law.

In order to arrive at this conclusion the Advocate is based on a contradiction. While he asserts the complete independence of the two forms of protection, - copyright protection and sui generis protection -, he invokes the unitary concept of "database" in order to propose a unitary approach for the delimitation of the scope of protection of the two forms of protection. In a certain degree, this contradiction is inherent in the logic of the Directive itself which aims to protect a single informational asset through distinct layers, levels and forms of protection. According to his opinion, the unitary concept of database - and consequently database protection - concerns only the phase in which the data are collected, verified and presented and not the preliminary phase of the creation of the data. In other words, there is a database for the purposes of the Directive if the data which are included in the database have already been created since the objective of the Directive is to encourage the creation of systems for collecting and consulting information and not the creation of data.

The question of the independence of the two forms of protection is not unequivocal, since certain points of intersection exist. In fact, the axiom of the complete independence of copyright and sui generis protection is certainly valid if the basis for the award of copyright protection is the original arrangement of the database's contents. Nevertheless, the autonomy of the two protections is doubtful if copyright protection is sought on the basis of the original selection of the database's contents. In that case, copyright protection results to cover not only the thematic structure of the database (which might be found out of the scope of the protection due to the exclusion of ideas from copyright protection) but also the specific contents which correspond to the criteria of selection and are finally entered in the database. Therefore, database contents can be protected at the same time by the sui generis right as a whole or as a substantial part of the database and by database copyright on the basis of their original selection in the context of the database.

On the basis of a unitary concept of database the Advocate General expands the rule of exclusion of the creation of the data which has been affirmed for the sui generis right to database copyright protection. This exclusion seems to serve the same goals which led to the exclusion of the stage of the creation of data from the assessment for the award of sui generis protection, which is the prevention of the creation of monopolies over information. Indeed, if the sole source of certain data can prevent others from extracting and reusing them on the basis of the sui generis right, there is a great risk of creating an information monopoly which can be detrimental to the information market. Due to the absence of a regime of compulsory licensing in the Database Directive this restriction is justified in order to remedy the anticompetitive effects of the award of sui generis protection to sole source databases. Moreover, if the question is seen globally, it shall not be forgotten that the recourse of the claimants to the copyright protection is a way to get around the denial of protection of fixture lists by the sui generis right and this has been pinpointed by the Attorney General.

As regards question 1 b), the Advocate admits that it cannot be excluded as a principle that adding informational value to data by their introduction to a database which presents an original structure or original selection of its contents is taken into account for the award of database copyright protection. Indeed, the whole vocation of database protection by proprietary rights lies in the reward of the informative value which derives from the inclusion of the data in a database. In the Advocate's opinion, nevertheless, this principle cannot apply to football fixture lists, since the transformation of raw data to valuable information was completed before the creation of the database. Under this view, the individual matches to be played derive from a laborious work that has transformed the raw data to fixtures lists, but all this took place in the preliminary phase of the creation of information and thus it cannot be taken into account.

The preliminary question itself seems peculiar from a database copyright point of view. Database copyright concerns only the original selection or arrangement of the database contents. The insertion of data, works of mind or other contents in a database adds undoubtedly informational value to these contents in the sense that they can be retrieved more easily, even though the latter might prove to be incorrect if the arrangement is original but not user friendly. Nonetheless, original selection or arrangement of data is a key element for the award of database copyright and not for the award of copyright over the contents themselves, even if the informative value of the latter is augmented indirectly due to their inclusion to the database. Therefore, fixing the date for a football match presupposes necessarily a selection and an arrangement of data, but this could not be relevant for the protection of the list as a database. Indeed, the selection and arrangement of possible dates of matches and venues in order to fix the final date and place of each match concerns the production of a single item of information, while the Directive protects the selection and the arrangement of several items which are put in a football fixture list. For database copyright it is irrelevant if the original selection and arrangement took place for the production of a specific content, since it is aimed to protect the selection or/and the structure of the list of contents and not the creation of contents themselves, in our case the fixation of the date of a match. In fact, it seems that for the referring court the fixing of the date for a football match and the creation of the list of football matches, thus the creation of the database, are not necessarily two distinct activities.

The Advocate General seems to provide a clear cut answer to this interrogation by stating that the fixing of matches took necessarily place before the creation of the list of matches. But could this assessment be relevant for all cases or does it correspond to the specific circumstances of a football fixture list? What will be the case if certain data are created and presented through a database at the same time? The definition of the database presupposes the gathering of independent informational elements and by consequence pure data without autonomous informative value cannot constitute the contents of the database for the purposes of the Directive. But what if the creation of information and the creation of the database take place simultaneously? Will database copyright be denied due to the fact that the selection of the database's contents is organically linked to the creation of the contents? Is there always a clear borderline between the stage of the creation of data with an autonomous informative value and the creation of the database? How are going to be decided if and when the generic data have become autonomous information? Indeed, according to the Advocate's opinion, database creativity begins only after data creation has finished.

But what about creativity? Is it necessary for the protection of a database by copyright? The question 1 c) is the one which has a wider interest since it concerns the definition of the criterion of the author's own intellectual creation which is established by the Software, the Database and the Duration Directive. The Advocate clearly opts for a continental oriented concept of originality as regards database copyright. While mechanical efforts involved in the collection of data could count as substantial investment for the purposes for the award of sui generis right, database copyright requires a creative element superior to skill and labour. In other words, the author's own intellectual creation cannot exist without a certain creative spark.

If his opinion is followed by the Court the Football Dataco decision might probably have for UK copyright law the same effect as the Feist decision in the USA. This is far more true if it is combined with the answer of the Advocate General in question 2 which states that the Database Directive precludes national law from conferring copyright protection upon a database which does not meet the requirements laid down in article 3 of the Directive, thus which is not the author's own intellectual creation. Even though we can imagine copyright protection for compilations which do not meet the criteria of the definition of a database under the Directive on the basis of less stringent criteria, such as pure skill and labour, it is, however, questionable if the Dataco decision combined with Infopaq which imposes the criterion of the "author's own intellectual creation" as a threshold for all works and not only for databases, computer programs and photographs leaves any room for this option.