

## 20 years after the birth of the Database Directive, still mapping EU database law...

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On October 29<sup>th</sup> 2015, the Court of Justice of the European Union delivered its judgment in the case [C-490/14, Freistaat Bayern v Verlag Esterbauer GmbH](#). The Court was called upon to clarify the definition of "database" in [Directive 96/9](#) on the legal protection of databases.

It is noteworthy that the Database Directive, one of the oldest pieces of EU legislation in the field of copyright law, still offers scope for puzzling questions even now, just a few months before its 20th anniversary.

The facts of the case are quite simple. The Land of Bavaria publishes topographic maps covering the entire Federal state of Bavaria. Verlag Esterbauer is an Austrian publisher which publishes atlases, tour books and maps for cyclists, mountain bikers and inline skaters. The cause of the dispute was the unauthorised scanning of the Land of Bavaria's topographic maps and the subsequent extraction and reuse of geographical information by Verlag Esterbauer for the creation of its own specialised maps. Specifically, the Court was asked to elucidate whether geographical data extracted from a topographic map in order that a third party may produce and market another map retains, after extraction, sufficient informative value so as to be held to be 'independent materials' of a 'database' within the meaning of the definition of database in Article 1(2) of the Directive.

The question is tricky since even though every bit of data, from the moment that it is capable of conveying a message, is *ab initio* deemed to have a certain informative value, only a collection of "independent works, data or other materials" can be protected as a database. The criterion of independence has been interpreted by the Court in the *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* case (case C-444/02, Judgment of 9 November 2004), where it clarified that independent materials within the meaning of Article 1(2) of the directive are those which are separable from one another without their informative, literary, artistic, musical or other value being affected and, consequently, they have an autonomous informative value. Indeed, the Court since the first cases where database law issues were raised has continually and clearly adopted a wide and teleological definition of the concept of "database", with emphasis on the function of a "database" and the purpose of the legal protection established by the Database Directive.

So, it is not surprising that in the present judgment the Court has, in line with its previous case law, confirmed that EU database law is applicable to an analogue topographic map. What is, however, surprising is the ambit and the notional dynamism of the definition of "database". Indeed, as the Court affirms, it is irrelevant whether the separable pieces of geographical information in the map significantly or completely lose their individual informative value once they have been extracted. What matters is the value of those pieces of information to the users of sub products of the initial database made by third parties. The evaluation of the informative value of the materials should be flexible and take into consideration the collective informative value of the pieces of information which have been reused. Accordingly, the Court asserts that not only an individual piece of information, but also a combination of pieces of information can constitute 'independent material' within the meaning of Article 1(2) of Directive 96/9.

Therefore, the combination of those two pieces of information can have an autonomous informative value, since those combined data convey relevant information to the customers of the third party who has selectively extracted them from the maps. In order to reach this conclusion, the Court interpreted the concept of "informative value" liberally by disconnecting it from common value standards, such as the purpose, the principal intended use or the use that would be made by a typical user of a collection such as a topographic map. It seems that for the Court it is sufficient that the subsequent reuse of the data has a certain independent commercial value, and that the independence of the data is linked to the potential of an autonomous commercial exploitation after their extraction from the "database".

The Court justifies this conceptual laxity by referring to the various purposes of a topographic map and to the difficulties involved in determining a principal intended use or typical user of a collection such as a map. It also stresses that the application of such a criterion for the assessment of the autonomous informative value of the materials making up a collection would run counter to the intention of the EU legislature to give broad scope to the definition of the term 'database' (par. 26 of the judgment). The approach of the Court is based on the axiom that even a sole piece of information taken either separately or combined with other pieces can have an autonomous informative value.

The Court's reasoning is *a priori* understandable, since, given the evolution of the technology, the informative value of works, data and other materials cannot be assessed on the grounds of pre-established standards. Nonetheless, in a big data information world where combined bits of information can be retrieved, mined, analysed and reused by intelligent computer systems for various meaningful purposes, asking whether the data have an independent informative value on the grounds of how "relevant" or useful they are for new users or consumers appears more a rhetorical question than a real one. Furthermore, with the exception of data which are interconnected in a linear way, such as a novel or a film, the contents of a collection of materials will, after their extraction, always retain a certain value, -albeit reduced or different from the initial one-, for various new purposes and applications. Certainly, in the present case the "relevance" and usefulness of the data was direct, because the new product was a map. But this will not always be the case, for instance where the data will be extracted, analysed and reused for a new service or application, but won't be directly usable (or even visible) by end users.