Court of Justice EU, 1 March 2012, Football Dataco v Yahoo

COPYRIGHT LAW

Originality: making free and creative choices and thus stamp personal touch

- **As regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices (see, by analogy, Infopaq International, paragraph 45; Bezpečnostní softwarová asociace, paragraph 50; and Painer, paragraph 89) and thus stamps his 'personal touch' (Painer, paragraph 92).**

Copyright on database: selection or arrangement of the data which amounts to an original expression of the creative freedom of its author; not mere intellectual effort, labour an skill

- **that Article 3(1) of Directive 96/9 must be interpreted as meaning that a 'database' within the meaning of Article 1(2) of that directive is protected by the copyright laid down by that directive 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.

Database Directive harmonises copyright protection of databases

- **that Directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, it precludes national legislation which grants databases, as defined in Article 1(2) of the directive, copyright protection under conditions which are different to those set out in Article 3(1) of the directive.**

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Court of Justice EU, 1 March 2012
(K. Lenaerts, J. Malenovský, E. Juhász, G. Arestis and D. Šváby)
JUDGMENT OF THE COURT (Third Chamber)
1 March 2012 (*)
(Directive 96/9/EC – Legal protection of databases – Copyright – Football league fixture lists)
In Case C-604/10,
REFERENCE for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 10 December 2010, received at the Court on 21 December 2010, in the proceedings
Football Dataco Ltd,
Football Association Premier League Ltd,
Football League Ltd,
Scottish Premier League Ltd,
Scottish Football League,
PA Sport UK Ltd
v
Yahoo! UK Ltd,
Stan James (Abingdon) Ltd,
Stan James plc,
Enetpulse ApS,
THE COURT (Third Chamber),
composed of K. Lenaerts (Rapporteur), President of the Chamber, J. Malenovský, E. Juhász,
G. Arestis and D. Šváby, Judges,
Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,
having regard to the written procedure and further to the hearing on 27 October 2011, after considering the observations submitted on behalf of:
– Football Dataco Ltd, Football Association Premier League Ltd, Football League Ltd, Scottish Premier League Ltd, Scottish Football League and PA Sport UK Ltd, by J. Mellor QC, S. Levine and L. Lane and R. Hoy, Barristers,
– Yahoo! UK Ltd, Stan James (Abingdon) Ltd, Stan James plc and Enetpulse ApS, by D. Alexander and R. Meade QC, P. Roberts and P. Nagpal, Barristers,
– the United Kingdom Government, by L. Seeboruth, acting as Agent, assisted by S. Malynicz, Barrister,
– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,
– the Maltese Government, by A. Buhagiar and G. Kimberley, acting as Agents,
– the Portuguese Government, by A.P. Barros and by L. Inez Fernandes and P. Mateus Calado, acting as Agents,
– the Finnish Government, by J. Heliskoski, acting as Agent,
– the European Commission, by J. Samnadda and T. van Rijn, acting as Agents,
after hearing **the Opinion of the Advocate General at the sitting on 15 December 2011**,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

2 The reference has been made in proceedings between Football Dataco Ltd, Football Association Premier League Ltd, Football League Ltd, Scottish Premier League Ltd, Scottish Football League et PA Sport UK Ltd (collectively, 'Football Dataco and Others'), on the one hand, and Yahoo! UK Ltd, Stan James (Abingdon) Ltd, Stan James plc and Enetpulse ApS (collectively, 'Yahoo and Others'), on the other, concerning intellectual property rights claimed by Football Dataco and Others over the English and Scottish football league fixture lists.

Legal context

International law

3 Under a section on copyright and connected rights, Article 10(2) of the Agreement on Trade -Related Aspects of Intellectual Property Rights, which constitutes Annex 1C to the Agreement establishing the World Trade Organisation, signed in Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) provides:

'Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.'

4 Article 5 of the World Intellectual Property Organization (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996, which relates to 'Compilations of Data (Databases)', states:

'Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.'

European Union law

5 Recitals 1 to 4, 9, 10, 12, 15, 16, 18, 26, 27, 39 and 60 to Directive 96/9 state that:

'(1) Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;

(2) Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on the basis of harmonized legal arrangements throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation in this field, which is now taking on an increasingly international dimension;

(3) Whereas existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising;

(4) Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community;

…

(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;

(10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;

…

(12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;

…

(15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;

(16) Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;

…

(18) Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; …

…

(26) Whereas works protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may

not be incorporated into, or extracted from, the database without the permission of the rightholder or his successors in title;
(27) Whereas copyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database;
…
(39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and [collecting] the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;
…
(60) Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned'.

6 Article 1(2) of Directive 96/9 states that:

'For the purposes of this 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.'

7 Under chapter II, entitled 'Copyright', Article 3 of Directive 96/9, which defines the '[o]bject of protection', states that:

'1. In accordance with this Directive, 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.
2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.'

8 Under chapter III, entitled 'Sui generis right', Article 7 of Directive 96/9, relating to the '[o] bject of protection', states in paragraphs 1 and 4:

'1. 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 reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.
…
4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. …'

9 Under chapter IV, entitled 'Common provisions', Article 14 of Directive 96/9 states:

'1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to [in] Article 16(1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.
2. Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3(1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under those arrangements.
…'

10 The date of the publication of Directive 96/9 in the Official Journal of the European Communities is 27 March 1996.

11 That directive was implemented in the United Kingdom by the adoption of the Copyright and Rights in Databases Regulations 1997 (SI 1997, No 3032), which came into force on 1 January 1998. The wording of the provisions of those Regulations which are relevant in the present case is identical to that of the relevant provisions of the directive.

The facts which gave rise to the dispute in the main proceedings and the questions referred for a preliminary ruling

Creation of the fixture lists of the English and Scottish football leagues

12 According to the order for reference, the creation of the annual fixture lists of the football leagues in England and Scotland follows, on the whole, comparable rules and procedure.

13 It involves having regard to several rules, which are called 'the golden rules', the most important of which are:

– no club shall have three consecutive home or away matches;

– in any five consecutive matches no club shall have four home matches or four away matches;

– as far as possible, each club should have played an equal number of home and away matches at all times during the season, and

– all clubs should have as near as possible an equal number of home and away matches for mid-week matches.

14 The procedure for drawing up a fixture list such as those in question in the main proceedings consists of several stages. The first stage, which begins during the previous season, is the preparation by employees of the

leagues concerned of the Premier League fixture schedule and an outline fixture list for other leagues. That stage consists of establishing a list of possible dates for the fixtures on the basis of a series of basic parameters (the dates of the start and the end of the season, the number of fixtures which must be played, the dates reserved to other national, European or international competitions).

15 The second stage is the sending out, to the clubs concerned, of questionnaires prior to the fixing of the schedule and the analysis of the responses to these questionnaires, in particular 'specific date' requests (a request by a club to play its fixture against another club at home or away on a particular date), 'non-specific date' requests (a request by a club to play a certain match on a certain day of the week at a certain time, for example, Saturday after 1.30 pm), and 'pairing' requests (a request that two or more clubs not play at home on the same day). Around 200 requests are made per season.

16 The third stage, which, in the case of the English football leagues, is undertaken by Mr Thompson of Atos Origin IT Services UK Ltd, comprises two tasks, 'sequencing' and 'pairing'.

17 Sequencing aims to achieve the perfect home-away sequence for every club, having regard to the golden rules, a series of organisational constraints and, as far as possible, the requests made by the clubs. Mr Thompson then produces a pairing grid on the basis of the requests made by the teams. He gradually inserts the names of the teams into that grid and attempts to resolve a maximum amount of problem cases until a satisfactory draft fixture list is completed. For that purpose, he uses a computer program, to which he transfers information from the sequencing sheet and the pairing grid to produce a readable version of the fixture list.

18 The final stage involves Mr Thompson working with employees of the professional leagues concerned to review the content of the fixture lists. That review is carried out manually with the assistance of computer software to find solutions to outstanding problems. Two meetings then take place, one with a fixtures working party and the other with police representatives, in order to finalise the fixture list. In the 2008/2009 season, 56 changes were made during that final stage.

19 According to the findings of fact made by the judge at first instance reproduced in the order for reference, the process of preparing the football fixture lists in question in the main proceedings is not purely mechanistic or deterministic; on the contrary, it requires very significant labour and skill in order to satisfy the multitude of competing requirements while respecting the applicable rules as far as possible. The work needed is not mere application of rigid criteria, and is unlike, for instance, the compilation of a telephone directory, in that it requires judgment and skill at each stage, in particular where the computer program finds no solution for a given set of constraints. With regard to the partial computerisation of the process, Mr Thompson states that it does not eliminate the need for judgment and discretion.

The facts in the main proceedings and the questions referred for a preliminary ruling

20 Football Dataco and Others claim that they own, in respect of the English and Scottish football league fixture lists, a 'sui generis' right pursuant to Article 7 of Directive 96/9, a copyright pursuant to Article 3 of that directive, and a copyright under United Kingdom intellectual property legislation.

21 Yahoo and Others do not accept that such rights exist in law, arguing that they are entitled to use the lists in the conduct of their business without having to pay financial compensation.

22 The judge at first instance held that those lists are eligible for protection by copyright under Article 3 of Directive 96/9, on the ground that their preparation requires a substantial quantum of creative work. However, he refused to recognise either of the two other rights claimed.

23 The referring court confirmed the judgment at first instance as regards the ineligibility of the lists in question in the main proceedings for protection by the 'sui generis' right under Article 7 of Directive 96/9. By contrast, the referring court raises the question of whether the lists are eligible for protection by copyright under Article 3 of that directive. The referring court also has doubts regarding the possibility of the lists being protected by the copyright pursuant to United Kingdom legislation prior to that directive under conditions which are different to those which are set out in Article 3 of Directive 96/9.

24 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. In Article 3(1) of Directive 96/9 … 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 preexisting item of data (as in fixing the date of a football match), and

(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 [Directive 96/9]?'

The first question submitted for a preliminary ruling 25

By its first question, the referring court is essentially seeking an interpretation of Article 3 (1) of Directive 96/9. In particular, it is asking:

– firstly, whether the intellectual effort and skill of creating data should be excluded in connection with the application of that provision;

– secondly, whether the 'selection or arrangement' of the contents, within the meaning of that provision,

includes adding important significance to a pre-existing item of data, and

– thirdly, whether the notion of 'author's own intellectual creation' within the meaning of that provision requires more than significant labour and skill from the author and, if so, what that additional requirement is.

26 First of all, it is to be noted that, on the one hand, the Court has already held that a football league fixture list constitutes a 'database' within the meaning of Article 1(2) of Directive 96/9. The Court essentially held that the combination of the date, the time and the identity of the two teams playing in both home and away matches has autonomous informative value which renders them 'independent materials' within the meaning of Article 1(2) of Directive 96/9, and that the arrangement, in the form of a fixture list, of the dates, times and names of teams in the various fixtures of a football league meets the conditions set out in Article 1(2) of Directive 96/9 as to the systematic or methodical arrangement and individual accessibility of the data contained in the database (**see Case C-444/02 Fixtures Marketing [2004] ECR I-10549, paragraphs 33 to 36**).

27 On the other hand, it is apparent from both a comparison of the terms of Article 3(1) and Article 7(1) of Directive 96/9 and from other provisions or recitals of Directive 96/9, in particular Article 7(4) and recital 39 to that directive, that the copyright and the 'sui generis' right amount to two independent rights whose object and conditions of application are different.

28 Consequently, the fact that a 'database' within the meaning of Article 1(2) of Directive 96/9 does not satisfy the conditions of eligibility for protection by the 'sui generis' right under Article 7 of Directive 96/9, as the Court held in relation to football fixture lists (**Case C-46/02 Fixtures Marketing [2004] ECR I-10365, paragraphs 43 to 47; Case C-338/02 Fixtures Marketing [2004] ECR I-10497, paragraphs 32 to 36; and Case C-444/02 Fixtures Marketing, cited above, paragraphs 48 to 52**), does not automatically mean that that same database is also not eligible for copyright protection under Article 3 of that directive.

29 Under Article 3(1) of Directive 96/9, 'databases' within the meaning of Article 1(2) of that directive are protected by copyright if, by reason of the selection or arrangement of their contents, they constitute the author's own intellectual creation.

30 Firstly, it is apparent from reading Article 3(2) in conjunction with recital 15 of Directive 96/9 that the copyright protection provided for by that directive concerns the 'structure' of the database, and not its 'contents' nor, therefore, the elements constituting its contents.

31 Similarly, as is apparent from Article 10(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights and from Article 5 of the WIPO Copyright Treaty, compilations of data which by reason of the selection or arrangement of their contents constitute intellectual creations are protected as such by copyright. On the other hand, that protection does not extend to the data itself and is without prejudice to any copyright subsisting for that data.

32 In that context, the concepts of 'selection' and of 'arrangement' within the meaning of Article 3(1) of Directive 96/9 refer respectively to the selection and the arrangement of data, through which the author of the database gives the database its structure. By contrast, those concepts do not extend to the creation of the data contained in that database.

33 Consequently, as Yahoo and Others, the Italian, Portuguese and Finnish governments as well as the European Commission have argued, the materials mentioned in section (a) of the referring court's first question that concern the intellectual effort and skill of creating data are not relevant in order to assess the eligibility of the database that contains them for the copyright protection provided for by Directive 96/9.

34 That analysis is confirmed by the purpose of that directive. As is apparent from recitals 9, 10 and 12 of that directive, its purpose is to stimulate the creation of data storage and processing systems in order to contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity (**see Case C-46/02 Fixtures Marketing, cited above, paragraph 33**; **Case C-203/02 The British Horseracing Board and Others [2004] ECR I-10415, paragraph 30**; **Case C-338/02 Fixtures Marketing, cited above, paragraph 23; and Case C-444/02 Fixtures Marketing, cited above, paragraph 39**) and not to protect the creation of materials capable of being collected in a database.

35 In the case in the main proceedings, it must be observed that the resources, in particular intellectual resources, described by the referring court and referred to in paragraphs 14 to 18 of this judgment, are deployed for the purpose of determining, in the course of arranging the leagues concerned, the date, the time and the identity of teams corresponding to each fixture of those leagues, in accordance with a set of rules, parameters and organisational constraints as well as the specific requests of the clubs concerned (**see Case C-46/02 Fixtures Marketing, cited above, paragraph 41; Case C-338/02 Fixtures Marketing, cited above, paragraph 31; and Case C-444/02 Fixtures Marketing, cited above, paragraph 47**).

36 As Yahoo and Others and the Portuguese government have pointed out, those resources relate to the creation of the same data which is contained in the database in question, as already noted in paragraph 26 of the present judgment (**see Case C-46/02 Fixtures Marketing, cited above, paragraph 42; Case C-338/02 Fixtures Marketing, cited above, paragraph 31; and Case C-444/02 Fixtures Marketing, cited above, paragraph 47**). As a consequence, and having regard to what is stated in **paragraph 32 of the present judgment**, they are, in any case, of no relevance in order to assess the eligibility of the football fixture lists in question in the main proceedings for the copyright protection provided for by Directive 96/9.

37 Secondly, as is apparent from recital 16 of Directive 96/9, the notion of the author's own intellectual creation refers to the criterion of originality (see, to that effect, **Case C-5/08 Infopaq International [2009] ECR I-6569, paragraphs 35, 37 and 38**; **Case C-393/09 Bezpečnostní softwarová asociace [2010] ECR I-0000 paragraph 45**; **Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-0000, paragraph 97**; **and Case C-145/10 Painer [2011] ECR I-0000, paragraph 87**).

38 As regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices (see, by analogy, **Infopaq International, paragraph 45**; **Bezpečnostní softwarová asociace, paragraph 50**; and **Painer, paragraph 89**) and thus stamps his 'personal touch' (**Painer, paragraph 92**).

39 By contrast, that criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom (see, by analogy, **Bezpečnostní softwarová asociace, paragraphs 48 and 49**, and **Football Association Premier League and Others, paragraph 98**).

40 As is apparent from both Article 3(1) and recital 16 of Directive 96/9, no other criteria than that of originality is to be applied to determine the eligibility of a database for the copyright protection provided for by that directive.

41 Therefore, on the one hand, provided that the selection or arrangement of the data – namely, in a case such as the one in the main proceedings, data corresponding to the date, the time and the identity of teams relating to the different fixtures of the league concerned (see paragraph 26 of the present judgment) – is an original expression of the creativity of the author of the database, it is irrelevant for the purpose of assessing the eligibility of the database for the copyright protection provided for by Directive 96/9 whether or not that selection or arrangement includes 'adding important significance' to that data, as mentioned in section (b) of the referring court's first question.

42 On the other hand, the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author, as mentioned in section (c) of that same question, cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data.

43 In the present case, it is for the referring court to assess, in the light of the factors set out above, whether the football fixture lists in question in the main proceedings are databases which satisfy the conditions of eligibility for the copyright protection set out in Article 3(1) of Directive 96/9.

44 In that respect, the procedures for creating those lists, as described by the referring court, if they are not supplemented by elements reflecting originality in the selection or arrangement of the data contained in those lists, do not suffice for the database in question to be protected by the copyright provided for in Article 3(1) of Directive 96/9.

45 In light of the considerations above, the answer to the first question is that Article 3(1) of Directive 96/9 must be interpreted as meaning that a 'database' within the meaning of Article 1(2) of that directive is protected by the copyright laid down by that directive 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.

46 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.

The second question submitted for a preliminary ruling

47 By its second question, the referring court is essentially asking whether Directive 96/9 must be interpreted as precluding national legislation which grants databases, as defined in Article 1(2) of that directive, copyright protection under conditions which are different to those set out in Article 3(1) of the directive.

48 In that respect, it must be pointed out that Directive 96/9 aims, according to recitals 1 to 4 of the directive, to remove the differences which existed between national legislation on the legal protection of databases, particularly as regards the scope and conditions of copyright protection, and which adversely affected the functioning of the internal market, the free movement of goods or services within the European Union and the development of an information market within the European Union.

49 In that context, as is apparent from recital 60 of Directive 96/9, Article 3 of that directive carries out a 'harmonization of the criteria for determining whether a database is to be protected by copyright'.

50 It is true that, as regards databases which were protected on 27 March 1996 by national copyright arrangements under different eligibility criteria than those set out in Article 3(1) of Directive 96/9, Article 14(2) of the directive preserves the duration of the protection granted by such arrangements in the Member State concerned. However, subject only to that transitional provision, Article 3(1) of the directive precludes national legislation which grants databases as defined in Article 1(2) of that directive copyright

protection under conditions which are different to that of originality laid down in Article 3(1) of the directive.

51 As for recitals 18, 26 and 27 of Directive 96/9, highlighted by Football Dataco and Others, those recitals note the freedom which authors of works have to decide whether to include their works in a database and the absence of effect which the incorporation of a protected piece of work in a protected database has on the rights protecting the work thus incorporated. However, they do not support an interpretation contrary to that set out in the previous paragraph of this judgment.

52 In light of the above considerations, the answer to the second question is that Directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, it precludes national legislation which grants databases, as defined in Article 1(2) of the directive, copyright protection under conditions which are different to those set out in Article 3(1) of the directive.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases must be interpreted as meaning that a 'database' within the meaning of Article 1(2) of that directive is protected by the copyright laid down by that directive 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.

2. Directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, it precludes national legislation which grants databases, as defined in Article 1(2) of the directive, copyright protection under conditions which are different to those set out in Article 3(1) of the directive.

[Signatures]

* Language of the case: English.

OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 15 December 2011(1)

Case C-604/10

Football Dataco Ltd

Football Association Premier League Ltd

Football League Limited

Scottish Premier League Ltd

Scottish Football League

PA Sport UK Ltd

v

Yahoo! UK Limited

Stan James (Abingdon) Limited

Stan James PLC

Enetpulse APS

(reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division), United Kingdom)

(Directive 96/9/EC – Legal protection of databases – Football league fixture lists – Copyright)

1. In the present case the Court is called upon to expand upon its case-law regarding the possibility of protecting football league fixture lists on the basis of Directive 96/9/EC on the legal protection of databases (also 'the Directive'). (2) In 2004, the Court held that such fixture lists cannot, in principle, be protected on the basis of the 'sui generis' right provided for under the Directive. In order to complete the picture, it is now necessary to determine whether copyright protection applies and, if so, on what conditions.

I – Legal context

2. Under Directive 96/9, a database can be covered by two distinct types of protection. The first is that provided by copyright, defined in the following terms in Article 3:

'1. In accordance with this Directive, 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.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.'

3. Article 7 of the Directive then provides for another type of protection for databases, based on a 'sui generis' right, where a 'substantial investment' has been needed to build them up:

'1. 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 reutilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

…

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it

shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their content.'

4. Article 14 of Directive 96/9 deals with the application of that directive over time. In particular, Article 14(2) lays down the rule to be applied where a database was protected by copyright before the Directive entered into force, but does not meet the requirements for such protection on the basis of the Directive itself:

'[w]here a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3(1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under those arrangements.'

II – Facts, the main proceedings and the questions referred for a preliminary ruling

5. Football Dataco Ltd and the other applicant companies ('Football Dataco and Others') organise the English and Scottish football leagues. In that context, they draw up and make public the list of all the fixtures to be played each year in those leagues. The opposing parties, Yahoo! UK Limited and Others ('Yahoo and Others'), use those schedules to provide news and information and/or to organise betting activities.

6. Football Dataco and Others are essentially demanding that Yahoo and Others pay for the rights to use the football fixture lists compiled by Football Dataco and Others. They claim protection for those fixture lists under the Directive, on the basis of both the copyright and the 'sui generis' right.

7. The national courts have ruled out the possibility of protection based on the 'sui generis' right, since the Court of Justice has ruled on the point recently and in very clear terms, in four judgments delivered by the Grand Chamber in November 2004. (3) However, on the view that the issue concerning possible protection under the copyright – which was not raised in the context of the cases resolved in 2004 – remains open, the referring court stayed proceedings and referred the following questions for a preliminary ruling:

'(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?'

III – Question 1

8. By Question 1, the referring court asks the Court to specify, essentially, under what conditions a database may be protected by copyright under Directive 96/9/EC. In order to respond adequately, it is first of all necessary to review the Court's case-law on football fixture lists and then to ascertain the relationship between the two types of protection possible under the directive, namely, the copyright and the 'sui generis' right.

A – Relevant case-law of the Court

9. The Court's case-law relating to the protection of databases – and I refer, in particular, to the November 2004 judgments mentioned above – has clarified two fundamental points, which must be kept in mind when examining the questions referred in the present case.

10. First, a football fixture list, albeit consisting in a simple list of matches, must be regarded as a database for the purposes of the Directive. (4) That point is taken as given by the referring court and by all the parties who submitted observations, and therefore requires no further attention.

11. Secondly, a football fixture list does not meet the requirements for protection by the 'sui generis' right under Article 7 of the Directive. That is because the drawing up of the fixture list – that is to say, the entry of a series of pre-existing components (the data relating to each match) into an ordered list – does not require any substantial investment in the obtaining, verification or presentation of the contents. (5) As I have stated, that aspect is also taken for granted by the referring court (although some parties to the main proceedings sought to have questions relating to the 'sui generis' right referred to the Court as well), which accordingly restricted the scope of its questions to protection on the basis of the copyright.

B – The relationship between protection under the copyright and the 'sui generis' protection

12. Another point which must necessarily be clarified before addressing Question 1 concerns the relationship between the two types of protection provided for under the Directive. It could be thought, on a reading of the applicable provisions, that there is a hierarchical relationship between protection under the copyright and the 'sui generis' protection. On such an interpretation, which counts some authoritative endorsements, (6) and which was alluded to in certain observations made at the hearing, the 'sui generis' protection is regarded as a second-level protection, which can be held to apply to a database that does not possess the necessary originality to be protected by the copyright. If that were case, the fact that, in its judgments of November 2004, the Court ruled out the possibility of 'sui generis' protection (the 'lesser' protection, as it were) for football leagues would mean that protection under the copyright (the 'greater' protection, as it were) is automatically excluded.

13. However, careful examination of the Directive shows that such an interpretation is not correct, and that the two types of protection must be regarded as mutually independent in all respects, a fact which all the parties who submitted observations in the present

case, including the Commission, seem to have accepted.

14. It must be observed that, in the Directive, the very object of the two types of protection is different. On the one hand, protection under the copyright focuses essentially on the structure of the database, that is, the way in which it has actually been put together through the selection of the data to be included or the way in which they are presented. What is more, Article 3(2) states clearly that the copyright provided for in that article 'shall not extend to [the] contents' of databases, which can be protected by copyright autonomously, but are not protected by virtue of being entered in a protected database. Recital 15 to the Directive states that the copyright protection 'cover[s] the structure of the database'. The 'sui generis' protection, on the other hand, is simply a right to prohibit extraction and/or re-utilisation of the data contained in the database. That right is conferred, not to protect the originality of the database in itself, but to compensate the effort expended in obtaining, verifying and/or presenting the data contained therein. (7)

15. In other words, therefore, a database can be protected by the copyright alone, or by the 'sui generis' right alone, by both or by neither, depending on the case.

C – The concept of a 'database' for the purposes of the Directive

16. The fact that – as we have just seen – the two possible types of protection for a database are mutually independent in all respects does not mean, however, that the concept of a 'database', as developed by the Court in its judgments of November 2004, must differ as between the two types of right. On the contrary, I am convinced that the concept of a database must necessarily be the same in both cases. There would be no sense in a key concept of the Directive, defined in Article 1, having a different meaning – with nothing in the text to suggest that it should – for the purposes of construing two separate provisions, which are in no way compromised if they are interpreted in the light of a common concept of a 'database'. The copyright can protect the structure of the database, while the 'sui generis' right guards its content, but that does not mean that there must be two separate concepts of a 'database'.

17. In that context, the Court has made it clear that the scope of protection provided by the Directive does not cover the phase in which the data are created, but only the phase in which they are collected, verified and presented. (8) In other words, in identifying the 'database', care must be taken to plot clearly the dividing line between the time when the data are created, which the Directive does not concern, and the time when they are collected or developed, which, by contrast, is relevant for the purposes of determining whether or not the database is eligible for protection.

18. The Court drew that distinction, between the creation and the banking of the data, in the course of discussing the 'sui generis' protection. In my view, however, these are considerations which concern, more generally, the very concept of a 'database' for the purposes of the Directive. That finding also makes it clear, once and for all, that the Directive protects the creation of databases – both in terms of the structure of the database and in terms of the collection of the data – but does not deal with the protection of the data as such. Furthermore, the objective of the Directive is to encourage the creation of systems for collecting and consulting information, (9) not the creation of data. When discussing the concept of a 'database', the Court has, moreover, repeatedly stressed the independent informative value of the data entered in a database. (10)

19. Furthermore, as regards copyright, it is perfectly logical not to take the activities involved in the creation of the data into consideration for the purposes of Directive 96/09, since that directive makes it clear that the data may still be protected as such by copyright, if the conditions for such protection are met, independently of any copyright in the database itself.

20. I must also observe that, in the present case, the very idea of using copyright to protect football fixture lists seems peculiar, to say the least. As I have already pointed out above, in the case of a database, the copyright essentially protects its 'external' aspect, its structure. It is my understanding that Yahoo and Others use the data developed by the companies which organise the leagues, not the form in which in which those companies make the data public. Perfectly reasonably, before the Court's judgments of 2004 ruled out the possibility that the 'sui generis' type of protection could apply, the only type of protection that the organising companies considered was the 'sui generis', which, as has been seen, protects the contents of a database (or, more accurately, the effort required to collect and present the data) rather than its structure. Recourse to the copyright now appears to be a 'fallback' solution prompted by the Court's exclusion of 'sui generis' protection. Moreover, it is not even certain that, were protection under copyright available for football fixture lists, it would impede the current activities of Yahoo and Others, which, as far as can be understood from the case file, appear to be confined to use of the raw data (the dates, times and teams for the various matches), and not the structure of the database.

21. On the basis of all those preliminary remarks, we can now move on to consider Questions 1 (a), (b) and (c). As will be seen, because of the approach taken to each of those three queries. The solution to these will allow me to arrive at an answer to the whole of the first question.

D – Question 1(a)

22. By the first of the three sub-questions, the referring court asks the Court whether the activity that goes into creating the data which are entered into the database is to be taken into consideration when deciding whether or not the database is eligible for protection under the copyright.

23. The answer to that question flows directly from what I have stated above regarding the fact that, throughout the Directive, the term 'database' necessarily relates to one and the same concept. The

effort expended in the creation of the data cannot be taken into account for the purposes of assessing eligibility for protection under the copyright, just as, according to the Court's case-law, they cannot be taken into account for the purposes of assessing eligibility for 'sui generis' protection. The creation of the data is an activity which falls outside the scope of the Directive.

24. Furthermore, it should be noted that if the activities involved in the creation of the data cannot, as the Court has affirmed, be taken into consideration for 'sui generis' protection, which is more closely linked to the data and the obtaining of those data, then a fortiori those activities will have to be disregarded for protection by copyright, which is more tenuously linked to the collection of the data and is focused more on their representation.

E – Question 1(b)

25. By the second sub-question, the referring court asks the Court to clarify whether the 'selection or arrangement' of the contents of the database – appraisal of which makes it possible to determine whether the requirements for protection under the copyright are satisfied – can also consist in adding important significance to a pre-existing item of data.

26. Essentially, what is being asked is whether, for instance, the attribution of additional specific characteristics to an item already entered in a database amounts to 'selection or arrangement' in sufficient measure to ensure protection under Article 3. The referring court mentions by way of example the act of determining the date of a given match between two football teams.

27. To my mind, that sub-question is based on a mistaken premise. Indeed, all the details relating to each match in a given league must be regarded as having been fixed by the time they are entered in the database. In the case of football fixture lists, the basic data entered in the database are not – as the Court has already made clear – all the teams and all the possible dates, but the specific details of every single match to be played (date, teams, venue, and so on).(11) In other words, all the details for each match are identified and collected at the data creation stage – which, as has been seen, is excluded from protection under the Directive – and the determination of those details cannot be regarded as caused by or following upon the organisation of the data in the database.

28. The referring court, on the other hand, seems to start from the assumption that, in practice, a number of simple lists are entered in the database: all the teams in the league, and all the possible dates and times for the matches. Viewed in that way, the determination of the specific details of each match (the teams involved, the date and time) would take place after the basic data were entered in the database. Such a determination would be output generated by the database.

29. In my opinion, that is an incorrect reading of the facts. It is not the generic lists of teams and the possible dates and times that are entered in the database. Rather, what is entered in the database is all the individual matches to be played, each with its details already finalised: time, date, and teams. The transition from the generic lists (for instance, teams A, B, C, D and so on, and dates x, y z, and so on) to the definition of the individual matches (for instance, team A against team B on date x) takes place at the data creation stage, which precedes the entry of those data in the database.

30. In consequence, the fairly detailed observations submitted by the parties to the case before the referring court in order to demonstrate that the process of determining the details of each individual match is not simply automatic, but in fact requires considerable judgment and skill, are irrelevant. That process is wholly preliminary to, and separate from, that of the creation of the database.

31. The interpretation just suggested is confirmed by the case-law of the Court referred to above and, in particular, by those passages in which it is stressed that the individual components of a database must have autonomous informative value. (12) To my mind, generic lists of teams, dates and times cannot be regarded as genuinely 'informative'. Only the set of details identifying each individual match can have such value.

32. That said, I believe that, if framed in abstract terms and posed outside the context of the present case, the sub-question should be answered in the affirmative. In other words, the adding of important significance to pre-existing items of data – by entering those data in a database – can constitute an 'arrangement of contents' which can properly be taken into consideration for the purposes of protection under the copyright. In my view, there is no doubt that, in the spirit of the Directive, the fact that the entry of data in a database adds further value or significance to those data can be relevant, in the context of an overall assessment, for the purposes of determining whether the database itself is to be accorded copyright protection. What is more, that is the very purpose of the provision, which seeks to protect what a database 'adds', in whatever way, to the basic data entered in it. The elements which characterise the matches of a football league, however, are all basic data, and are not output generated by the entry of the basic data in a database.

F – Question 1(c)

33. By the third sub-question, the referring court asks the Court about the concept of the 'intellectual creation' of the author of the database. This is, of course, a reference to the condition laid down in Article 3 of the Directive to the effect that, to be protected by the copyright, the database must, by reason of the selection or arrangement of its contents, be the author's own intellectual creation. In particular, the referring court asks whether or not the application of 'significant labour and skill' is sufficient for there to be an intellectual creation.

34. In all likelihood, this third sub-question – like the second – is based on the assumption, which I believe to be mistaken, that the effort expended by the organising companies to determine the teams, the date and the times of the various league matches – which undoubtedly requires a certain amount of labour and

organising experience – are linked to the setting up of the database. In reality, as I have pointed out above, that effort is expended at the previous stage, at which the data are created, which cannot be taken into consideration for the purposes of assessing whether the database is eligible for protection.

35. In any case, even leaving aside that matter and considering the national court's question in the abstract, I believe that the answer admits of no alternative: copyright protection is conditional upon the database being characterised by a 'creative' aspect, and it is not sufficient that the creation of the database required labour and skill.

36. It is common knowledge that, within the European Union, various standards apply as regards the level of originality generally required for copyright protection to be granted. (13) In particular, in some European Union countries which have common law traditions, the decisive criterion is traditionally the application of 'labour, skills or effort'. For that reason, in the United Kingdom for example, databases were generally protected by copyright before the entry into force of the Directive. A database was protected by copyright if its creator had had to expend a certain effort, or employ a certain skill, in order to create it. On the other hand, in countries of the continental tradition, for a work to be protected by copyright it must generally possess a creative element, or in some way express its creator's personality, even though any assessment as to the quality or the 'artistic' nature of the work is always excluded.

37. Now, on this point there is no doubt that, as regards copyright protection, the Directive espouses a concept of originality which requires more than the mere 'mechanical' effort needed to collect the data and enter them in the database. To be protected by the copyright, a database must – as Article 3 of the Directive explicitly states – be the 'intellectual creation' of the person who has set it up. That expression leaves no room for doubt, and echoes a formula which is typical of the continental copyright tradition.

38. Clearly, it is not possible to define, once and for all and in general terms, what constitutes an 'intellectual creation'. That depends on an assessment which, as I have said, is not necessary in the present case. In any event, if ever that assessment is required, it is for the national courts to undertake it on the basis of the circumstances of each individual case.

39. The Court has made some statements on this matter and, in particular, has stressed that the copyright protection of databases under Article 3 of the Directive – like the copyright protection of computer programs under Article 1(3) of Directive 91/250 (14) or of photographs under Article 6 of Directive 2006/116 (15) – requires that the works be 'original, in the sense that they are their author's own intellectual creation'. (16)

40. In that regard, the Court has also stated that a work is an intellectual creation if it reflects the personality of its author, which is the case if the author was able to make free and creative choices in the production of the work. (17) The Court has further specified that, in general, the necessary originality will be absent if the features of a work are predetermined by its technical function. (18)

41. What the legislature sought to achieve through the Directive, essentially, is a sort of compromise/reconciliation between the approaches in the various Member States of the European Union at the time when the Directive was adopted. For copyright protection, the more 'rigorous' paradigm of the countries of the continental tradition was chosen, whereas, for 'sui generis' protection, a criterion was used which, in practice, is closer to that of the common law tradition. (19)

42. As can be seen, these are rather general tendencies, which need not be explored any further here, since, as I stated above, in the case of a football fixture list, the database accommodates complete and autonomous items of information which do not acquire any additional significance by being entered in the database itself.

43. Naturally, the fact that copyright protection of databases is subject to a fairly stringent originality requirement does not mean that the 'mechanical' efforts involved in the collection of the data are irrelevant for the purposes of the Directive. On the contrary, the essential purpose of Article 7 of the Directive, relating to 'sui generis' protection, is precisely to provide legal protection for those activities. The fact that the Court has excluded its application to football fixture lists does not detract from its importance in more general terms.

44. The fact also remains that, in principle, even a football fixture list can in some circumstances be protected by copyright if, in actually putting it together, the creator introduces sufficiently original features. For example, a football fixture list characterised by a particular manner of representing the matches, through the use of colours or other graphic elements, could certainly qualify for copyright protection under the Directive. However, that protection would extend only to the means of the representation, and not the data represented. In the case before the referring court, it does not appear that the football fixture list produced by the organising companies is characterised by any original means whatsoever of presenting the data; it is for the national court to make that assessment, however, also taking into account the guidance from the Court, referred to above.

G – Conclusion on Question 1

45. Consideration of the three sub-questions has made it possible to clarify certain essential aspects of the protection of databases by copyright under the Directive. In particular, it has been established that the effort expended in the creation of the data cannot be taken into consideration for the purposes of assessing the eligibility for protection of the database as such (Question 1(a)). Secondly, we have seen that, although the addition of new elements to the pre-existing data as a result of their being entered in a database can be relevant for the purposes of assessing whether the database is eligible for protection, in the case of a series

of football matches entered in a database, there is no 'enhancement' of the pre-existing items of data (Question 1(b)). Lastly, it has been found that the mere application of effort or skill does not suffice to make a database an intellectual creation protected by the copyright (Question 1(c)). On the basis of those observations, it is now possible to formulate an answer to Question 1.

46. I therefore propose that, in answer to Question 1, the Court should state that a database can be protected by copyright under Article 3 of Directive 96/9/EC only if it is an original intellectual creation of its author. The activities involved in the creation of the data cannot be taken into account for the purposes of that assessment. In the case of a football fixture list, the determination of all the elements relating to each individual match is a data creation activity.

IV – Question 2

47. By Question 2, the referring court asks the Court if protection provided for under the Directive on the basis of the copyright is the only type of copyright protection possible for a database or if, on the contrary, national law may confer the same protection on databases which do not meet the necessary conditions under the Directive.

48. The referring court states clearly in the order for reference that it has only minor doubts regarding the answer to the question and, in fact, Question 2 can be rapidly resolved. It is clear that the Directive has completely harmonised the protection of databases by copyright, so that further rights cannot be conferred at national level.

49. That this was the legislature's intention is demonstrated unambiguously by the recitals to the Directive alone. For example, recital 3 states as follows:

'… existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising'.

50. Recital 12 to the Directive follows the same line of thought:

'… such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases'.

51. In my view, however, the matter is conclusively settled by Article 14 of the Directive. That provision establishes special transitional arrangements for databases formerly protected by copyright under national rules which do not meet the requirements for copyright protection under the Directive. Those databases are to retain copyright protection for the remainder of the term of protection afforded under the national arrangements preceding the Directive. It is obvious that the rule would make no sense if, after the entry into force of the Directive, national law could continue, without any limitation in time, to protect a database which does not meet the requirements under the Directive. If that were the case, 'national' copyright would continue to apply autonomously, and there would be no need for a transitional rule for databases which are not sufficiently original to qualify for protection under the Directive.

52. In answer to Question 2, it must therefore be stated that the 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 itself.

V – Conclusion

53. On the basis of the foregoing considerations, I propose that the Court give the following answer to the questions referred by the Court of Appeal for a preliminary ruling:

(1) A database can be protected by copyright, for the purposes of Article 3 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases only if it is an original intellectual creation of its author. For the purpose of that assessment, the activities involved in the creation of the data cannot be taken into account. In the case of a football fixture list, the determination of all the elements relating to each single match is a data creation activity.

(2) Directive 96/9 precludes national law from conferring copyright protection upon a database which does not meet the requirements laid down in Article 3 of the Directive itself.

1 – Original language: Italian.

2 – Directive of the European Parliament and of the Council of 11 March 1996 (OJ 1996 L 77, p. 20).

3 – Case C-46/02 Fixtures Marketing [2004] ECR I-10365; Case C-203/02 The British Horseracing Board and Others [2004] ECR I-10415; Case C-338/02 Fixtures Marketing [2004] ECR I-10497; and Case C-444/02 Fixtures Marketing [2004] ECR I-10549.

4 – Case C-444/02 Fixtures Marketing, cited in footnote 3, paragraphs 23 to 36.

5 – Case C-46/02, Fixtures Marketing, cited in footnote 3, paragraphs 44 to 47.

6 – To that effect, see, in particular, the Working Paper of the Directorate General for the Internal Market of 12 December 2005, First evaluationof Directive 96/9/EC on the legal protection of databases, available on the Commission's website.

7 – Case C-46/02 Fixtures Marketing, cited in footnote 3, paragraph 39. It may be remarked, incidentally, that the Italian version of Article 7 of the Directive seems to require that the significant investment be expended in the obtaining, verification and presentation of the data. The other language versions, on the other hand, use the conjunction or and the interpretation provided by the Court is consistent with those versions: the significant investment can justify protection even if it concerns only the obtaining, or only the verifying or only the presentation of the data.

8 – Case C-444/02 Fixtures Marketing, cited in footnote 3, paragraphs 39 and 40, and Case C-338/02 Fixtures Marketing, cited in footnote 3, paragraph 25.
9 – Case C-444/02 Fixtures Marketing, cited in footnote 3, paragraph 28.
10 – Ibidem, paragraphs 29 and 33 to 35.
11 – Case C-46/02 Fixtures Marketing, cited in footnote 3, paragraphs 41 to 42; Case C-338/02 Fixtures Marketing, cited in footnote 3, paragraph 31; and Case C-444/02 Fixtures Marketing, cited in footnote 3, paragraph 47.
12 – See footnote 10.
13 – In its initial proposal for a directive, dated 13 May 1992 [COM(92) 24 final], the Commission had already identified divergence in national rules regarding originality as one of the factors militating in favour of harmonising the legal protection of databases (see paragraph 2.2.5).
14 – Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).
15 – Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) (OJ 2006 L 372, p. 12).
16 – Case C-5/08 Infopaq International [2009] ECR I-6569, paragraph 35. Moreover, it must be observed that the three directives just referred to use terminology which in some languages is identical and in others (for instance, Italian) clearly indicates, despite some slight differences, that the legislature intended to refer to the same concept.
17 – Case C-145/10 Painer [2011] ECR I-0000, paragraphs 88 to 89.
18 – Case C-393/09 Bezpečnostní softwarová asociace [2010] ECR I-0000, paragraph 49.
19 – On that point, see also the Commission Working Paper cited in footnote 6 (paragraph 1.1).