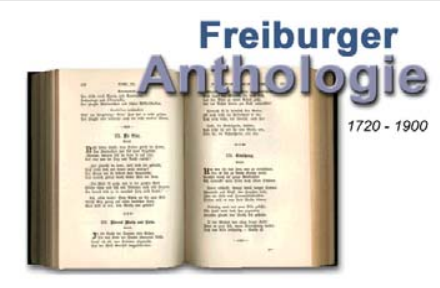
European Court of Justice, 9 October 2008, Directmedia v Albert-Ludwigs-Universität Freiburg



v

DATABASE RIGHTS

Extraction

- **On-screen consultation and individual assessment of the material contained in the database is capable of constituting an 'extraction' to the extent that that operation amounts to the transfer of a substantial part of the contents of the protected database**

The transfer of material from a protected database to another database following an on-screen consultation of the first database and an individual assessment of the material contained in that first database is capable of constituting an 'extrac-tion', within the meaning of Article 7 of Directive 96/9, to the extent that – which it is for the referring court to ascertain – that operation amounts to the transfer of a substantial part, evaluated qualitatively or quantita-tively, of the contents of the protected database, or to transfers of insubstantial parts which, by their repeated or systematic nature, would have resulted in the recon-struction of a substantial part of those contents.

Accordingly, the fact that an act of transfer does not concern a substantial and structured series of ele-ments which appear in a protected database does not preclude that act from falling within the scope of 'ex-traction' within the meaning of Article 7 of Directive 96/9.

Similarly, as the Commission has stated, it is true that the fact that material contained in one database may be transferred to another database only after a critical assessment by the person carrying out the act of transfer could prove to be relevant, in appropriate cases, for the purpose of determining the eligibility of that other database for one of the types of protection provided for in Directive 96/9. However, that fact does not preclude a finding that there has been a transfer of elements from the first database to the second one.

The objective pursued by the act of transfer is also immaterial for the purposes of assessing whether there has been an 'extraction' within the meaning of Article 7 of Directive 96/9.

It cannot be interpreted as reducing the scope of the acts subject to the protection of the sui generis right merely to acts of copying by technical means

- **Where the maker of a database makes the contents of that database accessible to third parties his sui generis right does not allow him to prevent such third parties from consulting that database**

However, where the maker of a database makes the contents of that database accessible to third parties, even if he does so on a paid basis, his sui generis right does not allow him to prevent such third parties from consulting that database for information purposes (see, to that effect, The British Horseracing Board and Others, paragraph 55). It is only when on-screen display of the contents of that database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium that such an act of consultation may be subject to authorisation by the holder of the sui generis right, as is apparent from recital 44 in the preamble to Directive 96/9.

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European Court of Justice, 9 October 2008
(K. Lenaerts, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and G. Arestis)
JUDGMENT OF THE COURT (Fourth Chamber)
9 October 2008 (*)
(Directive 96/9/EC – Legal protection of databases – Sui generis right – Concept of 'extraction' of the contents of a database)
In Case C□304/07,
REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 24 May 2007, received at the Court on 2 July 2007, in the proceedings
Directmedia Publishing GmbH
v
Albert-Ludwigs-Universität Freiburg,
THE COURT (Fourth Chamber),
composed of K. Lenaerts (Rapporteur), President of Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and G. Arestis, Judges,
Advocate General: E. Sharpston,
Registrar: R. Grass,
having regard to the written procedure,
after considering the observations submitted on behalf of:
– Directmedia Publishing GmbH, by C. von Gierke, Rechtsanwältin,
– the Albert-Ludwigs-Universität Freiburg, by W. Schmid and H.□G. Riegger, Rechtsanwälte,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by F. Arenal, avvocato dello Stato,
– the Commission of the European Communities, by H. Krämer and W. Wils, acting as Agents,
after hearing the **Opinion of the Advocate General** at the sitting on 10 July 2008,
gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 7(2)(a) 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 the course of proceedings between Directmedia Publishing GmbH ('Directmedia') and the Albert□Ludwigs-Universität Freiburg following the marketing by Directmedia of a collection of verse compiled from a list of German verse titles drawn up by Mr Knoop, a professor at that university.

Legal context

3 Article 1(1) of Directive 96/9 provides that the aim of the directive is 'the legal protection of databases in any form'.

4 A database is defined, for the purposes of Directive 96/9, in Article 1(2) thereof, as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.

5 Article 3 of Directive 96/9 provides for copyright protection for 'databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation'.

6 Article 7 of Directive 96/9, entitled 'Object of protection' provides for a sui generis right in the following terms:

'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 re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) "extraction" shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) "re-utilisation" shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilisation.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

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 contents.

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

7 Article 13 of Directive 96/9, entitled 'Continued application of other legal provisions', states that that directive is to be without prejudice to provisions concerning inter alia 'laws on restrictive practices and unfair competition'.

8 Under Article 16(3) of Directive 96/9:

'Not later than at the end of the third year after [1 January 1998], and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the sui generis right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.'

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

9 Mr Knoop directs the 'Klassikerwortschatz' (vocabulary of the classics) project at the Albrecht-Ludwigs-Universität Freiburg. That project led to the publication of Freiburger Antholgie (Freiburg Anthology), a collection of verse from 1720 to 1933.

10 That anthology is based on a list of verse titles drawn up by Mr Knoop which was published on the Internet under the heading Die 1 100 wichtigsten Gedichte der deutschen Literatur zwischen 1730 und 1900 (The 1 100 most important poems in German literature between 1730 and 1900) ('the list of verse titles drawn up by Mr Knoop') .

11 Following an introductory section, that list of verse titles, which is arranged according to the frequency with which the poem is cited in various anthologies, sets out the author, title, opening line and year of publication for each poem. That list is based on a selection of 14 anthologies chosen from a total of approximately 3 000, and was supplemented by the bibliographic compilation of 50 German□language anthologies by Ms Dühmert, Von wem ist das Gedicht? (Who wrote that poem?).

12 From those works, which contain some 20 000 poems, those poems were selected which are listed in at least three anthologies or are mentioned on at least three occasions in Ms Dühmert's bibliographic compilation. As a precondition for that statistical analysis, the titles and opening lines of the poems were standardised and a list of all verse titles was compiled. As a result of bibliographic research, both the works in which the poems were published and their date of composition were identified. This task took approximately two and half years, the costs of which, amounting to a total of EUR 34 900, were borne by the Albert-Ludwigs-Universität Freiburg.

13 Directmedia markets a CD-ROM, 1 000 Gedichte, die jeder haben muss ('1 000 poems everyone should have'), which appeared in 2002. Of the poems on that CD-ROM, 876 date from the period between 1720 and 1900. 856 of those poems are mentioned also in the list of verse titles drawn up by Mr Knoop.

14 In selecting the poems for inclusion on its CD-ROM, Directmedia used that list as a guide. It omitted certain poems which appeared on that list, added others and, in respect of each poem, critically examined the selection made by Mr Knoop. Directmedia took the actual texts of each poem from its own digital resources.

15 Taking the view that, by distributing its CD-ROM, Directmedia had infringed both the copyright of Mr Knoop, as compiler of an anthology, and the related right of the Albert-Ludwigs-Universität Freiburg as 'maker of a database', Mr Knoop and the Albert-Ludwigs-Universität Freiburg brought an action for cessation and for damages against Directmedia. Their action also sought an order requiring it to deliver up for destruction any copies of its CD-ROM in its possession.

16 The court hearing the matter at first instance upheld that action. Its appeal having been dismissed, Directmedia lodged an appeal in law before the Bundesgerichtshof (Federal Court of Justice).

17 That appeal in law was dismissed in so far as it related to the order made against Directmedia on the basis of Mr Knoop's heads of claim. On the other hand, since the provisions of German law governing the protection of the maker of a database, infringement of which the Albert-Ludwigs-Universität Freiburg invokes, represent the means whereby Directive 96/9 was transposed into German law, the referring court is of the opinion that the resolution of the dispute, in so far as it concerns Directmedia and the University, depends on the interpretation to be given to Article 7(2)(a) of the directive.

18 Noting that it is apparent from the findings of the appeal court that Directmedia used the list of verse titles drawn up by Mr Knoop as a guide to select the poems which were to appear on its CD-ROM, that it critically examined each poem selected by Mr Knoop and ultimately omitted to include in the marketed medium some poems that figured in that list whilst adding others, the referring court raises the question whether using the contents of a database in such circumstances constitutes an 'extraction' within the meaning of Article 7(2)(a) of Directive 96/9.

19 In its view, the definition of the concept of 'extraction' contained in that provision of Directive 96/9, several recitals in the preamble to that directive, paragraphs 43 to 54 of **Case C-203/02 The British Horseracing Boardand Others [2004] ECR I-10415**, passages of the Opinion of Advocate General Stix-Hackl in **Case C-338/02 Fixtures Marketing [2004] ECR I-10497**, one possible construction of the purpose and the subject-matter of the sui generis right and the requirement of legal certainty appear to support a narrow interpretation of that concept, according to which that right permits the maker of a database to prevent the physical transfer of all or part of that database to another medium, but not the use of that database as a source of consultation, information and critical inquiry, even if by that process substantial parts of the database in question would be gradually recopied and incorporated in a different database.

20 The referring court acknowledges however that, according to a different construction of the subject-matter of the sui generis right, it can be argued that the concept of 'extraction', within the meaning of Article 7(2)(a) of Directive 96/9, includes acts consisting merely of transferring, as data, elements of a database.

21 In the light of that difficulty of interpretation, the Bundesgerichtshof decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

'Can the transfer of data from a database protected in accordance with Article 7(1) of [Directive 96/9] and their incorporation in a different database constitute an extraction within the meaning of Article 7(2)(a) of that directive even in the case where that transfer follows individual assessments resulting from consultation of the database, or does extraction within the meaning of that provision presuppose the (physical) copying of data?'

The question referred for a preliminary ruling

22 By its question, the referring court seeks to ascertain, in essence, whether the concept of 'extraction', within the meaning of Article 7(2)(a) of Directive 96/9, covers the operation of transferring the elements of one database to another database following visual consultation of the first database and a selection on the basis of a personal assessment of the person carrying out the operation or whether it requires that a series of elements be subject to a process of physical copying.

23 As a preliminary point, it should be noted that that question is based on the premiss, set out in the order for reference, that the list of verse titles drawn up by Mr Knoop constitutes a 'database' within the meaning of Article 1(2) of Directive 96/9.

24 It is also stated in that order that the Albert-Ludwigs-Universität Freiburg, which financed the costs of creating that list, is eligible for protection by the sui generis right established by that directive in the light of the fact that the investment expended in the collection, verification and presentation of the contents of that list,

which amounts to EUR 34 900, is deemed to be 'substantial' within the meaning of Article 7(1) of that directive.

25 Against that background, the referring court raises the question whether an operation such as that undertaken by Directmedia in the case in the main proceedings constitutes an 'extraction' within the meaning of Article 7(2)(a) of Directive 96/9.

26 In that provision, the concept of extraction is defined as 'the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form'.

27 Article 7(1) of Directive 96/9 entitles the maker of a database which required substantial investment from a quantitative or qualitative point of view to prevent acts of extraction in respect of all or a substantial part of the contents of that database. Furthermore, Article 7(5) is intended to enable that maker to prevent acts of repeated and systematic extraction in respect of an insubstantial part of the contents of that database, which, by their cumulative effect, would lead to the reconstitution of the database as a whole or, at least, of a substantial part of it, without the authorisation of the maker, and which would therefore seriously prejudice the investment of that maker just as the extractions referred to in Article 7(1) of the directive would (see The British Horseracing Board and Others, paragraphs 86 to 89).

28 Since the concept of extraction is thus used in various provisions of Article 7 of Directive 96/9, it must be interpreted in the general context of that article (see, to that effect, The British Horseracing Board and Others, paragraph 67).

29 In this respect, it must be stated, first of all, that, as Directmedia has acknowledged, it is not essential to that concept that the database or the part of the database from which the act in question is effected should, by the effect of that act, disappear from its original medium.

30 The use, in a number of the recitals in the preamble to Directive 96/9, including, in particular recitals 7 and 38, of the verb 'to copy' to illustrate the concept of extraction indicates that, in the mind of the Community legislature, that concept is intended, in the context of that directive, to cover acts which allow the database or the part of the database concerned to subsist in its initial medium.

31 Next, it should be pointed out that the use, in Article 7(2)(a) of Directive 96/9, of the expression 'by any means or in any form' indicates that the Community legislature sought to give the concept of extraction a wide definition (see The British Horseracing Board and Others, cited above, paragraph 51).

32 As the Albert-Ludwigs-Universität Freiburg, the Italian Government and the Commission have argued, that broad construction of the concept of extraction finds support in the objective pursued by the Community legislature through the establishment of a sui generis right.

33 That objective is, as is apparent in particular from recitals 7, 38 to 42 and 48 in the preamble to Directive 96/9, to guarantee the person who has taken the initiative and assumed the risk of making a substantial investment in terms of human, technical and/or financial resources in the obtaining, verification or presentation of the contents of a database a return on his investment by protecting him against the unauthorised appropriation of the results of that investment by acts which involve in particular the reconstitution by a user or a competitor of that database or a substantial part of it at a fraction of the cost needed to design it independently (see also, to that effect, **Case C□46/02 Fixtures Marketing [2004] ECR I□10365, paragraph 35**; **The British Horseracing Board and Others, paragraphs 32, 45, 46 and 51**; Case C□338/02 Fixtures Marketing, paragraph 25; and Case C□444/02 Fixtures Marketing [2004] ECR I□10549, paragraph 41).

34 In the light of that objective, the concept of extraction, within the meaning of Article 7 of Directive 96/9, must be understood as referring to any unauthorised act of appropriation of the whole or a part of the contents of a database (see The British Horseracing Board and Others, paragraphs 51 and 67).

35 As the Albert-Ludwigs-Universität Freiburg and the Commission have claimed, it is apparent from the wording itself of Article 7(2)(a) of Directive 96/9 that that concept is not dependent on the nature and form of the mode of operation used.

36 The decisive criterion in this respect is to be found in the existence of an act of 'transfer' of all or part of the contents of the database concerned to another medium, whether of the same nature as the medium of that database or of a different nature. Such a transfer implies that all or part of the contents of a database are to be found in a medium other than that of the original database.

37 In that context, as the Italian Government has stated, it is immaterial, for the purposes of assessing whether there has been an 'extraction', within the meaning of Article 7 of Directive 96/9, that the transfer is based on a technical process of copying the contents of a protected database, such as electronic, electromagnetic or electro-optical processes or any other similar processes (see, in this respect, recital 13 in the preamble to Directive 96/9), or on a simple manual process. As the Albert-Ludwigs-Universität Freiburg has argued, even a manual recopying of the contents of such a database to another medium corresponds to the concept of extraction in the same way as downloading or photocopying.

38 Recital 14 in the preamble to Directive 96/9, according to which 'protection under this Directive should be extended to cover non□electronic databases', as well as recital 21 in the preamble to that directive, according to which the protection afforded by the directive does not require the materials contained in the database to 'have been physically stored in an organised manner', also supports an interpretation of the concept of extraction unencumbered, in the same way as that of databases, by formal, technical or physical criteria.

39 It is also immaterial, for the purposes of interpreting the concept of extraction in the context of Directive 96/9, that the transfer of the contents of a protected database may lead to an arrangement of the elements concerned which is different from that in the original database. As is apparent from recital 38 in the preamble to Directive 96/9, an unauthorised act of copying, accompanied by an adaptation of the contents of the database copied, is among the acts against which that directive seeks, through the establishment of the sui generis right, to protect the maker of such a database.

40 It cannot therefore be argued, as Directmedia has done, that only acts consisting of the mechanical reproduction, without adaptation, by means of a standard 'copy/paste' process, of the contents of a database or a part of such a database fall within the concept of extraction.

41 Similarly, the fact, on which Directmedia placed considerable reliance, that the author of the act of reproduction in question may refrain from transferring a part of the material contained in a protected database and complements the material transferred from that database with material deriving from another source is, at the very most, capable of showing that such an act did not relate to the contents of that database in their entirety. However, it does not preclude a finding that there has been a transfer of a part of the contents of that database to another medium.

42 Contrary to what Directmedia also submitted, the concept of 'extraction', within the meaning of Article 7 of Directive 96/9 cannot moreover be reduced to acts concerning the transfer of all or a substantial part of the contents of a protected database.

43 As is apparent from paragraph 27 of this judgment, a reading of Article 7(1) in conjunction with Article 7(5) of Directive 96/9 shows that that concept does not depend on the extent of the transfer of the contents of a protected database since, pursuant to those provisions, the sui generis right established by that directive offers protection to a maker of a database not only against acts of extraction in respect of all or a substantial part of the contents of his protected database but also, subject to certain conditions, against those of those acts which relate to an insubstantial part of those contents (see, to that effect, The British Horseracing Board and Others, paragraph 50).

44 Accordingly, the fact that an act of transfer does not concern a substantial and structured series of elements which appear in a protected database does not preclude that act from falling within the scope of 'extraction' within the meaning of Article 7 of Directive 96/9.

45 Similarly, as the Commission has stated, it is true that the fact that material contained in one database may be transferred to another database only after a critical assessment by the person carrying out the act of transfer could prove to be relevant, in appropriate cases, for the purpose of determining the eligibility of that other database for one of the types of protection provided for in Directive 96/9. However, that fact does not preclude a finding that there has been a transfer of elements from the first database to the second one.

46 The objective pursued by the act of transfer is also immaterial for the purposes of assessing whether there has been an 'extraction' within the meaning of Article 7 of Directive 96/9.

47 Thus, it is of little importance that the act of transfer in question is for the purpose of creating another database, whether in competition with the original database or not, and whether the same or a different size from the original, nor is it relevant that the act is part of an activity, whether commercial or not, other than the creation of a database (see, to that effect, The British Horseracing Board and Others, paragraphs 47 and 48). Moreover, as is apparent from recital 44 in the preamble to Directive 96/9, the transfer of all or a substantial part of the contents of a protected database to another medium, which would be necessary for the purposes of a simple on□screen display of those contents, is of itself an act of extraction that the holder of the sui generis right may make subject to his authorisation.

48 In its reference for a preliminary ruling, the referring court draws attention to recital 38 in the preamble to Directive 96/9. In so far as that recital refers to the case of the contents of a database being 'copied and rearranged electronically', it could, in the referring court's view, militate in favour of an interpretation of the concept of extraction which is limited to acts based on a process of copying by technical means.

49 However, as the Advocate General pointed out at point 41 of her Opinion, the recital in question seeks to illustrate the particular risk for database makers of the increasing use of digital recording technology. It cannot be interpreted as reducing the scope of the acts subject to the protection of the sui generis right merely to acts of copying by technical means, since otherwise, first, there would be a failure to have regard to the various matters set out in paragraphs 29 to 47 of this judgment militating in favour of a broad interpretation of the concept of extraction in the context of Directive 96/9, and, second, contrary to the objective assigned to that right, the maker of a database would be deprived of protection against acts of extraction which, although not relying a particular technical process, would be no less liable to harm the interests of that maker in a manner comparable to an act of extraction based on such a process.

50 Directmedia submitted that a database does not constitute ownership of information and that to include the transfer of information contained in that database within acts capable of being prohibited by the maker of a database protected under his sui generis right would amount, first, to infringing the legitimate rights of users of that database to free access to information and, second, to promoting the emergence of monopolies or abuses of dominant positions on the part of makers of databases.

51 None the less, as regards, first, the right of access to information, it must be pointed out that protection by the sui generis right concerns only acts of extraction

and/or re-utilisation within the meaning of Article 7(2) of Directive 96/9. That protection does not, however, cover consultation of a database (The British Horseracing Board and Others, paragraph 54).

52 Of course, the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people (The British Horseracing Board and Others, paragraph 55), or make that access subject to specific conditions, for example of a financial nature.

53 However, where the maker of a database makes the contents of that database accessible to third parties, even if he does so on a paid basis, his sui generis right does not allow him to prevent such third parties from consulting that database for information purposes (see, to that effect, The British Horseracing Board and Others, paragraph 55). It is only when on-screen display of the contents of that database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium that such an act of consultation may be subject to authorisation by the holder of the sui generis right, as is apparent from recital 44 in the preamble to Directive 96/9.

54 In this case, it is apparent from the description of the facts in the order for reference that although the Albert-Ludwigs-Universität Freiburg does indeed seek to prevent unauthorised transfers of material contained in the list of verse titles drawn up by Mr Knoop, it none the less authorises third parties to consult that list. Consequently, the information collected in that list is accessible to the public and may be consulted by it.

55 As regards, second, the risk that competition would be affected, it is apparent from recital 47 in the preamble to Directive 96/9 that the Community legislature was sensitive to the concern that protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position.

56 That is why Article 13 of Directive 96/9, which confers normative value on the statement, contained in recital 47 in the preamble to that directive, that the provisions of that directive 'are without prejudice to the application of Community or national competition rules', states that that directive is to be without prejudice to provisions concerning inter alia laws on restrictive practices and unfair competition.

57 In the same vein, Article 16(3) of Directive 96/9 requires the Commission to draw up periodic reports on the application of that directive designed, inter alia, to verify whether the application of the sui generis right has led to abuses of a dominant position or other interference with free competition which would justify appropriate measures being taken.

58 In that context, which is characterised by the existence of instruments of Community law or national law which are designed to deal with any infringements of the competition rules, such as abuses of a dominant position, the concept of 'extraction', within the meaning of Article 7 of Directive 96/9, cannot be interpreted in such a way as to deprive the maker of a database of protection against acts which would be liable to harm his legitimate interests.

59 In the case in the main proceedings, it is for the referring court to ascertain, in the light of all the relevant circumstances, for the purposes of establishing whether there has been an infringement by Directmedia of the sui generis right of the Albert-Ludwigs-Universität Freiburg, whether the operation undertaken by Directmedia on the basis of the list of verse titles drawn up by Mr Knoop amounts to an extraction in respect of a substantial part, evaluated qualitatively or quantitatively, of the contents of that list (see, in that respect, The British Horseracing Board and Others, paragraphs 69 to 72), or to extractions of insubstantial parts which, by their repeated and systematic nature, would have led to reconstituting a substantial part of those contents (see, in that respect, The British Horseracing Board and Others, paragraphs 73, 87 and 89).

60 In the light of the above, the answer to the question referred must be that that the transfer of material from a protected database to another database following an on□screen consultation of the first database and an individual assessment of the material contained in that first database is capable of constituting an 'extraction', within the meaning of Article 7 of Directive 96/9, to the extent that – which it is for the referring court to ascertain – that operation amounts to the transfer of a substantial part, evaluated qualitatively or quantitatively, of the contents of the protected database, or to transfers of insubstantial parts which, by their repeated or systematic nature, would have resulted in the reconstruction of a substantial part of those contents.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

The transfer of material from a protected database to another database following an on□screen consultation of the first database and an individual assessment of the material contained in that first database is capable of constituting an 'extraction', within the meaning of Article 7 of Directive 96/9 of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, to the extent that – which it is for the referring court to ascertain – that operation amounts to the transfer of a substantial part, evaluated qualitatively or quantitatively, of the contents of the protected database, or to transfers of insubstantial parts which, by their repeated or systematic nature, would have resulted in the reconstruction of a substantial part of those contents.

OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 10 July 2008 (1)
Case C-304/07
Directmedia Publishing GmbH

v

Albert-Ludwigs-Universität Freiburg

(Legal protection of databases – Directive 96/9/EC – Notion of 'extraction' in Article 7(2)(a) of Directive 96/9/EC)

1. The Bundesgerichtshof (Federal Court of Justice) (Germany) asks the Court whether the transfer of data from a database protected in accordance with Article 7(1) of Directive 96/9/EC ('the Database Protection Directive') (2) and their incorporation in a different database can constitute an extraction within the meaning of Article 7(2)(a) of that directive even when the data are individually assessed after consultation of the database before being used in that manner, or whether extraction within the meaning of that provision covers merely (physical) copying of data. (3)

Legal Framework

The Database Protection Directive

2. The directive contains the following relevant recitals:

'…

(7) … the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently;

(8) … the unauthorised extraction and/or re-utilisation of the contents of a database constitute acts which can have serious economic and technical consequences;

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

(10) … 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;

(11) … there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries;

(12) … 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;

…

(17) … the term "database" should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; … it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed …;

(18) … the protection of databases by the sui generis right is without prejudice to existing rights over their contents … in particular where an author or the holder of a related right permits some of his works or subject-matter to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or subject-matter subject to the required consent of the author or of the holder of the related right without the sui generis right of the maker of the database being invoked to prevent him doing so, on condition that those works or subject-matter are neither extracted from the database nor re-utilised on the basis thereof;

…

(21) … the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; … it is not necessary for those materials to have been physically stored in an organised manner;

…

(26) … 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) … 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;

…

(38) … the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorisation, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;

(39) … 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 collecti[ng] the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

…

(42) … the special right to prevent unauthorised extraction and/or re-utilisation relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; … the right to prohibit extraction and/or re-utilisation of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment;

(43) … in the case of on-line transmission, the right to prohibit re-utilisation is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;

…

(45) … the right to prevent unauthorised extraction and/or re-utilisation does not in any way constitute an extension of copyright protection to mere facts or data;

…
(48) … the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aim of Directive 95/46/EC … [(4)], which is to guarantee free circulation of personal data on the basis of harmonised rules designed to protect fundamental rights, notably the right to privacy which is recognised in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; … the provisions of this Directive are without prejudice to data protection legislation;
…'

3. Article 1(1) defines the directive's scope as 'the legal protection of databases in any form'.

4. 'Database' is defined in Article 1(2) as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.

5. Article 3(1) provides that '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'.

6. Article 7 establishes a sui generis protection for databases:

'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 re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) "extraction" shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) "re-utilisation" shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

…

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 contents.

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

Relevant national legislation

7. Paragraph 87a of the Urheberrechtsgesetz ('UrhG') (German Law on copyright), (5) provides:

'(1) A database within the meaning of this Act is a collection of works, data or other independent elements arranged in a systematic or methodical way the elements of which are individually accessible either by electronic or by other means, and the obtaining, verification or presentation of which requires a qualitatively or quantitatively substantial investment. A database the contents of which has been changed in a way that is qualitatively or quantitatively substantial is deemed a new database provided that the change entails a qualitatively or quantitatively substantial investment.

(2) The maker of a database within the meaning of this Act is the one who has made the investment defined in subsection 1.'

8. Paragraph 87b UrhG provides:

'(1) The maker of the database has the exclusive right to reproduce, to distribute and to communicate to the public the whole data base or a qualitatively or quantitatively substantial part thereof. The repeated or systematical reproduction, distribution or communication to the public of qualitatively and quantitatively insubstantial parts of the database shall be deemed as equivalent to the reproduction, distribution or communication of a qualitatively or quantitatively substantial part of the database provided that these acts run counter to a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.
…' (6)

Factual context and the question referred

9. Professor Dr Ulrich Knoop is full professor in the German Department I of the Albrecht-Ludwigs-Universität Freiburg ('the University of Freiburg'). He directs the 'vocabulary of the classics' (Klassikerwortschatz) project, which led to the publication of the Freiburg Anthology, a collection of verse from 1720 to 1933.

10. As part of the 'vocabulary of the classics' project, Professor Knoop drew up a list of verse titles that was published on the internet under the heading 'The 1 100 most important poems in German literature between 1730 and 1900' (Die 1 100 wichtigsten Gedichte der deutschen Literatur zwischen 1730 und 1900), (7) which served as a basis for the Freiburg Anthology. The list sets out, in order of the frequency with which the poem is mentioned, (8) the author, title, opening line and year of publication for each poem.

11. The selection of poems which formed the basis of the list was compiled as follows. From some 3 000 published anthologies of poetry, 14 were selected. That selection was supplemented by the bibliographic compilation of 50 German-language anthologies by Ms Anneliese Dühmert under the title 'Who wrote that poem?' (Von wem ist das Gedicht?). Altogether, that yielded some 20 000 poems. Poems which were listed

in at least three anthologies or were mentioned on at least three occasions in Ms Dühmert's bibliographic compilation qualified for inclusion in the list. As a precondition for that statistical analysis, the titles and opening lines of the poems were standardised and a list of all verse titles compiled. Finally, the poems were referenced to the works in which they were published and the year of their composition was established.

12. The task of compiling the list, which was performed by Mr Klemens Wolber and his assistants under the overall direction of Professor Knoop, took approximately two and a half years to complete. The total costs of EUR 34 900 were borne by the University of Freiburg.

13. Directmedia Publishing GmbH ('Directmedia') markets a CD-ROM entitled '1000 poems everyone should have' (1000 Gedichte, die jeder haben muss'), which appeared in 2002. Of the poems on the CD-ROM, 876 are from the period 1720 to 1900 and, of these, 856 appear in the list of verse titles generated by the 'vocabulary of the classics' project.

14. In selecting the poems for inclusion on its CD-ROM, Directmedia used the list of verse titles from the 'vocabulary of the classics' project as a guide. It examined attentively the selection made by Professor Knoop, omitting some of the poems listed and adding others of its own choice. Directmedia took the actual verse texts from its own digital resources.

15. Professor Knoop and the University of Freiburg took the view that, in reproducing and distributing its CD-ROM, Directmedia had infringed the copyright of Professor Knoop as compiler of an anthology and the related right of the University of Freiburg as maker of a database. They therefore sought an order requiring Directmedia to desist from reproducing and/or distributing the CD-ROM '1 000 poems everyone should have'. They also sought damages from Directmedia, together with an order requiring it to divulge information and to deliver up for destruction any copies of its verse collection in its possession.

16. Directmedia, however, argued that it had itself collected for its CD-ROM the most popular poems from the period 1720 to 1900. In arriving at that selection, it had used only the list of verse titles from the 'vocabulary of the classics' project, and that merely for reference. It had applied additional selection criteria, such as whether individual poems were referred to in literary encyclopaedias. It had also dated the poems independently. In its view, the absence of creative effort involved in the selection and arrangement of the material rendered the list of verse titles from the 'vocabulary of the classics' project a work incapable of being protected by copyright. Moreover, the collection of data was not, as such, a database within the meaning of Paragraph 87a UrhG.

17. The Landgericht (Regional Court) ruled in favour of Professor Knoop and the University of Freiburg.

18. Directmedia's appeal to the Oberlandesgericht was unsuccessful. It then appealed on a point of law to the Bundesgerichtshof.

19. The Bundesgerichtshof, in an initial judgment, rejected the appeal against the judgment granted in favour of Professor Knoop. (9) It then proceeded to consider the appeal against the judgment granted in favour of the University of Freiburg.

20. The University of Freiburg submits that Directmedia has infringed its rights as the maker of the database under Paragraphs 97(1) and 98(1) (10) in conjunction with Paragraphs 87a and 87b UrhG. Those provisions were inserted into the UrhG to transpose the Database Protection Directive. The referring court therefore takes the view that the outcome of Directmedia's appeal depends on the interpretation of Article 7(2)(a) of that directive.

21. The referring court considers that the list of verse titles 'The 1 100 most important poems in German literature between 1730 and 1900' published on the internet constitutes a database within the meaning of Article 1(2) of the Database Protection Directive. (11) The referring court also considers that the University of Freiburg enjoys a sui generis right in respect of that database, having made substantial investments in obtaining, verifying and presenting its contents.

22. The referring court states that, as the basis for the selection of poems on its CD-ROM, Directmedia made repeated and systematic use of substantial parts of the data contained in the University of Freiburg's database. The selection of verse for the period 1720-1900 corresponds almost exactly to the University of Freiburg's list of verse titles: of 876 poems from that period, 856 (almost 98%) were already listed in the University of Freiburg's database. Directmedia itself obtained the actual texts of the poems, as the University of Freiburg's list merely gave the titles.

23. The referring court notes that, according to the findings of the appellate court, Directmedia used the University of Freiburg's list of verse titles merely as a guide in selecting the poems for its CD-ROM. Directmedia itself critically examined each poem selected by the University of Freiburg. As a result, it omitted some poems that figured in the list of verse titles and added others. The question is therefore whether using the contents of a database in such a manner (following individual assessment) nevertheless constitutes an extraction within the meaning of Article 7(2)(a) of the Database Protection Directive.

24. Academic commentators take the view that the sui generis right enjoyed by a maker of a database does not entitle him to prevent use of his database as a source of information, even if by that process substantial parts of the data are gradually taken from the database and incorporated in a different database. The right to protection can be invoked only if all (or substantial parts of) the database contents are transferred 'physically', that is to say, are copied to another medium. The referring court finds support for this approach in recitals 38, 42, 45, and 48 in the preamble to the directive, the wording of Article 7(2)(a) itself, the judgment of the Court in The British Horseracing Board, its perception of the purpose and the specific subject-matter of the sui generis right, certain passages

of the Opinion of Advocate General Stix-Hackl in Svenska Spel (12) and the interests of legal certainty. The referring court acknowledges, however, that a different interpretation is also possible.

25. The Bundesgerichtshof has therefore referred the following question to the Court:

'Can the transfer of data from a database protected in accordance with Article 7(1) of Directive 96/9/EC and their incorporation in a different database constitute an extraction within the meaning of Article 7(2)(a) of that directive even in the case where that transfer follows individual assessments resulting from consultation of the database, or does extraction within the meaning of that provision presuppose the (physical) copying of data?'

26. Written observations were submitted by Directmedia and the University of Freiburg, by the Italian Government, and by the Commission.

27. Essentially, Directmedia submits that 'extraction' within the meaning of Article 7(2)(a) of the directive requires that the database be directly or indirectly copied physically. There is no extraction if the database is merely used as a source of information. The University of Freiburg (supported by Italy and the Commission) takes the contrary view, and submits that an 'extraction' on the basis of prior consultation of the database and individual assessment of the data is still an 'extraction'.

28. No hearing was requested and none has been held.

Assessment

29. Making a direct copy of a complete database or substantial parts thereof from one medium into another clearly constitutes an extraction. (13) The simple consultation of a database without any transfer of data equally clearly does not. (14) Directmedia's use of the University of Freiburg's database appears to fall somewhere between those two points on the spectrum.

30. The referring court essentially takes the view that the wording of Article 7(2)(a) of the directive, the subject-matter and the purpose of the sui generis right all militate in favour of interpreting the concept of 'extraction' narrowly, that is, as being restricted to 'physically' copying all or substantial parts of the contents of a database to another medium. I therefore examine those three elements in turn.

The wording of Article 7(2)(a) of the Database Protection Directive

31. Article 7(2)(a) of the directive defines 'extraction' as 'the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form'.

32. In The British Horseracing Board, the Court held that the use, in Article 7(2), of expressions such as 'by any means or in any form' (in the definition of the concept of 'extraction') and 'any form of making available to the public' (in the definition of 're-utilisation') indicates that the Community legislature intended to define those concepts broadly. The Court added that, in the light of the objective pursued by the directive, those terms 'must therefore be interpreted as referring to any act of appropriating and making available to the public, without the consent of the maker of the database, the results of his investment, thus depriving him of revenue which should have enabled him to redeem the cost of the investment'. (15)

33. The referring court considers that that wording suggests that there is no extraction when a user consulting an electronic database transcribes data from the screen and incorporates them, following individual assessment, in a different database. In its view 'extraction' refers to a process by which, through 'acts of copying', the data incorporated within a database are 'transferred' to another medium. Recital 38 supports that construction, as it states that 'the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorisation, to produce a database of identical content …'. (16)

34. As I see it, the referring court thereby limits the concept of 'extraction' in two ways. On the one hand, it introduces a qualitative criterion, namely the intellectual effort put in by the person who copies the information from the database; and deems that, where that criterion is satisfied, there is no extraction. On the other hand, it ties the concept of 'extraction' to a particular (limited) definition of what is meant by 'copying' data from a database.

35. Neither of these limitations is convincing.

36. First, the fact that Article 7(1) prohibits the extraction of 'the whole or of a substantial part' (17) of the contents of the database implies that at least some degree of choice and critical examination takes place, if only to determine which parts are to be extracted. Similarly (as pointed out by the University of Freiburg) the prohibition in Article 7(5) on 'the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database' presupposes some individual appreciation of the elements to be extracted. Where the user decides to copy the entire database at once, that may have been done after examining its entire content and deciding that the whole merits extraction.

37. As the Commission correctly observes, the fact that Directmedia 'critically examined' the content of the University of Freiburg's database may be relevant in determining whether Directmedia's CD-ROM is (in turn) the result of its 'own intellectual creation' within the meaning of Article 3(1) of the directive or constitutes the result of 'qualitatively and/or quantitatively a substantial investment' in the sense of Article 7(1) of the directive, so as to give rise to protection of the CD-ROM under copyright or the sui generis right, respectively. However, even if that were so, it could not prejudice the University of Freiburg's (prior) sui generis right. The Commission in that context draws a parallel with Article 2(3) of the Berne Convention, (18) which provides for 'translations, adaptations, arrangements of music and other alterations of a literary or artistic work' to be protected as original works without prejudice to the copyright in the original work.

38. Second, it is not clear to me on what basis the referring court seeks to limit what is meant by 'copying' data. It appears to suggest that copying implies (in the case of an electronic database) the actual electronic copying of data, presumably by an operation akin to the 'copy' and 'paste' functions on a word processor or (in the case of a paper-based database) (19) the taking of a photocopy. I cannot find any ground for such a restriction in the actual wording of Article 7(2)(a) of the directive.

39. In OPAP (20) the Court pointed to several indications that the Community legislature intended to give the term 'database' itself, as defined in the directive, a wide scope, unencumbered by considerations of a formal, technical or material nature. Classification of a collection as a database requires that the independent materials making up the collection be systematically or methodically arranged and individually accessible in one way or another. (21) As recital 21 to the directive makes clear, it is not necessary for the systematic or methodical arrangement to be physically apparent. (22)

40. It therefore seems both inappropriate and arbitrary to limit the concept of 'extraction' to a process by which data incorporated within a database are transferred to another medium by 'physically' taking a copy (or copies) of them. Copying the bulk of the data in a database individually by consulting the database on-screen and then manually entering the data in another medium cannot plausibly be considered to be any less damaging to the investment made by the creator of the database than making an electronic copy of those items from the original database and pasting them directly into another electronic medium.

41. Nor do I read recital 38 to the directive as supporting a restrictive interpretation of the term 'extraction'. That recital speaks merely of the particular risks for the creator of the database that arise from electronic copying of his creation. It does not imply that that is the only harmful way in which databases may be copied. Indeed, the fact that the protection under the directive also covers non-electronic databases (23) implies that it could not be. If a user consults a database on-screen and then copies some of its contents into another database by manually entering the information into the latter, he has merely – in a more cumbersome way – performed the equivalent of the operation of 'cop[ying] and rearrang[ing] electronically' the contents of the database. As the Commission correctly observes, what matters is that the systematic and methodical arrangement of data to be found in the original database is then reproduced in some manner in another medium.

42. I add that in my view recital 43 likewise provides no support for the interpretation suggested by the referring court. Recital 43 notes that 'in the case of online transmission, the right to prohibit re-utilisation is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder'. (24) To my mind, that recital does no more than point out that the sui generis right is not exhausted just because the database has been transmitted online. The reference to a 'material copy of the database' merely clarifies that a material copy of such database transmitted online equally cannot prejudice the sui generis right of the right holder. I do not read the words 'material copy' as limiting the sui generis protection to circumstances in which a material copy of the database is taken by the user.

43. On my reading, the wording of Article 7(2)(a) of the directive and those recitals militate, rather, in favour of a broad construction of the concept of 'extraction'.

44. An analysis of the subject-matter and the objective of the sui generis right supports that conclusion.

The subject-matter of the sui generis right

45. The referring court rightly notes that the sui generis right is not a right over the information stored in the database. (25) None the less, as the Commission correctly emphasises, this does not imply that the sui generis right pertains to the tangible database as such. Rather, it protects the result of the investment in a methodical and systematic classification of independent data as an intangible good, regardless of the medium through which it is made available. It is in that respect rather like a text, which remains the same regardless of whether it is made available through a paper copy of a book, in an e-book, on the internet, projected onto a building or through any other type of medium. Whether one uses a photocopier to take a paper copy of the paper book, copies it electronically from the e-book or the internet and pastes it into another document, or makes a digital photograph of the projection and manipulates it digitally into a new document, one is still 'copying' the text.

The objective of the sui generis right

46. The objective of creating and protecting the sui generis right can be gleaned, inter alia, from the preamble to the directive. There, the considerable investment in resources needed to create databases (described as 'a vital tool in the development of an information market within the Community') is emphasised and contrasted with the fact that databases can be copied or accessed at a fraction of the cost needed to design them independently. (26) The unauthorised extraction and/or re-utilisation of the contents of a database is said potentially to have serious economic and technical consequences. (27) The preamble also mentions the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry, which calls for investment in all the Member States in 'advanced information processing systems', but notes that there is a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries. (28) The necessary investment 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'. (29) On the basis of recitals 9, 10, and 12, the Court has interpreted the pur-

pose of the Database Protection Directive to be 'to promote and protect investment in data "storage" and "processing" systems …'. (30)

47. The directive also seeks to 'safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor'. (31) Thus, the sui generis right aims to ensure protection of any investment in obtaining, verifying or presenting the contents of a database (which may consist in the deployment of financial resources and/or the expending of time, effort and energy) and to give the maker of a database the option of preventing the unauthorised extraction and/or re-utilisation of all or a substantial part of the contents of that database. (32)

48. The Court's ruling in The British Horseracing Board provides a clear indication as to how the question referred should be answered.

49. First, the Court held that the terms 'extraction' and 're-utilisation' in Article 7(1) and (5) must be interpreted in the light of the objective of the sui generis right, which is intended to protect the maker of the database against 'acts by the user which go beyond [the] legitimate rights and thereby harm the investment' of the maker. (33) Furthermore, 'the right to prohibit extraction and/or re-utilisation of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment'. (34) Against that background, the Court held that facts such as that the extraction and/or re-utilisation is for the purpose of creating another database, whether in competition with the original database or not, and whether the same or a different size from the original, or that it forms part of an activity other than the creation of a database, were not relevant for determining the scope of the sui generis right. (35)

50. Second, the Court emphasised that the concepts of 'extraction' and 're-utilisation' cannot be exhaustively defined to mean direct extraction and re-utilisation from the original database. To do so would risk leaving the maker of the database without protection from unauthorised copying from a copy of the database. (36) The Court concluded that, since acts of unauthorised extraction and/or re-utilisation by a third party from a source other than the database concerned are liable, just as much as such acts carried out directly from that database, to prejudice the investment of the maker of the database, the concepts of extraction and re-utilisation cannot imply direct access to the database. (37)

51. Similarly, it seems to me that transcribing the content of a database after consulting it on-screen and then incorporating it into a different database is just as likely to prejudice the investment of the maker of the database as copying that database electronically or photo-copying it. The Court's analysis in The British Horseracing Board does not presuppose that 'extraction' should be limited to these latter ways of copying (parts of) a database.

52. Nor does the fact that the Court held that the protection of the sui generis right concerns only acts of extraction and re-utilisation as defined in Article 7(2) of the directive, and does not cover consultation of a database, imply such a limitation. The consent of the maker of the database to consultation does not entail exhaustion of the sui generis right. The Court held that analysis to be confirmed, as regards extraction, by recital 44 in the preamble to the directive, which indicates that the permanent or temporary transfer of all or a substantial part of the contents of an on-screen display of a database to another medium is subject to authorisation by the right-holder. (38)

53. Finally, the Court clarified the scope of Article 7(5) of the directive. The objective of that provision is to prevent repeated and systematic extractions and/or re-utilisations of insubstantial parts of the contents of a database, the cumulative effect of which would be seriously to prejudice the investment made by the maker of the database just as would the extractions and/or re-utilisations referred to in Article 7(1) of the directive. (39) As regards 'extraction', the expression 'acts which conflict with a normal exploitation of [a] database or which unreasonably prejudice the legitimate interests of the maker of the database' refers to unauthorised actions for the purpose of reconstituting, through the cumulative effect of acts of extraction, the whole or a substantial part of the contents of a database protected by the sui generis right, which thus seriously prejudice the investment made by the maker of the database. (40)

54. In my view, the objective of the sui generis right as interpreted by the Court therefore does not support a restrictive interpretation of the notion of 'extraction'. Indeed, the fact that in The British Horseracing Board the defendant could not have 'physically' copied all its data into its own electronic system clearly did not stop the Court from holding that it was carrying out 'acts of extraction and re-utilisation within the meaning of Article 7(2)' of the directive. (41)

55. The key issue therefore appears to be whether the extraction (in whatever manner it has taken place) affects the whole or a substantial part of the contents of a database and hence damages the investment made to create the original database. That is so if the copying process involves not only the entirety or a substantial part of the data themselves that were contained in the database, but also the systematic and methodical way in which they were arranged in the database. In my view, it is irrelevant whether that extraction happens by copying the contents of the original database or by reproducing them following on-screen consultation of the database.

56. The referring court suggests that legal certainty is better served if (as it proposes) there is no 'extraction' if the database is used merely as a source of information, even where that use is particularly extensive. It argues that users who do not obtain their data directly from the database itself, but from derived sources, are often unable to tell whether (and if so,

how) those data have been taken from a protected database, and whether the data adopted constitute a substantial part of a database or were obtained by unauthorised repeated and systematic extraction.

57. As I understand it, protection of legal certainty is here being deployed as an argument against holding that indirect copying of databases is an infringement of the sui generis right. The argument is, at first sight, not unattractive. However, the Court has already implicitly decided that considerations of legal certainty are not necessarily conclusive, inasmuch as it has already held that direct access to the original database is not necessary for there to be an unauthorised 'extraction'. Hence, indirect copying of a protected database can indeed infringe the sui generis right. (42)

58. In any event, it appears from the order for reference that Directmedia has in fact made direct use of the University of Freiburg's database. The question of indirect access to a database therefore does not arise in the present reference. It will of course be for the national court, rather than this Court, to decide whether, on the facts, the use Directmedia has made of the University of Freiburg's database amounts to an extraction.

59. I therefore conclude that 'extraction' within the meaning of Article 7(2)(a) of the directive does not presuppose the (physical) copying of data. In order to constitute an 'extraction' within the meaning of Article 7(2)(a) of the directive, it is immaterial whether the transfer of data from a database protected in accordance with Article 7(1) of the directive and their incorporation in a different database takes place following individual assessments of the data after consulting the database.

Conclusion

60. For the reasons given above, I am of the view that the question referred by the Bundesgerichtshof should be answered as follows:

– 'Extraction' within the meaning of Article 7(2)(a) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases does not presuppose the (physical) copying of data;

– In order to constitute an 'extraction' within the meaning of Article 7(2)(a) of the directive, it is immaterial whether the transfer of data from a database protected in accordance with Article 7(1) of the directive and their incorporation in a different database takes place following individual assessments of the data after consulting the database.

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1 – Original language: English.

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

3 – The Court first ruled on the interpretation of this Directive in Case C-203/02 The British Horseracing Board and Others [2004] ECR I-10415; Case C-46/02 Fixtures Marketing v Veikkaus [2004] ECR I-10365; Case C-338/02 Fixtures Marketing v Svenska Spel [2004] ECR I-10497; and Case C-444/02 Fixtures Marketing v OPAP [2004] ECR I-10549. I shall refer to the latter three cases individually by the name of the defendant. The judgments in all four cases were delivered on 9 November 2004. A reference concerning the interpretation of Article 7(1) and (5) and Article 9 of the Directive was made to the Court, but subsequently withdrawn, in Case C-215/07 Verlag Schawe.

4 – Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

5 – Law of 9 September 1965 (BGBl. I, p. 1273).

6 – Translation by the International Bureau of WIPO, available online at http://www.wipo.int/clea/docs_new/pdf/en/de/de080en.pdf

7 – Available online at http://www.klassikerwortschatz.uni-freiburg.de/Lyrik.htm.

8 – See next point.

9 – Professor Knoop does not therefore appear as a party to the reference to the Court of Justice.

10 – Paragraph 97(1) provides that the injured party may bring an action for injunctive relief against the person who infringes a copyright or any other right protected by the UrhG requiring him to cease and desist and, as appropriate, an action for damages or a surrender of the profits made by the infringer. Paragraph 98(1) provides for the possibility for the injured party to require destruction of all unlawful copies in the possession of the infringer or that are his property.

11 – The order for reference sets out the Bundesgerichthof's reasons for reaching that conclusion.

12 – Both judgments cited in footnote 3.

13 – See, to that effect, the Opinions of Advocate General Stix-Hackl in British Horseracing Board, points 62 to 70, Veikkaus, points 78 to 86, and OPAP, points 84 to 92, all cited in footnote 3.

14 – British Horseracing Board, cited in footnote 3, paragraphs 54 and 55.

15 – The British Horseracing Board, cited in footnote 3, paragraph 51. In her Opinion in that case, Advocate General Stix-Hackl similarly suggested that the words 'by any means or in any form' implied that the Community legislature gave the term 'extraction' a wide meaning, adding that 'it thus covers not only the transfer to a data medium of the same type but also to one of another type. That means that merely printing out data falls within the definition of "extraction"' (at points 98 and 99). See also her Opinions in Veikkaus, points 113 and 114, in Svenska Spel, points 94 and 95, and OPAP, points 119 and 120 (all cited in footnote 3).

16 – Emphasis added.

17 – Emphasis added.

18 – Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works, as last amended on 28 September 1979.

19 – Recital 14 in the preamble to the directive notes that the protection under the directive should be extended to cover non-electronic databases.

20 – Cited in footnote 3.
21 – See also recital 17 in the preamble to the directive.
22 – None the less, that condition implies that the collection should be contained in a fixed base, of some sort, and include technical means (such as electronic, electromagnetic or electro-optical processes, as indicated in recital 13 to the directive) or other means (such as an index, a table of contents, or a particular plan or method of classification) to allow the retrieval of any independent material contained within it: OPAP, cited in footnote 3, paragraphs 20 and 30.
23 – Recital 14.
24 – Emphasis added.
25 – See Article 7(4) of the directive, as well as recitals 18, 26 and 27 in the preamble to the directive.
26 – Recitals 7 and 9.
27 – Recital 8.
28 – Recitals 10 and 11.
29 – Recital 12.
30 – The British Horseracing Board, paragraph 30; Veikkaus, paragraph 33; Svenska Spel, paragraph 23; and OPAP, paragraph 39, all cited in footnote 3 (emphasis added).
31 – Recital 39.
32 – Recitals 40 and 41.
33 – At paragraph 45. The Court was there citing recital 42.
34 – Ibid. The Court also referred (at paragraph 46) to recital 48, which explains that the sui generis right has an economic justification: to protect the maker of the database and guarantee a return on his investment in its creation and maintenance.
35 – The British Horseracing Board, cited in footnote 3, paragraphs 45 to 47.
36 – It held that interpretation to be confirmed by Article 7(2)(b) of the directive, according to which the first sale of a copy of a database within the Community by the right-holder or with his consent exhausts the right to control 'resale', but not the right to control extraction and re-utilisation of the contents of that copy within the Community.
37 – The British Horseracing Board, cited in footnote 3, paragraphs 52 and 53.
38 – The British Horseracing Board, cited in footnote 3, paragraphs 54 to 59.
39 – See also the Opinions of Advocate General Stix-Hackl in The British Horseracing Board, point 34; Svenska Spel, point 121; and OPAP, point 146 (all cited in footnote 3).
40 – The British Horseracing Board, cited in footnote 3, paragraphs 86 to 89.
41 – The British Horseracing Board, cited in footnote 3, paragraphs 63 to 66. The order for reference in that case stated that the data concerning horse races which the defendant displayed on its internet site and which originated in the British Horseracing Board (BHB)'s database came from newspapers published the day before the race and from unprocessed information supplied by a third party. The defendant extracted data (originating in the BHB database) from those two sources by integrating them into its own electronic system. It then re-utilised those data by making them available to the public on its internet site in order to allow its clients to bet on horse races.
42 – The British Horseracing Board, cited in footnote 3, paragraphs 52 and 53. See point 50 above.