Overview

I. Background of EU-Harmonization
II. Main Provisions of the Database Directive 96/9/EC
III. The Issue of „Freedom of Information“:
     Overprotection and Erosion of the Public Domain?
IV. European and International Perspectives
II. Background in 1996

- **Legal Situation in most Continental European MS**
  - Protection through Copyright Law
    - E.g. Sec. 4 German Copyright Act
    - Problem: Protection only for creative structures (individual creation regarding the „selection and arrangement of the elements”).
    - Contrast: Modern databases typically comprehensive and arranged in a systematic rather than in a „creative“ way.
  - Protection through Unfair Competition Law.
    - Flexible protection against „unfair“ imitations. → Comparable to the *misappropriation*-concept in U.S. Case Law but broader.

- **Legal Situation in the Nordic Countries**
  - Copyright.
  - Specific Catalogue Right (neighbouring right). → model for the European sui generis right

- **Legal Situation in U.K. and Ireland**
  - Broad copyright Protection.
    → „what’s worth copying is prima facie worth protecting“; „sweat of the brow“ doctrine.
  - No Unfair Competition Law Protection.

Example: Protection of Telephone Directories
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II. Main Provisions (1): Structure

- Scope of the Directive (Art. 1-2)
  - Unitary definition of the notion of „database“.
  - Covering copyright and the new investment protection right.

- Copyright (Art. 3-6)
  - Mandatory and conclusionary definition of the condition and object of protection: „own intellectual creations“.
    → Compromise between the „high“ standards of Continental European MS and the comparably „lower“ threshold in the U.K.
    → Cf. now ECJ Infopaq-case (2009).
  - Temporary copies, and any communication to the public explicitly included in the „exclusive rights“ catalogue.
  - Private copying exceptions restricted to reproductions of „non-electronic“ databases.
II. Main Provisions (2): Scope

- Art. 1 (1): "...databases in any form"

- Art. 1 (2)
  - Systematic or methodical arrangement
    - Aesthetic arrangements? → Opinion 1 (+); opinion (2) = index function is necessary.
  - Independent elements (works, data or any other material)
    - Independence of the included elements as crucial limitation with respect to all kinds of multi-media, and other audiovisual products.
    - Some clarification: Recital 19.
    - Discussions regarding electronic multi-media applications.
  - Individually accessible by electronic or other means
    - Federal Supreme Court of Germany – „Tele Info CD“ (1999): sui generis right applies to „non-electronic databases“ (i.e. telephone books).

II. Main Provisions (3): Scope

- **„Classic“ Field of Application**
  - Traditional Compilations (Telephone Directories; Encyclopedias ...)
  - All kinds of electronic databases, online and offline.

- **Internet Applications as a „database“?**
  - Search Engines (+), the „elements“ do not have to be owned by the database maker.
  - Compilations of links (+).
  - Compilations of other material (+), provided it is independent, e.g. price lists, small ads etc.
  - Possibly: The single pages of a larger website could be regarded as independent „elements“, which are systematically or methodically arranged and individually accessible.

- **Other examples**
  - Geographical data (and maps)

- (-) with respect to („integrated“) multi-media presentations or uniform graphical user interfaces of computer programs or internet applications („look and feel“; combination of icons etc.).
Hamburg District Court and Court of Appeal: Roche - Medizinlexikon (2000/2001)
Urheberrechtliche Probleme im Internet

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Cologne District Court: „Kidnet.de“ (1999)
Urheberrechtliche Probleme im Internet

Munich Regional Court (2006)
II. Sui generis right (1):
Conditions of Protection

- Art. 7 (1)
  - “Substantial investment”;
  - “in either the obtaining, verification or presentation of the contents”;
  - quantitatively and/or qualitatively.

- Art. 10 (3): Investments in the “updating” of Databases.

Main Points of Discussion
- The height of the “substantiality” threshold.
  - Mere “de minimis” rule or need for considerable investments?
    - German “trend”: “de minimis”-rule;
    - however, the discussion in a European context could tend towards
      higher conditions of protection.
- The “spin off”-problem or “Which investments are protectable?”
  - Related to the issue of a possible overprotection through the Database
    right in „sole source data“-situations and the resulting competition law
    problem (cf. slide 22).

II. Sui generis right (2)

Case C-203/02: British Horseracing Board v William Hill
- Cf. also the three parallel Marketing Fixtures-cases, C-46/02, C-337/02 and C-444/02
- All available at www.curia.eu.int; text with comments by Leistner also in 36 IIC 2005, 592-595.

The ratio decidendi:
- Spin-off Theory expressly dismissed.
- The Court finds another solution in the notion of investment into
  „either the obtaining, verification or presentation of the contents“.
  - Obtaining: Investment into the very generation of data excluded.
  - Verification: Investments into verification, which take place during
    the process of data generation excluded.

The result:
Investment into the organisation, and “generation” of different
types of horseraces and their participants excluded.
II. Sui generis right (3): Scope of Protection

- **Exclusive Rights Art. 7 (2)**
  - Extraction = reproduction right ("+" temporary reproductions).
  - Re-Utilization = distribution right, making available right.
  - Community wide exhaustion of the distribution right.

- **Limited to**
  - Art. 7 (2) = „substantial parts of the contents of a database”
    - Relationship between the size of the extracted/re-utilized part and the complete size of the database.
    - Teleological interpretation with regard to the nature of the underlying investment and function of the original database.
  - Art. 7 (5) = „repeated and systematic extraction/re-utilization of insubstantial parts”
    - „which conflict with a normal exploitation of that database OR which unreasonably prejudice the legitimate interests of the maker...”
    - Art. 9 par. 2 „Berne Convention”?
    - Teleological interpretation with regard to the nature of the underlying investment and the specific market on which the database is exploited. i.e. must „sum up” to a substantial part.

II. Sui generis right (4)

**In Particular (cf. BHB v Hill):**

- **Extraction/Re-utilization**
  - From whichever source, i.e. no direct extraction needed.
  - Even when the rightholder has made the data publicly available (this does not affect the exclusive right as such, although it might include an implicit license for the immediate user).
  - For whichever purpose, i.e. use for a competing product of the infringer is no precondition.

- **Quantitatively or Qualitatively substantial parts**
  - Quantitatively = In Relation to the overall volume of the database.
  - Qualitatively = In Relation to the overall investment.

- **Repeated and systematic extraction/re-utilization of insubstantial parts**
  - Must „sum up” to a substantial part AND
  - Substantial harm to the amortisation of the investment.
II. Sui generis right (5)

Case C-304/07: *Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg*

available at www.curia.eu.int

The *ratio decidendi*:

- Emphasised the character of the sui generis right as a genuine, exclusive IP-right, protecting databases against unauthorized use in any form.
- ECJ missed the opportunity to further clarify the specific subject matter of the sui generis right.

The *result*:

- ‘Extraction’ within the meaning of Art. 7 (2)(a) does not require the physical copying of data.
- An on-screen consultation of the first database and an individual assessment of this material can constitute an extraction within this meaning.
- Quantitatively or Qualitatively substantial parts are necessary.

II. Sui generis right (6):
Exceptions and Limitations

- **Art. 8:** Rights and Obligations of Lawful Users
  - Private copying of non-electronic databases.
  - Illustration for non-commercial teaching or scientific research.
  - Purposes of public security or administrative or judicial procedure.
  - Limited to substantial parts?
  - Limited to lawful users?
  - Remarkably narrower than the exceptions to copyright.

- **Art. 9:** Exceptions to the sui generis right
  - Substantial changes needed or are substantial investments into verifications sufficient?
  - Recital 55: "... A substantial new investment ... may include a substantial verification ...".
II. Sui generis right (7): Ownership of Rights

- Art. 7 (1): „a right for the maker of a database...“.
  → No legal definition in the text of the Directive.

- Recital 41: „the maker of a database” is the person
  - who takes the initiative and the risk of investing;
  - whereas this excludes subcontractors in particular from the definition of a database maker.

- Criteria:
  Who bears the entrepreneurial risk, according to the terms of the underlying contract (Problems, when no clear contractual regulation).
  → Need for clear contractual terms.

- The database right can be transferred in total (Art. 7(3)).

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III. Restrictions on Competition and „Freedom of Information“

- General argumentation of the critics
  - Over-protection → protection of the information as such, and therefore unduly limitation of the „free flow of information“.

- Problem: „sole source data situations“ (e.g.: TV-programme listings; train timetables; horse-racing lists etc.)
  - Possible solutions:
    - "BHB v Hill": Limitation of the notion of protectable investments; it is necessary to distinguish between generation and compilation of data
    - Competition Law: Art. 82 EC?
      - „Magill“, „IMS Health“ → Application of the „essential facilities“- doctrine ("Bronner") to IP-rights?
    - Interpret the substantiality criterion with regard to this problem?
      - „spin off“ doctrine; exclusion of costs for „generating“ data?
      - Can specific limitation of the market on which the database is refinanced be considered for assessing the scope of protection?
      - "BHB v Hill": Purpose and position of the infringer is irrelevant, however, „generation“-costs must be excluded.
    - Explicit provisions on compulsory licenses?
    - Alternative approach: misappropriation-doctrine/unfair competition law.

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IV. Perspectives

- **Europe**
  - ECJ decisions in “BHB v Hill”, “Marketing Fixtures I-III”, “Apis-Hristovich v Lakorda” and “Directmedia v Universität Freiburg” Cases.
    - no proven positive effects on the growth of database industry in Europe
  - However, actually no changes intended.

- **USA, WIPO**
  - No current projects for specific database protection.

- **Asia**
  - Main concern: Compliance with TRIPS (Art. 10 [2]), e.g. China -> Copyright protection for databases.
  - Additional database rights are seen rather sceptically.

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Important Cases of the ECJ

- C-203/02 (9. 11. 2004) The British Horseracing Board Ltd u.a. v William Hill Organization Ltd (BHB v Hill)
- C-444/02 (9. 11. 2004) Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP) (Fixtures Marketing I)
- C-338/02 (9. 11. 2004) Fixtures Marketing Ltd v Svenska Spel AB (Fixtures Marketing II)
- C-46/02 (9. 11. 2004) Fixtures Marketing Ltd v Oy Veikkaus Ab (Fixtures Marketing III)
- C-304/07 (9. 10. 2008) Directmedia Publishing-GmbH/Albert-Ludwigs v Universität Freiburg (Directmedia Publishing)
- C-545/07 (5. 3. 2009) Apis-Hristovich EOOD v Lakorda AD (Apis-Hristovich)
Legal Protection for Databases

Thank you for your attention.

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