

Problems of European
harmonisation – What we can
learn from the Database Directive

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Disparity of concepts
in the pre-Directive era

- Sweat of the brow copyright (UK): sufficient expenditure of labour, skill and judgement. Standard of « not copied »
- Authors' rights. Need for surmounting a threshold of originality. The author's own intellectual creation. Below this threshold availability of unfair competition remedies (FR, DE and most of Continental Europe).

Disparity of concepts in the pre-Directive era

- Nordic catalogue rule precedent (DK, FI, IS, NO, SE, 1959/1970): “*A catalogue, a table or another similar production in which a large number of information items have been compiled may not be reproduced without the authorisation of the producer until ten years have elapsed from the year in which the production was published.*”

Disparity of concepts in the pre-Directive era

- In deviation from the continental European *droit d'auteur* tradition, Dutch law also protected *non-original writings*, i.e. texts, compilations of data and other information products expressed in alpha-numerical form, that do not meet the test of originality. This regime, the so-called ***geschriftenbescherming*** (protection of writings), was a remnant of an ancient 18th century printer's right, that still survived in the work catalogue of the Dutch copyright Act, Article 10 (1): “books, brochures, newspapers, magazines and *all other writings*.”

Emergence of new challenges

- Digitisation
- Emergence of the internet
- Transnational implications
- Online databases as gateways
- Database contents as valuable assets (free riding issue)

Need for action

- Disparities
- Obstacles to trade
- Distortions of competition
- Outdated responses to new challenges

Need for a tailor-made solution

- Copyright in selection or arrangement only (weak protection), cf. *Feist* and *Vandaele* case law (US, NL)
- Unfair competition remedies no solution in a transnational context

Need for a tailor-made solution

- Multinational law making
- No preference for any national solutions
- Need for respecting acquired rights and legitimate expectations
- Innovative approach providing for some compensation

Need for a tailor-made solution

- Investment *versus* creativity
- IP right *versus* misappropriation doctrine
- Building a bridge between conflicting concepts

Need for a tailor-made solution

- Drawing from precedents
- Shorter term of protection
- Interim scheme (no curtailing, application over time)

General clauses and undetermined legal concepts

- Deliberate choice by law makers
- Clauses and concepts led to references to the ECJ
- Autonomous and binding interpretation by the European Court
- Uniform interpretation throughout Europe

Extraction and re-utilisation

- ECJ, BHB ./ William Hill (2004): The terms 'extraction' and 're-utilisation' as defined in Article 7 of Directive 96/9 must be interpreted as referring to any unauthorised act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned.

Substantial part

- The expression 'substantial part, evaluated ... quantitatively, of the contents of [a] database' in Article 7 of Directive 96/9 refers to the volume of data extracted from the database and/or re-utilised and must be assessed in relation to the total volume of the contents of the database

Substantial part

- The expression 'substantial part, evaluated qualitatively ... of the contents of [a] database' refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.

Insubstantial part

- **Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.**

Repeated taking of contents

- The prohibition laid down by Article 7(5) of Directive 96/9 refers to unauthorised acts of extraction or re-utilisation the cumulative effect of which is to reconstitute and/or make available to the public, without the authorisation of the maker of the database, the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker.

Need for providing a balance

- Insubstantial parts are in the public domain
- Catalogue of exceptions (concern substantial parts). No database cloning allowed
- Binding nature of certain provisions (users' rights. No total freedom of contract)

Continued application of other legal provisions

- Security
- Data protection and privacy
- Access to public documents
- Anti-trust

Need for providing international solutions

- Promotion of a WIPO instrument
- Regional agreements
- Bilateral agreements
- Reciprocity and unilateral introduction of sui generis right