# How the Court of Justice of the European Union made open data proprietary

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# What is open data?

- Data freely available to everyone to use and republish as they wish
- No copyright
- No patent
- No trademark
- No restrictions of use

# Open data

- So, what is *not open data*:

“Space” covered by:

- Copyright=a right to works by authors, a right *in rem*
- Patent=a right on inventions by inventors, a right *in rem*
- Trademark=a right to a distinctive sign by user, a right *in rem*

# Dichotomies

- Original work of the mind/collection of facts
- Idea-expression dichotomy
- Author---maker (database)
- Invention and discovery

# Open data-specifics

A free space

Data in the public domain:

-facts/ideas

-works whose copyright has expired/forfeited rights

-space of fair use to a work/exceptions-limitations (?)

-trademark disuse/failure to assert trademark rights/common usage by the public without regard for its intended use=falls into public domain/open data (generic trademark)

# Value of free space/public domain/open data

- Building blocks for the creation of new knowledge, examples include data, facts, ideas, theories, and scientific principle.
- Access to cultural heritage through information resources such as ancient Greek texts and Mozart's symphonies.
- Promoting education, through the spread of information, ideas, and scientific principles.
- Enabling follow-on innovation, through for example expired patents and copyright.
- Enabling low cost access to information without the need to locate the owner or negotiate rights clearance and pay royalties, through for example expired copyrighted works or patents, and non-original data compilation
- Promoting public health and safety, through information and scientific principles.
- Promoting the democratic process and values, through news, laws, regulation, and judicial opinion.
- Enabling competitive imitation, through for example expired patents and copyright, or publicly disclosed technologies that do not qualify for patent protection

# Enclosed and open space

- Important: we see TWO classes of domains
- Enclosed (copyright/patent/trademark protection) OR
- Open, free, public data, public domain
- “Free as the air to common use” (Benkler)

# A question

Is there a THIRD space? A THIRD domain?

*quasi* public?

*Quasi* protected?

*Quasi* enclosed?

# Public domain/open data

- the public domain ---pressure from the "commodification of information"
- items of information / no economic value in the past now: independent economic value in the information age,
- factual data (facts), personal data, genetic information and pure ideas
- commodification of information is taking place through intellectual property law and contract law

# Collections of information

- Copyright doctrine always in trouble with collections
- Old days: collections of poems, flower collections
- Encyclopedias, guides, lexicons etc
- Collections of laws/judgments
- telephones

# US: *Feist* 1991

- Supreme Court
- Rejects “sweat of the brow” doctrine
- Copyright protects originality, not effort
- No protection to telephone lists
- Free to copy for all/Public domain-open data.
- This instigated pressure for legislation/US and EU

# Database Directive 96/9/EC

- Start: strict an unfair competition model
- In the end: tight copyright regime.
- A database is: a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means
- A collection of everything?
- The purpose of the database is not relevant

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# A new *sui generis* right

- A right for the maker of the database (no author)
- To prevent extraction and/or reutilization of the whole or of a substantial part of the contents
- Evaluated qualitatively or quantitatively

# Purpose of the new right

- From the recitals and other sources:
- Purely economic justifications=
- To foster a strong European database industry
- ‘A strong IP right means more database production’
- To surpass, if possible, the American database industry

# Substantial investment

- The main condition of this sui generis right
- ‘sweat of the brow’ activities
- Example: obtaining details of subscribers in telephone services-verifying them-presenting them in a database (Feist)
- Qualitative? Use of specialized personnel etc/purchase of a famous painting for an art gallery…
- The right means: the exclusive right to control extraction/reutilization of a substantial part of the database

# Exceptions to the new right-the lawful user

- Only for the LAWFUL USER
- Who is this??
- A user who is already bound by contract with the rightholder
- A user who invokes an exception such as teaching or research?
- A user invoking fair dealing?

# Exceptions to the new right

- Private use: optional exception/only for non-electronic db
- A lawful user may: extract or reutilize insubstantial parts of the database
- **This may not be altered by contract**
- But: no acts which conflict with the normal exploitation of the database
- No acts which unreasonably prejudice the legitimate interest of the maker
- Repeated and systematic extraction/reutilization of insubstantial parts is not permitted

# Nature of the *sui generis* right

- A strong property right
- Exclusive right
- Duration=15 years but if the database is being verified and updated=new term starts (perpetual protection??)
- First time such a right is being implemented
- Covering collections of facts, which ordinarily merit no intellectual property protection

# Implementation of the Directive in member-states

- The Directive has been implemented:
- Very dedicatedly by Italy and Spain
- Quite dedicatedly by Belgium and Greece
- Mostly satisfactorily, though not flawlessly by Austria, France, Ireland, the Netherlands, Portugal and the United Kingdom
- More or less satisfactorily but far from flawlessly by Germany and Luxembourg
- Overly sketchily by Denmark and Finland
- Extremely sketchily by Sweden

# Evaluating the Directive I: the courts

- Litigation in Europe
- Mostly on ‘synthetic’ data (telephone numbers, dates/places of horse races or football matches etc)
- A database is everything: movie schedules, news articles and headlines, job records, a collection of 251 weblinks, a hit-chart, advertisements, addresses
- Four cases initially were remanded together to the European Court of Justice for clarification (*William Hill* etc)

# CJEU and the Directive - I

- Case: sporting event information and database protection
- The British Horseracing Board demanded that the William Hill corporation pay for the ‘use’ of the database
- Use=the bets placed – state lotteries
- The BHB wanted to license the database to them

# CJEU and the Directive - II

- Held: the substantial investment to the construction of the BHB database was NOT and investment in OBTAINING the data
- ‘spin-off’ theory: the purpose of the database = important
- Protected=only databases which would NOT exist otherwise
- This makes sense from the incentive-offering grounds of the sui generis right

# Has the CJEU resolved the interpretation problems?

- NO: the resolution was merely semantic and definitional (what is a database?)
- Created a difference between: Created data---------obtained data
- If you create data-NO *sui generis* right.
- BUT: this distinction is not always easy!!
- Example: if I record meteorological data-I create or do I record them?
- Example: if I obtain the genetic sequence of a living organism, do I create or obtain it? (Hugenholtz)
- These are representations of natural phenomena….
- The same scientists will ask for PATENT protection of sequences, because they have created them and copyright-like database protection because they have obtained them?
- Metaphysical distinctions…. (Hugenholtz)

# Evaluating the Directive-III

- December 2005 (three years late)-evaluation by the European Commission
- No mention of the Nautadutilh study whatsoever
- Whom did we ask to evaluate the Directive? Major database producers (only)
- Asked: 500 database publishers/answers: 101 of them
- 1 in 4 database makers in Europe are not aware that the *sui generis* rights exists
- The economic impact of the *sui generis* right is unproven
- 1 to 2 ratio EU/US databases in 1996 (pre-Directive) became 1 to 3 in 2004 (!)

# ‘Death’ of a Directive?

- One ‘kind of death’ is a ‘reflective’ one:
- Plans for introducing similar legislation in the States have ‘freezed’
- Plans for an international Treaty for the protection of databases=‘freezed’ as well
- Independent states considering (or pushed towards) similar legislation=difficult as well

# Evaluating the Directive-IV

- Proposals:
- Repeal the Directive (‘not a good idea-brings us back to discussing better protection, costly, database producers will not like it’)
- Withdraw the *sui generis* right (again, not a good idea, database producers don’t agree)
- Amend *sui generis* provisions
- Maintaining status quo (this is a good idea)

# Next CJEU case

- *Football Dataco* case, 2012:
- "The crux of the judgment comes at paragraph 42 when the court clearly states that skill and labour in the selection or arrangement of the data, even if significant, is not sufficient as such to trigger copyright protection."

  So=You have to show ORIGINALITY in the selection or arrangement of the data to claim protection of a database **as an original** database

  ("skill and labour is dead")

  (again a case of football fixture lists)

# *Ryanair v PA Aviation*, 2015

- Decided without an opinion of the AG
- Within one year from application
- PA Aviation scraped data from Ryanair for her price comparison site and sold tickets
- In *Ryanair's* site, general terms and conditions forbid using the site for any commercial purpose
- Ryanair sues

# National Courts

- Ryanair sues on 1. original database 2. non-original database so sui generis right 3. breach of contract
- National courts: PA Aviation wins on the Netherlands national copyright law (legal applications of exceptions)/loses claim that the Directive was breached
- Court of Appeals: Ryanair loses on all grounds
- Supreme Court asks the CJEU=if not original db, not non-original db, can a contract be valid?
- When is a database a database under the Directive??

# The *Ryanair* decision

- CJEU: YES: the contract is possible-national contract laws apply.
- The database ‘owner’ is NOT bound by them Directive’s exceptions to the exclusive right, because the WHOLE of the Directive is inapplicable
- So-stronger protection for the database which is not original in the Directive’s sense and not non-original in the Directive sense
- We have stronger-*complete* protection, no time limits, no exceptions, with a database which was the epitome of a spin-off database!
- NO creative effort
- NO substantial investment

# A step back

- WHY won't *Ryanair* tolerate price comparison websites and sales from another company?
- Would this not increase transparency and sales?
- Does this mean that perhaps it is not as cheap as they market and they hide it?
- Does this mean that they want us to go through their own site to see their ads?

# Claims

- We need this to protect our customers from other website mistakes/consistent quality of services/post-sales assistance
- Mistakes with flight information which is cancelled etc wrong check ins
- In general *Ryanair* has been very active in courts, sues on databases rights, on its trademark, etc etc

# And more claims now

- No, we DON'T have an original database-we are very very common actually…
- We DON'T have a database protected with the *sui generis* right-we did NOT dedicate substantial investment in the database!
- Because what we now want, is CONTRACT

# Contract

- A right *in personam, freedom of contract yes* BUT this is a ***contract of adhesion*** where one needs to click I agree, **otherwise no data.**
- SOLE SOURCE database
- AVAILABLE to the public, everyone can see the data.
- One NEEDS access -
- EXACTLY the case the DB Directive wanted to offer access to, under conditions!

# Result?

- We use contract to re-construe intangible properties at our wish?
- A paradox situation here
- Is there LOGIC in this result?
- “contracts which exclude fair use with copyright works, where unenforceable by law, should be unenforceable also when applied to works **in the public domain**”

# Another issue:

- Do we have a contract only because PA Aviation did CLICK YES?
- The behavior afterwards shows very clearly that they never intended to accept the contract terms
- UK law (*Newspaper Agency v. Meltwater*)

  for example: MIXED as to the validity of these general terms and conditions in a website
- NOT sure that these terms are valid and part of the contract
- Same under DUTCH contract law.

# WHAT IS THE CONTRACT *FOR*?

- Can we contract or license a public domain work? A work whose copyright has ended?
- A collection of FACTS which is NOT protected by the Database Directive **is in the PUBLIC DOMAIN---it consists of OPEN DATA**
- We see in commentators, when dealing with licensing of public sector information (re-use etc)-they note that they have to do this **BECAUSE** these collections ARE PROTECTED by the *sui* generis right-which can be held by the STATE-

(Ricolfi et al.)

Walk in a public park-note Don't enter? You do enter. In breach?

# A third space?

- Between copyright enclosed space and Open, free data
- Can we have a LICENSING space?
- A gray area?
- Containing USES?
- We have AUTHORS of works
- MAKERS of databases
- Is there a third class? We see the word OWNER of a database everywhere in the texts BUT from an IP point of view, this makes no sense. Does it make sense in contract law? Can you OWN data in contracts, when you can’t enclose them in IP?

# Contract dangers I

- Terms of the contract should be determined by competition
- Free market
- Should you use your monopoly to this database to prevent competition?
- Abuse of a dominant position?
- There is no real contract here with Ryanair and users. There is no freedom.

# Contract dangers II

- A licensing regime may have social and political consequences by causing information inequality---(in other settings)
- Creation of new information depends on exposure to existing information
- Commodification of information here=raises barriers to an extent that would be socially undesirable
- We need a contract theory that gives us BOUNDARIES
- Copyright was born BECAUSE contract wasn't enough to exclude free riders….
- Current technology has extinguished this. Now you can enclose ANYTHING technologically, when it comes to information.

# Returning in the history of the DB Directive…

- Scholars have dreaded this new terminology…
- MAKER…
- Substantial investment…
- LAWFUL USER…
- It all was wrong, in the classic IP sense…It was UFAIR COMPETITION masked as IP, and the mask was bad.
- BUT even in their wildest dreams had they dreamt of a case where all this is unnecessary…irrelevant..the WHOLE Directive is USELESS NOW!

# Useless? Unnecessary? A failure?

- We have seen all this criticism against the directive- Even in its own evaluation by the European Commission: proposals to ban.
- Well, we have banned it now-at the entirely opposite direction.

# THANK YOU!

Maria