



Universiteit
Leiden
The Netherlands

Protection for databases : the European Database Directive and its effects in the Netherlands, France and the United Kingdom

Beunen, A.C.

Citation

Beunen, A. C. (2007, June 7). *Protection for databases : the European Database Directive and its effects in the Netherlands, France and the United Kingdom*. Wolf Legal Publishers, Nijmegen. Retrieved from <https://hdl.handle.net/1887/12038>

Version: Corrected Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/12038>

Note: To cite this publication please use the final published version (if applicable).

Protection for databases

Protection for databases

The European Database Directive
and its effects in the Netherlands,
France and the United Kingdom

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van de Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 7 juni 2007
klokke 16.15 uur

door

Annemarie Christiane Beunen

geboren te Tilburg in 1968

Promotiecommissie:

Promotores: prof. mr. H. Franken
 prof. mr. A.A. Quaedvlieg (Radboud Universiteit Nijmegen)
Referent: prof. mr. D.J.G. Visser
Overige leden: prof. mr. P.B. Hugenholtz (Universiteit van Amsterdam)
 prof. mr. A.H.J. Schmidt
 mr. D.W.F. Verkade (Hoge Raad der Nederlanden)

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

© 2007 Annemarie Beunen

ISBN 978-90-5850-267-4

Uitgever:

Wolf Legal Publishers
Postbus 31051
6503 CB Nijmegen
www.wolfpublishers.nl

The motto by Man Ray (American Dadaist and surrealist, 1890-1976) was taken from his preface in L. Anselmino, *Man Ray opera grafica*, Torino 1973.

Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnemen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Het reprorecht wordt niet uitgeoefend.

No part of this publication may be reproduced, stored in a retrieval system, made available or communicated to the public, in any form or by any means, without the prior permission in writing of the publisher, unless this is expressly permitted by law.

To create is divine, to reproduce is human

Man Ray

Preface

A lengthy project has come to an end. When we started our research on the Database Directive it had not even been transposed in the countries on which we focused this study. Yet, because of the prolonged length of the project, we were able to take note of the important judgments which the European Court of Justice delivered on the Directive's interpretation in November 2004, and of the first evaluation of the Directive. Moreover, we had the opportunity to travel abroad. We enjoyed a useful stay at the Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht in München and also visited the Institut de Recherche en Propriété Intellectuelle Henri Desbois (IRPI) in Paris.

At first, our intention was to study the effects of the Database Directive in more countries than the three which we eventually chose. We were especially keen on Italy because an intensive course in Italian was compulsory during our study of art history, as were several research visits to Florence. However, this plan proved to be too ambitious given the several posts which we held alongside conducting our Ph.D. research. Although these posts delayed our research, we could not have done without them. They enabled us to escape from academic humour and take part in the 'real world'. Here, we were glad to be able to work on the interface between law and the arts, which perfectly matched our training as a lawyer and an art historian. We would very much like to thank our former colleagues at the Council for Culture for the opportunity to learn about cultural policy and museum management, and at the Council of State, where we gained an insight into the law on subsidies and on the protection of cultural heritage.

Our dual training also accounts for the concern expressed in this study regarding the public interest served by museums, libraries and archives. In fulfilling their task of preserving our common cultural heritage and making it available on the internet for scholars and the general public, copyright and the new *sui generis* right present them with serious obstacles. Besides our Ph.D. research we had the opportunity to write some publications in which legal information is 'translated' for non-lawyers working in the cultural sector. We have learned that cultural institutions are in great need of such publications and we are grateful to the Boekmanstichting in Amsterdam, the Archives Taskforce, the Museums Association and the National Library for inviting us to help meet this need. We also wish to thank the Faculty of Creative and Performing Arts of Leiden University and the Reinwardt Academy in

Amsterdam for enabling us to regularly give guest lectures to their students, who have broadened our mind by their captivating questions. Our research has highly benefited from these experiences.

Finally, we also owe great debt to our colleagues at eLaw@Leiden, Centre for Law in the Information Society, at Leiden University for facilitating and supporting our Ph.D. research and our other research projects in many ways. They have always provided an excellent ‘ambiente’ for our efforts.

Table of contents

PREFACE	VII
TABLE OF ABBREVIATIONS	XVII
INTRODUCTION	1
1 A DRAFTING HISTORY AND GENERAL OVERVIEW OF THE DATABASE DIRECTIVE	3
1.1 Introduction	3
1.2 A drafting history of the Database Directive	3
1.2.1 The beginning	3
1.2.1.1 The 1988 Green Paper	3
1.2.1.2 The 1990 hearing on the (in)adequacy of copyright	4
1.2.2 The proposal phase	6
1.2.2.1 The First Proposal	6
(a) The restriction to electronic databases	6
(b) The copyright threshold and the introduction of a new unfair extraction right	6
(c) Reasons for introducing the new unfair extraction right	7
(d) Comparing the unfair extraction right with unfair competition and the final <i>sui generis</i> regime	8
(e) Reception of the First Proposal	10
1.2.2.2 The Amended Proposal	10
1.2.2.3 The 1995 Common Position	11
(a) Application to electronic and non-electronic databases alike	11
(b) Additional exceptions	11
(c) A new <i>sui generis</i> right	12
1.2.3 The final Database Directive	13
1.2.3.1 Adoption	13
1.2.3.2 The <i>sui generis</i> right	14
1.3 Methods of implementation	14
1.3.1 Introduction	14
1.3.2 The Netherlands	16
1.3.3 France	17
1.3.4 The United Kingdom	19
1.4 The WIPO Draft Database Treaty of 1996	20
1.5 A general overview of the Directive	22
<i>Chapter I Scope</i>	23
1.5.1 Article 1 Definition	23
1.5.2 Article 2 Other EU copyright legislation	24

<i>Chapter II Copyright</i>	24
1.5.3 Article 3 Condition for copyright	24
1.5.3.1 The author's own intellectual creation	24
1.5.3.2 Structure versus contents	24
1.5.4 Article 4 Copyright authorship	25
1.5.4.1 The right holder of copyright	25
1.5.4.2 Optional employer's copyright	26
1.5.5 Article 5 Scope of copyright	26
1.5.5.1 The rights covered	26
1.5.5.2 Temporary reproductions	27
1.5.6 Article 6 Exceptions to copyright	27
1.5.6.1 Introduction	27
1.5.6.2 Access and normal use for the benefit of the lawful user	28
<i>Chapter III Sui generis right</i>	29
1.5.7 Article 7 Condition and scope of the <i>sui generis</i> right	29
1.5.7.1 Introduction	29
1.5.7.2 The condition of a substantial investment	29
1.5.7.3 The rights of extraction and reutilisation	30
1.5.7.4 Repeated and systematic use of insubstantial parts	31
1.5.7.5 The right holder of the <i>sui generis</i> right	31
1.5.8 Article 8 Rights and obligations of lawful users	32
1.5.8.1 Introduction	32
1.5.8.2 The right to use insubstantial parts without authorisation	32
1.5.8.3 Prohibition on harming the interests of the <i>sui generis</i> right holder and other right holders	33
1.5.9 Article 9 Exceptions to the <i>sui generis</i> right	34
1.5.9.1 Introduction	34
1.5.9.2 Differences between the <i>sui generis</i> right and copyright exceptions	35
1.5.10 Article 10 Term of protection	36
1.5.10.1 Introduction	36
1.5.10.2 A new term of protection	36
1.5.11 Article 11 Beneficiaries of protection under the <i>sui generis</i> right	38
1.5.11.1 Database producers within the EU	38
1.5.11.2 Non-EU database producers	38
<i>Chapter IV Common provisions</i>	40
1.5.12 Article 12 Remedies	40
1.5.12.1 Introduction	40
1.5.12.2 Protection for technological measures and rights management information	40
1.5.13 Article 13 Continued application of other legal provisions	41
1.5.14 Article 14 Application over time	42
1.5.14.1 Transitional provisions on copyright	42
1.5.14.2 Transitional provisions on the <i>sui generis</i> right	42
1.5.15 Article 15 Binding nature of certain provisions	43
1.5.16 Article 16 Final provisions	44
1.5.17 Article 17 Addressees	44
1.6 Summary	44

2	THE DEFINITION OF A DATABASE	47
2.1	Introduction	47
2.1.1	Collections	49
2.1.1.1	History of copyright for collections	49
2.1.1.2	Inherent characteristics	51
2.2	The database definition	52
2.2.1	Introduction	52
2.2.2	Independence of the items	53
2.2.3	Systematic or methodical arrangement	55
2.2.3.1	Systematic or methodical	55
2.2.3.2	Arrangement as a copyrighted intellectual creation	57
2.2.3.3	Fixation	58
2.2.4	Individual accessibility of the items	59
2.2.5	Contents	60
2.2.5.1	Introduction	60
2.2.5.2	Works	61
2.2.5.3	Data	64
2.2.5.4	Other materials	65
2.2.6	Information purposes	65
2.2.7	A large number of items	67
2.3	Summary	69
3	COPYRIGHT IN DATABASES	71
3.1	Implementing the database definition	71
3.1.1	Databases in the Dutch Copyright Act and the Databases Act	71
3.1.2	Databases as <i>œuvres de l'esprit</i> in France	72
3.1.3	Databases versus compilations in the United Kingdom	73
3.2	The originality criterion in the Directive	76
3.2.1	Introduction	76
3.2.2	The Dutch originality criterion and the <i>geschriftenbescherming</i>	77
3.2.3	Originality in France	80
3.2.4	The copyright threshold in the United Kingdom	83
3.3	Authorship of copyright	85
3.3.1	Introduction	85
3.3.2	Copyright for employers	85
3.3.3	Collective works and joint authorship	86
3.3.4	British authorship peculiarities	88
3.4	The scope of copyright	89
3.4.1	Scope and implementation	89
3.4.2	Infringement	91
3.4.3	Exceptions	93
3.4.3.1	Introduction and implementation	93
3.4.3.2	Access and normal use	94
3.4.3.3	Private purposes	95
3.4.3.4	Illustration for teaching or scientific research	97
3.4.3.5	Public security or judicial or administrative procedures	98

3.4.3.6	Other copyright exceptions	99
3.5	Summary	101
4	THE <i>SUI GENERIS</i> RIGHT	105
4.1	Introduction	105
4.2	The requirement of a substantial investment	105
4.2.1	Introduction	105
4.2.2	Quantitative and qualitative investments	106
4.2.3	Investments in obtaining	107
4.2.3.1	The obtaining phase and the spin-off theory	107
4.2.3.2	The emergence of the spin-off theory in the Netherlands	108
4.2.3.3	The spin-off theory in Dutch case law	109
4.2.3.4	The spin-off theory in the Dutch literature	112
4.2.3.5	The spin-off theory in France, Germany and the United Kingdom	116
4.2.3.6	Defining the obtaining costs	120
4.2.3.7	The European Court of Justice	121
4.2.3.8	Some comments on the 2004 decisions of the European Court	126
4.2.3.9	National case law since the 2004 decisions	129
4.2.3.10	Conclusion	132
4.2.4	Investments in verification	134
4.2.5	Investments in presentation	135
4.2.6	The level of a substantial investment	138
4.2.6.1	Indications given by the Directive and the European Court of Justice	138
4.2.6.2	Exclusion of insignificant investments	140
4.2.6.3	Flexible criterion	141
4.2.7	The substantial investment in case law	142
4.2.7.1	The Netherlands	142
4.2.7.2	France	143
4.2.7.3	The United Kingdom	145
4.2.8	Conclusion	145
4.3	The <i>sui generis</i> right holder: the producer	146
4.3.1	Introduction and implementation	146
4.3.2	The factor of initiative versus commissioning situations	148
4.3.3	Subcontractors	150
4.3.4	The factor of risk	151
4.3.5	The commissioning party as a producer	153
4.3.6	Joint <i>sui generis</i> right holders	154
4.3.7	Subsidiary companies and take-overs	156
4.3.8	Conclusion	157
4.4	The scope of the <i>sui generis</i> right	158
4.4.1	Introduction	158
4.4.2	Extraction	159
4.4.2.1	Introduction and implementation	159
4.4.2.2	Indirect extraction	160
4.4.2.3	Extraction by intermediaries	162
4.4.3	Reutilisation	168

4.4.3.1	Introduction and implementation	168
4.4.3.2	Reutilisation by Internet intermediaries: a functional approach	170
4.4.3.3	Secondary making available in a copyright context	171
4.4.3.4	Reutilisation by Internet intermediaries: a technical approach	173
4.4.4	Hyper links	175
4.4.5	Liability of Internet service providers and intermediaries for an unlawful act	177
4.4.5.1	The WIPO Copyright Treaty	177
4.4.5.2	Liability rules for Internet intermediaries in the European E-Commerce Directive	179
4.4.5.3	Liability of Internet intermediaries in a <i>sui generis</i> right context	181
4.4.5.4	Conclusion	184
4.5	Substantial part of a database	185
4.5.1	Introduction	185
4.5.2	Quantitative assessment	187
4.5.2.1	The amount of data taken	187
4.5.2.2	Subsets of databases	189
4.5.3	Qualitative assessment	191
4.5.3.1	Money invested in the part	191
4.5.3.2	Quality of the part and the European Court of Justice	192
(a)	Relation to the producer's investment	192
(b)	Economic value and the position of the European Court of Justice	193
(c)	Qualitatively a substantial part in case law	195
4.5.4	Insubstantial parts	197
4.5.4.1	Repeated and systematic taking	197
4.5.4.2	Dynamic databases	198
4.6	Harm to the producer's investment	200
4.6.1	The whole database or a substantial part	200
4.6.2	The two-step test in articles 7(5) and 8(2)	201
4.6.3	The European Court of Justice on article 7(5)	204
4.6.4	A comparison with the three-step test from copyright law	205
4.6.5	National case law on article 7(5) in relation to intermediaries	208
4.6.6	The <i>sui generis</i> right versus unfair competition	209
4.7	The exceptions to the <i>sui generis</i> right	212
4.7.1	Introduction	212
4.7.2	The concept of the lawful user	213
4.7.3	Private purposes	217
4.7.4	Illustration for teaching or scientific research	218
4.7.5	Public security or administrative or judicial procedures	220
4.7.6	Other national exceptions either introduced or considered	221
4.7.6.1	Databases produced by a public authority in the Netherlands	221
4.7.6.2	Recital 52 and offering for on-the-spot reference use in the Netherlands	225
4.7.6.3	Other exceptions in France and the United Kingdom	227
4.7.7	Desirable additional exceptions for education, research and access to information purposes	228
4.8	Summary	230

5 INFORMATION MONOPOLIES, COMPETITION LAW AND COMPULSORY LICENSING	233
5.1 Introduction	233
5.2 European competition law	235
5.2.1 The EC Treaty	235
5.2.2 European case law on abuse of information monopolies	237
5.2.2.1 The Magill case	237
5.2.2.2 The Bronner case	238
5.2.2.3 The IMS Health case	239
5.2.2.4 Conclusion	241
5.2.3 The <i>sui generis</i> right versus European competition law	242
5.2.3.1 The <i>sui generis</i> right versus European case law	242
5.2.3.2 National case law	245
5.2.4 Conclusion	247
5.3 Compulsory licensing	248
5.3.1 Introduction	248
5.3.2 The proposed compulsory licensing regime	249
5.3.2.1 Introduction	249
5.3.2.2 Discussion of the compulsory licensing regime in the proposed article 11	251
(a) Single source and new product	251
(b) Public availability and commercial distribution	253
(c) Public bodies and firms with an exclusive concession	254
5.3.3 Compulsory licensing versus European competition law	257
5.3.3.1 Introducing a compulsory licensing provision	257
5.3.3.2 Suggestions for the contents of a compulsory licensing provision	258
5.4 Summary	260
6 SUMMARY AND CONCLUSIONS	263
6.1 A special directive for databases	263
6.2 Justifications for a <i>sui generis</i> right for databases	265
6.3 The demarcation of the <i>sui generis</i> right	268
6.4 Counterbalances	270
6.4.1 Introduction	270
6.4.2 Interests of non-profit users and society at large	271
6.4.3 Interests of competitors	272
6.5 Alternative ways of protection	274
6.5.1 Technological measures, contract law, et cetera	274
6.5.2 Unfair competition	276
6.6 Evaluating the <i>sui generis</i> right	278

7 SUMMARY IN DUTCH	283
APPENDICES	305
1 European Database Directive	307
2 WIPO Draft Database Treaty	319
3 Dutch transposition: Databankenwet	343
4 Dutch transposition in English: Databases Act	347
5 French transposition	353
6 French transposition in English	359
7 British transposition: Copyright and Rights in Databases Regulations 1997	363
8 Italian transposition	387
9 Italian transposition in English	393
BIBLIOGRAPHY	399
TABLE OF CASES	421
INDEX	431
CURRICULUM VITAE	437

Table of abbreviations

Periodicals are given in italics

AIDA	<i>Annali italiani del diritto d'autore, della cultura e dello spettacolo</i>
AMI	<i>Tijdschrift voor Auteurs-, Media- en Informatierecht</i>
AMR	<i>Auteursrecht, tijdschrift voor auteurs- en mediarecht</i>
art(s).	article(s)
BC	Berne Convention for the Protection of Literary and Artistic Works
BGH	Bundesgerichtshof (German Supreme Court)
BIE	<i>Bijblad Industriële Eigendom</i>
CA	Cour d'appel (French Court of Appeal)
Cass.	Cour de cassation (French Supreme Court), with the chambers:
1re civ.	première chambre civil (first civil law chamber)
ass. plén.	assemblée plénière (full assembly)
CDPA	Copyright, Designs and Patents Act 1988 (British Copyright Act)
Ch.	<i>Law Reports, Chancery Division (3rd Series)</i>
Ch. D.	<i>Law Reports, Chancery Division (2nd Series)</i>
Ch.D.	Chancery Division of the England and Wales High Court
C.L.S.R.	<i>Computer Law & Security Report</i>
CMLR	<i>Common Market Law Review</i>
CPI	Code de la Propriété Intellectuelle 1992 (French Copyright Act)
CR	<i>Computerrecht</i>
CRDR	Copyright and Rights in Databases Regulations 1997 (British transposition)
CuR	<i>Computer und Recht</i>
CuR Int	<i>Computer und Recht International</i>
D.	<i>Recueil Dalloz Sirey</i> , with the following sections:
chron.	<i>chronique</i>
inf. rap.	<i>informations rapides</i>
jur.	<i>jurisprudence</i>
somm.	<i>sommaries commentés</i>
D. Affaires	<i>Recueil Dalloz Sirey – Cahier Droit des Affaires</i>
DCA	Auteurswet 1912 (Dutch Copyright Act)
D.I.T.	<i>Droit de l'informatique et des télécoms</i>
ECLR	<i>European Competition Law Review</i>
Ecosoc	Economic and Social Committee (EU)
ECR	<i>European Court Reports</i>
EEA	European Economic Area
EIPR	<i>European Intellectual Property Review</i>
E.M.L.R.	<i>Entertainment and Media Law Reports</i>

EU	European Union
<i>EWCA (Civ)</i>	<i>England and Wales Court of Appeal (Civil Division)</i>
<i>EWHC (Ch)</i>	<i>England and Wales High Court (Chancery Division)</i>
<i>EWHC (Pat)</i>	<i>England and Wales High Court (Patents Court)</i>
F.S.R.	Fleet Street Reports
Gaz. Pal.	Gazette du Palais
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
HR	Hoge Raad (Dutch Supreme Court)
H.R.	House of Representatives (abbreviation used for United States bills)
<i>IER</i>	<i>Intellectuele Eigendom & Reclamerecht</i>
<i>IIC</i>	<i>International Review of Industrial Property and Copyright Law</i>
ISO	International Organization for Standardization
JAVI	<i>Juridische Aspecten van Internet</i>
<i>JCP</i>	<i>Juris-Classeur Périodique (La Semaine Juridique)</i>
KG	Kort Geding
LAB	Legal Advisory Board (EU)
<i>L. Ed.</i>	<i>United States Supreme Court Reports, Lawyers' Edition</i>
MMR	Multimedia und Recht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
NJW-CoR	Neue Juristische Wochenschrift Computerreport
NMa	Nederlandse Mededingingsautoriteit (Dutch Competition Authority)
no(s).	number(s)
note	with annotation by
<i>NTER</i>	<i>Nederlands Tijdschrift voor Europees Recht</i>
<i>OJEC</i>	<i>Official Journal of the European Communities</i>
OPTA	Onafhankelijke Post en Telecommunicatie Autoriteit (Dutch Independent Post and Telecommunications Authority)
para(s).	paragraph(s)
<i>PbEG</i>	<i>Publicatieblad van de Europese Gemeenschappen</i>
reg(s).	regulation(s)
<i>RIDA</i>	<i>Revue Internationale du Droit d'Auteur</i>
<i>RTD com</i>	<i>Revue trimestrielle du droit commercial</i>
<i>RPC</i>	<i>Reports of Patent, Design and Trade Mark Cases</i>
<i>RvdW</i>	<i>Rechtspraak van de Week</i>
<i>Schulze</i>	E. Schulze, <i>Rechtsprechung zum Urheberrecht</i> , München: Beck 1979-.
<i>ScotCS</i>	<i>Scottish Court of Session Decisions</i>
S. Ct.	United States Supreme Court
S. Ct.	<i>Supreme Court Reporter</i>
S.I.	Statutory Instrument (subordinate legislation of the United Kingdom)
s.l.	sine loco (without place of publication)
s(s).	section(s)
<i>TGI</i>	Tribunal de Grande Instance (French Court of First Instance)
<i>T.L.R.</i>	<i>Times Law Reports</i>

TRIPS	GATT Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994
US	United States
<i>U.S.</i>	<i>United States Supreme Court Reports</i>
USC	United States Code title 17 on copyright
v.	versus
WIPO	World Intellectual Property Organisation
<i>W.L.R.</i>	<i>Weekly Law Reports</i>
ZR	<i>Rechtsprechung in Zivilsachen</i>

