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

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3.1 IMPLEMENTING THE DATABASE DEFINITION

3.1.1 Databases in the Dutch Copyright Act and the Databases Act

The three countries studied here all adopted the Directive's database definition in their copyright acts, while the Netherlands and the United Kingdom also introduced it in their separate acts which accommodate the *sui generis* right.¹ The result reached in France is satisfactory in our opinion, whereas this is less so in the Netherlands and the United Kingdom.

The Dutch Copyright Act (DCA) already contained copyright protection for collections. They are expressly mentioned in art. 10(2):²

(2) Reproductions of adaptations of a literary, scientific or artistic work, such as translations, arrangements of music, cinematographic adaptations and other alterations, as well as collections of different works, shall be protected as separate works, without prejudice to the copyright in the original work.

This paragraph only speaks of collections of copyrighted works. Nevertheless, the Dutch courts have established that collections of unprotected subject-matter are also eligible for copyright. On the occasion of the implementation of the Directive, this has now been explicitly affirmed in the DCA. Indeed, a new paragraph 3 in art. 10 contains the database definition of the Directive:³

(3) Collections of works, data or other independent materials, systematically or methodically arranged, and individually accessible by electronic or other means, shall, without prejudice to other rights in the collection and without prejudice to the copyright or other rights in the works, data or other materials included in the collection, be protected as separate works.

Remarkably, the term 'database' is not explicitly mentioned here.⁴ It is, however, mentioned in the new Databases Act, which was introduced to exclusively

1 In France, this right has been incorporated in the Copyright Act, see section 1.3.3.

2 Translation by the Dutch Ministry of Justice, available on the Internet at www.justitie.nl/images/DW_tcm34-2347.pdf.

3 Translation by the Ministry of Justice, see Appendix 4.

4 Also see Verkade/Visser 1999, p. 25.

accommodate the *sui generis* right. It might be regretted that the term 'database' was not included in the DCA, as well, because currently it is not unambiguously clear that the same subject-matter – a database – is eligible for both copyright and the *sui generis* right.

The Databases Act uses the same wording as the Directive to define a database, but it moreover contains the condition of a substantial investment.⁵ According to the Directive, the presence of a substantial investment is the condition which databases have to meet in order to be protected by the *sui generis* right. As the Dutch Databases Act is solely concerned with the *sui generis* right, this condition was here incorporated within the database definition. According to the Explanatory Memorandum, this was done to restrict the Directive's definition, which was considered too wide.⁶ Moreover, the Explanatory Memorandum referred to the implementing legislation in Germany, where the same addition was made to the database definition.

However, the database definition is arguably not a suitable place for the condition for *sui generis* protection, as it should solely define the subject-matter to which the Directive's regimes apply.⁷ Moreover, it was not included in the definition in the DCA. The discrepancy thus created between the Databases Act and the DCA we believe may not serve legal clarity.⁸

3.1.2 Databases as *œuvres de l'esprit* in France

Collections of data are recognised as being eligible for copyright in the French Copyright Act (Code de la Propriété Intellectuelle, CPI), as from 1996. In that year, the addition of 'data' was made as a result of the implementation of art. 10(2) of the TRIPS Agreement.⁹ After the implementation of the Database Directive, databases and their definition have now been explicitly included in the CPI in the following provision:¹⁰

Art. L. 112-3

The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. The same shall apply to the authors of anthologies or collections of miscellaneous works or data, such as databases,

5 Art. 1(1)(a) defines a database 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 and for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment.

6 Kamerstukken II 1997/98, 26 108, no. 3, p. 8. Also see Klos 2000, p. 6.

7 Also see section 2.1.

8 The same opinion is expressed by Krikke -, p. Da II-art. 1-3.

9 Loi no. 96-1106 du 18 décembre 1996, *Journal Officiel de la République française* 1996, no. 295 du 19 décembre 1996, p. 18687.

10 Translation provided by the French government, see Appendix 6.

which, by reason of the selection or the arrangement of their contents, constitute intellectual creations.

Database means a collection of independent works, data or other materials, arranged in a systematic or methodical way, and capable of being individually accessed¹¹ by electronic or any other means.

The definition was literally copied from the Directive and applies to both copyright and the *sui generis* right since the latter is placed in the CPI as well.

3.1.3 Databases versus compilations in the United Kingdom

In the United Kingdom, the Copyright, Designs and Patents Act (CDPA) already contained a provision concerning compilations. After amendment by the 1997 Copyright and Rights in Databases Regulations (CRDR), this provision reads in conjunction with section 1(1):¹²

Section 1

(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work –

- (a) original literary, dramatic, musical or artistic works

Section 3

(1) In this Part “literary work” means any work, other than a dramatical or musical work, which is written, spoken or sung, and accordingly includes –

- (a) a table or compilation, *other than a database*,
- (b) a computer program,
- (c) preparatory design material for a computer program, and
- (d) *a database*

Databases thus represent a subset of the larger category of compilations, being in their turn a category of literary works. Doubts are expressed in the literature as to whether a compilation or a database containing only musical and/or artistic works may be considered a literary work, since musical and artistic works are expressly excluded from the definition of literary works in the opening sentence of section 3(1).¹³ However, Laddie/Prescott/Vitoria hold

11 The translation by the French government instead uses the word ‘assessed’ which most probably is an editorial error.

12 The words given in italics were added to the CDPA by reg. 5 of the CRDR. See Appendix 7.

13 See Monotti 1993, p. 161; Chalton 1997, p. 278; Chalton in Rees/Chalton 1998, pp. 44-45, 49, 51, 52, 55-56; Derclaye 2002-II, pp. 473-474. Being literary works, neither compilations nor databases can consist of three-dimensional or physical items according to Chalton in Rees/Chalton 1998, p. 44. He argues that the opposite is true for collections as these do not have to be written. In his view, a compilation may still be a collection of written (digital) representations of all forms of works, including other literary works, sound recordings, films, photographs, artistic works, works of architecture and works of artistic craftsmanship.

that a compilation as well as a database may consist of any works as the nature of its contents does not influence the fact that the collection as a whole qualifies as a literary work.¹⁴ Furthermore, the category of literary works requires that a database is written, spoken or sung in order to enjoy copyright protection, whereas the Directive itself does not require this.¹⁵ Moreover, apart from being expressed, literary works in the United Kingdom cannot enjoy copyright unless they are recorded, in writing or otherwise.¹⁶ As a result of these compulsory characteristics, a database under the CDPA may have a more limited meaning than its counterpart in the Directive. It has thus been argued that the British requirements of the literary work category may be contrary to the Directive.¹⁷

The distinction between non-database compilations¹⁸ and their subset of databases is of great importance. The Consultative Paper which accompanied the draft implementing legislation states: 'Compilations that are not databases continue to have the existing case-law applied to them as "original literary works" in the customary way.'¹⁹ It means that this category will still benefit from the low British threshold for copyright protection,²⁰ as opposed to databases which are subject to the stricter originality criterion in the Directive. Regrettably, the CDPA does not define the terms compilation²¹ and table.²² The Directive's database definition is literally copied in a new section 3A(1) of the CDPA,²³ reading:

14 Laddie/Prescott/Vitoria 2000, p. 1061, para. 30.14.

15 See Chalton in Rees/Chalton 1998, p. 44; Derclaye 2002-II, pp. 473-474; Nauta Dutilh Report 2002, p. 329.

16 S. 3(2) CDPA. We argued in section 2.2.3.3 that a fixation requirement should be adopted for databases.

17 Derclaye 2002-II, p. 474.

18 Term taken from Lai 1998, p. 33.

19 Consultative Paper, p. 11, no. 8.4.

20 See section 3.2.4.

21 The Consultative Paper, p. 8, no. 5.3 mentions that it is left to the courts what constitutes a compilation.

22 Chalton 1997, pp. 278-279 writes: "'Table" implies the inclusion of tabulations of facts or data or other non-works with an element of selection or arrangement: "compilation" implies elements of selection or arrangement or both. Neither "table" nor "compilation" necessarily requires systematic or methodical arrangement, individual accessibility of each item of content, or independence as between content items. It follows that a database, in the terms of the Directive's definition, may not include all tables or compilations currently protected by copyright as literary works under the CDPA.' On the other hand, Derclaye 2002-II, p. 468 argues that a compilation may be unarranged, such as a selection of poems, but a table must always be arranged.

23 By way of reg. 6 CRDR. The same definition applies to the *sui generis* right according to reg. 12.

Section 3A

(1) In this Part “database” means a collection of independent works, data or other materials which –

- (a) are arranged in a systematic or methodical way, and
- (b) are individually accessible by electronic or other means.

Given this broad definition, it will not always prove easy in practice to decide whether a compilation or a table is a database.²⁴ This will create legal uncertainty as to whether the British or the Directive’s copyright threshold applies. Since the British threshold is lower, it could prove remunerative to convince the courts that a compilation is at issue instead of a database.²⁵ Case law must in fact be awaited in order to learn whether the Directive provides stronger protection in practice than the traditional British copyright.²⁶ Notably, databases, as opposed to non-database compilations, are eligible for both copyright and the *sui generis* right.

The current retention of the CDPA’s protection for non-database compilations next to the Directive’s regime for databases has been questioned. Lai argues that the United Kingdom may be accused of affording three-tier protection,²⁷ instead of the two-tier protection prescribed by the Directive.²⁸ Preserving the traditional copyright regime for non-database compilations is, however, not inconsistent with the Directive since this only concerns databases. Nevertheless, Rowland rightly expresses doubts as to whether it is satisfactory in principle to apply different originality thresholds to works which are essentially similar in character.²⁹ It could indeed be argued, as Derclaye has done, that the Directive’s threshold and protection regime should also apply to the category of compilations and tables in section 3(1)(a) of the CDPA.³⁰ As a result of the Directive’s higher threshold, this category would probably no longer be so easily protected by copyright, but the new *sui generis* right would be available instead. Applying the Directive to compilations, tables and databases alike would remove the legal uncertainty which flows from the ‘three-tier protection’ to date. It is indeed a serious objection against the CDPA’s current

24 Lai 1998, p. 33. Also see Derclaye 2002-II, p. 471 and Chalton 1997, p. 280.

25 Also see Laddie/Prescott/Vitoria 2000, p. 1066, paras. 30.22 and 33.20A who advise database makers to consider producing, first, a compilation without a systematic or methodical arrangement in order to secure the CDPA’s copyright for non-database compilations.

26 Cook 1998, p. 37: ‘the extent to which compilations such as databases do secure copyright under UK law has been rarely tested while in the cases where it has been tested, the results have been somewhat equivocal’.

27 Lai’s term ‘three-tier protection’ seems, however, not to be appropriate as it suggests that one work category is entitled to three forms of protection, whereas these three are in fact divided between two work categories, being databases (copyright and the *sui generis* right in accordance with the Directive) and non-database compilations (copyright in accordance with the CDPA).

28 Lai 1998, p. 33.

29 Rowland 1997, para. 3a.

30 Derclaye 2002-II, p. 471.

wording that it leaves uncertainty as to the applicable regime of protection, because one cannot be certain whether one is dealing with a database or not.

3.2 THE ORIGINALITY CRITERION IN THE DIRECTIVE

3.2.1 Introduction

The Directive's condition for copyright had to compromise between the originality standards of the *copyright* tradition of the United Kingdom and the *droit d'auteur* tradition of most other European Member States. In order to qualify for copyright under the Directive, a database needs to constitute the author's own intellectual creation as regards its selection or arrangement.³¹ This criterion has been given various interpretations in the literature, ranging from continentally strict to Britishly lenient.³² The truth probably lies in the middle; personal creativity is indeed required³³ but of not such a high level as traditionally required in Germany, whereas the thresholds of the United Kingdom and Ireland will need raising. Gaster indeed argues that the harmonised criterion treads the middle ground between the continental and the Anglo-American approach.³⁴ Although the European originality criterion requiring the author's own intellectual creation already stems from 1991 when it was introduced in the Computer Programs Directive, the European Court of Justice has not yet had an occasion to express itself on its interpretation.

Nevertheless, the assessment of the originality of a work must be decided on the merits of each case.³⁵ Among other things, the category to which a work belongs is relevant. For example, a painting or a novel may more easily be assessed as being original than a computer program or a geographical map. Because of this variety of subject-matter, Karnell doubts whether a general EU-wide standard for originality can be formulated.³⁶ He is also of the opinion that the courts in the Member States will continue to apply their national originality criteria, and are allowed to do so. As for databases, this may arguably be the only thing the courts can do as long as the European Court of Justice has not provided a clear-cut interpretation of the harmonised

31 Art. 3(1) of the Directive. Also see section 1.5.3 on this provision.

32 Koumantos 1997, p. 93; Gaudrat 1998, p. 601, and Brazell in Rees/Chalton 1998, p. 86 argue that the Directive's criterion means: not copied. See section 3.2.4 on the low British threshold.

33 The Explanatory Memorandum accompanying the 1992 Proposal of the Directive states on p. 22, para. 3.2.2: '(...) copyright protection for the way in which the collection has been made, that is, the personal choices made by the author in selecting or in arranging the material and in making it accessible to the user.'

34 Gaster 1999, p. 49 no. 119 and p. 52 no. 137.

35 Also see Gaster 1999, p. 52 no. 137.

36 Karnell 1998, pp. 206-208.

originality criterion for databases, which would indeed be difficult to formulate.

Still, it may be argued that many databases do not display an original structure in the sense of the Directive.³⁷ This is because most of them are made for the benefit of users in search of specific information, so that their structure has to be as functional as possible.³⁸ Thus, there is good reason to assume that protection by copyright will only be of limited importance for databases. This was in fact the very reason why the new *sui generis* right was introduced.

3.2.2 The Dutch originality criterion and the *geschriftenbescherming*

The European originality criterion has not been included in the DCA for databases, nor for computer programs. The DCA does not contain an originality criterion, but this test has been developed in the Dutch case law. In the Netherlands, a work must have an original character of its own and has to bear the personal imprint of the author. This criterion was established by the Dutch Supreme Court in its judgment *Van Dale v. Romme I*.³⁹ In the same decision, the Supreme Court specified this criterion for collections by ruling that ‘the selection of a collection must express a personal view of the author’. Several commentators argued that the required presence of the author’s personal view meant that collections were made subject to a stricter originality criterion than other copyright works in the Netherlands.⁴⁰

Some lawyers similarly hold that the personal view required by the Supreme Court represents a higher threshold than that of the Directive.⁴¹ The Dutch criterion also seems incomplete in that it merely mentions that the collection’s selection must express the author’s personal view, whereas the Directive’s criterion may relate to either the selection or the arrangement.⁴²

³⁷ See, for example, Hugenholtz 1996, p. 132.

³⁸ For example, comprehensive databases with a simple alphabetical or chronological arrangement generally do not enjoy copyright. Also see section 2.2.3.2.

³⁹ HR 4 January 1991, *NJ* 1991, no. 608 note D. Verkade.

⁴⁰ See the annotations on this judgment by Verkade in *NJ* 1991, Hugenholtz in *CR* 1991, p. 86, and Spoor in *Informatierecht/AMI* 1991, p. 178.

⁴¹ Hugenholtz 1996, p. 133; Hugenholtz 1998-II, p. 200; Hugenholtz 1998-III, p. 246; Quaedvlieg 2000, p. 184. Also see the Nauta Dutilh Report 2002, p. 249. However, Speyart 1996-I, p. 160, argues that the European criterion well matches the criteria applied in the judgments of Feist and *Van Dale v. Romme I*. Spoor/Verkade/Visser 2005, para. 16.3, p. 610 are also of the opinion that the Dutch criterion corresponds with that of the Directive.

⁴² See Beunen 2000, p. 58. Gaster 1999, p. 57 no. 162 stresses that a database merits copyright when either its selection or its arrangement represents the author’s own intellectual creation. Only the originality of the selection was examined in the case President District Court The Hague 29 June 1999 (*KPN v. XSO*), *Mediaforum* 2000/2, p. 64 note P.B. Hugenholtz; *IER*

Still, the Dutch legislator did not consider it necessary to incorporate the European originality criterion into the DCA. The Explanatory Memorandum accompanying the Dutch implementing legislation remarks that the European criterion is at any rate binding, whether it is implemented or not. The legislator mentioned that it trusts the courts to apply the European criterion in case this does not correspond with the Dutch originality criterion.

Since the Database Directive has been implemented, Dutch case law has so far produced only one decision in which copyright was recognised in a database's structure because of its 'own personal character'.⁴³ In the majority of cases, the databases at issue were not assessed to be original because their contents were exhaustive and/or their arrangement banal.⁴⁴ In some cases, though, the so-called *geschriftenbescherming* was successfully invoked.

The *geschriftenbescherming* is a peculiarity in Dutch copyright law. It is a copyright protection for non-original writings,⁴⁵ the scope of which has been developed in case law. It resembles the 'catalogue rule' in the copyright acts of the Scandinavian countries, which protects the producer of non-original catalogues, tables and similar compilations against reproduction.⁴⁶ Because no originality is required, the *geschriftenbescherming* is considered in the Dutch literature as a pseudo-copyright⁴⁷ or a *sui generis* right.⁴⁸ In order to enjoy *geschriftenbescherming*, the Dutch Supreme Court merely requires that the writing at issue has been made available to the public or is so destined.⁴⁹

2000/2, p. 72 note F. Grosheide; *Informatierecht/AMI* 2000/4, p. 71, note A. Beunen p. 58; *CR* 2000/3, p. 154 note B. Aalberts and M. Schellekens.

43 President District Court Almelo 28 December 2000 (*Presscorp v. GoldNet*), *IER* 2001/3, p. 108; *AMI* 2001/3, p. 64. The telephone directory at issue contained an elaborate structure of subdivisions.

44 For example, in President District Court Haarlem 21 April 2000 (*IMS Health v. Pharma Vision*), *CR* 2000/4, p. 209; *IER* 2000/4 p. 194, it was established that the database at issue was meant to be exhaustive and had a functional arrangement.

45 Art. 10(1)(1) DCA lists 'books, pamphlets, newspapers, periodicals and all other writings' among the works eligible for copyright.

46 Such compilations need not be original but must contain a large number of elements, see section 2.2.7. They are protected for ten years. Also see Bensinger 1999 and Karnell 1999 on the catalogue rule and its consistency with the Directive.

47 Hirsch Ballin in his annotation on the case HR 25 June 1965 (*Televizier I*), *Ars Aequi* 1966/XV, p. 349; Pfeffer-Gerbrandy 1973, p. 59; H. Cohen Jehoram in his annotation on the case European Commission for Human Rights 6 July 1976, *Ars Aequi* 1979/28, p. 145; Quaedvlieg 1987, p. 60; Verkade 1988, p. 66 (para-copyright); Dommering 1988, p. 66 (proto-copyright); Van Lingen 1998, p. 56 no. 17; Spoor/Verkade/Visser 2005, para. 3.21, p. 87 (para-copyright). Visser 2003, p. 105 considers the *sui generis* right for databases as a pseudo-copyright, as well.

48 Van Engelen 1987, p. 243.

49 HR 25 June 1965 (*Televizier I*), *NJ* 1966, no. 116 note L. Hijmans van den Bergh; *Ars Aequi* 1966/XV, p. 345 note E. Hirsch Ballin. Recently, this requirement has once again been affirmed by the Dutch Supreme Court in its decision of 8 February 2002 (*EP Controls v. Regulateurs*), *NJ* 2002, no. 515 note J. Spoor; *AMI* 2002/4, p. 122 note P.B. Hugenholtz; *IER* 2002/4, p. 128 note F. Grosheide; *BIE* 2004, p. 27 note A. Quaedvlieg. Contrary to the

The *geschriftenbescherming* only protects against reproduction of the written form of the information included.⁵⁰ Thus, collecting the same information from another source is permitted. It may therefore be argued that the *geschriftenbescherming* is in fact a protection against unfair competition, rewarded for the investments undertaken in the activities of collecting, arranging and publishing the writing.⁵¹ However, the Dutch Supreme Court considers it a form of copyright.⁵²

On the occasion of implementing the Directive, the Dutch legislator had to decide whether it was permitted to maintain the *geschriftenbescherming* for databases. The legislator had earlier abolished it for computer programs reasoning that the Computer Programs Directive exclusively provides copyright protection for computer programs that are the author's own intellectual creation,⁵³ so that the *geschriftenbescherming* requiring no originality had to give way.⁵⁴ Many authors rightly favoured the same approach for databases.⁵⁵ Remarkably, however, the Minister of Justice argued this time that the *geschriftenbescherming* by its nature is a regulation of competition law which is permitted under the Directive.⁵⁶ Nevertheless, the legislator half-heartedly

Supreme Court, Grosheide argued that secret commercial know-how should be entitled to *geschriftenbescherming*.

- 50 This includes straightforward reproductions which show minor changes compared to the original writing (for example, deletions or additions) and translations of the writing according to the Supreme Court's judgment of 25 June 1965 (Televizier I). This has recently been confirmed in HR 22 March 2002 (NVM v. De Telegraaf), para. 3.7.1, *Mediaforum* 2002/5, p. 174 note T. Overdijk; *AMI* 2002/3, p. 88 note D. Visser; *IER* 2002/4, p. 150 note H. Speyart; *JAVI* 2002/1, p. 25 note B. Lenselink; *CR* 2002/3, p. 161 note H. Struik. Also see the conclusion (paras. 4.43-4.47) of Advocate General Verkade in HR 6 June 2003 (NOS v. De Telegraaf), *AMI* 2003/4, p. 141.
- 51 Van Engelen 1987, p. 250. Hugenholtz 1989, p. 46 draws a comparison between the *geschriftenbescherming* and the neighbouring right conferred on producers of phonograms. Also see the conclusion of Advocate General Langemeijer in HR 8 February 2002 (EP Controls v. Regulateurs), *AMI* 2002/4, p. 122.
- 52 Yet, it has established that the provisions in the DCA applying to regular copyright do not automatically apply to the *geschriftenbescherming*. Instead, this has to be judged for each provision individually in accordance with its purport. HR 25 June 1965 (Televizier I), *NJ* 1966, no. 116 note L. Hijmans van den Bergh; *Ars Aequi* 1966/XV, p. 345 note E. Hirsch Ballin.
- 53 Art. 3(1) of Council Directive 91/250/EEC on the legal protection of computer programs, *OJ* 1992 L 122/42.
- 54 Parlementaire geschiedenis Auteurswet, pp. 10.47, 10.52 and 10.55.
- 55 Van Overbeek 1992, p. 125; Cohen Jehoram 1992, p. 132; Hugenholtz 1995, p. 86; Hugenholtz 1996, p. 133; Hugenholtz 1998-III, p. 246; Speyart 1996-II, p. 177; T. Cohen Jehoram 1998, pp. 109-112; H. Cohen Jehoram 1999, p. 479; Spoor/Verkade/Visser 2005, para. 16.23, pp. 639-640; Hugenholtz in his annotation on case C 203/02 of the European Court of Justice (British Horseracing Board Ltd v. William Hill Ltd) in *AMI* 2005/1, p. 37. The opposite opinion is held by Frequin 1999, p. 15. The Databases Study Committee of the Dutch Association for Copyright was divided on the matter in its 1999 report, pp. 29-30.
- 56 Handelingen II, 1998/99, 26 108, p. 3668. The Directive's art. 13 states that the Directive shall be without prejudice to laws on unfair competition, amongst other things.

decided to partly abolish the *geschriftenbescherming*. As a result, the DCA currently excludes from the *geschriftenbescherming* only databases which provide evidence of a substantial investment.⁵⁷ They will enjoy the *sui generis* right,⁵⁸ whereas the *geschriftenbescherming* will still be available for the remaining non-original databases.⁵⁹ However, the Directive does not differ between database categories; all databases are subject to a single originality criterion so that when their selection or arrangement does not constitute the author's own intellectual creation, they should remain without copyright. Therefore, by partly maintaining the *geschriftenbescherming*, the Dutch implementing legislation in our view conflicts with the Directive.

3.2.3 Originality in France

The criterion of originality for collections was revised in France on the occasion of the implementation of the TRIPS Agreement in 1996. As opposed to art. 2(5) of the Berne Convention, the CPI contained a cumulative criterion in art. L. 112-3 until 1996, requiring the collection's selection *and* arrangement to constitute an intellectual creation. Desbois pointed out that the French legislator introduced this strict criterion on purpose.⁶⁰ Yet, the 1996 amendment changed *and* into *or*, so that the CPI now contains the same alternative criterion for collections as art. 10(2) of the TRIPS Agreement and art. 3(1) of the Database Directive.⁶¹ Therefore, no further action was needed on the occasion of the implementation of the Database Directive.

Koumantos and Gaudrat argue that the Directive's criterion of the selection or arrangement being the author's own intellectual creation suggests a very low threshold, namely that the database is not copied.⁶² Gaster, however,

⁵⁷ Art. 10(4) DCA.

⁵⁸ Spoor/Verkade/Visser 2005, para. 8.4, p. 396 argue that such databases will be free of rights after the expiry of the *sui generis* right. Still, an exception is retained for 'transitional databases' which on 27 April 1996 did not meet the Directive's copyright threshold but were protected by the Dutch *geschriftenbescherming*. After the expiry of their *sui generis* right, such databases still enjoy the *geschriftenbescherming* on the basis of art. 14(2) and recital 60 of the Directive, and art. III(C) of the Databases Act.

⁵⁹ Consequently, producers may seek to deny a substantial investment in their databases in order to profit from the longer *geschriftenbescherming* (until 70 years after the maker's death) instead of the 15-year *sui generis* right. See Verslag, Kamerstukken II 1998/99, 26 108, no. 5, p. 3; Verkade/Visser 1999, p. 29; Frequin 1999, p. 15. However, Spoor/Verkade/Visser 2005, para. 16.23, p. 640 refer to the 1965 *Televisier I* ruling of the Dutch Supreme Court (see footnote 49) which in their view leaves room for a much shorter *geschriftenbescherming*, for example, fifteen years like the *sui generis* right or even less.

⁶⁰ Desbois 1978, p. 43 no. 30 and Kéréver 1997, p. 75.

⁶¹ Still, Mallet-Poujol 1996, p. 8 and Gaudrat 1998, pp. 605-606 prefer the cumulative threshold, requiring that the selection *and* arrangement of a database is an intellectual creation.

⁶² Koumantos 1997, p. 91; Gaudrat 1998, p. 601. In the same sense Lemarchand/Fréget/Sardain 2003, p. 15.

points out that a database's selection or arrangement should provide evidence of individuality, although merely to a modest degree. The traditional French interpretation of the originality criterion for collections in our view corresponds to Gaster's approach.⁶³ This is the criterion of *apport intellectuel* (intellectual contribution). The French Supreme Court established it in its Coprosa judgment of 1989, when it decided that an *apport intellectuel* suffices for collections, meaning that a minimum of creativity will do.⁶⁴ This *apport intellectuel* represents a lower threshold than the general French originality criterion, which requires works to bear the imprint of the author's personality.⁶⁵ Lucas/Lucas state that the European originality criterion does not add much to the existing French case law, which already gives copyright protection to databases of little originality.⁶⁶ Still, in their view, the European criterion will incite indulgence by causing more and more databases to enjoy copyright, in spite of the threshold set by the Coprosa judgment.

Many collections were assessed to be original by the French courts before the Directive was implemented.⁶⁷ However, Lucas/Lucas point out that there are also several judgments in which the reverse was decided.⁶⁸ For example, copyright was denied to an organigram of the principal car construction companies in the world,⁶⁹ a catalogue of paintings arranged chronologically,⁷⁰ or a wine list classified by year and production region.⁷¹ Mallet-Poujol

63 The French Supreme Court implicitly recognised that a database can enjoy copyright protection in its Microfor judgment: Cass. 1re civ., 9 November 1983 (Microfor v. Le Monde), *JCP* 1984.I.20189 note A. Françon, and Cass. ass. plén., 30 October 1987, *D.* 1988, p. 21 note J. Cabannes.

64 Cass. 1re civ., 2 May 1989 (SARL v. SA Coprosa), *JCP* 1990.II.21932 note A. Lucas; *RIDA* 1990/143, p. 309; *D.I.T.* 1990/2, p. 38 note Ph. Gaudrat; *D.* 1990, somm., p. 49 note C. Colombet and p. 330 note J. Huet.

65 Strowel/Derclaye 2001, p. 309 and Girot in her annotation on Tribunal de commerce Nanterre 27 January 1998 (Edirom v. Global Market Network), *D.I.T.* 1999/3, p. 42.

66 Lucas/Lucas 2001, p. 113, no. 114.

67 For example, a web site exploiting strategic business information in Tribunal de commerce Paris 9 February 1998 (Cybion v. Qualisteam), on the Internet: www.legalis.net, and a database with consumer product information in Tribunal de commerce Nanterre 27 January 1998 (Edirom v. Global Market Network), *D.I.T.* 1999/3, p. 42 note C. Girot; on the Internet: www.legalis.net note A. Ragueneau. According to the tribunal, the structure and contents of the database gave evidence of an *apport intellectuel* of the maker. However, since copyright only rests in a collection's structure, Ragueneau rightly criticises the court for taking the contents into account, as well. More case law on collections is mentioned by Lucas/Lucas 2001, p. 111, no. 113.

68 Lucas/Lucas 2001, p. 111, no. 113.

69 Coprosa judgment of the Supreme Court, see footnote 64.

70 CA Paris 8 October 1997 (Louise Laurin v. veuve Lam et autres), *Gaz. Pal.* 1998/2, somm., p. 454 note L. Tellier-Loniewski.

71 Cass. 5 January 1999 (Cie des Courtiers Jurés Piqueurs de Vins de Paris v. Sté Cellier des Halles et Gilbert Babin), discussed by A. Kéréver in *RIDA* 1999/180, pp. 279-281. In the preceding case on appeal (CA Paris 26 March 1991, *RIDA* 1991/4, p. 148; *D.* 1992/38, jur., p. 462 note A. Tricoire) it was, however, held that the wine list did enjoy copyright. In CA Douai 7 October 1996 (Sté DDB Needham v. Cie des Courtiers Jurés Piqueurs de Vins de

observes that the assessment of a collection's originality is necessarily subjective and that courts take varying factors into account, such as the nature and origin of the incorporated information, and its method of arrangement.⁷²

After the French implementing legislation took effect, copyright was acknowledged, for example, in a CD-Rom with circa 400 collective agreements thematically arranged,⁷³ a database for pet breeders which was classified by animal race, the names of breeders and French regions,⁷⁴ a guide with biographical data of all French bishops,⁷⁵ a gay tourist guide,⁷⁶ and a database describing medicines.⁷⁷ However, the Coprosa criterion was not explicitly referred to in these cases. Among the databases which were refused copyright are a web-site publishing press releases originating from companies quoted on the stock exchange,⁷⁸ a publication of circa 100 pages containing calls for tender arranged geographically,⁷⁹ an internal company database with e-mail addresses of employees,⁸⁰ a web site on mortgage credit,⁸¹ a web site listing

Paris), *RIDA* 1997/172, p. 286, the court decided that the personal classification according to the wines' quality was not sufficiently original because other experts would arrive at similar appreciations.

72 Mallet-Poujol 1996-II, pp. 103-105.

73 TGI Lyon 28 December 1998 (Editions Législatives v. Le Serveur Administratif, Thierry Ehrmann and others), *RIDA* 1999/181, p. 325 with a brief annotation by Kéréver at pp. 257-259. However, the tribunal applied the criterion of *apport créatif* which took into account not only the database's selection or arrangement, but also its presentation and composition. The database's originality was confirmed on appeal by CA Lyon 22 June 2000 (Monsieur T., Madame N., SA Le Serveur Administratif v. Sarl Editions Législatives, SA Jet On Line, SA France Télécom), and the French Supreme Court 20 January 2004 (Le Serveur administratif v. Thierry E. et autres), on the Internet: www.legalis.net. Remarkably, the *sui generis* right was not invoked.

74 TGI Lille 11 July 2000 (Webvisio.com v. Multimédia Assistance Internet), on the Internet: www.legalis.net. This decision in summary proceedings was very short. It appears that the court acknowledges copyright for the database's criteria of classification.

75 CA Paris 11 January 2002 (Golias v. Les Editions du cerf), *Légipresse* 2002/1, p. 19; *Propriétés Intellectuelles* 2002/5, p. 42 note A. Lucas. Lucas criticises that the court too easily accepted copyright protection without any reasoning. He observes that an original selection was not made as the guide was comprehensive, while the judgment did not mention what sort of arrangement it had.

76 CA Paris 29 March 2002 (Sarl Editions EXES v. Sarl PX PRESS), *Propriétés Intellectuelles* 2002/4, p. 61 note A. Lucas.

77 Tribunal de commerce Paris 19 March 2004 (Société OCP Répartition v. Société Salvea), on the Internet: www.legalis.net. The tribunal found that the claimant's database was not a simple compilation of information taken from the public domain but, instead, the claimant had produced, organised and integrated the data and his comments according to precise editing and classification rules, using key words compiled from a dictionary.

78 CA Versailles 11 April 2002 (Sarl News Invest v. SA PR Line), *RIDA* 2002/194, p. 247 note A. Kéréver.

79 CA Paris 18 June 1999 (SA Groupe Moniteur et autres v. Sté Observatoire des marchés publics), *RIDA* 2000/183 p. 316; *GRUR Int* 2000, p. 799; Gaster 2000-I, p. 43; Gaster 2000-II, p. 91.

80 TGI Paris 25 April 2003 (Sonacotra v. Syndicat Sud Sonacotra), on the Internet: www.legalis.net.

medical products and equipment,⁸² and an Internet database containing auction prices of works of art.⁸³ In the last-mentioned case, the appeal court explicitly acknowledged that a database must represent an *apport intellectuel* to enjoy copyright. It continued, however, that *apport intellectuel* should be assessed on the basis of the plan, composition, form, structure, language and, more generally, the expression of the author's personality. Although the court used Coprosa's criterion of *apport intellectuel*, it took several factors other than the Directive's selection or arrangement into account and thus seemed to use a stricter originality criterion than the Directive.

Regrettably, the interpretation of the originality criterion followed in French judgments is not always easy to determine because the courts often do not elaborate thereon but merely state without argumentation that a work is, or is not, protected by copyright.⁸⁴ Thus, it is sometimes difficult to determine whether the Coprosa criterion was indeed used.

3.2.4 The copyright threshold in the United Kingdom

The CDPA traditionally lacked a criterion which works must meet in order to get copyright protection. Instead, the British criterion has been developed in case law, like in the Netherlands. The British courts use a low threshold – sometimes called the 'sweat of the brow' doctrine – according to which the expenditure of skill, labour or money is sufficient for a (literary) work to acquire copyright protection.⁸⁵ The Directive, however, imposes its own, higher originality criterion on all Member States,⁸⁶ and as a result, the United

81 CA Douai 23 February 2004 (Courta Finance v. Dominique L., Abyss Finance, Eatime), on the Internet: www.legalis.net.

82 TGI Caen 15 September 2005 (Itac v. Equipmedical, Jacques L.), on the Internet: www.legalis.net. The court considered that the originality of a database is assessed with regard to its global architecture, structure, form and presentation.

83 CA Paris 18 June 2003 (Credinfor v. Artprice.com), on the Internet: www.legalis.net.

84 French case law on databases is available on the Internet at www.legalis.net, www.juriscom.net and www.juritel.com.

85 See the Consultative Paper, p. 8, no. 5.4. Rowland 1997 cites from the case *Macmillan & Co Ltd v. Cooper* (1924) 40 *T.L.R.* 186, at p. 188: 'it is necessary that labour, skill and capital should be expended sufficiently (...)'. This was confirmed by the later case *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 *W.L.R.* 273, at pp. 277-278: 'And it is not disputed that, as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation.'

86 See, for example, Chalton in Rees/Chalton 1998, p. 52, Laddie/Prescott/Vitoria 2000, p. 1068, paras. 30.26 and 30.27, and Davison 2003, p. 15. On the other hand, Copinger and Skone James 1999, p. 114, para. 3-97 put it that the European originality criterion does not alter the meaning of original as it has been interpreted by the British courts through the skill and labour test.

Kingdom had to abandon its low threshold.⁸⁷ It has now for the first time introduced an originality standard in the CDPA which is exclusively meant for the literary work category of databases, reading:⁸⁸

Section 3A

(2) For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation.

It is remarkable that the CDPA did not yet contain this stricter criterion given that the Computer Programs Directive already prescribed it for computer programs.⁸⁹ Fortunately, the British government recognised that the explicit introduction of the European originality criterion was indeed necessary for databases. In turn, the vagueness of the Directive's criterion has been criticised in the United Kingdom.⁹⁰

The new criterion requiring originality clearly constitutes a higher threshold than the 'sweat of the brow' doctrine of the United Kingdom. In British case law dating from before the Directive's implementation, many databases have been held to enjoy copyright.⁹¹ On the other hand, case law decided under the CRDR is not abundant.⁹² In the 1999 case of *Mars v. Teknowledge*, a company manufacturing coin receiving and changing machines successfully sued for infringement of copyright and *sui generis* right in its so-called Cashflow.⁹³ This Cashflow was a discriminator in the form of a computer program which could determine the authenticity and denomination of a coin fed into the machine. The court accepted without further research or reasoning that Cashflow was protected by copyright and the *sui generis* right. The same was done in a Scottish judgment on, among other things, a database containing Scottish customers and prospects of a company that supplied hearing aids.⁹⁴

87 Art. 14(2) of the Directive contains a transitional provision which seeks to ease the pain. Also see recital 60.

88 Reg. 6 CRDR.

89 The British implementation of the Computer Programs Directive has therefore been criticised by the European Commission according to Cook 1998, p. 37 and Colston 2001, note 20.

90 See Brazell in Rees/Chalton 1998, p. 86: '(...) a creation may be anything that is made, not copied, exactly as under the old copyright standard. The criterion that it be an 'intellectual' creation is almost tautologous, as it is difficult to see how a database within the definition could be created by purely mechanical means; this term probably does no more than exclude computer-generated databases (...)'.
91 See the case law mentioned by Brown in Rees/Chalton 1998, p. 147.

92 See more British case law in sections 4.2.3.9 and 4.2.7.3.

93 *Mars UK Ltd. v. Teknowledge Ltd.* [2000] *F.S.R.* 138 (Ch. 1999), *EIPR* 1999/9, p. N-158 note J. Watts. It may be questioned whether the CRDR should have been applied because Cashflow was a computer program and arguably not a database.

94 The defendants had not contested this protection. They were found to have infringed copyright and *sui generis* right in the database, see *SieTech Hearing v. Borland & Ors* [2003] *ScotCS* 37.

So far, the scarce British case law decided under the CRDR has not spoken out on the interpretation of the new threshold for copyright protection. Future case law must thus be awaited to see how the European originality criterion will be applied and interpreted in the United Kingdom.

3.3 AUTHORSHIP OF COPYRIGHT

3.3.1 Introduction

The Directive defines the owner of copyright in a database in accordance with copyright principles as the natural person or group of natural persons who created the database.⁹⁵ National legislation may designate legal persons and employers as copyright holder, as well.⁹⁶ For situations where several persons have produced a database, the Directive recognises joint authorship while it also does not affect national legislation on collective works. It must be noted, however, that the Directive only assigns copyright to the person(s) who designed the original selection or arrangement of the database contents. Therefore, regimes which apply to works made by several persons are irrelevant when this structure was made by only one person.⁹⁷

The existing authorship provisions in the copyright acts of many Member States did not need adapting since they already reflected the Directive's art. 4. Still, in some countries, consideration was given to the introduction of a provision which assigns copyright to the employer.

3.3.2 Copyright for employers

It is traditionally stipulated in both the Netherlands and the United Kingdom that employers (including legal persons) are vested with the copyright in the works created by their employees.⁹⁸ For the sake of legal certainty and efficiency, one could indeed support this for copyrighted databases as well. Moreover, the employer often coincides with the producer who is entitled to the *sui generis* right in the database, whereas where copyright and the *sui generis* right are in different hands, a user needs to seek a use licence from two parties. Moreover, the refusal of one party makes the licence granted by the other party useless. From a practical point of view, copyright and the *sui generis* right in a database are thus better assigned to one party. Still, one need

⁹⁵ Art. 4(1).

⁹⁶ See recital 29. Employer copyright was considered for inclusion in the Directive, see section 1.5.4.2.

⁹⁷ The same is stressed by Gaudrat 1999-I, p. 108.

⁹⁸ S. 11(2) CDPA.

not necessarily make statutory provision for this as the same may be achieved by contract.

In France, a provision on employers' copyright was not adopted on the occasion of the implementation of the Database Directive.⁹⁹ Although the Senate's commission did consider the possible drawbacks of not adopting such a provision for databases,¹⁰⁰ it ultimately decided to remain true to the French principle that copyright always originates in the natural person who creates the work.¹⁰¹ The commission put forward two arguments against a special provision on employers' copyright for databases in the CPI.¹⁰² Firstly, employers are not empty-handed as they can profit from the special *sui generis* right. Secondly, the commission pointed at art. 4(2) of the Directive which allows Member States to apply their national regime of collective works to databases. This regime vests copyright in the person at whose initiative and under whose direction the work was made, and this is often the employer.

3.3.3 Collective works and joint authorship

In France, the collective work regime is one of the three allocation regimes for works made by several authors.¹⁰³ The French Copyright Act also contains special provisions for works of collaboration and composite works. For *œuvres collectives*, the copyright vests in the natural or legal person under whose direction and name the work has been disclosed, who in practice is the employer or producer. Art. L. 113-2 CPI defines a collective work as follows:

"Collective work" shall mean a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.

99 Such a provision was, for example, adopted in Italy. Art. 12bis of the Italian Copyright Act states that unless it is otherwise agreed, the employer owns the exclusive right of economic use of the computer program or database created by his employee in the course of his duties or on instructions given by the employer.

100 French Senate's Jolibois report 1997/1998, Examen des articles, article premier. According to the report, it could (among other things) drive the production of databases out of France to Anglo-Saxon countries, while diverging allocation regimes for computer programs and databases could create legal difficulties.

101 This is also a fundamental principle in the copyright law of most European countries on the continent, and of many countries which adhered to the Berne Convention. See Ricketson 1987, p. 158.

102 Lorimy 1999, p. 100 also spoke out against such a provision.

103 The collective work regime is also known in Italy, Spain and Portugal.

Databases will in most cases satisfy this definition according to the Senate's commission and Lucas,¹⁰⁴ while the French legislator also relies on this assumption.¹⁰⁵ The qualification of a database as a collective work is indeed supported by a 1996 decision of the State Council¹⁰⁶ and also by the fact that the category of collective works was introduced in the French Copyright Act in 1950 especially for dictionaries and encyclopaedias.¹⁰⁷ Both can be regarded as typical examples of databases.¹⁰⁸ The Senate's commission considered including a mandatory provision in the CPI qualifying databases as collective works, but rejected this in order to leave open the possibility of a different qualification. The Directive does the same in art. 4(3) which mentions the possibility of joint authorship for the creators.

In France, joint authorship is recognised for works of collaboration.¹⁰⁹ The persons who contributed to an *œuvre de collaboration* are jointly entitled to the copyright if they succeed in proving that they created the work in joint consultation. With a database, the object of copyright is its selection or arrangement. If this structure is designed by more persons, it may well be argued that the regime of a work of collaboration¹¹⁰ applies and not that of a collective work.¹¹¹ Indeed, creators of a database structure (e.g. of an encyclopaedia) are involved in the concept of the database as a whole by developing its selection or arrangement, which they can only do in joint consultation. Instead, contributors to a collective work provide their specific contribution without being involved in the making of the work as a whole.¹¹² The French courts, however, already tend to regard the legal person (producer/employer) as the right holder whenever a work is exploited under his direction and

104 Lucas 1998, p. 96-97, no. 197. Cavanagh 1987, pp. 26 and 30 holds the same opinion.

105 According to Gaudrat 1999-I, p. 108.

106 Conseil d'Etat 10 July 1996 (Sté Direct Mail Promotion et autres), *RIDA* 1996/170, p. 207 note A. Kéréver. The repertory called SIRENE containing information about enterprises was qualified by the Conseil d'Etat as a collective work on which the Institut national de la statistique et des études économiques (INSEE) held the copyright.

107 Desbois 1978, pp. 199-201, no. 168; Lucas/Lucas 2001, p. 183, no. 206.

108 Cass. 1re civ., 3 April 2002 (Mme Kannas v. Sté Larousse-Bordas), *D. Affaires* 2002/19, jur., p. 1552 note J. Daleau. In this case, the Supreme Court affirmed that a dictionary is a collective work.

109 Art. L. 113-3 CPI.

110 According to Kéréver 1997, pp. 475-476, a database is a work of collaboration if it is made by several natural persons and the criteria for a collective work are not met. He argues that a database can also be a composite work (art. L. 113-2 second sentence), for example, if it contains a pre-existing, protected computer program and the database is made without the collaboration of the author of this computer program. However, he thus fails to recognise that copyright in a database only rests in its structure.

111 Interestingly, newspapers have been both awarded and denied the qualification of a collective work, see Thoumyre 2000.

112 Desbois 1978, p. 171, no. 203.

name.¹¹³ It is thus to be expected that a database will often be considered the copyright of its producer, in accordance with the collective work regime.¹¹⁴ Nonetheless, it is possible for co-authors to produce reverse proof in favour of a work of collaboration.¹¹⁵

The collective work regime does not exist in the Netherlands and the United Kingdom. Yet, the Dutch Copyright Act does contain a specific authorship provision for works which consist of copyright works made by two or more persons; art. 5 states that the author who is entitled to the copyright in the whole work is the person under whose guidance and supervision the work was made or, in the absence of such a person, the compiler of the various works. This provision may also be applied to a database structure created by several persons. Joint authorship is acknowledged in the Netherlands on the condition developed in case law that the contributions of the authors to the work are not separable.¹¹⁶ The British CDPA also recognises joint authorship. Its section 10(1) requires that the contribution of each author is not distinct from that of the other author(s).

3.3.4 British authorship peculiarities

A typical feature of British copyright law is the so-called Crown copyright and the Parliamentary copyright, which confer copyright respectively on Her Majesty the Queen, and on the House of Lords or the House of Commons, or on both Houses jointly.¹¹⁷ These authorship provisions concern legal persons and are thus permitted by the Directive. Crown copyright and Parliamentary copyright may prove to be of relevance to databases, provided that the large databases created by the British government – which contain, for example, domestic laws¹¹⁸ – are original under the Directive.

Another British curiosity is the category of computer-generated works introduced in the CDPA in 1988. A work is computer-generated if it is generated by a computer in circumstances where there is no human author of the work.¹¹⁹ Section 9(3) takes the author to be the person who undertook the arrangements necessary for creating the work. Chalton and Lai, however, argue

113 Lucas 1998, pp. 94-97, nos. 194-197; Edelman 1998, pp. 141-144. They both criticise this lenient approach.

114 An example is the database case Tribunal de commerce Paris 9 February 1998 (*Cybion v. Qualisteam*), on the Internet: www.legalis.net. The fact that Cybion's web site was divulged under the name of a legal person was sufficient for the court to qualify it as a collective work.

115 Also see Gaudrat 1999-I, p. 108.

116 Art. 26 DCA and HR 25 March 1949 (*La belle et la bête*), *NJ* 1950, no. 643.

117 Ss. 163 and 165 CDPA. The same applies to the *sui generis* right in accordance with regs. 14(3) and 14(4) CRDR.

118 See this legislation on the Internet at: <http://www.opsi.gov.uk>.

119 S. 178.

that computer-generated databases cannot qualify for copyright under the Directive because they cannot constitute the author's own intellectual creation due to the lack of a human author.¹²⁰ These databases would thus not qualify for copyright protection,¹²¹ although the *sui generis* right would still be available.¹²² Gaster interprets the CDPA's definition of computer-generated works as requiring the work to be autonomously made by a computer.¹²³ He argues that such works, as opposed to computer-aided works,¹²⁴ do not yet exist and are not addressed in the Directive's art. 4. Thus, the British provisions on computer-generated works are not affected by the Directive in his view.

3.4 THE SCOPE OF COPYRIGHT

3.4.1 Scope and implementation

Copyright in a database under art. 5 of the Directive covers a database's permanent and temporary reproduction, its adaptation or alteration in any form, its distribution in the form of physical copies and its non-physical communication, display or performance to the public (e.g. via a computer network).¹²⁵ This has not induced the Netherlands, France or the United Kingdom to make adaptations to their copyright acts.¹²⁶ However, some omissions may be observed in their implementing legislation, as will be shown below.

The extension of the reproduction right to temporary reproductions was specified neither in the Dutch nor the French implementing legislation. In France, this is remarkable given that the equally broad copyright for computer

120 Chalton 1997, pp. 280-281; Lai 1998, p. 33; Chalton 1998, p. 179. In the same sense O'Hare 2006, p. 488.

121 Cook 1996, p. 28. Moreover, Copinger and Skone James 1999, p. 903, para. 18-03; Laddie/Prescott/Vitoria 2000, p. 1068, para. 30.27, and Brazell in Rees/Chalton 1998, p. 86 also express doubt that computer-generated databases can enjoy copyright under the Directive's regime. Bull 1998-I, p. 301, on the other hand, argues that the person who made the arrangements for the creation of a computer-generated database should attempt to demonstrate that he thus made an intellectual creation.

122 Chalton 1997, p. 281 proposes to abolish copyright protection for computer-generated works altogether and to confer on them a right analogous to the Directive's *sui generis* right.

123 Gaster 1999, pp. 76-77 nos. 255-263.

124 Gaster argues that the creation of a computer-aided work is eventually controlled by a human author who merely uses the computer as an instrument and thus this person is vested with copyright. Also compare Brazell in Rees/Chalton 1998, p. 83.

125 Art. 5 of the Directive. Under the 2001 Copyright Directive, the first two sorts of use are covered by the reproduction right, while the last two are forms of making available covered by the right of distribution and the right of communication to the public respectively.

126 Yet, one addition was made to the British CDPA regarding the adaptation right in s. 21; 'adaptation' is specified for databases as meaning an arrangement or altered version of the database or a translation thereof, see reg. 7 CRDR.

programs was indeed expressly laid down in a special art. L. 122-6 transposing the European Computer Programs Directive of 1991. Leaving out such a provision for databases may thus be considered an omission.¹²⁷ This omission is less worrisome in the Netherlands, because the description of the reproduction right in art. 13 of the DCA has traditionally enabled a broad interpretation, which may also cover temporary reproductions. However, a new art. 13a was added in 2004 which excludes from this right certain temporary reproductions lacking independent economic significance. This provision implements the 2001 Copyright Directive and applies to all copyright works, including databases, which seems to be contrary to the reproduction right's broad scope in the Database Directive. Yet, we support the European Commission's position that the Database Directive will need to be brought into line with the Copyright Directive to reflect its compulsory exception for certain temporary reproductions of a technological nature that lack economic significance.¹²⁸ Interestingly, the British CDPA explicitly states that copyright covers transient copies.¹²⁹ Still, the United Kingdom has implemented the Copyright Directive in 2003 and accordingly excludes certain temporary reproductions without independent economic significance.¹³⁰ However, an exception has been made for computer programs and databases, which is indeed in conformity with the *current* wording of the Database Directive and the Computer Programs Directive.

In the Dutch and French implementing legislation, the distribution of physical copies of a database is not explicitly mentioned as being covered by copyright. Yet, the Dutch *recht van openbaarmaking* in art. 12 DCA includes the making available of a work both in material copies (distribution), as well as in immaterial ways (communication to the public). In France, the distribution of physical copies of a work is covered by copyright in accordance with the theory of the *droit de destination* (right of destination), which is covered by the reproduction right and gives the right holder the possibility to control the circulation and use of copies of his work.¹³¹ However, doubts have been expressed in the literature as to whether this theory exactly corresponds with

127 Several provisions in the Computer Programs Directive correspond to provisions in the Database Directive. For example, arts. 4 and 5(1) of the first largely correspond to arts. 5 and 6(1) of the Database Directive. The CPI devotes special provisions to computer programs (art. L. 122-6 to art. L. 122-6-2), whereas this is not the case for databases. In our opinion, it would have been logical to add databases to the equivalent articles on computer programs in art. L. 122-6 (scope of copyright) and art. L. 122-6-1 paragraphs I and V (lawful user exception).

128 Commission staff working paper on the review of the EC legal framework in the field of copyright and related rights, Brussels, 19 July 2004, SEC(2004) 995, pp. 3, 7, and 8. Also see section 1.5.5.2 and compare section 4.7.7 for the *sui generis* right.

129 S. 17(6).

130 New art. 28A CDPA, introduced by the Copyright and Related Rights Regulations 2003 (S.I. 2003 No. 2498) which entered into force on 31 October 2003.

131 Lucas 1998, p. 143, no. 279. This theory is applied in Belgium as well.

the distribution right in the Copyright Directive.¹³² The Directive stipulates that the distribution of physical copies is subject to EU-wide exhaustion. This has incorrectly not been implemented in France, as was observed by Brüning and Gaudrat.¹³³ In the Netherlands, the European exhaustion for databases was explicitly added in the Copyright Act, as this act did not yet contain a provision on exhaustion. Moreover, a provision imposing EU-wide exhaustion was introduced for all copyright works in 2004 when the Copyright Directive was implemented in the Netherlands.¹³⁴ The British Copyright Act already contained such a provision,¹³⁵ so that it did not need adapting to the Database Directive or the Copyright Directive.

The communication, display or performance to the public of a database is covered in the Netherlands by the broad making available right, in France by the right of representation and in the United Kingdom it is included in the copyright restricted acts of performing, showing or playing a work in public, or communicating it to the public by electronic transmission.¹³⁶

3.4.2 Infringement

The British copyright traditionally conferred by the CDPA protects against infringements of the work 'as a whole or any *substantial* part of it'.¹³⁷ At first sight, the copyright protection in the Directive seems broader as its art. 5(1) covers the reproduction of the database 'in whole or in part'.¹³⁸ However, the opening of art. 5 specifies that its copyright protection only extends to the expression of the database, or in other words,¹³⁹ the selection or arrangement of the contents.¹⁴⁰ In order for this selection or arrangement to still be recognisable, the database part has to be sufficiently large. This arguably means that, in practice, only the taking of a substantial part will constitute an infringement. Thus, the copyright conferred by the British Copyright Act and the Directive may well have the same scope.¹⁴¹ On the other hand, Laddie/Prescott/Vitoria state that, for British copyright, there is high authority in

132 See, for example, Lucas 1998, p. 143, no. 297.

133 Gaudrat 1998, p. 608; Brüning 1998, pp. 381 and 382.

134 At first, the European exhaustion in art. 12b DCA only applied to databases, but it was extended to all works in 2004.

135 S. 18(2) and (3) CDPA provides for EEA-wide exhaustion for copyright in general.

136 Art. 12 DCA, art. L. 122-2 CPI, and ss. 19 and 20 CDPA. S. 20 was revised in 2003 to implement the right of communication to the public from the Copyright Directive.

137 S. 16(3)(a) CDPA.

138 Rees/Chalton 1998, pp. 53-54.

139 See recital 35.

140 Recital 15 calls this the structure of the database. The fact that copyright only applies to the structure of a database is not explicitly stated in the implementations of the Member States discussed, but it follows from the criterion of originality.

141 The same assumption is made by the Nauta Dutilh Report 2002, p. 331.

favour of the rough, practical test that what is worth copying is *prima facie* worth protecting.¹⁴² Still, they warn that this is only a rough test and that case law proves that, in several cases, minor parts have legally been appropriated.¹⁴³ In other cases, however, minor parts have still been assessed as being substantial on the basis of their specific quality.¹⁴⁴ British courts have to keep in mind that copyright infringement *in a database* must not be assessed in that way; instead, the only question that counts is whether a database's original selection or arrangement is recognisable in the part taken.

Indeed, the Directive explains in recital 35 that copyright applies only to the selection or arrangement of the database contents. As a consequence, using just one work or one non-original element from a database is not infringing. We believe this principle may affect art. 5 of the Dutch Copyright Act. This concerns collections made of individual works by two or more persons, and it may thus also cover databases. Problematic for databases may be the second and third paragraph on the scope of copyright in such a collection. In full, art. 5 reads:¹⁴⁵

(1) If a literary, scientific or artistic work consists of separate works by two or more persons, the person under whose guidance and supervision the work as a whole has been made or, if there is no such person, the compiler of the various component works, shall be deemed to be the author of the whole work, subject to the copyright in each of the separate works.

(2) Where a separate work in which copyright subsists is incorporated in a whole work, the reproduction or making public of each separate work, by any person other than the author thereof or his successor in title, shall be deemed to be an infringement of the copyright in the whole work.

(3) Where such a separate work has not been previously made public, the reproduction or making public of the separate work by the author thereof or his successors in title, without mention of the whole work of which it is a part, shall be regarded as an infringement of the copyright in the whole work, unless otherwise agreed between the parties.

Paragraphs 2 and 3 state that the owner of the copyright in the whole work can bring an action against the person who uses a separate work without the

142 Laddie/Prescott/Vitoria 2000, p. 143, para. 3.131. This test was proposed for assessing originality, not infringement, by Mr. Justice Peterson in *University of London Press Limited v. University Tutorial Press Limited* [1916] 2 *Ch.* 601, at p. 610. Laddie 1996, p. 260 seriously criticises the validity of this originality test.

143 See the case law mentioned by Laddie/Prescott/Vitoria 2000, pp. 142-143, para. 3.131.

144 Compare the words of Lord Reid in the British case *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 *W.L.R.* 273, at p. 276: '(...) the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a commonplace arrangement of ordinary words or well-known data.' Also see Laddie/Prescott/Vitoria 2000, p. 142, para. 3.131.

145 WIPO translation.

consent of its author. These provisions do so by qualifying the taking of one work as an infringement of the copyright in the collection. This is, however, not in conformity with the Directive.¹⁴⁶

3.4.3 Exceptions

3.4.3.1 Introduction and implementation

The Directive contains a compulsory exception in art. 6(1) for the purposes of access to and normal use of a database. The other three exceptions in art. 6(2) are optional. They concern reproduction for private purposes as regards non-electronic databases, use for teaching or research and use for public security or administrative or judicial procedures. The access and normal use exception is the only one that requires a lawful user.¹⁴⁷ Art. 6(2)(d) also leaves room for other exceptions which already exist in the copyright acts of the Member States,¹⁴⁸ unless these are contrary to the ones in art. 6. These four may be invoked by a user who wishes to use a whole database or a substantial part thereof. He is, on the other hand, free to use merely one element/work or a small part from a database. Such use does not infringe copyright because this right only extends to the database's original structure, in accordance with recital 35. Consequently, several exceptions traditionally known in national copyright acts are irrelevant for databases.¹⁴⁹

Under the Dutch Copyright Act, all four exceptions from art. 6 apply to databases save for the scientific research exception. The French legislator adopted three exceptions from art. 6, omitting the one for teaching or research. The British government did not seem eager to adopt the exceptions permitted by the Directive, since it wished to disturb its own copyright system as little as possible.¹⁵⁰ Yet, it adopted the compulsory art. 6(1) and an exception for

¹⁴⁶ Speyart 1996-II, p. 177 also argues that art. 5 needs adapting. Yet, this provision may still apply to collections which are not databases at the same time.

¹⁴⁷ See section 4.7.2 on the interpretation of the term 'lawful user'.

¹⁴⁸ Moreover, recital 37 states that the Directive does not affect the exception for quotation purposes in art. 10(1) BC. Although this exception is compulsory according to the BC, it lacks practical significance here as quotations are too short to display the copyrighted structure of a database. Gaster 1999, p. 103 no. 396 remarks that the recital was not removed from the Directive as a result of an editorial error. Also see Gaster 1999, p. 104 nos. 405-406.

¹⁴⁹ See Gaster 1999, p. 104 nos. 405-406 and p. 106 no. 412. A discussion of relevant exceptions is contained in section 3.4.3.6.

¹⁵⁰ See Consultative Paper, pp. 10-11, nos. 7.1, 7.3 and 7.4. A quotation: 'Since many electronic databases are licensed with stringent conditions on use, this raises the question of whether there should be any exceptions to copyright and the new right, particularly in the field of education and research where licensing appears to be common. The Government has not reached a final decision on the optional exceptions. It fears that singling out databases for special treatment by providing no exceptions would be seen by some in the user community as a retrograde and unwarranted step, and by holders of rights in other works

research or private study, while the exception for public security or administrative or judicial procedures was already included in the CDPA.

3.4.3.2 Access and normal use

The Directive states in art. 6(1) that, on a compulsory basis, a lawful user may freely perform any of the acts covered by copyright provided that they are necessary for the purposes of access to and normal use of the database contents. Moreover, this exception may not be overridden by contract according to art. 15. As this exception is compulsory, it has been adopted in the copyright acts of all the three countries studied. The Dutch equivalent, however, incorrectly permits only reproduction.¹⁵¹

The French provision also deviates from the Directive in several aspects.¹⁵² Firstly, it merely applies to electronic databases, whereas the Directive's exception is not thus restricted.¹⁵³ Secondly, the French provision merely allows acts necessary for accessing a database, whereas the Directive also permits acts which enable normal use. Thirdly, instead of requiring a lawful user, it mentions that the acts may be performed for the purposes of and within the limits of the use provided by contract. It is questionable whether this wording corresponds with the lawful user requirement.¹⁵⁴ Lastly, the French exception omits to stipulate that it may not be overridden by contract.

According to the British implementing legislation, doing anything which is necessary for the purposes of access to and use of the database contents is not an infringement of copyright.¹⁵⁵ Merely use is mentioned here, instead of normal use.¹⁵⁶ Moreover, this new provision in the CDPA describes a lawful user as the person enjoying a right to use it whether under a licence or otherwise,¹⁵⁷ whereas the Database Directive does not define this term. The non-overrideable character of the provision has been correctly implemented.¹⁵⁸

of placing them at a disadvantage. On the other hand the Government accepts that exceptions must be justified by real need among users.'

151 New art. 24a DCA.

152 Art. L. 122-5 paragraph 5 CPI.

153 Brüning 1998, p. 381.

154 See section 4.7.2.

155 Reg. 9 CRDR introduces this provision in a new s. 50D of the CDPA. This is closely grafted onto ss. 50A to 50C which implement the Computer Programs Directive.

156 This has been criticised in the Nauta Dutilh Report 2002, p. 332.

157 The same definition of a lawful user is given in the part on the *sui generis* right, see reg. 12 CRDR.

158 This was done in the new ss. 50D(2) and 296B in the CDPA, see regs. 9 and 10 CRDR. S. 56(2) CDPA generally permits imposing use restrictions on a work which remain valid after the work is transferred. Chalton 1998, p. 180 and Brazell in Rees/Chalton 1998, pp. 73-75 argue that this provision does not apply to both first purchasers of databases and subsequent transferees in so far as they are bound to terms which restrict the access or normal use of the database.

3.4.3.3 *Private purposes*

Art. 6(2)(a) permits reproduction of a non-electronic database for private purposes. Like most Member States, the Netherlands already had an exception for private use in its Copyright Act. However, since the Directive dictates that this exception only holds true for non-electronic databases, this restriction was added.¹⁵⁹

Similarly, the French exception for private use forbids making copies or reproductions of electronic databases.¹⁶⁰ This provision is very complete in mentioning both copies and reproductions. 'Copies' mean physical copies in French (as well as in English). Thus, making printouts on paper of an electronic database is prohibited, as well as making immaterial, digital reproductions thereof. This is in conformity with the Directive, which in art. 6(2)(a) uses the term 'reproduction' within the meaning of the act of reproducing, thereby covering reproductions in any form according to art. 5(a).

The Consultative Paper which accompanied the first draft of the British CRDR observed that the exception for private purposes is only relevant to Member States with reprographical or blank media levies. As such a levy system does not exist in the United Kingdom, the Consultative Paper argued that this exception is not applicable here.¹⁶¹ Nevertheless, the CDPA already contained an exception for research or private study in its section 29. In subsection 1A, the CRDR introduced such an exception also for databases. However, amendments were made to section 29 in October 2003 to implement the Copyright Directive.¹⁶² The subsection for databases has been deleted and section 29 now applies to, among other things, literary works which include databases. This section dedicates separate provisions to fair dealing for non-commercial research and for private study.¹⁶³ Private study may well be encompassed by the private purposes meant by the Directive. However, the Directive's exception is more restricted in that it merely applies to acts of reproduction, which, moreover, are permitted only in respect of non-electronic databases. Thus, the British exception for private study in the CDPA is probably inconsistent with the Directive.

The British concept of 'fair dealing' deserves special attention in this context, as it is unknown either in the Directive, or in any of the other Member

159 This was done in the first paragraph of the existing art. 16b DCA. After the implementation of the Copyright Directive in 2004, this restriction was moved to art. 16c paragraph 8. Art. 16c applies to digital reproducing, while art. 16b applies to making physical copies. Placing the restriction merely in art. 16c may not be in conformity with the Directive which also forbids making physical copies (e.g. printouts) of electronic databases.

160 Art. L. 122-5 paragraph 2 CPI.

161 Consultative Paper, p. 12, no. 8.12, referring to recital 35. Brazell in Rees/Chalton 1998, pp. 76-77.

162 Reg. 9 of the Copyright and Related Rights Regulations 2003 (S.I. 2003, No. 2498).

163 Subsections 1 and 1C of s. 29 CDPA respectively.

States apart from Ireland. Several exceptions in the CDPA contain a test of fair dealing; relevant for databases are the above-mentioned exceptions for research and private study, and the existing exception for criticism or review and reporting current events in section 30.¹⁶⁴ Whether a part taken for such use has a permitted size or volume depends on what the British courts consider fair dealing in the circumstances of a particular case. The Directive's exceptions in art. 6 do not address the size of the part that may be taken. Still, the teaching or research exception gives an indication: 'to the extent justified by the non-commercial purpose to be achieved'.¹⁶⁵ This wording needs further interpretation in specific cases. Arguably, art. 6 thus leaves the proportion test to the courts of the Member States and/or domestic law. In the United Kingdom, this assessment is performed through the statutory test of fair dealing and, in our opinion, this test is not contrary to the Directive.¹⁶⁶

Gaster, however, argues that this test cannot be unabatedly maintained for databases.¹⁶⁷ He puts forward that the exceptions in art. 6 are meant to be exhaustive, and that fair dealing is undefinable. Indeed, the European Commission seems to favour the *droit d'auteur* system with its exhaustive set of well-defined exceptions over an open standard enabling a weighing of interests on a case by case basis.¹⁶⁸ Such an open standard exists in American copyright law, where the test of 'fair use' is applied to purposes such as – but not only – criticism, comment, news reporting, teaching, scholarship or research.¹⁶⁹ However, the British fair dealing test is not as open as the American fair use test. This is because the fair dealing test is applied solely within the context of well-defined exceptions which precisely describe the situations in which use may be fair.¹⁷⁰ Therefore, we believe that it is unaffected by the Database Directive.¹⁷¹ Interestingly, the British legislator has retained the fair dealing test in the exceptions of the CPA after the implementation of the Copyright Directive in 2003, as well.

164 Also see section 3.4.3.6.

165 Therefore, Gaster 1999, p. 102 no. 390 remarks that this exception requires a weighing of interests.

166 The same holds true in our opinion within the context of the *sui generis* right, see section 4.7.4. The Nauta Dutilh Report 2002, p. 340 argues that as long as fair dealing bears no independent meaning in s. 29, this provision is in conformity with the Directive.

167 Gaster 1999, p. 98 no. 362.

168 See, for example, art. 5 of the Copyright Directive.

169 S. 107 of the United States Code provides four fair use factors which the courts have to weigh in each case. These are 1) the purpose and character of the use, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used, and 4) the effect on the potential market or value of the work.

170 See Laddie 1996, pp. 258-259 on this fundamental distinction between fair use and fair dealing.

171 Besides, art. 6(3) forbids that the copyright exceptions are interpreted so as to unreasonably prejudice the right holder's interests or to conflict with a normal exploitation of the database. The fair dealing test may perhaps be a guarantee for this.

3.4.3.4 Illustration for teaching or scientific research

The Directive in art. 6(2)(b) allows a database to be used for the purposes of illustration for teaching or scientific research provided that the source is indicated and to the extent justified by the non-commercial purpose to be achieved.¹⁷² The Dutch Copyright Act already contained an exception permitting use for the purpose of illustration for teaching.¹⁷³ However, the Dutch implementing legislation omitted to supplement that such use must be non-commercial, like the Directive requires. This was rectified in 2004 when the Copyright Directive was implemented. Moreover, the Dutch exception for teaching includes an obligation to compensate the copyright holder, which is absent in the Directive. The exception for scientific research, on the other hand, was unknown in the Netherlands. Remarkably, this has not been adopted for copyright, whereas it has been for the *sui generis* right. Consequently, the reproduction of the whole or a part of a database for scientific research purposes infringes the copyright, but does not infringe the *sui generis* right, which we believe is an undesirable discrepancy.¹⁷⁴

France did not adopt the copyright exception for the purpose of illustration for teaching or scientific research in its implementing legislation of the Database Directive, given that such an exception was unknown in the French Copyright Act.¹⁷⁵ However, this changed in 2006 as a result of the French implementation of the Copyright Directive.¹⁷⁶ The newly introduced exception for the purpose of illustration for teaching or research in the CPI – which requires payment of compensation – applies to all copyright works and thus, it also covers databases which enjoy copyright.¹⁷⁷ This new exception will come into effect as from 1 January 2009.

¹⁷² See a discussion of the scope of the equivalent exception to the *sui generis* right in section 4.7.4.

¹⁷³ Art. 16 DCA.

¹⁷⁴ The 2004 Dutch implementation of the Copyright Directive has not nullified this discrepancy. Although this directive permits an exception for scientific research purposes in its art. 5(3)(a), the Dutch legislator decided not to introduce such an exception in the DCA, despite contrary advice by the Dutch Copyright Commission.

¹⁷⁵ In connection with this exception, the Senate commission led by Jolibois stated in its report that the choice not to go beyond the existing national exceptions was justified by the need to secure a strong level of protection for the authors of databases. See the French Senate's Jolibois report 1997/1998, Examen des articles, art. 2. Lucas 1998, p. 219 no. 438 which advised against adopting a general teaching and research exception in the CPI as it would go against the French legal tradition. Instead, the Senate commission suggested exploring the possibility of collective negotiation. The same was suggested for databases by Lorimy 1999, p. 100.

¹⁷⁶ Loi no. 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, *Journal Officiel de la République française* 2006, no. 178 du 3 août 2006, p. 11529, on the Internet at <<http://www.legifrance.gouv.fr>>. This new exception is introduced in art. L. 122-5 paragraph 3(e) of the CPI.

¹⁷⁷ A parallel exception has been introduced for the *sui generis* right as well, see section 4.7.4.

The British government would have preferred not to adopt the teaching and research exception. It observed that licences for databases have shown that they work well in practice, so that there seems to be no need for such an exception. Nevertheless, despite its pragmatic view, the British government did eventually adopt a research and private study exception for databases in the CDPA.¹⁷⁸ This exception was substituted for general research and private study exceptions for literary works on the occasion of the implementation of the Copyright Directive in 2003.¹⁷⁹

3.4.3.5 Public security or administrative or judicial procedures

The Directive's fourth exception to copyright in art. 6(2)(c) concerns use for public security and administrative or judicial procedures. Both the Dutch and the British Copyright Acts already contained such exceptions so that no special provisions were necessary for databases.¹⁸⁰

The French Copyright Act, on the other hand, did not yet contain an explicit exception permitting the use of copyright works for the purposes of public security or administrative or judicial procedures. Still, the purport of this exception is already laid down in French provisions of procedural law outside the CPI. Yet, the first legislative proposal for the transposition of the Directive contained a special article on this issue for inclusion in the CPI. The government considered this inclusion to be necessary for the *sui generis* right and consequently feared an *a contrario* interpretation if this exception was not adopted for copyright and the neighbouring rights, as well.¹⁸¹ Thus, a general provision was added to the CPI which does not only hold true for the copyright and the *sui generis* right on databases,¹⁸² but also for copyright and neighbouring rights on all other categories of works.¹⁸³

178 Reg. 8 CRDR, introducing a new art. 29(1A) in the CDPA.

179 S. 29(1) CDPA. See its equivalent in art. 5(3)(a) of the Copyright Directive.

180 Arts. 16b(4) and 22 DCA, and ss. 45 to 50 CDPA.

181 Exposé des motifs accompanying the first legislative proposal of 22 October 1997, p. 7. The provision was, however, considered unnecessary by both the National Assembly and the Senate. The Senate commission led by Jolibois considered the addition superfluous in view of art. 13 of the Directive, which stresses the validity of provisions outside copyright law. See the French Senate's Jolibois report 1997/1998, Examen des articles, art. 6.

182 This new art. L. 331-4 was included in Book III Title III (Procedures and sanctions) of the CPI.

183 Brüning 1998, p. 381. This wide scope was criticised by senator Jolibois during the senate debates (session of 29 April 1998). He would have preferred limiting the provision to databases, as he argued that it is a rule of implementation that modifications of French law always merely affect the subject-matter of the directive at issue.

3.4.3.6 *Other copyright exceptions*

According to art. 6(2)(d) of the Directive, other copyright exceptions traditionally authorised under national law may be maintained for databases. However, these may not go beyond the wording of art. 6's other exceptions and may not be interpreted so as to unreasonably prejudice the right holder's interests or conflict with a normal exploitation of the database.¹⁸⁴

It is not clear whether art. 6(2)(d) implies that the traditional copyright exceptions automatically apply to copyrighted databases, or whether this provision requires national legislators to actively implement the traditional exceptions explicitly for databases. In the following, we favour the first approach – the three countries we studied did not explicitly implement their existing copyright exceptions for databases, other than adopting or adapting the exceptions mentioned in art. 6(2)(a) to (c) of the Directive. Another open question is whether the wording 'exceptions traditionally authorised' must be interpreted broadly, or restrictively in that new exceptions introduced in national law after the Database Directive's enactment may not be taken into account. Several Member States have recently extended the amount of exceptions in their copyright acts as a result of the implementation of the 2001 Copyright Directive. Some of these newly introduced exceptions may also be relevant for databases,¹⁸⁵ provided that one accepts a broad interpretation of the term 'traditionally'.

The Dutch Copyright Act since long contained a press exception in art. 15 and a quotation exception in art. 15a. The press exception permits the use of news reports, miscellaneous reports or articles on current economic, political or religious topics taken from newspapers, (weekly) periodicals, radio or television broadcasts, for publication in the press, or in radio or television programs. This exception is relevant here in so far as the sources may qualify as databases. The Dutch quotation exception allows quotation in an announcement, criticism, polemic, scholarly article or such like, while the amount and extent of the quoted parts must be justified by the purpose to be achieved. This will usually mean that only small parts of a work may be quoted. However, copyright in a database is thus not infringed, but only when the whole database is used or a part large enough to display its original selection or arrangement. The quotation exception may thus not be important for databases.¹⁸⁶ The opposite is however true for the following new exceptions in

184 Art. 6(3). Its wording is in accordance with art. 9(2) BC, art. 13 TRIPS, art. 10 WCT and art. 5(5) Copyright Directive. See section 4.6.4 on its interpretation.

185 They will be discussed here save for the exception for temporary, purely technical reproductions which was prescribed by the Copyright Directive on a compulsory basis. In section 3.4.1, we advocated adopting this exception in the Database Directive as well.

186 Also see footnote 148. Irrelevant for the same reason are the exceptions in art. 16a (short display of a work for the purpose of reporting current events through photography, film, radio or television), and art. 18a (incidental inclusion of a work in another work).

the DCA which originate from the Copyright Directive. Libraries, museums and archives which have a non-commercial purpose are allowed to make copyright works from their collections available to the public by dedicated terminals on their premises, and may reproduce such works for purposes of restoration or preservation. Furthermore, handicapped people may make specific non-commercial use of a work against payment of fair compensation.¹⁸⁷

French copyright exceptions which could be of relevance to databases are the exception for press reviews and the one permitting the dissemination of public speeches, even in their entirety, for news purposes.¹⁸⁸ Still, it seems unlikely that a whole database or a substantial part thereof will be used for such purposes. In most cases, the media will use only small parts of a database so that these exceptions need not be invoked. The CPI also contains an exception which permits the use of analyses and short quotations of a work provided that they are justified by the educational or scientific (among other things) nature of the work in which they are incorporated.¹⁸⁹ Still, its relevance will be limited for databases for the same reason as we just mentioned. On the other hand, the French implementing legislation of the Copyright Directive of 2006 has introduced two new copyright exceptions which will indeed be relevant for databases. These concern exceptions for the benefit of the handicapped, as well as for certain acts carried out by libraries, museums and archives. These institutions are allowed to make reproductions of a copyright work for conservation purposes, and for the purpose of enabling the consultation of such works on their premises.¹⁹⁰

In the United Kingdom, the existing exceptions for literary works in the CDPA apply to databases. Relevant are the exceptions for criticism, review and news reporting (s. 30, including fair dealing),¹⁹¹ copying for educational purposes (s. 32) and copying by librarians or archivists (ss. 39 and 41 to 44).¹⁹² Bearing in mind once again that the copyright protection of a database only extends to its structure, some traditional exceptions will prove irrelevant as

187 Arts. 15h, 15n and 15i of the DCA respectively.

188 Art. L. 122-5 paragraphs 2(b) and 2(c) respectively. The name of the author and the source must be indicated in all cases. The exception for parodies, pastiches and caricatures in paragraph 4 is of little relevance to databases.

189 Art. L. 122-5 paragraph 3(a) CPI.

190 Loi no. 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, *Journal Officiel de la République française* 2006, no. 178 du 3 août 2006, p. 11529. See <<http://www.legifrance.gouv.fr>>.

191 See section 3.4.3.3 on fair dealing. We believe that this test in s. 30 is unaffected by the Directive in view of art. 6(2)(d) which implicitly leaves room for fair dealing exceptions, provided that they are consistent with art. 6(3).

192 Less likely to be relevant are the exceptions in s. 31 (inclusion of a work in an artistic work, sound recording, film, broadcast or cable program), s. 34 (performance of a literary work), and s. 59 (reading or recitation in public of a reasonable extract of a work).

they only permit the use of parts which are too small to represent this protected structure.¹⁹³

3.5 SUMMARY

The way in which the Directive's definition of a database has been transposed in the Netherlands and the United Kingdom may be criticised. The definition in the Dutch Databases Act includes the requirement of a substantial investment, as opposed to the Directive and the database definition in the Dutch Copyright Act. What is a database in a copyright context may thus not be a database in the context of the *sui generis* right, which does not serve legal certainty. In the British Copyright Act, databases are housed in the category of literary works. However, such works need to be written, spoken or sung, whereas the Directive does not require this for databases. Another problematic issue is the distinction made in the CDPA between compilations and tables, on the one hand, and databases, as a subset, on the other. Both categories have their own originality criterion to qualify for copyright, and their own protection regime. However, these categories are not easy to distinguish in practice. To remove this legal uncertainty, it has been proposed to do away with the distinction and to equally apply the regime of the Database Directive to databases, tables and compilations.

The Directive requires a database's selection or arrangement to constitute the author's own intellectual creation in order for it to enjoy copyright. This European criterion was introduced for harmonisation purposes and treads the middle ground between the continental originality thresholds which in general require a work to express its author's personality and the British 'sweat of the brow' doctrine requiring merely the expenditure of skill, labour or money. The United Kingdom thus had to abandon its low threshold and to introduce the new European criterion in its CDPA for databases. The British courts have not yet spoken out on the interpretation of this new criterion, with which they have no previous experience. In the Netherlands, the European criterion was not adopted in the Copyright Act. Instead, the Dutch legislator trusts the courts to apply the European test in case this would not correspond with the Dutch originality criterion established in case law. So far, the Dutch courts have rarely recognised copyright in the structure of a database. In French case law, on the other hand, several databases have been assessed to be original under the Directive. As from 1996, the originality criterion for collections in the French CPI precisely corresponds with the Directive's criterion. The interpretation followed by the French courts to determine whether com-

¹⁹³ Thus, not relevant are the exceptions in s. 33 (inclusion of a short passage in a collection), s. 36 (reprographic copying of not more than one per cent of a work), and s. 38 (copying by librarians of one article from a periodical).

pilations qualify for copyright is *apport intellectuel* (intellectual contribution). The French Supreme Court established this criterion in its 1989 Coprosa judgment. The Coprosa criterion appears to be an adequate interpretation of the compulsory criterion of the Directive provided that it is applied merely to the selection or arrangement of a database. It is thus to be hoped that the French courts will continue to apply it to databases.

The Directive's authorship provisions leave room for the Member States to maintain their own provisions designating legal persons or employers as copyright owners, and to maintain their collective work regime. In the Netherlands and the United Kingdom, the employer is entitled to copyright in a database made by his employee. The British CDPA moreover confers copyright on the legal persons of the Crown and Parliament. The French CPI contains three different authorship regimes for works made by several persons. One of these is the collective work regime which vests copyright in the natural or legal person under whose direction and name the work was disclosed, being in practice the employer or producer. French courts tend to regard databases as collective works unless reverse evidence is furnished in favour of joint authorship under the regime of works of collaboration.

The scope of copyright in the Directive has been implemented somewhat defectively in France and the Netherlands. The European exhaustion concerning the distribution of copies of a database was not adopted in France. Furthermore, the French and Dutch Copyright Acts do not specify that copyright in databases covers permanent as well as temporary reproductions. In the 2001 Copyright Directive, the European Commission revised its opinion on this broad reproduction right, so that temporary reproductions which are an essential part of a technological process and have no independent economic significance have been excluded on a compulsory basis. The European Commission rightly acknowledges that this approach should also be introduced for both copyright and the *sui generis* right in the Database Directive.¹⁹⁴

As for the exceptions to copyright, the compulsory access and normal use exception in the Directive's art. 6(1) has been defectively transposed in France and the Netherlands. This exception has been implemented too restrictively in France as it is limited to electronic databases and only allows acts which enable access to a database. Furthermore, it requires the presence of a contract, while this is uncertain for the Directive. Moreover, the non-overrideability of this exception has not been made explicit. The Dutch equivalent of art. 6(1) is too narrow because it merely allows reproduction instead of any use. In the British CDPA, there are research and private study exceptions for databases which contain the fair dealing test traditionally included in several British exceptions. Gaster argues that the inclusion of this test is contrary to the Directive. However, we believe that such a proportion test is permitted given

¹⁹⁴ Commission staff working paper on the review of the EC legal framework in the field of copyright and related rights, Brussels, 19 July 2004, SEC(2004) 995, pp. 7-8.

that art. 6 of the Directive does not specify the size of the database parts that may be freely taken for the purposes described in this article. It is only logical to leave this assessment to the national courts, and the fair dealing test could be helpful for that. The Copyright Directive induced several Member States to introduce new exceptions which may be relevant to databases as well. For example, the Dutch and French Copyright Acts adopted exceptions for libraries, museums and archives for conservation purposes and for the purpose of making copyright works available via dedicated terminals on their premises.

