ECJ gives wide meaning to “extraction” of data from a database

In the case of Directmedia v Albert-Ludwigs-Universität Freiburg, the European Court of Justice (“ECJ”) was asked by the Bundesgerichtshof to clarify the meaning of “extraction” in the context of Directive 96/9/EC (the “Database Directive”).

The Database Directive established the sui generis database right, which protects the interests of makers of qualifying databases. A database qualifies for protection if (i) the maker is a qualifying person (which is essentially a matter of nationality) and (ii) making the database involved a substantial investment – in terms of human, technical or financial resources – in the obtaining, verification or presentation of the data. Database right is infringed by the extraction (the permanent or temporary transfer of database contents to another medium by any means) or reutilisation (making database contents available to the public).

The facts
Directmedia concerned a list of 1100 titles of German poetry written between 1730 and 1900 which had been compiled at a cost of €34,900 and two-and-a-half years’ work by Professor Knoop of the Albert-Ludwigs-Universität Freiburg (“ALU”). The selected titles, which were chosen on the basis of their inclusion in anthologies and references to them in bibliographic works, were said to be the most important poems in German literature during that period. Professor Knoop’s list (the “Knoop List”) was published on the internet. For the purposes of the reference to the ECJ, it was assumed that the Knoop List was a database within the meaning of the Database Directive and that ALU, which had funded the exercise, was the maker of that database and owned the database right in it.

Directmedia marketed a CD-ROM containing 1000 German poems, billed as poems everyone should have. Of those 1000 poems, 876 were written in the period covered by the Knoop List and 856 were also mentioned in the Knoop List. Directmedia did not deny using the Knoop List as a guide when preparing its CD-ROM, but denied that it had extracted any data from that list. Directmedia’s key point was that, although it had consulted the Knoop List, it had subjected each poem mentioned on that list to independent critical examination before deciding whether or not to include it in the CD-ROM. At no point was the Knoop List copied by any mechanical, electrical, electromagnetic or electro-optical means (except to the extent necessary to view the online list on screen). In the circumstances, Directmedia contended that it could not be said to have “extracted” anything from the Knoop List.

The wide scope of “extraction”
The ECJ considered that “extraction” was to be given a wide meaning. The purpose of database right was to provide the maker of a database with protection against the unauthorised appropriation of the results of his investment. That protection would be compromised by giving the notion of “extraction” a narrow definition.

Since appropriation is at the heart of the notion of extraction, it does not matter whether there is any “physical” copying of the database. Data can be extracted as much by making handwritten copies of information displayed on screen or on the page as by any process of downloading or photocopying. It is equally irrelevant whether or not the extracted data is stored in a similar manner or in a similar arrangement to the original database. There is no need for the “databaseness” of the protected database to be replicated as part of the process of extraction. Nor does it matter whether or not the extracted data is stored in a new database of any kind. Extraction is extraction, irrespective of whether the purpose is to create a second database. There is no requirement that the extraction be intended to enable the infringer to compete with the database right owner. Indeed, it does not matter whether the extraction is conducted for a commercial purpose at all. Purely
non-commercial extraction is as much an infringement as extraction by a person intending to set himself up in competition with the right owner.

Likewise, it is irrelevant that there might be some independent critical analysis involved in deciding what parts of a database to extract. At best, this might mean that less of the data is selected for extraction. If as a result of that critical analysis, the extracting party transferred only an insubstantial part of the database, there would be no infringement (unless such insubstantial extractions were conducted systematically). However, if the extracting party’s critical analysis led him to select a substantial part of the data, there would be an infringement. The use of critical analysis itself has no part to play in the infringement analysis. All that matters is the fact of extraction.

Conclusion
The ECJ previously considered database right in the case of British Horseracing Board Limited v William Hill [2004] ECR I – 10415 (the BHB case). In that case, it ruled that any investment in the creation of data must be ignored in assessing whether a database qualifies for database right. The result was that fewer databases qualify for protection than might otherwise have been anticipated. It also meant that those whose databases consisted solely of data they had themselves created were unlikely to own database right, whereas a third party who paid a fee to obtain that data might well qualify for database right protection. In BHB, the ECJ adopted a narrow view of a qualifying database. By contrast, in Directmedia, the ECJ has given the widest possible meaning to the concept of extraction.

The result is that, while many databases may fail to qualify for protection under the Database Directive, those that do enjoy a very broad protection. While database right may be hard to obtain, it is apparently easy to infringe.

A further observation: obtaining database right by infringing acts
In the course of rejecting the argument that subjecting data to critical examination was relevant to the question of infringement, the ECJ observed that:

‘the fact that material contained in one database may be transferred to another database only after a critical assessment by the person carrying out the act of transfer could prove to be relevant, in appropriate cases, for the purpose of determining the eligibility of that other database for one of the types of protection provided for in [the Database Directive]. However, that fact does not preclude a finding that there has been a transfer of elements from the first database to the second one.’

In other words, if the process of extracting data from a protected database involves the extracting party making a substantial investment in the obtaining and verification of the data being extracted, and if the extracted data is then used to constitute a second database (which may involve further investment in the presentation of the extracted data), that second database may also be protected by database right, notwithstanding the fact that it was created by means of an infringing act. In principle, it would seem this could be the case even if the two databases are identical.

Suppose A creates a protected database from which B then extracts data (after critical assessment) to form another database. It seems from what the ECJ has said that both A and B may own database right in their respective databases, notwithstanding that the creation of B’s database was premised on the infringement of A’s database rights. If C then makes an unauthorised extraction of data from B’s database, C will infringe B’s rights despite B having acquired those rights by means of unlawful acts.

The interesting question is whether C can also be said to infringe A’s database right. After all, C may also be said to have “extracted” data from A’s database, albeit indirectly. Certainly, C has (via B) appropriated the results of A’s initial investment. Unless B’s own infringement is considered to be a supervening event, it may be that C will be liable to A as much as to B. Equally, if C is granted a licence by B to use B’s database, acts of extraction will not be an infringement of B’s database right, but may still infringe A’s database right.

Further difficult questions would arise in relation to B’s exploitation of its own database. On the one hand, B’s database is premised on infringing acts, so A might claim that any licensing fees obtained by B should be payable to A as damages. On the other hand, it might be said that since B has made sufficient investment of its own to qualify for database right, B should be entitled to reap the economic benefit of that investment.

It seems likely that there will be a need for future clarification of the Database Directive by the ECJ in the future.

Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg (Case C-304/07), 9 October 2008.

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