

The Legal Protection of Databases in Nordic Countries¹

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The objective of study is to investigate the problems on the implementation of the EU Directive 96/9/EC on the Legal Protection of Databases (hereinafter 'EU Database Directive') into Member States of the Nordic countries. Argument will be focused on the issue whether or not it is necessary for the Nordic countries to revise the provision further in connection with the sui generis protection provided in Part III of the EU Database Directive. For the purpose of the study, recent case law of Denmark, Sweden and Finland will be used.

1. Background

The EU Database Directive provides a *sui generis* protection in the Chapter III. The Chapter defines that databases with substantial investment were to invite the *sui generis* protection. Thereby, databases without creativity could be legally protected should the databases be the result of a substantial investment. Databases with creativity had been legally protected as a copyright work in the EU Member States as well as in the US and Japan, while protective legal methods varied amongst the Member States regarding databases without creativity prior to the EU Database Directive.

English law did not require a subject matter having creativity to invite a legal protection as a copyright work. German law did not protect databases without creativity by copyright law however some could be protected by unfair competition law. Nordic countries protected databases without creativity under the condition that the databases contain a large number of information items by the catalogue rules provided within the scope of copyright act.

It is said that the sui generis protection in EU Database Directive was inspired by the Nordic catalogue rules.³ It looks similar on surface, perhaps because of similar wordings. The catalogue rules are indeed called sui generis rules in Nordic countries. However, in my view, the EU type of sui generis protection is completely different from the Nordic catalogue rules. For, the Nordic catalogue rules provide a protection to databases with a large number of information items, while the EU type of sui generis protection does to databases with a substantial investment. 'A substantial investment' does neither necessarily result in 'a large number of information items', nor vice versa.

¹ Special thanks to my Danish colleague, Professor Jens Schovsbo, and Faculty of Law, University of Copenhagen, for providing me an extremely charming guest flat in the middle of Copenhagen city centre for a month. Without this generous offer, I could not complete this article.

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³ See, P.B. Hugenholtz, The Database Right File: Denmark, www.ivir.nl/files/database/index.html.

Moreover, the EU type of sui generis protection is aimed to protect a right to an investor, while the catalogue rules were based on the concept of unfair competition, which were provided as a neighbouring right within the framework of the copyright act. The sui generis protection is provided as a neighbouring right within the framework of the copyright act in some of the EU Member States as a result of the implementation of the EU Database Directive.⁴ Therefore, it is often misunderstood that the EU type of sui generis protection provides similar protection by the catalogue rules.

Due to the similarity, not only legislators in the Nordic countries but also authorities of the EU were confused during the time when the Nordic countries implemented the EU Database Directive into their own countries.⁵ Basically, Nordic legislators initially did not find necessity to amend their catalogue rules to comply with the EU Database Directive due to the word ‘comparable’ in Recital 52 of the EU Database Directive which stated as:

... those Member States which have specific rules providing for a right comparable to the sui generis right provided for in this Directive should be permitted to retain, as far as the new right is concerned, the exceptions traditionally specified by such rules.

They, however, revised the relevant provision of the copyright act in accordance with the EU Database Directive, inputting the word such as ‘substantial investment’. Yet, the EU authorities advised the Nordic countries to revise further to omit the words such like ‘a large amount of information items.’ Nordic countries opposed and insisted not to revise the provision any further on the basis of Recital 52.

2. Legal Framework

Article 7 (1) of the EU Database Directive provides the sui generis protection as follows:

Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

Both the sui generis protection and the catalogue rules and the are provided in Article 71 of the Copyright Act in Denmark and Article 49 in Finland. The Danish Copyright Act had previously defined the catalogue rules in Article 49, too, however it was moved to Article 71 in 1995.⁶

⁴ For example, Article 87 of the German Copyright Act.

⁵ See, for example, G. Karnell, §49 URL – en EG rättsvidrig skvader? (Article 49 of the [Swedish] Copyright Act – A mixture with unpleasant EU Law?), NIR 1/99, p. 53. See also, M. Koktvedgaard & M. Levin, *Lärobok i Immaterialrätt*, 2000, p.142.

⁶ By the Act No. 305 of the 14th June 1995.

2.1. Denmark

The sui generis protection had been provided in Article 71 of the Danish Copyright Act before the implementation of the EU Database Directive as follows:

Catalogues, tables and similar works in which *a large number of items of information* have been compiled, shall not be reproduced without the consent of the producer until 10 years have elapsed since the expiry of the year in which work was published. Term of protection shall expire at the latest when 15 years have elapsed from the year in which the work was completed. ... (emphasis added)

This article was amended in order for the EU Database Directive to be implemented as:⁷

(1) The person who produces a catalogue, a table, a database or the like, in which *a great number of items of information* has been compiled, *or* which is the result of *a substantial investment*, shall have the exclusive right to control the product in question as a whole or an essential part thereof by making copies of it and by making it available to the public. ... (emphasis added)

The preparatory works leading to the 1995 Copyright Act stated that a work in digital form including a compilation of unprotected data should be legally protected in accordance with Article 1 (1) of the Copyright Act, given that the work constitutes a work within the meaning of the Copyright Act, under the condition that the work is a result of the author's own intellectual creative contributions.⁸ Article 1 of the Copyright Act now refers to compilations of unprotected data, as a consequence.⁹

Subject matters are identical to be protected under Article 1 and 5 of the Copyright Act,¹⁰ such as compilations of existing works or parts of works. Article 71 of the Copyright Act might provide the sui generis protection even if a work is not qualified to invite a protection as a copyright work within the meaning of the Copyright Act. The subject matters which could be protected under the Article are; catalogues, tables, databases and similar works; and that includes e.g., exhibition catalogues, library catalogues, telephone directories, arithmetical tables, timetables, price lists, exchange lists, calendars, lists of books and prize lists.¹¹

⁷ Amended by the Act No. 407 of the 26th June 1998.

⁸ See, Cf. *Folketingstidende* (the gazette of the Danish Parliament) 1994-95, A, p. 1332.

⁹ Article 1 defines as follows:

- (1) The person creating a literary or artistic work shall have copyright therein, be it expressed in writing or in speech as a fictional or descriptive representation, or whether it be a musical or dramatic work, cinematographic or photographic work, or a work of fine art, architecture, applied art, or expressed in some other manner.
- (2) Maps and drawings and other works of a descriptive nature executed in graphic or plastic form shall be considered as literary works.
- (3) Works in the form of computer programs shall be considered as literary works.

¹⁰ Article 5 defines as follows:

A person who, by combining works or parts of works, creates a composite literary or artistic work, shall have copyright therein, but the right shall be without prejudice to the rights in the individual works.

A work may invite both a protection as a copyright work and the sui generis right defined in Article 71 in a cumulative manner. Accordingly, parts of a database may be protected as a copyright work whereas the database as a whole may be protected under Article 71 of the Act. The Copyright Act provides a protection of databases regardless of the type of manifested database forms such as whether electronic or non-electronic forms. The implementation of the Database Directive, however, did not result in any changes regarding the scope of the subject matters to be protected under the Copyright Act.

2.2. Sweden

The sui generis protection had been provided in Article 49 of the Swedish Copyright Act before the implementation of the EU Database Directive as follows:

A catalog, a table or another similar production in which a large number of information items have been compiled may not be reproduced without the authorization of the producer until 10 years have elapsed from the year in which the production was published.¹²

This article was amended in order for the EU Database Directive to be implemented as:¹³

Anyone who has produced a catalogue, a table or another similar product in which a large number of information items have been compiled, or which is the result of a substantial investment, has an exclusive right to make copies of the product and to make it available to the public.

The right under the first paragraph lasts until fifteen years have elapsed from the year in which the production was completed. Where the product has been made available to the public within fifteen years from the completion of the production, the right shall, however, last until fifteen years have elapsed from the year in which the production was first made available to the public.

The implementation of the Directive, both traditional Nordic catalogue rules and the sui generis protection provided in Article 7 of the EU Database Directive have been defined in the same paragraph in Article 49 of the Copyright Act,¹⁴ which causes many misunderstandings, in my view.

2.3. Finland

The sui generis protection was originally provided in Article 49 of the Copyright Act in Finland as follows:

Catalogues, tables, and similar productions in which a large number of information items have

¹¹ See, T. Riis, Intellectual Property Law in Denmark, (DJØF Publishing Kluwer, 2000) p 28; P. Schønning, ophavsretsloven med kommentarer, 2. udg (Copyright Law with Commentaries, 2nd Ed.), p. 557.

¹² As enacted by Law 1993:1007.

¹³ Amended by the Act 1997:790 of the 6th November 1997.

¹⁴ See, M. Koktvedgaard & M. Levin, Lärobok i Immaterialrätt, 2002, p.148.

been compiled may not be reproduced without the consent of the producer, until ten years have elapsed from the year in which the production was published. ...

This article was amended in 1991 as:

A catalogue, a table, a programme or any other production in which a large number of information items are compiled shall not be reproduced without the consent of the producer, until ten years have elapsed from the year in which the production was published. However, the term of protection shall expire at the latest when 15 years have elapsed from the year in which the work was completed. ...

This article was amended in order for the EU Database Directive to be implemented as:¹⁵

A person who has made

1) a catalogue, table, program or any other production in which *a large quality of data* are compiled, or

2) a database which shows that there has been *a substantial investment* in either the obtaining, verification or presentation of the contents,

has the exclusive right to dispose of the whole or of a substantial part, evaluated qualitatively or quantitatively, of the production by making copies of it and by making it available to the public. ...
(Emphasis added)

Databases can be protected as literary works or compilations, as well as on the grounds of the catalogue rules introduced in the above. Where a database consists of works or parts thereof, it is recognised as a compilation, given that the works are arranged with creativity and originality. However, a database would not be legally protected as a compilation where the works were chosen in accordance with fixed rules. If a database is made up of individual items of information which are not protected separately, and arranged with creativity and originality, such database enjoys copyright protection as an independent work.¹⁶

However, even if such databases cannot be considered as a result of intellectual creativity (for instance, neither as an independent work nor a compilation), yet these could be protected as databases by the catalogue rules. Catalogues are protected exclusively against copying, although it is within the scope of exclusive rights where copyright protects the use of even a part of databases as independent works.¹⁷

¹⁵ Amended by the Act No. 250 of the 3rd April 1998.

¹⁶ See, N. Bruun, *Intellectual Property Law in Finland*, 2001, p.28

¹⁷ Government Bill 1987:8, pp. 10ff.

2.4. Summary

As clearly seen, databases ‘with a large quality without substantial investment’ can be legally protected by the provision mentioned in the above in the Nordic countries. This is the difference between the sui generis protection of the EU Database Directive and of the amended Nordic catalogue rules. However, it should be noted that databases with ‘qualitatively and/or quantitatively a substantial investment’ also invite legal protection in the manner that the EU Database Directive requests in all the three Nordic countries mentioned in the above.

3. Case Law before the ECJ Rulings

There are not many court decisions in connection with the catalogue rules in the Nordic countries. Several famous cases both before and after the implementation of the EU Database Directive in each Member State are introduced in this chapter, while there has been no court decision in connection with sui generis protection after the implementation of the EU Directive in Sweden. Two cases have been referred to the European Court of Justice from this region. One was by Swedish Supreme Court¹⁸ and the other was by Finnish Vantaa District Court¹⁹ and the ECJ has ruled the cases in 2004, to which would be referred in the next chapter.

3.1. Denmark

3.1.1. Before the Implementation of the EU Database Directive

There are some precedents in connection with the catalogue rules before the implementation of the EU Database Directive in Denmark. The following was a case on a prize list for a cattle fair, which was not eligible for inviting a protection defined in Article 49 (1) of the Copyright Act.²⁰ This case is often referred because the price list could not be recognised as a subject matter to be protected by the catalogue rules.²¹

The plaintiffs, two journalists worked for the newspaper company, *Aalborg Stiftstidende*. They worked together to make a prize list at the cattle fair, which was published together with their names in local pages of the magazine. The defendant, another newspaper company, *Løgstør Avis*, used an exact copy of the prize list without reference of the names of the two journalists and *Aalborg Stiftstidende* a few days later. All the parties in disputes admitted that the defendant’s list was a direct copy of the plaintiffs’ list. The plaintiffs exchanged the information with one of the local editor of the defendant company.

The plaintiffs insisted that the prize list must be protected as ‘catalogues, tables and other work of this kind’ defined in Article 49 (1) of the Copyright Act, stating that the purpose of the provision was to give

¹⁸ C-338/02.

¹⁹ C-46/02.

²⁰ U.1975.258V (præmieliste).

²¹ See, Mogens Koktvedgaard, *Lærebog i Immaterielret*, 1999, p. 76.

a short time protection to a work which shape was not protected by Article 1 of the Copyright Act but which was the result of an independent work put together by a large number of information. The plaintiffs claimed that the list both in shape and in quality was qualified to invite the protection defined in Article 49 and the list also had the quality of news value.

Moreover, the plaintiff stated that the defendant could not exempt monetary compensation for the usage of prize list on the basis of Article 56 of the Copyright Act, even if the list could not be protected under Article 49 of the Copyright as the defendant maintained. Furthermore, the plaintiff argued that the primary purpose of Article 49 of the Copyright Act was not to protect a copyright interest but alone to provide creators of a product a financial protection.

The defendant uttered an objection again the plaintiff, maintaining that the list could not be protected by Article 49 of the Copyright Act and that it should not be the plaintiffs but the company, *Aalborg Stiftstidende* who was competent to claim the right defined in Article 49 of the Copyright Act.

The Fjerritslev District Court concluded that the list should be protected by Article 49 considering the amount of information used for making the prize list on the presumption that the two journalists have used their skills in making their manuscript for the magazine. The court also agreed with the defendant that the aim of Article 49 of the Copyright Act was to protect economical interests of companies. According to the court, however, the aim does not exclude the persons who have done the preliminary work for the company, or received compensation for the work from the company to claim their legal interest for the protection of the works. Accordingly, the court recognised the competence of the plaintiffs, too.²²

However the Western Court of Appeals did not recognise the prize list to be protected by Article 49 of the Copyright, stating that the protected objects should be independent works whereas the prize list in this case was an integrated part of a press report and that it did not take much time for the defendants to create the prize list in dispute [therefore the court did not recognised the list containing a large amount of information, which Article 49 (1) of the Copyright Act required subject matters to invite a legal protection].

There is another precedent regarding the catalogue rules.²³ The defendant, Limited Company P, was engaged in the sales of nursery products, and made a planting catalogue with independent price lists every single year since 1950's in cooperation with the industry. The price lists were divided into planting groups and in these groups divided into sorts placed in alphabetical order. Moreover, size, age and price for each plant were described there. Furthermore, suitability being of use for 'hedge, fence or

²² Fjerritslev ret dom, 12 Sep. 1973.

²³ U 1983.981Ø (prisliste). It is interesting to compare this Danish case with the Swedish similar case, to which is referred later.

shelter' was stated for some of the plants. The defendant, nursery owner B found that the prices on the lists were too low reviewing the P's price lists in 1981. The defendant published his own price lists after the consensus with 12 other nursery owners, which were more or less identical with the plaintiff's price list except the prices.

The court did not recognise the plaintiff's price lists as subject matters defined in Article 1 of the Copyright Act because the lists were not 'expression of such an independent works', but the lists to be protected as subject matters defined Article 49 of the Copyright Act because the lists contained a large number of information regarding the marketing of the plants. This protection started on the day when the plaintiff's price lists were published in 1981 and continues for 10 years [and this case was decided in 1983]. Moreover, the defendant's lists were considered identical with the plaintiff's ones. The court accordingly concluded that the defendant infringed the plaintiff's right defined in Article 49 of the Copyright Act.

The above two cases are considered as leading cases in Denmark.²⁴ The court did not award any protection in the præmieliste case while it did in the prisliste case, although the defendants directly copied the subject matter in disputes in both cases. What is the difference here? The plaintiffs did not convince the court that they took much time to create the list in the præmieliste case, therefore they could not receive any legal remedies from the court. However, the court would provide such remedies if the plaintiffs could prove it, in my view.

One of the purposes of catalogue rules is to provide a legal protection from free ride, as the rules comes from the concept of unfair competition. Thus, it is important for the court whether or not a subject matter is worth in being legally protected case by case, examining how much does it cost or how long does it take to create the subject matter. In my opinion, it is instructive to compare the above two cases in order to grasp meanings of the catalogue rules.

3.1.2. After the Implementation of the EU Database Directive

There is a court decision in connection with the sui generis protection after the implementation of the EU Database Directive in Denmark.

The case was officially recorded that the decision was ruled by the Maritime and Commercial Court.²⁵ However, the ruling by the district court was upheld without much argument because the defendant did not appear in the court. Therefore, the following case summary is of the district court which ruled that the extraction from headlines of newspapers and establishment of deep links by an internet service

²⁴ As other cases, U 80/604 SH (vejviser), U 74/228 Ø (lokaltelefonbog), U 64/422 V (varekatalog), U 62/254 SH (vejviser). As old cases, U 59/71 H (flyveplaner), U 48/936 Ø (fortegnelse over slægtsnavne), U 41/454 Ø (strikkeanvisning).

²⁵ Maritime and Commercial Court in Denmark is equivalent to High Court, where one can appeal to the Supreme Court after the decision.

company violated the rules provided in Article 71 of the Copyright Act and Article 1 of the Act on Marketing Practice.²⁶

The defendant providing internet service page, *Newsbooster* (hereinafter, NB), extracted headlines and established deep links to newspaper articles on the internet of the plaintiff, Danish Newspaper Association (hereinafter DNA)²⁷. Deep links here means that users of NB could reach the articles directly through the NB's homepage or by using users' own e-mail system, without any direct access to the homepage of the newspapers. NB had neither any contract with the newspapers nor offered any compensation to the newspaper regarding the conduct in advance.

The court concluded that the articles and headlines in internet be subject matters to invite the protection provided in Article 71 of the Copyright Act. Given the fact that the extracted materials by the defendant were fundamentals for add-value type business and that the defendant competed with the newspapers in the same media field, the court found that the defendant damaged the interest of the newspapers unreasonably.

The court stated that the distribution of electronic newsletters with deep links to articles of the newspapers placed in the internet as one of the service by the defendant violated Article 71 (2) of the Copyright Act, as well as extracting headlines from the newspapers to make it accessible to the users. However, the court did not recognise the articles and headlines to be protected by the quotation right defined in the Article 22 of the Copyright Act²⁸ in according with Article 71 (5) of the Copyright Act, and considered the use of deep link as a bad marketing practice.

The above rulings by the district court was upheld by the Maritime and Commercial Court, which only decided whether or not the mandates by the DNA had the sui generis right defined in Article 71 of the Copyright Act. Thus, it has to be determined whether or not the DNA's mandates in a digital environment can be protected as being catalogues, tables, database or the likes in accordance with Article 71 (1) and (2) of the Copyright Act. The term 'a database' is defined as 'a collection of work, data and other independent material, that is structured systematically or methodically and can be consulted individually by use of electronic equipment or in other ways' in the preparatory works.²⁹ The Maritime and Commercial court recognised the plaintiff's mandates as subject matters to be protected by the sui generis right provided in Article 71 of the Copyright Act.

3.2. Sweden

There has been no court decision by the Supreme Court with regard to the catalogue rules in Sweden

²⁶ District Court (Byret) Copenhagen, 16 July 2002.

²⁷ Commercial and Maritime Law Court, 19 Feb. 2003

²⁸ Article 22 of the Danish Copyright Act states as follows:

'A person may quote from a work which has been made public in accordance with proper usage and to extent required for the purpose.'

²⁹ No. 407 of the 26 June 1998.

after the implementation of the EU Database Directive. However, there are two cases relating with the topic before the implementation.³⁰

3.2.1. Before the Implementation of the EU Database Directive

The first case was decided in 1985, which referred to the issue whether or not a compilation of information on potted plants could be recognised as a protectable work by Article 49 of the Copyright Act.³¹ The facts were as follows:

The plaintiffs wrote a series of articles about potted plants, which were published as a supplement of four consecutive numbers of a Swedish magazine, *Hemmets Journal*, in autumn 1979. The plaintiffs worked as freelancers being specialised in plants. Each article included 16 so called potted-plant-cards (*krukväxtkort*); therefore 64 such cards altogether. The cards presented a coloured picture of a plant on one side and information on several facts about the plant on the other side. The plaintiffs made such cards, dividing plants into four groups in accordance with their proposed place of the window where the plant was supposed to be placed (four cardinal points in this case), providing brief information on placing, watering, fertilising, re-potting, pruning, multiplying, noxious insects and history of each plant under the separate headings, and showing both Swedish and Latin name of each plant. The total amount of data collected in the cards was 1,250.

The defendant was a company which published another magazine, *Husmodern*. The 14th *Husmodern* magazine in 1980 included a supplement called ‘our potted plants’ containing information on 53 various potted plants. However, 40 out of the 53 plants were the same plants to which the *Hemmets Journal* referred and the manner how the *Husmodern* arranged the cards was very similar to the manner of *Hemmets Journal*, while *Husmodern* did not use the same pictures as the *Hemmets Journal*.

The plaintiffs claimed that the defendant infringed the plaintiffs’ right provided in Article 49 of the Copyright Act, as their 40 cards out of the 64 were plagiarism. Moreover, the plaintiffs insisted that they made it user-friendly (easy to use) without any misinformation, which other publishers could not perform in the same way. Furthermore, it was mentioned that the plaintiffs aimed to develop the articles on the plants in order to publish a book in future, which became not realistic due to the conduct by the defendant.

The defendant argued that the articles by the plaintiffs could not enjoy the protection under Article 49 of the Copyright Act because the plaintiffs’ work was not recognised as ‘a catalogue, a table or other equivalent work’. The defendant also maintained that the writers of the *Husmodern* did not collect the data mechanically in the way Article 49 of the Copyright states as ‘with relatively simple principles and totally routinely’, according to the preparatory works of the Act, and that the quantity of data in the

³⁰ These cases are often cited as leading cases regarding catalogue rules in Nordic countries.

³¹ NJA 1985 s 813 (*krukväxtkort*), NIR 1986 s. 246.

plaintiffs' articles was not large enough to invite a protection defined in Article 49 of the Copyright Act. Moreover, the defendant stated that there were similar articles found with the plaintiffs, therefore the data was not exclusively compiled by the plaintiffs.

The District Court was in favour of the defendant because (1) it could not be considered 'mechanic' to arrange plants in accordance with the four cardinal points of the compass, and (2) plaintiffs' work did not have a large quantity of data. However, the Court of Appeals found that the plaintiffs' work could enjoy copyright protection, and possibly protection by the catalogue rules defined in Article 49 of the Copyright Act. The court stated that the both publications were essentially similar in terms of contents and arrangement, and it was not necessary [for the two publications] to be completely identical [in order to invite a copyright protection], and that the plaintiffs' work contained a large quality of data which enjoyed a protection by the catalogue rules. The court awarded each plaintiff 2,500 Swedish crowns (approximately 300 Euro) as an actual damage.

The Supreme Court was also in favour of the plaintiffs with similar reasoning by the Court of Appeals. The Court stated as:

... The Court has no doubt to recognise the devised part of the potted-plants-cards, such as order, selection or presentation, as a result of a [work of] compilation. The compilation including 1,250 different specifications which, taken into account of the considerable amount of time that has been needed to complete the work, has to be viewed as 'a large number' within the meaning of Article 49 (1) of the Copyright Act. Even though a part of the information was presented in the form of short coherent texts, it does not prevent the whole compilation from being viewed as a catalogue and table equivalent to 'another similar production'.

The Supreme Court also mentioned that the defendant plagiarised the plaintiffs' articles without permission [which did matter in the case] even if the plaintiffs' articles were compiled on the basis of data gathered from previously available sources, and awarded 5,000 Swedish crowns (approximately 600 Euro) to each plaintiff as an actual damage.

This case well illustrates what the catalogue rules are, and makes it very clear the difference of the rules from the sui generis protection provided in Article 7 of the EU Database Directive. As mentioned before, the catalogue rules were developed from the concept of unfair competition. In the judgment, the court clearly stated that it was not necessary to be completely identical in order to invite a legal protection, which was not the case within the scope of the traditional copyright protection. Moreover, the Supreme Court considered the manner the defendants used the plaintiffs' articles as free ride even though the data which the plaintiffs collected were placed in the public domain, which led the Court to reach the conclusion that the conduct of the defendant was illegal.³²

It was the Nummer Bank case which defined the scope of protection under Article 49 of the Copyright Act.³³ In this case, the Swedish Electric Wholesale Association constituted an association of leading

wholesale companies within the electric line of business. The association ran a part of the business in a private limited company called SEG, which used a database with a production number system (known as nummerbank) from the 60's, however developed a totally new computerised database consisted of approximately 118,000 articles in 1984-87.³⁴

Each production was given a number, an E-number, which consisted of the letter E and seven digits. Every production sold by the member companies could be identified by the code, instead of using names of the production or its description which could be easily confused with other production. Moreover, the database contained other information on the production, such as type number, or name of wholesale dealers. The system was build in the manner to make it easy to add new production to the system when it came to market and to remove old one when it was taken away from the market. The articles were sorted into categories 01-99 according to the use.

The codes were widely used by retailers and became a standard in the business. SEG ran the system by computers, making both electronic and hard copies regularly, updating number bank and sending these copies to the member companies for their use. The member companies used the system in order to manage their stocks and customer orders. Even non member companies could purchase a licence to use

³² There was a case in Japan referred to catalogues (*Toudo v. Nihon Yuso K.K.*, 8 Kaminshu 9, p. 1830 [Kyoto District Court, 30 Sep. 1957]), which might be interesting in comparing with this Swedish case.

Plaintiff X made a catalogue of transportation machines for advertising. Defendant Y used the X's picture in his own catalogue without any leaves from X, who insisted that Y violated Article 6 of the Utility Model Act. Although the court did not consider that the defendant Y violated Article 6 of the Utility Model Act, the conduct of the defendant was considered as an unfair competitive practice. The court stated in the judgment:

'Anyone is allowed to run a business freely and advertise such business unless one does not infringe other's rights under the current social structure which aims free competition. It is required, however, that the manner of advertising should fall into the scope within the accepted one as social norms, and not permitted to accomplish the purpose (advertising) by unfair or unjust manners. The defendant is a company which manufactures and sells transportation machines, and the plaintiff is the similar company which competes with the defendant. ... It should be ruled that it is illegal for the defendant to use the pictures of the machines on the plaintiff's catalogue without any leaves, since such conduct does not fall within the scope of free competition which is permitted to each person, and is recognised as an infringement of deserved business interest to be enjoyed by the plaintiff. It must be easily foreseeable that the defendant's conduct occurred certain type of damages to the plaintiff. Thus, it is recognised that the defendant on purpose acted in the manner to cause possible damages to the plaintiff by its own illegal conduct. Accordingly, it is natural that the defendant ought to be responsible for damages as an illegal conductor [emphasis added].'

The court, however, did not find any violation of Article 6 of the Utility Model Act by the defendant, while the court admitted that the defendant's conduct was illegal. The court dismissed the case since the plaintiff asserted neither its own pictures' copyright not the defendant's unfair competitive practice.

To compare this Japanese case with the Swedish case, the both courts appeared to protect subject matters not only within the scope of copyright protection. Traditional copyright law prohibits copying. However, the both courts stated that law could provide further protection. The Swedish Court of Appeals did not require the two publications in dispute to be completely identical in order to invite a legal protection by the catalogue rules and the Japanese court by unfair competition law.

The scope of subject matters to be protected by law is similar in the two judgments. The catalogue rules were meant to protect databases or compilations which were not protected by traditional copyright law due to the minimum creativity requirement. It costs and takes a time to create such databases or compilations. Therefore, Nordic countries protect these kinds of subject matters by the catalogue rules, which fall within the scope of neighbouring rights. Japanese court appeared to protect this scope of subject matters by unfair competition law. It could be noted as an interesting phenomenon.

³³ NJA 1995 s 256 (nummerbank).

³⁴ 90,000 at the time of the alleged copyright infringement.

the number system. SEG spent much money (4 million Swedish crowns) and labour (20 people for three years) to establish the E-code system.

The defendant, Direkt-El, was a low price wholesaler which was not affiliated with SEG, which did not buy a licence from the number bank, either. The defendant's catalogue had 3,060 items and 2,836 items out of the 3,060 was found in the SEG number bank. In the defendant's database, each item had a code similar with the code which was given in the SEG number bank, which consisted of 7 digits without letter E. However, the defendant's system had only 42 categories while the SEG used 100 categories, with a relatively small portion (approximately 3,000 out of 90,000). Moreover, the SEG's system was much more detailed than the defendant's system because the SEG's system presented up to 13 facts, such like production code, name or price, on each item while the defendant's system could make it only 3 facts.

SEG accused the defendant on the basis of the infringement of the SEG's right provided in Article of the Copyright Act and/or by the catalogue rules defined in Article 49 of the Copyright Act because the defendant used the protected SEG number bank. The defendant admitted having used the numbers, however denied having committed a plagiarism, since the defendant did not have access to the original SEG database. The production numbers were collected in the public domain, such like customer orders or other materials written by third parties, and approximately 10 % of the production codes in the defendant's system were different from the SEG's ones, according to the defendant.

Both the District Court and the Court of Appeals found in favour of the defendant, stating that the use of codes in catalogues was free because the defendant did not gather the codes from the SEG's database. In the meantime, the both courts clearly mentioned that the database of the SEG could be protected both under Article 1 of the Copyright Act because the database was original and independent, and 49 of the Copyright Act because the database contained a large quantity of data, while neither type of protections protected the facts or idea itself.

However, the Supreme Court found the defendant guilty of copyright infringement on the grounds of Article 1 of the Copyright Act and ordered the defendant to destroy or alter the existing catalogues so that the SEG's codes could not be used. The Court found that the database was sufficiently original and independent to invite a protection under Article 1 of the Copyright Act. The Court stated that it was not necessary to refer to the protection by the catalogue rules, since the rules were purely for the protection without originality requirements. However, this ruling received severe criticisms,³⁵ and it is fairly difficult to grasp the points stated by the Supreme Court, why the database in dispute could be recognised as a subject matter to be protected under Article 1 of the Copyright Act, in my view.³⁶

³⁵ For example, see, G. Karnall, *Debatt. Igen! Kort kommentar till Högsta domstolens dom den 20 april 1995, Svenska Elgrossisters Förenings Serviceaktiebolag (SEG) ./. Direkt-El i Göteborg Aktiebolag (Direkt-El) (Debate. Again! Brief Comments on the Case SEG v. Direkt-El as Decided by the Supreme Court of Sweden, April 20th, 1995)*, NIR p. 242.

3.2.2. After the Implementation of the EU Database Directive

There have not been any court decisions by the Supreme Court regarding the issues in Sweden.³⁷

3.3. Finland³⁸

There are not many court decisions regarding the catalogue rules in Finland. However, opinions by the Copyright Board are well respected in Finland. In this section, the opinions are introduced as well as court decisions in order to induce more due outcome.

3.3.1. Before the Implementation of the EU Database Directive

There is no leading case in connection with catalogue rules before the implementation of the EU Database Directive. The followings are summaries of some non-binding opinions given by the Finnish Copyright Board that concern the protection by the catalogue rules provided in Article 49 of the Finnish Copyright Act.

Opinion 1987:16 [Phone book] permitted anybody to use protected catalogues by the catalogue rules, unless the catalogues were slavishly copied. The summary of the facts is that an association asked the Board if it was permitted to publish a business catalogue containing phone numbers, addresses and so on without leaves. The association planned to obtain the necessary data from other business catalogues and phone books. The Board advised that a phone book itself was a work to be protected by Article 49 of the Copyright Act. The protection, however, does not prevent anyone from using the data contained in the work. Therefore, the applicant can obtain information from protected catalogues as long as no catalogues as such would be copied in whole or in part.

Opinion 1989:3 [The electricity numbers] concerned two databases in the electrify branch exactly like in the nummer bank case by the Swedish Supreme Court. The applicant of the case was the alleged violator, the *Union of Contractors in the Electricity Branch*. The creator of the original database was the *Union of Wholesalers in the Electricity Branch* (Hereinafter, Contractors and Wholesalers).

The Wholesalers had published since a catalogue of production numbers that included all the production sold in the unionised wholesale stores since 1971. There were 63,000 items in the catalogue in the beginning of 1988. The system was based on the production numbers which were 7 digit number codes, whose first two digits indicated the group of the production; the next three indicated the sub-group and

³⁶ Regarding this points, the Supreme Court stated ‘SEG did not have a copyright for each peace of information in the database. Therefore, the use of the SEG number codes could only infringe SEG’s copyright if the used codes themselves would form a creation that would enjoy the protection under Article 1 of the Copyright Act.’

³⁷ There was a court decision after the implementation of the Directive in Sweden: Svea HovR, T-1458-97, Brand News 11/99 s. 14 (Spelordning). This case was reviewed by the Supreme Court that referred the case to the European Court of Justice. The particulars of the case are introduced in 4.1.1.

³⁸ Special thanks to my research associate, Mr. Marko Lounatmaa, LL.M., for his assistance in depth. Without his competence, I could not complete the work. Naturally, any kinds of mistakes or errors that remain are my own.

the last two identified the production. The Wholesalers published the catalogue as a book and as a computer-accessible version. The book contained only 10,000 items while the computerised version contained all items.

The Contractors started to market a registry called Watti which included three different registries and a price catalogue in 1989. Both catalogues contained in their records similar computer codes (the 7-digit product code) and also the price of the production and the last date of price changes. The record in the Contractors' database had 58 digits and the Wholesalers' had 139 digits (originally 55). The Wholesalers' database had room for production name, factory data and discount information. The Contractors' database contained information about 22,000 productions, 10,000 of which were same as those in the Wholesalers' database.

According to the Contractors, the information in the Watti's database concerning production and their prices was retrieved from manufacturers and importers. The production numbers were copied from material of third party as they were widely used in the branch. The Wholesalers asked manufacturers who produced about 40% of the branches production if they had given any information to the Contractors. The manufacturers replied that they had not, so the Wholesalers claimed that the information could have been gotten only from their books. The Wholesalers had heard that the Contractors had asked wholesale stores to send them the original database disks so that the Contractors could provide better customer support.

The Board found that the Wholesalers' catalogue was eligible for protection under Article 49 of the Copyright Act because it contained a large quantity of data. The Board seemed to believe the Wholesalers' remark on the information source of the Contractors' production numbers when it stated that the obtaining 10,000 production codes from the original computerised database did not constitute a copy of the original catalogue or its part. In other words, it was legally permitted to copy about 1/6 of the original database. In my opinion, 1/6 of the original database means at least 'its part'.

Opinion 1996:1 [The name day lists of the University of Helsinki] concerned the list of name days originally published by the University of Helsinki (hereinafter HU). The HU had had a privilege to print calendars and almanacs at latest from the 19th century. That privilege had been repealed by the 1195/1994 Act which came into force in 1995. The applicant of the case was a publisher that had printed a calendar with name days in it. Printing calendars was no longer a privilege of the HU, so the applicant wanted to know if he could use information of the name days in his calendars.

The original HU name day list contained 752 names arranged to the days of a year at the time of the opinion. The list was originally based on a medieval list of saints, but had later undergone changes as it was updated every ten years or so. Only about 40 of the present names were from the saints' list. The last update done in 1992, introduced 39 new names. In the almanac that was published by the HU, the 752 names and their respective days were shown in two formats in an alphabetical list of names and in

a chronological list of days. In the applicant's calendar, a page showing all the days of an individual week contained a list of the names that were celebrated during that week.

The Board found that the original list of name days was indeed a work containing 'a large quantity of data arranged in a special manner' and that it could therefore gain protection by Article 49 of the Copyright Act. Since the list was updated regularly, its protection period started again and again. The fact was irrelevant that at least some of the applicant's calendars were printed outside Finland, however the Board noticed that the HU could use its exclusive right to the catalogue only when the calendars were brought to Finland. Once again, the Board stated that the right under Article 49 of the Copyright Act did not prevent others from using any piece of information of the name days.

The Board seemed to accept the claim by the HU that the listing name days had always been free for everyone, but had in recent years been done only by the HU. The fact that printing calendars (with which the name day list was often associated) had been HU's privilege was a different matter. The name day list was HU's creation that just had been used in calendars. The applicant had claimed that the HU had had a privilege to the name day lists (because, in its view, the list was part of the calendar) and that that privilege had been repealed in 1994. The Board considered this matter as something beyond its "jurisdiction" and did not take a stand *expressis verbis*.

The same matter had been solved already in **the opinion 1995:11**, in which the applicant was a different person (a company). In that opinion the Board found that the name day list did not enjoy copyright but catalogue protection. The opinion concerned also the list of Swedish name days which contained 587 names. The Board found in favour of the HU also with regard to that list. In both cases (1995:11 and 1996:1) the applicants relied also on other grounds that were not presented here as they are not relevant to the issue of Article 49 of the Copyright Act.

3.3.2. After the Implementation of the EU Database Directive

There is a court decision in connection with Article 49 of the Copyright Act after the implementation of the EU Database Directive in Finland.³⁹ The case was related to a list of Finnish name days which was referred in the above sub-section. The list was compiled by researchers at Helsinki University, which 1995 Finnish version consisted of 752 first names widely used in Finland and was systematically arranged as a list under independent days in calendar.

The selection of such first name was based on extensive research in frequency of first names given to children in Finland for a long time. The manner how the first names were systematically put into different days, was at least partly, on the basis of the research information on the origin and previous use

³⁹ There were other court decisions on the *Veikkaus* case after the implementation of the Directive in Finland. Due to the implementation of the EU Database Directive, this case was reviewed by Vantaa District Court that referred the case to the European Court of Justice. The particulars of the case are introduced in 4.1.2.

of such first names.

The list has been usually revised once in ten years. The last amendment both in Finnish and in Swedish was confirmed by Helsinki University in November 1992, and such amendment came into force in January 1995. 39 new names were added, a name was removed and 6 names were placed into other days during the last revision in Finnish. Such changes were on the grounds of the alternation of the frequency of different first names.

Concerning the rights to the list, it was Helsinki University that had an exclusive right to publish calendars both in Finnish and Swedish on the basis of Article 5 of the Helsinki University Regulation. However, the exclusive right was repealed by one of the amendments, which came into force in January 1995. Helsinki University transferred a copyright on the list to the plaintiff in November 1994. The plaintiff company was responsible for administrating such copyrights and collected remuneration for publication of the list.

The defendant produced and published a periodical. Number 1/1995 of the periodical was published together with a calendar containing first names in the same way as the list of name days. The plaintiff brought this dispute into the court, asserting that such conduct by the defendant infringed the plaintiff's right on the basis of Article 49 of the Copyright Act, and claimed an equitable damages on the grounds of Article 57 and 60 of the Copyright Act.

The case presented two primary issues. One was whether or not the list was recognised as a catalogue to be protected by Article 49 of the Copyright Act, and the other was whether or not the list was not qualified to be protected by Article 49 of the Copyright Act because of the statement of Article 9 of the Copyright Act.

Concerning the first issue, the amendment of this article (in accordance with the implementation of the EU Database Directive) was discussed with the fact that the compilation of a catalogue could involve a large amount of particular efforts, professional skills and capitals. Although a catalogue is not qualified as a copyright work in the meaning of the Finnish Copyright Act, it can be regarded comparable to such work because it involves substantial efforts. A protection of such catalogue from unauthorised copying should be justified under the condition that such catalogue is combined with a large amount of information in a specific manner.

The list was based on an extensive research work. It was, therefore, a combination of a large amount of information. Accordingly, the list was to be protected as a catalogue within the meaning of Article 49 of the Copyright Act. Regarding the involvement by the Helsinki University, the University had no longer any exclusive rights to publish calendars, and this matter did not affect the argument whether or not the University was still the right holder of the list. It should be recognised that the rights had been transferred to the plaintiff.

Concerning the second issue, Article 9 of the Copyright Act excludes laws and decrees or decisions and statements of authorities and other public bodies from subject matters to be protected under the Copyright Act. The point was whether or not the decision of the Helsinki University in November 1992 to adjust the list was a decision of a public body, which falls within the meaning of Article 9 of the Copyright.

The court held that the changes which the researchers had proposed, were decided at the University only because it was on the basis of contractual duties. The University did not have any specific obligations to compile the list. The University did not act as a public body since the University approved the proposed changes. The list did not contain such a public interest that would have been justified to refuse the protection provided in Article 49 of the Copyright Act. Accordingly, the court stated that Article 9 of the Copyright Act was not applicable to the case.

The Finnish Supreme Court, as well as the district court and the court of appeals, ruled that the list was to be protected by Article 49 of the Copyright Act. The defendant's conduct of reproducing the list constituted an infringement of the right of the plaintiff's catalogue within the meaning of Article 49 of the Copyright Act. The defendant was obliged to pay an equitable compensation, which was 60,440.26 FIM (about 10,000 Euro) on the grounds of Article 57 and 60 of the Copyright Act.

There are several opinions by the Copyright Board after the implementation of the EU Database Directive, too. In the **Opinion 2000:9 [National Flags of all the independent countries]**, the applicant of the case, an entrepreneur in the branch of drawing and graphics, wanted to know whether his database of the flags of all the independent countries of the world would enjoy copyright, catalogue and/or database protection. He had started to compile his database in 1994 after noticing that the generally available information on the flags was poor. He wanted to create a database based on the most accurate information available and relied above other sources on the official information provided by the respective countries. He had also got some information from the Flag Research Centre in the USA and from some magazines and bulletins.

In the time of the opinion the database contained 197 flags (192 of the belonged to independent nations). The applicant had used 147.5 hours on drawing all the flags in the same size according to the official information. The flags that had an emblem were first scanned and then drawn by using a computer program. After that the biggest job had been to make sure that he had used the right colours. Usually the colour information had been given in PMS format (the Pantone system) but the applicant wanted to use the CMYK system which is used in printing. The red colour had been the most difficult one because the PMS red 'fades away' when it is printed in CMYK system. The compiler had made so-called cromalines from the PMS-coded red colour and also from some CMYK-coded colours. By comparing those he had been able to choose the right red colours defined with CMYK system.

The database contained also updated information on measures of the flags, on important dates relating

to them and on the proper use etc. The database existed in his office as an alphabetical file. The pictures of the flags were also on his computer.

The Board found that the database was not protected by copyright because it did not reflect original creative work in choosing and arranging data. On the other hand, it had demanded considerable effort to obtain and verify the information on the flags and to draw them with exactly the right colours. Therefore, the compilation gained protection under Article 49 of the Finnish Copyright Act. The Board noticed that a similar right could protect the information used in the making of the flags and that the protection did not cover individual pieces of information contained in the database.

In the **Opinion 2001:5 [Charts of accounts]**, company A had been developing a special accounting system for a certain branch from the eighties. The system contained a list of all the accounts needed to run a business in that branch, about 1,200 accounts in total. The needs of both the internal and external accounting had been taken into account. For internal accounting the system contained 15 surveillance accounts that provided information for the company management. The system could be used by a specially designed computer program, by MS Excel or even without computer by an experienced accountant. It required a lot of work and even outside consultation to establish the system. The system was very different from the other charts of accounts that were used in the branch.

The company A owned the company B that had created two other charts of accounts for the needs of two clients. These two charts were based on the first chart and the both contained all or almost all the accounts of the first system and also the structure of the original chart.

Person O had worked for company B until December 1998. He copied at least the second chart before he left the firm. He later established his own accounting business and used the charts for his own company. The companies A and B started a police investigation, including an investigation at O's house, however the prosecutor dropped the charges. The 'defendant' of the case at the Board, namely O, had denied some of the plaintiff A's arguments.

The Board noticed that the first chart created by company A had 20 pages in total and contained 14 pieces of information on all the 1,186 accounts. Therefore, the Board concluded that the chart was protected under Article 49 of the Finnish Copyright Act as it contained a large quantity of data. The second and the third charts created by the company B had 4 and 16 pages and 207 and 585 accounts respectively. Again, 14 pieces of information had been given on each account. It was considered that the both charts should invite the legal protection on the same grounds as the first one.

There was another issue in the case. If person O had copied the chart on a disk and used it for his business, there was an infringement of the plaintiff's rights as the owner of the database had the privilege to copy the database. The use in O's business would then inhibit seeing the copying as private use in the sense of Article 12 of the Finnish Copyright Act. According to the Board, the fact that some

of the charts had been created on the basis of client's needs was irrelevant. The Board did not say anything about the possible database protection under Article 49 (1) (2) of the Finnish Copyright, possibly because the charts were considered eligible for protection in any case.

Opinion 2001:14 [Bird-watching places] concerned a database of bird-watching places in a digital environment. The applicant had uploaded a database of approximately 1,400 places that were suitable for bird-watching to his internet site in October 2000. He estimated that there would be more than 2,000 places in summer 2001. The places were defined with GPS route points and with coordinates that match the ones used in the most used maps. An equivalent database had not been published before in Finland.

The database gave coordinates to various bird-watching towers and bird lakes that had been arranged according to respective regions and municipalities. The information had been gathered in two manners: by measuring the coordinates in the field and by recording information that can be seen only by visiting the places. For example, the right directions to the place and a possible parking lot nearby had been presented at least in some cases. The choose of places to database had been done according to the anticipated interest among users, the accuracy of measuring, the effect that the publishing may have to outsiders etc. The drafting of the database had demanded about 60 days in the field, about 7,000 km of driving and about 1,000 hours of work.

In February 2001 an outside party had done 'an attempt to overtake the database'. The applicant wanted to know if the database could be protected with copyright, catalogue and/or database right. The Board found that it did not enjoy copyright since it did not reach to the required level of creativity. However, because it presented a large quality of data it enjoyed catalogue protection under Article 49 (1) (1) of the Finnish Copyright Act, and possibly even database protection under Article 49 (1) (2) of the Act, if it was a result of considerable investment.

In **Opinion 2002:14 [Standing in an orienteering competition]**, the applicant presented to the Board a question that was almost hypothetical. The question was whether or not a list of standing and results of a sports event such as an orienteering competition could enjoy a copyright protection. In orienteering competitions each competitor has with him an electronic memory device that he uses to check-in to control points. After the competition, the data saved in the memory devices is read by the organizers. The standing and results are automatically calculated by simple computer software. The computer program draws up lists of the standings and records etc. Usually the computer program used by various organizers is the same. The drawing up of the lists requires only one routine and no special procedure.

The Board answered that the list could gain protection under Article 49 (1) (1) of the Finnish Copyright Act, if it contained a large quantity of data, which criterion has been interpreted in the praxis of the Board so that hundreds or thousands of pieces of information have to be contained in the list. The Board noticed that the catalogue right belonged to the compiler who usually was the person economically responsible of the drafting. The right can even originally belong to a company or other legal person. In a

sports event the right would probably belong to the organizing body of the competition or to a company responsible for the computer systems. In the described orienteering competition, the former would enjoy the catalogue right.

3.4. Summary

The study has not proved whether or not the scope of the subject matters to be protected by the revised Nordic catalogue rules (after the implementation of the EU Database Directive) is comparable to the scope by the *sui generis* protection provided in the Part III of the EU Database Directive, because there had been not many precedents in the jurisdiction. However, most of the protected subject matters are overlapped, though not entirely identical. Rather, broader scope of subject matters had been protected in Nordic countries. Therefore, in my view on the basis of the study, it had been unnecessary for the EU Member States in the Nordic countries to revise the provision in order to comply with the EU Database Directive up until the rulings by the ECJ in November 2004.

4. Rulings by the European Court of Justice

Many court decisions have been accumulated since the implementation of the Directive in the Member States. The court decisions appear to address a direction, for example, especially in Germany.⁴⁰ In the meantime, however, some courts in the Member States referred to the cases to the ECJ in order to receive an opinion regarding the interpretation of the *sui generis* protection.

The cases were; Fixtures Marketing Ltd. v. Svenska AB at the Swedish Supreme Court,⁴¹ Fixtures Marketing Ltd. v. Organismos Prognostikon Agonon Podosfairou EG (OPAP) in Greece,⁴² Fixtures Marketing Ltd. v. Oy Veikkaus Ab at the Vantaa District Court in Finland⁴³ and British Horseracing Board Ltd. v. William Hill Organisation Ltd. at High Court in the UK.⁴⁴ The decisions by the ECJ were delivered in November 2004 after a few years' review.⁴⁵

The decisions included primary two points. One was that investment in creating data would not be recognised as substantial investment. The other was that economic value of data would not be relevant in determination of whether or not the *sui generis* right of the data was infringed. However, it still remains many vague issues even after the decisions. In this chapter, it will be examined whether or not the rulings by the ECJ limited the scope of the *sui generis* protection, focusing the analysis on the two points mentioned in the above.

⁴⁰ For detail, see K. Soga, The Legal Protection of Databases in Germany and Japan, 46 Aichi-Gakuin Law Review 1, p.9-70.

⁴¹ C-338/02.

⁴² C-444/02. Due to lack of my knowledge of Greek, unfortunately, this case cannot be included in the study.

⁴³ C-46/02.

⁴⁴ C-203/02.

⁴⁵ Press release No. 89/04 (9 Nov. 04).

4.1. Referred Cases

4. 1. 1. Fixture Case in Sweden

The professional football matches are organised by the F.A. Premier League and the Football League Ltd. in England and by the Scottish Football League in Scotland. Before each football season starts, the organisations draw up electronic fixture lists of the games that will be played in the respective league during that season. The fixture lists are published also in printed form. In England, each division has about twenty teams that play against each other twice during the season, so there are over 2,000 games in total. The Scottish divisions have fewer teams but they play against each other four times during one season, so the total of games played is about 700. The costs of the drawing up and the administration of the fixtures are about 11.5 million per year. The above-mentioned organisations have chosen a Scottish company, Football Fixtures Ltd. to market the fixtures through licensing etc., another company, Fixtures Marketing Ltd., has in turn acquired the right to market these fixtures. The Swedish pools company, AB Svenska Spel, markets pools games in which the customers can place bets on, among others, the matches played in the English and Scottish football leagues. The fixtures are used in the pools coupons of three separate games called Stryktipset, Måtipset and Oddset.

The plaintiff of the case, Fixtures Marketing Ltd, sued AB Svenska Spel for infringing the plaintiff's rights on the basis of Article 49 of the Swedish Copyright Act.⁴⁶ The plaintiff claimed that the fixture list was formed by two databases (England and Scotland), and that the defendant copied and/or re-used a protected database by using the fixtures in the pools coupons, which infringed the right to the database. In Oddset, for example, 769 matches of the English leagues were used during the season 98-99, which is about 38% of the games in total. Approximately 90% of the match of the Premier League was used during that season. According to the plaintiff, the described use constituted a copy of an essential part of the database. The plaintiff argued alternatively that the defendant copied and re-used non-essential parts of the fixtures continuously and systematically, which was 'against the normal use of the database and caused inexcusable damage'.

The defendant stated that the database was not a subject matter to invite a protection defined in Article 49 of the Swedish Copyright Act as it neither contained 'a large quantity of data' nor was a 'result of an essential investment'. The defendant pointed out that the investment to draw the fixture lists was aimed to place the football matches in the market, therefore the lists were recognised a by-product of the original purpose of the investment. Moreover, the defendant argued that the investment was solely for drawing up the fixture lists but not 'gathering, checking up and/or presenting of the data'.

⁴⁶ Article 49 of the Swedish Copyright Act protects 'catalogues, tables and other equivalent works' that contain a large quality of data or are a result of an essential investment. The Article protects a larger variety of works than the EU Database Directive, the latter only protects works that are a result of an essential investment, which is called 'sui generis protection'.

The Swedish Copyright Act has no provisions that implement Article 7 (5) of the EU Database Directive, which protects databases against 'continuous and systematic copying and/or re-use of non-essential parts of that database being against the normal use of the database and causes inexcusable damage.'

The defendant did not admit to have infringed the plaintiff's right, either, because the defendant did not use an essential part of the database at a time. Rather, the defendants argued (1) that an individual pools coupon was not to be considered as a sample of the database as it did not have a lot of data in it and, on the other hand, all the pools coupons were not to be seen as one but as separate, (2) that the defendant retrieved the fixtures from other sources than the original database, such as newspapers and televisions, and (3) that the fact should be free for any one to use, that two football teams were going to play against each other at certain time and place.

4.1.1.1. The Courts

The lower courts both found in favour of the defendants. The District Court of Gotland found that the database did enjoy protection under Article 49 of the Swedish Copyright Act as a result of essential investment, but the defendant had not used the fixtures in a way that would infringe the plaintiff's rights. The Svea Court of Appeals upheld the District Court's sentence. It did not clearly take a stand on the issue of whether the database could be protected under Article 49 of the Swedish Copyright Act, but stated that the plaintiff did not prove that AB Svenska Spel had copied the database even though it had used data that could be found in it.⁴⁷

The plaintiff appealed the case to the Supreme Court arguing that the database contained a large quantity of data and was a result of an essential investment. The creation of the database had demanded a great deal of work and money, which could not be divided into categories according to their purpose, such as actual drawing up the fixtures and the presenting the fixtures. Moreover, the plaintiff argued that the purpose of the investment did not have any meaning and denied the defendant's statement that the use of the fixture in pools would be a by-product, and that it was irrelevant to the judgment to determine whether or not AB Svenska Spel may have gathered the data from other sources because the data was originally from the plaintiff's database.

4.1.1.2. The ECJ

The Swedish Supreme Court referred the case to the European Court of Justice and presented the following questions:

1) In regard to determining whether a database is a result of an essential investment, can the producer of a database count in the investments that primarily relate to the drawing up of something that is independent from the database and not relate to the gathering, checking up and/or presenting of the contents of the database? Does it have any bearing to the evaluation that the investment may be a precondition to the database?

⁴⁷ There was criticism against the decision by the Court of Appeals. See, J. Gaster, European sui generis right for databases: Legal protection of chronological lists of football matches and compilations of data related to horseracing under database right – or how your judge might get it right or wrong, Computer und Recht, CRi Mar. 2001, pp. 74-8.

2) Does a database enjoy protection under the Database Directive only from actions that are similar to the purposed for which the database was created?

It must be reminded that AB Svenska Spel has argued that the drawing up of the fixtures lists was not aimed to make the football pools possible and that the possibility is a by-product in relation to the purpose of the investment. Fixtures Marketing Ltd. has stated that the purpose makes no difference and generally denied the statement that the possibility to use the lists in pools would be a by-product.

3) What is meant by the concept ‘essential part of the contents of the database in qualitative and/or quantitative meaning’?

4) Is the protection under Article 7 (1) or (5) of the Database Directive from ‘copying and/or re-use’ of the contents of a database limited to use that includes a direct exploitation of the database, or is the protection aimed also to situations in which the contents of the database are available in another source or are generally available?

It must be reminded that AB Svenska Spel has argued that the company did not have knowledge of the databases and had gathered the information to pools coupons from other sources and that the fixtures used in an individual pools coupon do not constitute a whole or an essential part of the fixture lists. Fixtures Marketing Ltd. has argued that the fact that AB Svenska Spel had gathered the fixtures from other sources was irrelevant because the data was originally from the database.

5) How should the concepts ‘normal use’ and ‘inexcusable damage’ in the Database Directive in Article 7 (5) of the Database Directive be interpreted?

It must be reminded that Fixtures Marketing Ltd. has argued that AB Svenska Spel has for a commercial purpose copied and re-used the contents of the database continuously and systematically in such a manner that it is not normal use and therefore causes inexcusable damage to the football organization in question. AB Svenska Spel has stated that it is not the proper way to interpret the use of fixtures to see all the individual pools coupons as one and denied that the use would be against Article 7 (5) of the Database Directive.

4.1.2. Fixture Case in Finland

4.1.2.1. Description of the Original Database

The professional football matches are organised by *The F.A. Premier League Ltd* and *The Football League Ltd.* in England. The former runs the highest league and the latter three do lower divisions. Each division has about 20 teams that play against each other twice during the season, so there are over 2000 games in total annually. Before each football season starts, the organisations draw up electronic fixture lists of the games that will be played in the leagues during that season. The fixture lists are also published in printed form as a 47-page booklet.

The fixtures are actually created by people working for a company called Sema Group Systems Ltd. The work is done by two so-called compilers and a group of representatives of interested parties such as football teams. The work is done by using specially designed computer software. The fixtures are done after the drafters have received opinions from, among others, the police and the football teams. Thus, the fixture lists are a result of interaction between several actors. Several principles have to be taken into account: for example, a team usually plays some matches as a home team and then some as a guest team and so on. The costs of the drawing up and the administration of the fixtures are about £ 2.3 million per year.⁴⁸

The above-mentioned organisations have chosen a Scottish company, Football Fixtures Limited to market the fixtures through licensing etc. Another company, Fixtures Marketing Limited, has in turn acquired from Football Fixtures Ltd., the right to market these fixtures in Scandinavia and some other places. All bookmakers, pools companies and such that use these fixtures always pay licence payments.

4.1.2.2. Veikkaus case in Finland

The Finnish pooling company, *Veikkaus*, has several different pooling games, namely *Vakioveikkaus*, *Tulosveto* and *Pitkäveto*. Veikkaus uses English football games in its pools without any kind of licence or permission. The fixtures are used in pools coupons during the English football season that lasts for about 40 weeks. Almost all the fixtures from the highest league, The Premier League, are used while only few games from the lower divisions are used. The pools game Vakioveikkaus only uses English matches during the English football season. Veikkaus also published a handbook called *Veikkaajan käsikirja* (The Pools Players' Handbook) in 1994, that contained all fixtures of the four above mentioned divisions.

4.1.2.3. The lawsuit of 1996

Fixtures Marketing Ltd. sued Veikkaus on the basis of infringement of the copyright and/or catalogue rights they have for the fixtures of season 94-95 in 1996.

As the plaintiff initially argued on the grounds of copyright infringement, it was not an issue how big a proportion of the fixtures were used in the pools coupons. The plaintiff claimed that using each individual pools coupon published during the football season (and even more, all of them put together) was an infringement of the plaintiff's rights because the coupons contained protected fixtures. However, all the pools coupons were to be seen as one because the defendant chose the games for the coupons bearing the whole season in mind: the whole season was taken into account when games for one weekly coupon were chosen.

Alternatively, the plaintiff argued on the basis of the catalogue right. By law, they could do that only if

⁴⁸ For some reason the sum is about 80% smaller than the one mentioned in the Swedish case. The fact that this case does not concern the Scottish league could explain this to some extent. It is a little bit strange, anyway.

Finland was the first place where the catalogue had been published. In the view of plaintiff, the catalogues had been published in that way since some English news papers, such as The Daily Mirror, that published the fixtures with licence, were imported and delivered in Finland. Therefore, the fixtures were published practically simultaneously in Finland and England.

The defendant denied the accused infringement. The defendant stated (1) that the fixture lists could not be seen as a creation that was protected by copyright under Article 1 of the Finnish Copyright Act, because the lists neither did reflect the creator's personality nor did result from independent creative process, (2) that the used 'labour and skill' was irrelevant to the case, (3) that the lists did not constitute a catalogue because they did not contain enough data, therefore the creation by the plaintiff had not demanded enough expertise, effort and time, and (4) that the lists had not been published in Finland first but in England.

The defendant admitted that the handbook was indeed a copy of the fixtures lists if the lists would constitute a catalogue. However, the pools coupons were to be seen separately, because they only had some of the English matches played during the respective week. Besides, the time and the place of the matches often changed after the publication of the fixtures, so the source of the fixtures used in the pools coupons could not possibly have been the original lists. The information of the fixtures was retrieved from many different sources, such as news papers and football literature. Veikkaus had also received information straight from the English Football Association (the above mentioned 'F.A.').

4.1.2.4. The Finnish Copyright Board in 1996

The Vantaa District Court asked and received a non-binding opinion (1996:5) from the Finnish Copyright Board. The Board found that the fixture lists were not a creation protected with copyright under Article 1 of the Copyright Act, but a catalogue or another equivalent work meant in Article 49 of the Copyright Act. However, the catalogue was firstly published in England and therefore not eligible for protection under Article 49 of the Copyright Act.

4.1.2.5. The Courts

The Vantaa District Court found that the lists were not subject to copyright because anyone who would have had the task to compile such a list would have likely made a list with a similar form, even though the details could and would have been different. The data was not arranged in a manner demanding originality and creativity. The originality and creativity needed in placing the matches in best possible dates etc. was not visible in the final work like it should have if the creation was to be protected with copyright. The Court found that the Swedish nummerbank case that the plaintiff had introduced did not necessarily enjoy status as a precedent in Finland because the Finnish Copyright Board had 'ruled' differently in a similar case (1989:3).

On the other hand, the Vantaa District Court found that the fixture lists were clearly a catalogue or an other equivalent work meant in Article 49 of the Copyright Act because 'drawing them up had

demanded certain amount of effort, skill and capital'.⁴⁹

The Vantaa District Court argued that the fixture lists were not eligible for protection under Article 49 of the Copyright Act, because they were not firstly published in Finland but in England. The fact that English news papers delivered in Finland does not matter in the case. However, the Court found that the above mentioned, original wording of Article 64 of the Copyright Act was against Article 12 of the Treaty of Rome and the Article 4 of the EEA Treaty as it discriminated foreign EC/EEA citizens on the ground of their nationality. If the plaintiff had been a Finnish citizen or a Finnish company, it would have enjoyed protection for its catalogues under Articles 49 and 64 of the Finnish Copyright Act even though the fixture lists were firstly published outside Finland. On the grounds of the so-called Phil Collins cases,⁵⁰ the Vantaa District Court found that Article 64 of the Copyright Act had to be interpreted so that the plaintiff could enjoy the protection in the same manner as any Finn could enjoy, thus the fixtures of Fixtures Marketing Ltd were eligible for protection under Article 49 of the Copyright Act despite the wording of Article 64 (7) of the Copyright Act.⁵¹

Veikkaus had already admitted that the handbook would infringe the plaintiff's catalogue right if the fixtures were protected as a catalogue under Article 49 of the Copyright Act. The remaining question was that of the pools coupons. The catalogue protection inhibits only copying of the whole catalogue or an essential part of it. The court found that the pools coupons used during one year could be seen as one. The court discussed in its verdict the nature of the three pooling games and found that two of them, namely Pitkäveto and Vakioveikkaus, infringed the catalogue rights to the extent in which essential parts of the fixture lists had been used in them. The court found that only the parts of the fixtures relating to the Premier League had been used widely enough, but those parts formed about 1/4 of the fixtures and therefore an essential part. The coupons used in these two Veikkaus's games resembled very much the original Premier League fixture lists.

The Helsinki Court of Appeal found that the pools coupons were not to be seen as one but separately because the information they contained was retrieved from various sources including news papers, English Football Association and the football teams. There were also differences between the original data-base and the defendant's database and the court found also that the coupons were useless after the

⁴⁹ The original Articles 49 and 64 of the Copyright Act protected works that belonged to Finnish citizens, Finnish companies and those with permanent residence in Finland and also works that were first published in Finland. After an *amendment* (Article 64 (7) of the Copyright Act) that came into force May 1st 1995, only works that were first published in Finland were protected. This amendment was not applied in this case because the case concerned time before the amendment.

⁵⁰ The European Court of Justice, cases C-92/92 and C-326/92.

⁵¹ This is interesting also in regard with the old KKO:1977-II-62 Case. The limitations in scope of application of Article 49 of the Copyright Act are the reason why the Swedish catalogue was not protected in that case. The old case is even mentioned by the Board in the opinion 1996:5. Obviously the Finnish Copyright Board did not wholly understand the new situation that was brought up by the joining into EEA in 1994 and into EC in 1995. The Board only stated that there was no obligation to give protection to foreign catalogues because the catalogue protection was not based on any international treaty such as the Bern Convention. Considering this point, the reasoning by the Vantaa District Court appeals more.

respective week. Therefore the Court revoked the District Court's sentence so that the Veikkaus pools coupons did not infringe Fixture Marketing Ltd.'s catalogue rights in any way. The sentence was not revoked as to the question of the handbook published by Veikkaus: it was an infringement.

The Supreme Court of Finland did not grant a permission to appeal, so this sentence gained *res judicata* (this sentence is legally binding). However, the EU adopted the EU Directive 96/6/EC on the legal protection of databases, which provided for a so-called *sui generis* protection of data-bases. Fixtures Marketing Ltd sued Veikkaus again, but this time on different grounds, the sui generis right.

4.1.2.6. The new case from 1999

The new case is based on similar facts except that the defendant has a fourth pools game called Moniveto. Currently all the matches in the Premier League and the first division are used in pools games while a smaller proportion of the matches in the two lower divisions is used. The case concerns the defendant's actions starting from the beginning of 1998.

The plaintiff, Fixtures Marketing Ltd, sued Veikkaus for infringing the right to the data-base it had according to the new Articles 49 (1) and (2) of the Copyright Act. The company argued that the fixture lists were a data-base that was 'arranged with a systematic and operational manner and that could be accessed individually' provided in Article 1 (2) of the EU Database Directive. In their view, the fixture lists were a result of an essential investment, as well.

Fixtures Marketing Ltd claimed that even one weekly pools coupon (or the fixtures in it) would be qualitatively and/or quantitatively taken an essential part of the database (Article 49 (2) of the Finnish Copyright Act and Articles 7 (1) and 7 (2) (a) of the EU Database Directive). The use during the whole season meets the requirements set in Article 7 (5) of the EU Database Directive.

The defendant denied the argument that the fixture lists would be a database meant in Articles 49 (1) and (2) of the Finnish Copyright Act or Article 1 (2) of the EU Database Directive. The company argued that the actual investment made to draw up the fixtures was not aimed to 'gather, check up and present the data'. The investment was necessary to the functions of the football leagues but it was not used for those three purposes that are mentioned in Article 7 (1) of the EU Database Directive. The database was a by-product (a spin-off) of the drawing up of the fixtures and did not require any additional investment.

The amount of money spent to draw up the fixtures is not effected by the licence incomes that relate to the use of fixtures in news papers, for example, wrote the defendant. The investment is necessary and inevitable cost of organising a football league. Therefore, the demanded protection under Article 7 of the EU Database Directive, should it be given to the fixtures, would not encourage investments to create databases as the directive is supposed to do, but would be useless.

The defendant stated that the sui generis protection under the EU Database Directive does not protect the facts or the data that can be found in the database, but the investment. The purpose of the EU Database Directive is not to monopolise the use of data. It is allowed to re-gather the generally available data and re-create the original database. The second data-base would then enjoy sui generis protection. In other words, it is possible that two identical protected databases exist.

The defendant relied on the old sentence of the Helsinki Court of Appeal and the res judicata thereof and stated that the pools coupons should be evaluated separately like the Helsinki Court of Appeal had done in its final decision. The facts are still the same as in the old case. One weekly pools coupon can not be an essential part of a database.

The EU Database Directive is adopted to prevent inappropriate exploitation of investment made in creation of data-bases, argued Veikkaus. Such exploitation could happen if someone would try to earn money with using someone else's database. Veikkaus denied having used the database when it gathered the data. The creator's right do not extend to data and in this case the data had even become independent from the original data-base because it was widely used. Therefore the fixtures could not be protected. An opposite decision would create a new kind of right and be in conflict with the preamble (paragraphs 45 and 46) of the EU Database Directive.

The parties of the case do not compete in the same market since Veikkaus has a pools monopoly in Finland. Therefore the use of fixtures can not be inappropriate exploitation.

The plaintiff argued that the creation of the data in the fixtures can not be distinguished from the obtaining [earlier I have used the word 'gathering'] of them like the defendant has done, because the same person has created and obtained the information. All investments made to the creation of the data-base are used to obtain and check up the data. The database is presented in electric form and the investment aimed to this presentation alone meets the requirements of Article 7 (1) of the EU Database Directive. The fixtures are often updated during the season, but that is irrelevant because the final fixtures always depend on the data-base: the teams themselves may not decide the time and the place of a match.

The possibility that the data is obtained from other sources than the original data-base is irrelevant. The data-base protection is not consumed by the first publication of the data, which can be read from Article 7 (2) of the EU Database Directive. The fact that Veikkaus is a monopoly in Finland is irrelevant because the unlicensed use of fixtures reduces the plaintiff's possibilities to get licence payments from Finnish companies that provide pools games on the internet, for example.

4.1.2.7. The Copyright Board

The Finnish Copyright Board gave the District Court a non-binding opinion (2001:7) in which it stated that the Articles 49 (1) and (2) of the Copyright Act protected even databases that do not meet the

requirements in Article 1 (2) of the EU Database Directive, because no such requirements can be found in Finnish legislation. The EU Database Directive allows this. The only requirement in Articles 49 (1) and (2) of the Copyright is that the investment has to have been made to obtain, check up and present the data.

The Board found, on the basis of the above-mentioned sentence of the Helsinki Court of Appeal from 1998, that the fixture lists form a database meant in Articles 49 (1) and (2) of the Copyright Act, but did not give an answer to the question of whether Veikkaus had infringed the plaintiff's rights, because the Board did not want to assess questions that pertain to the evidence presented to the court in the case. The Board also noted that the case was essentially the same as the old case that had already been ruled by the sentence of the Helsinki Court of Appeal. To the question as to what kind of meaning Article 7 (5) of the EU Database Directive had in this case the Board stated, in my view rather strangely, that the article could not have such an interpretational meaning that the use of fixtures in pools would be illegal in the light of Articles 49 (1) and (2) of the Copyright Act, because the norm of Article 7 (5) was not implemented in the Finnish statutory law (in Article 49 of the Copyright Act, for example).⁵²

4.1.2.8. The ECJ

The Vantaa District Court referred the case to the ECJ presenting the following questions:

- 1) Can the requirement in Article 7 (1) of the EU Database Directive, concerning the demand that the purpose of the investment has to have been to create the database, be interpreted so, that the obtaining of the data and the investment thereto mean in this case the investment that is targeted into the drawing up of the fixtures themselves? Does the actual investment made to draw up the fixture lists contain investment that is not taken into account when the criterion of the protection is assessed?
- 2) Is the goal of the directive to keep others than the creators of the fixtures from using the fixtures in pooling activities or to other commercial purpose without permission?
- 3) Is the proportion of the fixture lists used by Veikkaus a qualitatively and/or quantitatively essential part of the database in regard to the fact that during the whole season only fixtures needed for the next weekly pools coupon are used in the coupons and that during the whole season the knowledge of the matches is obtained and checked up from other sources than the creator of the database?

⁵² In my view, national law must be interpreted in the light of the EC law and a directive can even have a so-called direct effect, which makes it possible for member state citizens to rely on un-implemented community law. On the other hand, in this case the direct effect would be horizontal, because both the plaintiff and the defendant are private companies. The European Court of Justice has rejected the possibility of horizontal direct effect of directives.

4.1.3. BHB Case in the U.K.

The BHB and Others managed the horse racing industry in the UK and in various capacities compiled and maintained the BHB database which contained a large amount of information supplied by horse owners, trainers, horse race organisers and others involved in the racing industry. The database contained information on *inter alia* the pedigrees of some one million horses, and pre-race information on races to be held in the UK. That information included the name, place and date of the race concerned, the distance over which the race was to be run, the criteria for eligibility to enter the race, the date by which entries must be received, the entry fee payable and the amount of money the racecourse was to contribute to the prize money for the race.

Weatherbys Group Ltd., the company which compiled and maintained the BHB database, performed three principal functions, which led up to the issue of pre-race information. Firstly, the company registered information concerning owners, trainers, jockeys and horses and records the performances of those horses in each race. Secondly, the company decided on weight adding and handicapping for the horses entered for the various races. Thirdly, the company compiled the lists of horses running in the races, which activity was carried out by its own call centre, manned by approximately 30 operators who recorded telephone calls entering horses in each organised race.

The identity and status of the person entering the horse and whether or not the characteristics of the horse meet the criteria for entry to the race were then checked. The entries were provisionally published, following those checks. The trainer had to confirm the horses' participation by telephone by declaring it the day before the race at the latest in order to take part in the race. The operators had to ascertain then whether or not the horse could be authorised to run the race in the light of the number of declarations already recorded. A central computer then allocated a saddle cloth number to each horse and determined the stall from which it would start. The final list of runners was published the day before the race.

The BHB database contained essential information not only for those directly involved in horse racing but also for radio and television broadcasters and for book makers and their clients. The cost of running the BHB database was approximately 4 million pounds per annum. The fees charged to third parties for the use of the information in the database covered about a quarter of the amount.

The database was accessible on the Internet site operated jointly by BHB and Weatherbys Group Ltd. Some of its contents were also published in the BHB's official journal each week. The contents of the database, or of certain parts of it, were also made available to Racing Pages Ltd., a company jointly controlled by Weatherbys Group Ltd. and the Press Association, which then forwarded data to its various subscribers, including some book makers, in the form of a Declarations Feed, the day before a race. Satellite Information Service Ltd. (SIS) was authorised by Racing Pages to transmit data to its own subscribers in the form of a raw data feed (RDF). The RDF included a large amount of information, especially the names of the horses running in the races, the names of the jockeys, the saddle cloth numbers and the weight of each horse. The names of the runners in a particular race were made

available to the public during the course of the afternoon before the race through the newspapers and the Ceefax and Teletext services.

William Hill, which was a subscriber to both the Declarations Feed and the RDF, was one of the leading providers of off-course book making services in the UK, to both UK and international customers. It launched an on-line betting service on two Internet sites. Those interested could use these sites to find out what horses were running in which races at which racecourse and what odds were offered by William Hill. The information displayed on William Hill's Internet sites was obtained firstly from newspapers published the day before the race and secondly from the RDF supplied by SIS in the morning of the race.

According to the order for reference, the information displayed on William Hill's Internet sites represented a very small proportion of the total amount of data on the BHB database, given that it concerned only the following matters: the names of all the horses in the race, the date, time and/or name of the race and the name of the racecourse where the race would be held. Moreover, the horse races and the lists of runners were not arranged on William Hill's Internet sites in the same manner as in the BHB database according to the order for reference.

4.1.3.1. The Court

The BHB and Others brought proceedings against William Hill in the High Court of Justice of England and Wales, Chancery Division, alleging infringement of their sui generis right. They contended (1) that each day's use by William Hill of racing data taken from the newspapers or the RDF was an extraction or re-utilisation of a substantial part of the contents of the BHB database, contrary to Article (7) of the Database Directive, and (2) that the individual extracts should be prohibited under Article 7 (5) of the Database Directive even though they made by William Hill were not substantial. The High Court of Justice ruled in a judgment of 9 February 2001 that the action of the BHB and Others was well founded, and William Hill appealed to the referring court.

4.1.3.2. The ECJ

In the light of the problems of interpretation of the Database Directive, the Court of Appeal decided to stay proceeding and referred the following questions to the European Court of Justice for a preliminary ruling:

(1) May either of the expressions:

- substantial part of the contents of the database; or
- insubstantial parts of the contents of the database

in Article 7 of the Directive include works, data or other materials derived from the database but which do not have the same systematic or methodical arrangement of and individual accessibility as those to be found in the database?

(2) What is meant by obtaining in Article 7(1) of the Directive? In particular, are the [facts and matters

in paragraph 14] above capable of amounting to such obtaining?

- (3) Is verification in Article 7(1) of the Directive limited to ensuring from time to time that information contained in a database is or remains correct?
- (4) What is meant in Article 7(1) of the Directive, by the expressions:
 - a substantial part, evaluated qualitatively ... of the contents of the database? And
 - a substantial part, evaluated quantitatively ... of the contents of that database?
- (5) What is meant in Article 7(5) of the Directive, by the expression insubstantial parts of the database?
- (6) In particular, in each case:
 - does substantial mean something more than insignificant and, if so, what?
 - does insubstantial part simply mean that it is not substantial?
- (7) Is extraction in Article 7 of the Directive limited to the transfer of the contents of the database directly from the database to another medium, or does it also include the transfer of works, data or other materials, which are derived indirectly from the database, without having direct access to the database?
- (8) Is reutilisation in Article 7 of the Directive limited to the making available to the public of the contents of the database directly from the database, or does it also include the making available to the public of works, data or other materials which are derived indirectly from the database, without having direct access to the database?
- (9) Is reutilisation in Article 7 of the Directive limited to the first making available to the public of the contents of the database?
- (10) In Article 7(5) of the Directive what is meant by acts which conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database? In particular, are the facts and matters in paragraph [17-19] above in the context of the facts and matters in paragraph [15] above capable of amounting to such acts?
- (11) Does Article 10(3) of the Directive mean that, whenever there is a substantial change to the contents of a database, qualifying the resulting database for its own term of protection, the resulting database must be considered to be a new, separate database, including for the purpose of Article 7(5)?

4.2. Issues

4.2.1. Creating Data

Regarding the court decisions addressing that investment in creating data would not be recognised as

substantial investment, the court appeared to answer two questions at the same time. Local courts asked the ECJ; (1) whether or not ‘obtaining’ defined in Article 7 (1) of the Database Directive includes ‘creating’, and (2) whether or not the ‘investment’ defined in Article 7 (1) of the Database Directive should be interpreted as investment directly aimed at making databases.

4.2.1.1. Definition of ‘obtaining’

The court concluded that ‘obtaining’ data excluded ‘creating’ data within the meaning of Article 7 (1) of the Database Directive. The court stated as:

... the obtaining ... of a database must, ..., be understood to refer to the resources used to seek out *existing independent materials and collect them in the database*, and not to the resources used for the creation as such of independent materials. As Svenska Spel and the German Government point out, the purpose of the protection by the sui generis right provided for by the directive is to promote the establishment of storage and processing systems for *existing information* and not the creation of materials capable of being collected subsequently in a database [emphasis added].⁵³

The court explained then what the basis of the reasoning was as:

That interpretation is backed up by the 39th recital of the preamble to the directive,⁵⁴ according to which the aim of the sui generis right is to safeguard the results of the financial and professional investment made in obtaining and collection of the contents’ of a database. ... [A]ll the language versions of the 39th recital support an interpretation which excludes the creation of the materials contained in a database from the definition of obtaining.⁵⁵

The interpretation appears very reasonable however left some points to be addressed in the meantime. It is not always easy to distinguish conduct of ‘creating’ data from ‘obtaining’ data. For instance, is a scientific datum induced from natural phenomena recognised as ‘created’ or ‘obtained’? It appears that the ECJ recognises it as ‘created’ judging from the decisions. It is open to question, however, whether or not such a datum should be acknowledged in that manner, considering the purpose of the Database Directive on the grounds of its Recital 9th, 10th and 12th.⁵⁶

⁵³ Para. 24 of the decision on *Svenska Spel* case para. 34 of the decision on *Veikkaus* case; and para. 31 of the decision on the *BHB* case.

⁵⁴ The 39th recital defines as follows:

Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of database against certain acts by a user or competitor;

⁵⁵ Para. 25 of the decision on *Svenska Spel* case, para. 35 of the decision on *Veikkaus* case; and para 32 of the decision on the *BHB* case.

4.2.1.2. Investment directly aimed at making databases

The court did not express the opinion concerning the issue however it implied much between the lines of the judgment. Initially, the issue is whether or not if by-products enjoy the sui generis provided Article 7 of the Database Directive. Although some considered that the ECJ embraced ‘spin-off’ theory due to the decisions by the ECJ,⁵⁷ in my view, the decisions should be read in a different manner.

It is fairly difficult to draw a line between a database directly aimed at making as a database and a database as by-product, nor is it practical for the courts to do so. Accordingly, the court left the issue open on purpose, in my opinion. If the court intended to make the point clear, they could have stated in the manner that it was necessary for the court to recognise a direct link between the investment and the database at issue in order to invite the sui generis protection provided in Article 7 of the Database Directive.

Rather, the court appears to stand in the position not to allow anybody to monopolise newly created databases by the sui generis protection from the perspective of the competition law.⁵⁸ For, much information could be protected as databases should such ‘created’ databases are to be protected on the basis of the Database Directive. The position of the ECJ should be submitted considering the issue of free access to information, or otherwise nobody can reach any information freely, which costs societies too much.

4.2.1.3. Summary

The ECJ did not appear to employ the ‘spin-off’ theory. In my view, the court applied different criteria based on the competition law to the cases. The ‘spin-off’ theory appeals much because it serves the purpose of the Database Directive.⁵⁹ Moreover, the theory reasonably restricts the application of the sui

⁵⁶ Recitals (9), (10) and (12) of the EU Database Directive illustrate as follows:

(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;

(10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;

(12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection for the rights of makers of databases;

One should invest in order either ‘creating’ or ‘obtaining’ a scientific datum induced from natural phenomena. In my view, it would be contradictory to the purpose of the Directive if the ECJ excludes such a datum from the scope of sui generis protection.

⁵⁷ See, Mark Davison & Bernt Hugenholtz, Football fixtures, horse races and spin-offs: the ECJ domesticates the database right, EIPR 2005-3.

⁵⁸ For example, RTE v. Commission of the European Communities, European Court of Justice, 6 Apr. 1995, 1 C.E.C. 400, (Magill case) where the broadcasters’ behaviour was an abuse of a dominant position in the sense of Article 86 of the EEC Treaty according to the European Commission, which was supported by the ECJ.

⁵⁹ Recitals (9), (10) and (12) of the Directive provided in the above.

generis protection. Unnecessary restriction of free access to information prevents societies from being developed in a right direction. This thought behind the theory should be strongly submitted; however it simply does not appear that the ECJ employed the theory in the judgments.⁶⁰

4.2.2. Economic Value

In reply to the question ‘what is meant in Article (7) of the directive, by the expressions [such like] a substantial part, evaluated qualitatively ... of the contents of that database’,⁶¹ the ECJ dismissed the argument whether or not the data had economic value of data in determination of whether or not the sui generis right of the data was infringed in the decision of BHB case as:

The expression substantial part, evaluated qualitatively’, of the contents of a database refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, *regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database* [emphasis added].⁶²

and concluded as:

... the intrinsic value of the data affected by the act of extraction and/or re-utilisation *does not constitute a relevant criterion for assessing whether the part in question in substantial, evaluated qualitatively*. The fact that the data extracted and re-utilised by William Hill are vital to the organisation of the horse races which BHB and Others are responsible for organising *is thus irrelevant to the assessment whether the acts of William Hill concern a substantial part of the contents of the BHB database* [emphasis added].⁶³

While it was one of the highlighted issues whether or not the data re-utilised by William Hill had substantial economic value in the BHB case, where Justice Laddie stated his opinion as:

... the significance of the information to the alleged infringer may throw light on whether it is an important or significant part of the database.⁶⁴

⁶⁰ A datum induced from natural phenomena should be a subject matter of sui generis protection, while a telephone directory should not be protected, according to the spin-off theory. However, it does neither seem that the ECJ recognised such a datum as a subject matter to be protected by the Directive, nor mentioned that a telephone directory should not be protected by the Directive. Rather, in my view, the court appeared to imply that such a telephone directory could be a subject matter to invite the sui generis protection. It is interesting to compare the reasoning of the judgment on the Deutsche Telekom by the German Supreme Court, which concluded that the telephone directories invited a sui generis protection, with the reasoning of the ECJ’s decisions.

⁶¹ (4) of para. 21 of the decision of the BHB case.

⁶² Para. 71 of the decision of the BHB case.

⁶³ Para. 78 of the decision of the BHB case.

⁶⁴ HC 2000 1335, judgment of 9 Feb. 2001, para 52.

the ECJ well confined the issue to be answered and the manner should be submitted how the court addressed the issue.

4.3. Conclusions

Some Member States have fairly competitive chemical or pharmaceutical industries in the EU. It will be once again a highlighted argument whether or not a database produced by such industries is ‘created’, since the ECJ did not make it clear the point that a scientific datum induced from natural phenomena recognised as ‘created’ or ‘obtained’. These industries substantially invest to make such databases without doubt. Perhaps a guideline by the European Commission, such as the ‘spin-off’ theory, is expected in near future.

The decisions by the ECJ disclosed one of the problems of sui generis protection provided Article 7 of the EU Database Directive. Many Member States implemented the sui generis protection as a neighbouring right within the framework of the copyright act,⁶⁵ though ‘the sui generis right was transformed from an ex post remedy rooted in notions unfair competition into a powerful intellectual property right providing ex ante protection against the world’.⁶⁶

Now, it appears that the ECJ has to consider the correlation between the sui generis right and the monopoly issues such as compulsory licensing. Non-EU Member States could consider this point; it might be better to protect databases without creativities not as a neighbouring right under the copyright act in the same manner as the EU Member States do but by unfair competition law. It is not necessary for courts to consider the monopoly issues in the latter case. Yet, it is open to question whether or not databases without creativities should invite a legal protection outside the EU.

It is also very clear that ECJ substantially limited the scope of the sui generis protection by the rulings, which should be read that not all databases with a substantial investment invite the sui generis protection. It should be reviewed the scope of the protection under the catalogue rules in Nordic countries in accordance with the rulings, as my study in the previous chapter shows that Nordic countries appears to award the broader protection towards databases on the basis of the catalogue rules compared to the sui generis protection of the EU Database Directive which scope is now much more restricted.

5. Case Law after the Ruling by the ECJ

Some courts in the Member States, including Fixtures Marketing Ltd. v. Oy Veikkaus Ab at the Vantaa

⁶⁵ For example, Article 87 of the German Copyright Act; Article 49 of the Swedish and Finnish Copyright Act; Article 71 of the Danish Copyright Act.

⁶⁶ B. Hugenholtz, Abuse of Database Right: Sole-source information banks under the EU Database Directive, <http://www.ivir.nl/publications/hugenholtz/abuseofdatabaseright.html>.

⁶⁷ C-46/02.

District Court in Finland,⁶⁷ referred to their cases to the European Court of Justice (hereinafter ‘ECJ’) in order to receive an opinion regarding the interpretation of the sui generis protection. The decisions by the ECJ were delivered in November 2004 after a few years’ review.⁶⁸ The Vantaa District Court has concluded the case in accordance with the decision by the ECJ and Danish Maritime and Commercial Court has ruled the new case, Ofir v. Home⁶⁹ since then.

5.1. Ofir v. Home in Denmark

The Danish Maritime and Commercial Court ruled that Ofir’s (hereinafter, the ‘defendant’) deep linking to Home’s (hereinafter, the ‘plaintiff’) database neither infringed Article 71 of the Danish Copyright Act nor violated Article 1 of the Act on Marketing Practice, as the defendant’s database was not a threat to plaintiff’s market share.

5.1.1. Facts of the Case

The plaintiff was a subsidiary company of the Den Danske Bank, which ran a franchise chain composed of the plaintiff, the franchiser and the real estate brokers as franchisee, who were independent legal units. The plaintiff made marketing tools and other facilities for the brokers, including the internet home page, home dk.

The defendant was a subsidiary company of the media company Søndag Avisen A/S. One of its main areas of business was Internet portals, which offered advertising in the form of banner advertisements. On June 1998, Søndags Avisen contacted the plaintiff and offered free advertising amounting to 250,000 crowns in its newspaper, in exchange for the right to get data from the plaintiff, which would be used in the real estate property section of the defendant’s web page, ofir.dk, which had a search engine which enabled the user to search in its database, which contained a nation-wide property index. The plaintiff was not interested because it would be self-cannibalising: its marketing strategy was not in synergy with the defendant, which utilised banner advertising.

The plaintiff had its own webpage, which had links to its franchisee’s homepages, and to its chain of real estate broker. Moreover, the plaintiff’s webpage contained no banner advertisements and its database offered an extensive search possibility such as price, location, number of rooms, lot area, house area, net and gross price. The homepage was created in 1998 and subsequently revised in 2003 and 2005.

The defendant’s homepage was launched in accordance with the Danish government’s national policy of promoting real estate trading. The website used banner advertisings and contained other portal categories, such as cars, scooters and so on. It had numerous criteria and included all available residences in Denmark with information obtained from many property brokers and private individuals.

⁶⁸ Press release No. 89/04 (9 Nov. 04).

⁶⁹ Commercial and Maritime Law Court, 24 Feb. 2006.

The defendant's robotic search engine obtained 13 essential information on a daily basis from the plaintiff's database. The database was arranged and compiled without favouring any particular broker.

When the user clicked on the property, the real estate broker's name was shown and the user was transferred either to the broker's homepage or directly to the property. The data were taken from the broker and contained the mailing address, price, post number, zip code, cash price, down payment, gross and net price, and residential or commercial area, etc. In order to identify the property, it had an ID and internal information. The defendant did not only deep link; it also crawled and indexed to the plaintiff's website.

The plaintiff felt that the defendant's homepage would take a slice of its revenue and claimed that it cost them nearly 20 million crowns to build the homepage and the database system, to collect and to control the data and to compile the information in a systematic way. The franchisee provided the plaintiff the information, which was then controlled and put into the CASE system, which automatically registered the property and made financial calculations. The franchisee paid 875 crowns per residence it advertised regardless of whether or not it was sold. The plaintiff received 12 million crowns annually as advertising income, which was almost 25% of the total profit of the plaintiff.

In order to prevent the defendant from taking away the plaintiff's market share and deep linking to its homepage, the plaintiff told the defendant to desist from further data transfer and deep linking in 1998.

In spite of the stop and desist letter, the defendant continued its linking policy after receiving an assurance from one of the foremost authorities in the field of IT Law in Denmark, Professor Mads Bryde Andersen, University of Copenhagen, that the defendant's deep linking did not violate any rules nor did harm any business practice. The plaintiff then filed a case against the defendant at the Danish Maritime and Commercial court asking; (1) to examine whether or not the defendant violated Article 71 of the Danish Copyright Act for its continuous and systematic extraction of information from plaintiff's database, (2) to consider the defendant in breach of the marketing law for deep linking and bypassing the plaintiff's front page, and (3) to order the defendant to pay the amount of 250,000 crowns as damage.

5.1.2. Argument by the Plaintiff

The plaintiff argued that the defendant was in breach of Article 71 of the Danish Copyright Act, by extracting a number of information from the plaintiff's database, and claimed that plaintiff made 'qualitatively and/or quantitatively a substantial investment in control and presentation of the contents of its database' stated in Article 7(1) of the EU Database Directive. Moreover, the plaintiff contended that the defendant did not act in 'good faith' while Article 22 of the Danish Copyright Act implied that using work of other people must be done in accordance with proper usage and to the extent required for the purpose.

The plaintiff insisted that the Directive should be recognised as violated even when only an insubstantial part of a database was extracted as long as the extraction and systematic extraction and /or re-utilization

of the insubstantial parts occurred repeatedly and systematically as was in the Newsbooster case. The plaintiff also argued that the defendant was also in direct competition with the plaintiff because the former offered the same products, which resulted in loss of the plaintiff's income and withdrawal of advertisement revenues from franchisee.

5.1.3. Argument by the Defendant

The defendant argued that the four judgments,⁷⁰ delivered by the European Court of Justice in 2004, concerning the matter of precise scope of the sui generis right provided in the EU Database Directive, were to be understood that the Directive reserved the sui generis protection for such databases whose creation required a substantial investment.

The court held that 'the purpose of the protection [wa]s to promote the establishment of the storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in database'. The court further stated that the efforts to create such list were 'linked to the creation of the data contained in the database at issue and [we]re investments which relate[d] to the organizations.

The court held that 'the definition of "substantial investment" cover[ed] only the work involved in seeking, collecting, verifying and presenting existing materials and not the resources used to create the materials which made up the database.' In addition, the expression "investment in ... the obtaining ... of the contents' of a database" in Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.

The ECJ also ruled that the finding and collecting of data which make up a football fixture list do not require a particular effort on the part of the professional leagues. Those activities are indivisibly linked to the creation of those data, in which the leagues participate directly as those responsible for the organization of football league fixtures. Obtaining the contents of a football fixture list does not require any investment independent of that required for the creation of the data contained in that list and is therefore not protected under Directive 96/9/EC. Thus the courts made a clear distinction between the efforts made to create the database as such and creating the materials contained in the database where the efforts are not covered by the sui generis protection.

The defendant also contended that the act of retrieval by the search engine was not in contradiction with

⁷⁰ C-46/02, C-203/02, C-338/02 and C-444/02.

the EU Database Directive and was supported by the abovementioned four ECJ rulings, specifically, in the British Horseracing Board Ltd. v. William Hill Organization Ltd. (hereinafter ‘BHB’ case), where it was clearly stated, ‘that protection did not cover search in the database where the database maker had chosen to make it available to the public’.

The defendant questioned whether or not the amount of plaintiff’s investment was ‘substantial’ to the same degree as required by the EU Database Directive 7(1).

The defendant cited the judgment by the ECJ in the BHB case as:

‘... Accordingly, it is not relevant, in an assessment of the scope of the protection of the sui generis right, that the act of extraction and/or re-utilisation is for the purpose of creating another database, whether in competition with the original database or not, and whether the same or a different size from the original, nor is it relevant that the act is part of an activity other than the creation of a database. The 42nd recital of the preamble to the directive confirms, in that connection, that “the right to prohibit extraction and/or re-utilisation of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment”’. ⁷¹

The defendant pointed out the expression ‘investment’ was clearly clarified by the ECJ in the same BHB judgment as:

‘the expression “investment in ... the obtaining ... of the contents” of a database must be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the sui generis right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.’ ⁷²

5.1.4. Court Decision

The court concluded as:

‘... it should be an ordinary practice that search engines make available deep links which allow the user to access the required information in an effective manner. Parties, including providers in the Internet, should thus expect that search services will establish links to these pages which are published.’

⁷¹ Note 47.

⁷² Note 31 of the judgment of the BHB case.

The plaintiff's database was merely a derivative of its main business activity, which was selling real estate properties. The materials in the plaintiff's database consisted merely of existing information materials that had been sent by franchisee and put into the database by the franchiser. In other words, the database was merely a spin-off of the work done in putting together the housing lists.

The court also found that the two parties were neither in the competing position, nor did the existence of the defendant's database constitute a threat to plaintiff's market share, because the number of visitors to defendant's website would have decreased substantially if the information from the plaintiff's database had not been placed in public. Therefore, the defendant neither infringed Article 1 of the Act on Marketing Practice, nor conducted unfair marketing practice, because the defendant provided the user the opportunity to link directly to plaintiff's front page or directly to the advertised property.

5.1.5. Analysis

It appeared that the court did not take a part of the statute of Article 71 of the Copyright Act, which provided '..., in which a great number of items of information has been compiled, ...' into consideration in the judgment. For, the court would provide a legal protection towards the database should the court considered the full statute of Article 71 as the database indeed contained a great number of items of information.

The defendant pointed out that the EU Database Directive was meant to total harmonization and the Directive should be implemented in that manner on the basis of the rulings by the ECJ in 2004. EU Member States should follow the same direction as the ECJ drastically limited the scope of the protection by the sui generis right. However, current statute of Article 71 of the Danish Copyright Act does not seem to be updated. Standing on the point of view, the court decision and the defendant's argument should be strongly submitted.

5.2. Fixtures v. Veikkaus⁷³ in Finland

5.2.1. Argument by the Plaintiff

The plaintiff claimed that the ECJ ruling had little relevance in the Finnish trial because the ECJ had rephrased the question posed by the Vantaa District Court. According to the plaintiff, the ECJ considered the formation of a database as a two-phase process: the individual fixtures were drawn up firstly and then the database was collected secondly.⁷⁴ If the question itself contained the idea that the investment was made to something that was independent and separate from the database, the answer [given by the ECJ] was natural. An investment to something other than the database was not protected.

The plaintiff invoked Paragraph 39 of the ECJ ruling where the ECJ found that the person creating the

⁷³ Vantaa District Court, 14 Nov. 2005.

⁷⁴ This may have been caused by the way in which the Swedish court phrased its question of preliminary ruling.

data might enjoy the sui generis protection, if this person proved that a substantial investment was made in the collection, verification and presentation of the data and that was independent from the investment that was made in the creation of the data. The plaintiff insisted that it was the very substantial investment to verify the fixtures during the season.

The plaintiff maintained that the ECJ rephrased the question and answered to the question of whether the investment made to the creation of the database have to be taken into consideration in determination of whether or not the investment was substantial while the Vantaa District Court asked for a definition of ‘collecting the contents of the database’.

The plaintiff claimed some 96,000 Euro.

5.2.2. Argument by the Defendant

The defendant simply summarised the most important aspects of the ECJ rulings, claiming some 338,000 Euro for the attorneys’ fee.

5.2.3. Court Decision

The Vantaa District Court first summarised the ECJ ruling. It then noticed that the ECJ had rephrased the preliminary question but found that the difference between the collecting and the creation of data had been the issue at hand already in the preparatory stages of the process at the district court, where the defendant considered that the collecting of data was collecting of existing data and results in a systematic entity. The plaintiff, on the other hand, maintained that the creation and the collection could not be separated when the both were done by the same person. The court found it obligated to be in favour of the defendant on the grounds of the ECJ ruling. The plaintiff was ordered to compensate the defendant attorneys’ fee with just 100,000 Euros plus VAT.

The court also found that the facts presented in the ECJ were sufficiently clear considering that there were several similar cases pending in the ECJ, which had taken a stand in a question of facts of the case, which was not appropriate in the plaintiff’s opinion. The plaintiff had also stated that the ECJ’s ruling did not concern the verification of the data after the original collection was made and that the court should take a stand on that issue.⁷⁵

5.2.4. Analysis

The court did not take Article 49 (1) of the Copyright Act into account, which stated ‘... production in which *a large quality of data...*’ in the judgment in the same manner as in the *Ofir v. Home* case. The court decision, however, should be submitted on the basis of the ECJ’s ruling. Here, it could be

⁷⁵ The plaintiff has reported that it was ‘dissatisfied’ with the whole ruling and the defendant has done the same but limited its ‘report of dissatisfaction’ to the lawyers’ fees. The ‘report of dissatisfaction’ is the first phase in the appeal. It must be done within seven days from the date of the ruling. Once it is made, the party having reported its dissatisfaction may file an appeal within 30 days from the date of the ruling.

questioned again whether or not the statute of Article 49 (1) complies with the EU Database Directive after the scope of the sui generis protection was restricted by the ECJ.

6. Conclusions

In my view on the basis of the study, it is unnecessary for the EU Member States in the Nordic countries to keep the current provision as it is. Naturally, it is not clearly mentioned that the EU Database Directive is meant to the ‘minimum harmonisation’ but ‘total harmonisation’. However, the decisions delivered by the ECJ in November 2004 drastically restricted the scope of the subject matters protected by the sui generis protection under the EU Database Directive, which appeared that such databases with ‘a large amount of information items’ but without ‘substantial investment’ would not invite the sui generis protection.⁷⁶

However, it should be noted that it was nothing wrong for the Nordic countries to award the broader protection as long as they protected databases with a substantial investment in my view. The issue has been raised after the ECJ confined the scope of the sui generis protection. Prior to the rulings, the issues remained in grey area whether or not the scope of the sui generis protection should be defined and whether or not the EU Database Directive was meant to be total harmonisation.

The Danish Maritime and Commercial Court, however, interpreted after the decisions by the ECJ that the EU Database Directive was aimed for the total harmonisation, while the Finnish Vantaa Court did not refer to the issue in the judgment. Moreover, Swedish Supreme Court is now expected to rule the Fixture case in accordance with the rulings by the ECJ. As the courts interpreted the EU Database Directive in the manner mentioned in the study, in my opinion, it is high time for these countries to omit the part of the provision in dispute. It is not ideal that the court addresses one way and the provision does the other in a jurisdiction.

⁷⁶ Or otherwise, the Fixture’s database should be protected, because it obviously contained ‘a large amount of information items’.