JUDGMENT OF THE COURT (Grand Chamber)

9 November 2004 *

In Case C-46/02,

REFERENCE for a preliminary ruling under Article 234 EC,

from the Vantaan käräjäoikeus (Finland), by decision of 1 February 2002, received at the Court on 18 February 2002, in the proceedings

Fixtures Marketing Ltd

v

Oy Veikkaus Ab,

* Language of the case: Finnish.

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrars: M. Múgica Arzamendi and M.-F. Contet, Principal Administrators,

having regard to the written procedure and further to the hearing on 30 March 2004,

after considering the observations submitted on behalf of:

— Fixtures Marketing Ltd, by R. Kurki-Suonio, asianajaja,

— Oy Veikkaus Ab, by S. Kemppinen and K. Harenko, asianajajat,

— the Finnish Government, by E. Bygglin and T. Pynnä, acting as Agents,

— the Belgian Government, by J. Devadder, acting as Agent, and P. Vlaemminck, advocaat,

— the German Government, by W.-D. Plessing, acting as Agent,

— the French Government, by C. Isidoro, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Portuguese Government, by L. Fernandes and A.P. Matos Barros, acting as Agents,

— the Commission of the European Communities, by M. Huttunen and N.B. Rasmussen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the provisions of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20, 'the directive').

2 The reference was made in the course of proceedings brought by Fixtures Marketing Limited ('Fixtures') against Oy Veikkaus Ab ('Veikkaus'). The litigation arose over the use by Veikkaus, for the purpose of organising betting games, of information taken from the fixture lists for the English football leagues.

Legal background

The Community legislation

3 The directive, according to Article 1(1) thereof, concerns the legal protection of databases in any form. A database is defined, in Article 1(2) of the directive, as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.

4 Article 3 of the directive provides for copyright protection for databases which, 'by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation'.

5 Article 7 of the directive provides for a *sui generis* right in the following terms:

'Object of protection

1. 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 of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) "extraction" shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) "re-utilisation" shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a

database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community.

Public lending is not an act of extraction or re-utilisation.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their content.

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

The national legislation

6 Before its amendment by Directive 96/9, Article 49(1) of the tekijänoikeuslaki (copyright law) (Law No 404/1961), as amended by Law No 34/1991, provided that lists, tables, programmes and other similar works in which a large quantity of data is

combined may not be reproduced without the consent of the author during a period of 10 years from the year in which the work is published.

7 The directive was implemented in Finnish law by Law No 250/1998 of 3 April 1998, which amended Law No 404/1961.

8 Article 49(1) of Law No 404/1961, as amended by Law No 250/1998, is worded as follows:

'The author

(1) of lists, tables, programmes or other similar works in which a large quantity of data is combined, or

(2) of a database, the obtaining, verification or presentation of which required substantial input,

has the exclusive right to stipulate the use of the whole or a substantial part, evaluated qualitatively or quantitatively, of the contents of the work by reproducing it and placing it at the disposal of the public.'

The main proceedings and the questions referred for a preliminary ruling

9 In England professional football is organised by the Football Association Premier League Ltd and the Football League Ltd. Fixture lists are drawn up for the matches to be played during the season, that is to say, around 2 000 matches during each season over a period of 41 weeks.

10 The preparation of those fixture lists requires a number of factors to be taken into account, such as the need to ensure the alternation of home and away matches, the need to ensure that several clubs from the same town are not playing at home on the same day, the constraints arising in connection with international fixtures, whether other public events are taking place and the availability of policing.

11 Work on the preparation of the fixture lists begins a year before the start of the season concerned. It is entrusted to a working group consisting, inter alia, of representatives of the professional leagues and football clubs and necessitates a certain number of meetings between those representatives and representatives of supporters' associations and the police authorities. A computer programme purchased from Sema is used for the work.

12 During the season, the fixture lists may be altered to take account of changes dictated by, for example, the requirements of the television companies, or by postponement of a day's league matches because of the weather.

13 The professional leagues are also responsible for verifying that matches are held, checking the players' licences and for the monitoring and announcement of the scores.

14 The activities of the Football League altogether account for a cost of around GBP2.3 million per year.

15 Veikkaus has the exclusive right to organise gambling activities in Finland. Those activities concern, inter alia, football fixtures. In that connection, Veikkaus uses, as objects of the various betting games, data concerning matches in English league football, and chiefly concerning matches in the Premier league and in Division One. Around 200 matches are used each week for the purposes of betting. In order to organise such betting, Veikkaus collects data regarding around 400 matches each week from the internet, newspapers or directly from the football clubs and checks its correctness from various sources. Veikkaus' annual turnover from betting on league football matches in England amounts to several tens of millions of euros.

16 In a judgment of 17 June 1996 (S 94/8994 No 5507) the Vantaan käräjäoikeus held that the fixture list was a list which contained a large quantity of data within the meaning of Article 49 of the copyright law and Veikkaus' activities infringed the protection such lists enjoyed. That judgment was set aside by a judgment of 9 April 1998 of the Helsingin hovioikeus (Helsinki court of appeal) (Finland) (S 96/1304 No 1145) which ruled that there had been no infringement of that protection. The Korkein oikeus (Supreme Court) refused leave to appeal against the judgment of the Helsingin hovioikeus.

17 After the database directive came into force, Fixtures brought an action before the Vantaan käräjäoikeus against Veikkaus alleging that Veikkaus had, since 1 January 1998, been unlawfully using the database constituted by the fixture lists drawn up by the English football leagues.

18 The Tekijänoikeusneuvosto (Copyright Council), which was requested by the referring court to give its opinion, stated that is not a precondition of protection under the Finnish legislation that a database should fulfil the definition in Article 1 (2) of the directive. On the basis of the abovementioned decision of the Helsingin hovioikeus, it stated that the fixture list constituted a database within the meaning of Article 49(1) of Law No 404/1961, as amended by Law No 250/1998, and that the obtaining, verification or presentation of its contents had required a substantial investment. However, it took the view that Veikkaus' action had not infringed the protection enjoyed by that database.

19 In the light of the uncertainty as to whether the fixture list at issue is a protected database, and if it is, as to the type of action which constitutes an infringement of the protection provided for by the directive, the Vantaan käräjäoikeus decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) May the requirement in Article 7(1) of the directive for a link between the investment and the making of the database be interpreted in the sense that the "obtaining" referred to in Article 7(1) and the investment directed at it refers, in the present case, to investment which is directed at the determination of the dates of the matches and the match pairings themselves and, when the criteria for granting protection are appraised, does the drawing up of the fixture list include investment which is not relevant?

(2) Is the object of the directive to provide protection in such a way that persons other than the authors of the fixture list may not, without authorisation, use the data in that fixture list for betting or other commercial purposes?

(3) For the purposes of the directive, does the use by Veikkaus relate to a substantial part, evaluated qualitatively and/or quantitatively, of the database, having regard to the fact that, of the data in the fixture list, on each occasion only data necessary for one week is used in the weekly pools coupons, and the fact that the data relating to the matches is obtained and verified from sources other than the maker of the database continuously throughout the season?'

The questions referred

Admissibility

20 The Commission of the European Communities has doubts about the admissibility of the reference for a preliminary ruling. It contends, first, that the order for reference does not give sufficient details of the relationship between Fixtures and the English football leagues, or of the basis and extent of Fixture's right to access to the database apparently created by those leagues. Second, it points out that the referring court has not made clear its view as to whether Veikkaus has extracted and/or re-utilised the contents of the database within the meaning of Article 7 of the directive.

21 It must be recalled that according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 39).

22 The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that possibility is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (*Albany*, cited above, paragraph 40).

23 In the present case, it appears from the observations submitted by the parties to the main proceedings and by the governments of the Member States pursuant to Article 23 of the Statute of the Court of Justice, that the information given in the order for reference enabled them to understand that the dispute arose over the use by Veikkaus, for the purpose of organising sporting bets, of information from the fixture lists prepared by the professional football leagues and that, against that background, the referring court has raised questions about the scope and extent of the *sui generis* right provided for by Article 7 of the directive.

24 Moreover, the information provided by the national court gives the Court of Justice sufficient knowledge of the factual and legislative context of the main proceedings to enable it to interpret the Community rules which are relevant to the situation which forms the subject-matter of the dispute.

25 It must be observed that the lack of detail in the order for reference about the relationship between the English football leagues and Fixtures did not, as the observations submitted in this case confirm, prevent the governments of the Member States and the Commission from understanding properly the subject matter and significance of the questions referred to the Court or from expressing a useful opinion on them. Nor does it affect the ability of the Court of Justice to give a useful answer to those questions to the national court.

26 As regards the failure to take a view, in the order for reference, as to whether the actions by Veikkaus amounted to extraction and re-utilisation, the second question of the referring court must, given the context in which it appears, be understood as seeking clarification of the scope of those two terms which serve to define the scope of the prohibitions laid down by Article 7(1) and (5) of the directive.

27 It follows that the request for a preliminary ruling is admissible.

The merits

28 As a preliminary point it must be observed that, according to the order for reference, the questions referred by the national court are based on the premiss that a list of football fixtures constitutes a database within the meaning of Article 49(1)(2) of Law No 404/1961, as amended by Law No 250/1998.

29 As that provision makes the protection it confers subject to the condition that there be substantial investment in the obtaining, verification or presentation of the contents of the database, the referring court essentially seeks to know, by its first question, what the expression 'obtaining ... the contents ... of a database' in Article 7 (1) of the directive means, that expression having been incorporated into the relevant provision of the Finnish legislation cited above. More specifically, the first question seeks to know whether investment by the maker of a database in the creation as such of the data must be taken into account in assessing whether the investment in the creation of that database was substantial.

30 Although that question refers only to investment in the obtaining of the contents of a database, it appears from the order for reference that the Vantaan käräjäoikeus is raising the question, in general, of the definition of protected database in relation to a football fixture list, as is apparent from paragraph 19 of this judgment.

31 Thus, in order to give a useful answer to the referring court, it is appropriate to deliver a more general ruling on the scope of Article 7(1) of the directive, which defines the extent of the protection conferred by the *sui generis* right.

32 Article 7(1) of the directive reserves the protection of the *sui generis* right to databases which meet a specific criterion, namely to those which show that there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of their contents.

33 Under the 9th, 10th and 12th recitals of the preamble to the directive, its purpose is to promote and protect investment in data 'storage' and 'processing' systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity. It follows that the expression 'investment in ... the obtaining, verification or presentation of the contents' of a database must be understood, generally, to refer to investment in the creation of that database as such.

34 Against that background, the expression 'investment in ... the obtaining ... of the contents' of a database must, as Veikkaus and the German and Netherlands Governments point out, 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.

35 That interpretation is backed up by the 39th recital of the preamble to the directive, 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. As the Advocate General points out in points 61 to 66 of her Opinion, despite slight variations in wording, all 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.

36 The 19th recital of the preamble to the directive, according to which the compilation of several recordings of musical performances on a CD does not represent a substantial enough investment to be eligible under the *sui generis* right, provides an additional argument in support of that interpretation. Indeed, it appears from that recital that the resources used for the creation as such of works or materials included in the database, in this case on a CD, cannot be deemed equivalent to investment in the obtaining of the contents of that database and cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial.

37 The expression 'investment in ... the ... verification ... of the contents' of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The expression 'investment in ... the ... presentation of the contents' of the database concerns, for its part, the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility.

38 Investment in the creation of a database may consist in the deployment of human, financial or technical resources but it must be substantial in quantitative or qualitative terms. The quantitative assessment refers to quantifiable resources and the qualitative assessment to efforts which cannot be quantified, such as intellectual effort or energy, according to the 7th, 39th and 40th recitals of the preamble to the directive.

39 In that light, the fact that the creation of a database is linked to the exercise of a principal activity in which the person creating the database is also the creator of the materials contained in the database does not, as such, preclude that person from claiming the protection of the *sui generis* right, provided that he establishes that the obtaining of those materials, their verification or their presentation, in the sense described in paragraphs 34 to 37 of this judgment, required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.

40 In those circumstances, although the search for data and the verification of their accuracy at the time a database is created do not require the maker of that database to use particular resources because the data are those he created and are available to him, the fact remains that the collection of those data, their systematic or methodical arrangement in the database, the organisation of their individual accessibility and the verification of their accuracy throughout the operation of the database may require substantial investment in quantitative and/or qualitative terms within the meaning of Article 7(1) of the directive.

41 In the case in the main proceedings, it must be observed that the human and technical resources described by the referring court and referred to in paragraph 11 of this judgment, are deployed for the purpose of determining, in the course of arranging football league fixtures, the dates and times of and home and away teams playing in the various matches in accordance with a set of parameters such as those set out in paragraph 10 of this judgment.

42 As Veikkaus and the German and Portuguese Governments submit, such resources represent an investment in the creation of the fixture list. Such an investment, which relates to the organisation as such of the leagues is linked to the creation of the data contained in the database at issue, in other words those relating to each match in the various leagues. It cannot, therefore, be taken into account under Article 7(1) of the directive.

43 Accordingly, it must be ascertained, leaving aside the investment referred to in the previous paragraph, whether the obtaining, verification or presentation of the contents of a list of football fixtures attests to substantial investment in qualitative or quantitative terms.

44 Finding and collecting the data which make up a football fixture list do not require any 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 organisation of football league fixtures. Obtaining the contents of a football fixture list thus does not require any investment independent of that required for the creation of the data contained in that list.

45 The professional football leagues do not need to put any particular effort into monitoring the accuracy of the data on league matches when the list is made up because those leagues are directly involved in the creation of those data. The verification of the accuracy of the contents of fixture lists during the season simply involves, according to the observations made by Fixtures, adapting certain data in those lists to take account of any postponement of a match or fixture date decided on by or in collaboration with the leagues. As Veikkaus submits, such verification cannot be regarded as requiring substantial investment.

46 The presentation of a football fixture list, too, is closely linked to the creation as such of the data which make up the list, as is confirmed by the absence of any mention in the order for reference of work or resources specifically invested in such presentation. It cannot therefore be considered to require investment independent of the investment in the creation of its constituent data.

47 It follows that neither the obtaining, nor the verification nor yet the presentation of the contents of a football fixture list attests to substantial investment which could justify protection by the *sui generis* right provided for by Article 7 of the directive.

48 The activities described in paragraph 13 of this judgment are unconnected with the drawing up of fixture lists. As Veikkaus points out, the resources used for those activities cannot, therefore, be taken into account in assessing whether there was substantial investment in the obtaining, verification or presentation of those fixture lists.

49 In the light of the foregoing, the answer to the first question referred should be that the expression 'investment in ... the obtaining ... of the contents' of a database as defined in Article 7(1) of the directive 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.

50 In the light of the foregoing, there is no need to reply to the other questions referred.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

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.

Signatures.