JUDGMENT OF THE COURT (Fourth Chamber)

9 October 2008 *

In Case C-304/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 24 May 2007, received at the Court on 2 July 2007, in the proceedings

Directmedia Publishing GmbH

v

Albert-Ludwigs-Universität Freiburg,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and G. Arestis, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Directmedia Publishing GmbH, by C. von Gierke, Rechtsanwältin,

— the Albert-Ludwigs-Universität Freiburg, by W. Schmid and H.-G. Riegger, Rechtsanwälte,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by F. Arenal, avvocato dello Stato,

— the Commission of the European Communities, by H. Krämer and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 7(2)(a) 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).

2 The reference has been made in the course of proceedings between Directmedia Publishing GmbH ('Directmedia') and the Albert-Ludwigs-Universität Freiburg following the marketing by Directmedia of a collection of verse compiled from a list of German verse titles drawn up by Mr Knoop, a professor at that university.

Legal context

3 Article 1(1) of Directive 96/9 provides that the aim of the directive is 'the legal protection of databases in any form'.

4 A database is defined, for the purposes of Directive 96/9, in Article 1(2) thereof, 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'.

5 Article 3 of Directive 96/9 provides for copyright protection for 'databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation'.

6 Article 7 of Directive 96/9, entitled 'Object of protection' provides for a *sui generis* right in the following terms:

'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 contents.

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.'

7 Article 13 of Directive 96/9, entitled 'Continued application of other legal provisions', states that that directive is to be without prejudice to provisions concerning inter alia 'laws on restrictive practices and unfair competition'.

8 Under Article 16(3) of Directive 96/9:

'Not later than at the end of the third year after [1 January 1998], and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the *sui generis* right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.'

The facts which gave rise to the dispute in the main proceedings and the question referred for a preliminary ruling

9 Mr Knoop directs the 'Klassikerwortschatz' (vocabulary of the classics) project at the Albrecht-Ludwigs-Universität Freiburg. That project led to the publication of *Freiburger Antholgie* (Freiburg Anthology), a collection of verse from 1720 to 1933.

10 That anthology is based on a list of verse titles drawn up by Mr Knoop which was published on the Internet under the heading *Die 1 100 wichtigsten Gedichte der deutschen Literatur zwischen 1730 und 1900* (The 1 100 most important poems in German literature between 1730 and 1900) ('the list of verse titles drawn up by Mr Knoop').

11 Following an introductory section, that list of verse titles, which is arranged according to the frequency with which the poem is cited in various anthologies, sets out the author, title, opening line and year of publication for each poem. That list is based on a selection of 14 anthologies chosen from a total of approximately 3 000, and was supplemented by the bibliographic compilation of 50 German-language anthologies by Ms Dühmert, *Von wem ist das Gedicht*? (Who wrote that poem?).

12 From those works, which contain some 20 000 poems, those poems were selected which are listed in at least three anthologies or are mentioned on at least three occasions in Ms Dühmert's bibliographic compilation. As a precondition for that statistical analysis, the titles and opening lines of the poems were standardised and a list of all verse titles was compiled. As a result of bibliographic research, both the works in which the poems were published and their date of composition were identified. This task took approximately two and half years, the costs of which, amounting to a total of EUR 34 900, were borne by the Albert-Ludwigs-Universität Freiburg.

13 Directmedia markets a CD-ROM, *1 000 Gedichte, die jeder haben muss* ('1 000 poems everyone should have'), which appeared in 2002. Of the poems on that CD-ROM, 876 date from the period between 1720 and 1900. 856 of those poems are mentioned also in the list of verse titles drawn up by Mr Knoop.

14 In selecting the poems for inclusion on its CD-ROM, Directmedia used that list as a guide. It omitted certain poems which appeared on that list, added others and, in respect of each poem, critically examined the selection made by Mr Knoop. Directmedia took the actual texts of each poem from its own digital resources.

15 Taking the view that, by distributing its CD-ROM, Directmedia had infringed both the copyright of Mr Knoop, as compiler of an anthology, and the related right of the Albert-Ludwigs-Universität Freiburg as 'maker of a database', Mr Knoop and the Albert-Ludwigs-Universität Freiburg brought an action for cessation and for damages against Directmedia. Their action also sought an order requiring it to deliver up for destruction any copies of its CD-ROM in its possession.

16 The court hearing the matter at first instance upheld that action. Its appeal having been dismissed, Directmedia lodged an appeal in law before the Bundesgerichtshof (Federal Court of Justice).

17 That appeal in law was dismissed in so far as it related to the order made against Directmedia on the basis of Mr Knoop's heads of claim. On the other hand, since the provisions of German law governing the protection of the maker of a database, infringement of which the Albert-Ludwigs-Universität Freiburg invokes, represent the means whereby Directive 96/9 was transposed into German law, the referring court is of the opinion that the resolution of the dispute, in so far as it concerns

Directmedia and the University, depends on the interpretation to be given to Article 7(2)(a) of the directive.

18 Noting that it is apparent from the findings of the appeal court that Directmedia used the list of verse titles drawn up by Mr Knoop as a guide to select the poems which were to appear on its CD-ROM, that it critically examined each poem selected by Mr Knoop and ultimately omitted to include in the marketed medium some poems that figured in that list whilst adding others, the referring court raises the question whether using the contents of a database in such circumstances constitutes an 'extraction' within the meaning of Article 7(2)(a) of Directive 96/9.

19 In its view, the definition of the concept of 'extraction' contained in that provision of Directive 96/9, several recitals in the preamble to that directive, paragraphs 43 to 54 of Case C-203/02 *The British Horseracing Board and Others* [2004] ECR I-10415, passages of the Opinion of Advocate General Stix-Hackl in Case C-338/02 *Fixtures Marketing* [2004] ECR I-10497, one possible construction of the purpose and the subject-matter of the *sui generis* right and the requirement of legal certainty appear to support a narrow interpretation of that concept, according to which that right permits the maker of a database to prevent the physical transfer of all or part of that database to another medium, but not the use of that database as a source of consultation, information and critical inquiry, even if by that process substantial parts of the database in question would be gradually recopied and incorporated in a different database.

20 The referring court acknowledges however that, according to a different construction of the subject-matter of the *sui generis* right, it can be argued that the concept of 'extraction', within the meaning of Article 7(2)(a) of Directive 96/9, includes acts consisting merely of transferring, as data, elements of a database.

21 In the light of that difficulty of interpretation, the Bundesgerichtshof decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

'Can the transfer of data from a database protected in accordance with Article 7(1) of [Directive 96/9] and their incorporation in a different database constitute an extraction within the meaning of Article 7(2)(a) of that directive even in the case where that transfer follows individual assessments resulting from consultation of the database, or does extraction within the meaning of that provision presuppose the (physical) copying of data?'

The question referred for a preliminary ruling

22 By its question, the referring court seeks to ascertain, in essence, whether the concept of 'extraction', within the meaning of Article 7(2)(a) of Directive 96/9, covers the operation of transferring the elements of one database to another database following visual consultation of the first database and a selection on the basis of a personal assessment of the person carrying out the operation or whether it requires that a series of elements be subject to a process of physical copying.

23 As a preliminary point, it should be noted that that question is based on the premiss, set out in the order for reference, that the list of verse titles drawn up by Mr Knoop constitutes a 'database' within the meaning of Article 1(2) of Directive 96/9.

24 It is also stated in that order that the Albert-Ludwigs-Universität Freiburg, which financed the costs of creating that list, is eligible for protection by the *sui generis* right established by that directive in the light of the fact that the investment expended in the collection, verification and presentation of the contents of that list, which amounts to EUR 34 900, is deemed to be 'substantial' within the meaning of Article 7(1) of that directive.

25 Against that background, the referring court raises the question whether an operation such as that undertaken by Directmedia in the case in the main proceedings constitutes an 'extraction' within the meaning of Article 7(2)(a) of Directive 96/9.

26 In that provision, the concept of extraction is defined as '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'.

27 Article 7(1) of Directive 96/9 entitles the maker of a database which required substantial investment from a quantitative or qualitative point of view to prevent acts of extraction in respect of all or a substantial part of the contents of that database. Furthermore, Article 7(5) is intended to enable that maker to prevent acts of repeated and systematic extraction in respect of an insubstantial part of the contents of that database, which, by their cumulative effect, would lead to the reconstitution of the database as a whole or, at least, of a substantial part of it, without the authorisation of the maker, and which would therefore seriously prejudice the investment of that maker just as the extractions referred to in Article 7(1) of the directive would (see *The British Horseracing Board and Others*, paragraphs 86 to 89).

28 Since the concept of extraction is thus used in various provisions of Article 7 of Directive 96/9, it must be interpreted in the general context of that article (see, to that effect, *The British Horseracing Board and Others*, paragraph 67).

29 In this respect, it must be stated, first of all, that, as Directmedia has acknowledged, it is not essential to that concept that the database or the part of the database from which the act in question is effected should, by the effect of that act, disappear from its original medium.

30 The use, in a number of the recitals in the preamble to Directive 96/9, including, in particular recitals 7 and 38, of the verb 'to copy' to illustrate the concept of extraction indicates that, in the mind of the Community legislature, that concept is intended, in the context of that directive, to cover acts which allow the database or the part of the database concerned to subsist in its initial medium.

31 Next, it should be pointed out that the use, in Article 7(2)(a) of Directive 96/9, of the expression 'by any means or in any form' indicates that the Community legislature sought to give the concept of extraction a wide definition (see *The British Horseracing Board and Others*, cited above, paragraph 51).

32 As the Albert-Ludwigs-Universität Freiburg, the Italian Government and the Commission have argued, that broad construction of the concept of extraction finds support in the objective pursued by the Community legislature through the establishment of a *sui generis* right.

33 That objective is, as is apparent in particular from recitals 7, 38 to 42 and 48 in the preamble to Directive 96/9, to guarantee the person who has taken the initiative and assumed the risk of making a substantial investment in terms of human, technical and/or financial resources in the obtaining, verification or presentation of the contents of a database a return on his investment by protecting him against the unauthorised appropriation of the results of that investment by acts which involve in particular the reconstitution by a user or a competitor of that database or a substantial part of it at a fraction of the cost needed to design it independently (see also, to that effect, Case C-46/02 *Fixtures Marketing* [2004] ECR I-10365, paragraph 35; *The British Horseracing Board and Others*, paragraphs 32, 45, 46 and 51; Case C-338/02 *Fixtures Marketing*, paragraph 25; and Case C-444/02 *Fixtures Marketing* [2004] ECR I-10549, paragraph 41).

34 In the light of that objective, the concept of extraction, within the meaning of Article 7 of Directive 96/9, must be understood as referring to any unauthorised act of appropriation of the whole or a part of the contents of a database (see *The British Horseracing Board and Others*, paragraphs 51 and 67).

35 As the Albert-Ludwigs-Universität Freiburg and the Commission have claimed, it is apparent from the wording itself of Article 7(2)(a) of Directive 96/9 that that concept is not dependent on the nature and form of the mode of operation used.

36 The decisive criterion in this respect is to be found in the existence of an act of 'transfer' of all or part of the contents of the database concerned to another medium, whether of the same nature as the medium of that database or of a different nature. Such a transfer implies that all or part of the contents of a database are to be found in a medium other than that of the original database.

37 In that context, as the Italian Government has stated, it is immaterial, for the purposes of assessing whether there has been an 'extraction', within the meaning of Article 7 of Directive 96/9, that the transfer is based on a technical process of copying the contents of a protected database, such as electronic, electromagnetic or electro-optical processes or any other similar processes (see, in this respect, recital 13 in the preamble to Directive 96/9), or on a simple manual process. As the Albert-Ludwigs-Universität Freiburg has argued, even a manual recopying of the contents of such a database to another medium corresponds to the concept of extraction in the same way as downloading or photocopying.

38 Recital 14 in the preamble to Directive 96/9, according to which 'protection under this Directive should be extended to cover non-electronic databases', as well as recital 21 in the preamble to that directive, according to which the protection afforded by the directive does not require the materials contained in the database to 'have been physically stored in an organised manner', also supports an interpretation of the concept of extraction unencumbered, in the same way as that of databases, by formal, technical or physical criteria.

39 It is also immaterial, for the purposes of interpreting the concept of extraction in the context of Directive 96/9, that the transfer of the contents of a protected database may lead to an arrangement of the elements concerned which is different from that in the original database. As is apparent from recital 38 in the preamble to Directive 96/9, an unauthorised act of copying, accompanied by an adaptation of the contents of the database copied, is among the acts against which that directive seeks, through the establishment of the *sui generis* right, to protect the maker of such a database.

40 It cannot therefore be argued, as Directmedia has done, that only acts consisting of the mechanical reproduction, without adaptation, by means of a standard 'copy/paste' process, of the contents of a database or a part of such a database fall within the concept of extraction.

41 Similarly, the fact, on which Directmedia placed considerable reliance, that the author of the act of reproduction in question may refrain from transferring a part of the material contained in a protected database and complements the material transferred from that database with material deriving from another source is, at the very most, capable of showing that such an act did not relate to the contents of that database in their entirety. However, it does not preclude a finding that there has been a transfer of a part of the contents of that database to another medium.

42 Contrary to what Directmedia also submitted, the concept of 'extraction', within the meaning of Article 7 of Directive 96/9 cannot moreover be reduced to acts concerning the transfer of all or a substantial part of the contents of a protected database.

43 As is apparent from paragraph 27 of this judgment, a reading of Article 7(1) in conjunction with Article 7(5) of Directive 96/9 shows that that concept does not depend on the extent of the transfer of the contents of a protected database since, pursuant to those provisions, the *sui generis* right established by that directive offers protection to a maker of a database not only against acts of extraction in respect of all or a substantial part of the contents of his protected database but also, subject to certain conditions, against those of those acts which relate to an insubstantial part of those contents (see, to that effect, *The British Horseracing Board and Others*, paragraph 50).

44 Accordingly, the fact that an act of transfer does not concern a substantial and structured series of elements which appear in a protected database does not preclude that act from falling within the scope of 'extraction' within the meaning of Article 7 of Directive 96/9.

45 Similarly, as the Commission has stated, it is true that the fact that material contained in one database may be transferred to another database only after a critical assessment by the person carrying out the act of transfer could prove to be relevant, in appropriate cases, for the purpose of determining the eligibility of that other database for one of the types of protection provided for in Directive 96/9. However, that fact does not preclude a finding that there has been a transfer of elements from the first database to the second one.

46 The objective pursued by the act of transfer is also immaterial for the purposes of assessing whether there has been an 'extraction' within the meaning of Article 7 of Directive 96/9.

47 Thus, it is of little importance that the act of transfer in question 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, whether commercial or not, other than the creation of a database (see, to that effect, *The British Horseracing Board and Others*, paragraphs 47 and 48). Moreover, as is apparent from recital 44 in the preamble to Directive 96/9, the transfer of all or a substantial part of the contents of a protected database to another medium, which would be necessary for the purposes of a simple on-screen display of those contents, is of itself an act of extraction that the holder of the *sui generis* right may make subject to his authorisation.

48 In its reference for a preliminary ruling, the referring court draws attention to recital 38 in the preamble to Directive 96/9. In so far as that recital refers to the case of the contents of a database being 'copied and rearranged electronically', it could, in the referring court's view, militate in favour of an interpretation of the concept of extraction which is limited to acts based on a process of copying by technical means.

49 However, as the Advocate General pointed out at point 41 of her Opinion, the recital in question seeks to illustrate the particular risk for database makers of the increasing use of digital recording technology. It cannot be interpreted as reducing the scope of the acts subject to the protection of the *sui generis* right merely to acts of copying by technical means, since otherwise, first, there would be a failure to have regard to the various matters set out in paragraphs 29 to 47 of this judgment militating in favour of a broad interpretation of the concept of extraction in the context of Directive 96/9, and, second, contrary to the objective assigned to that right, the maker of a database would be deprived of protection against acts of extraction which, although not relying a particular technical process, would be no less liable to harm the interests of that maker in a manner comparable to an act of extraction based on such a process.

50 Directmedia submitted that a database does not constitute ownership of information and that to include the transfer of information contained in that database within acts capable of being prohibited by the maker of a database protected under his *sui generis* right would amount, first, to infringing the legitimate rights of users of that database to free access to information and, second, to promoting the emergence of monopolies or abuses of dominant positions on the part of makers of databases.

51 None the less, as regards, first, the right of access to information, it must be pointed out that protection by the *sui generis* right concerns only acts of extraction and/or re-utilisation within the meaning of Article 7(2) of Directive 96/9. That protection does not, however, cover consultation of a database (*The British Horseracing Board and Others*, paragraph 54).

52 Of course, the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people (*The British Horseracing Board and Others*, paragraph 55), or make that access subject to specific conditions, for example of a financial nature.

53 However, where the maker of a database makes the contents of that database accessible to third parties, even if he does so on a paid basis, his *sui generis* right does not allow him to prevent such third parties from consulting that database for information purposes (see, to that effect, *The British Horseracing Board and Others*, paragraph 55). It is only when on-screen display of the contents of that database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium that such an act of consultation may be subject to authorisation by the holder of the *sui generis* right, as is apparent from recital 44 in the preamble to Directive 96/9.

54 In this case, it is apparent from the description of the facts in the order for reference that although the Albert-Ludwigs-Universität Freiburg does indeed seek to prevent unauthorised transfers of material contained in the list of verse titles drawn up by Mr Knoop, it none the less authorises third parties to consult that list. Consequently, the information collected in that list is accessible to the public and may be consulted by it.

55 As regards, second, the risk that competition would be affected, it is apparent from recital 47 in the preamble to Directive 96/9 that the Community legislature was sensitive to the concern that protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position.

56 That is why Article 13 of Directive 96/9, which confers normative value on the statement, contained in recital 47 in the preamble to that directive, that the provisions of that directive 'are without prejudice to the application of Community or national competition rules', states that that directive is to be without prejudice to provisions concerning inter alia laws on restrictive practices and unfair competition.

57 In the same vein, Article 16(3) of Directive 96/9 requires the Commission to draw up periodic reports on the application of that directive designed, inter alia, to verify whether the application of the *sui generis* right has led to abuses of a dominant position or other interference with free competition which would justify appropriate measures being taken.

58 In that context, which is characterised by the existence of instruments of Community law or national law which are designed to deal with any infringements of the competition rules, such as abuses of a dominant position, the concept of 'extraction', within the meaning of Article 7 of Directive 96/9, cannot be interpreted in such a way as to deprive the maker of a database of protection against acts which would be liable to harm his legitimate interests.

59 In the case in the main proceedings, it is for the referring court to ascertain, in the light of all the relevant circumstances, for the purposes of establishing whether there has been an infringement by Directmedia of the *sui generis* right of the Albert-Ludwigs-Universität Freiburg, whether the operation undertaken by Directmedia on the basis of the list of verse titles drawn up by Mr Knoop amounts to an extraction in respect of a substantial part, evaluated qualitatively or quantitatively, of the contents of that list (see, in that respect, *The British Horseracing Board and Others*, paragraphs 69 to 72), or to extractions of insubstantial parts which, by their repeated and systematic nature, would have led to reconstituting a substantial part of those contents (see, in that respect, *The British Horseracing Board and Others*, paragraphs 73, 87 and 89).

60 In the light of the above, the answer to the question referred must be that that the transfer of material from a protected database to another database following an on-screen consultation of the first database and an individual assessment of the material contained in that first database is capable of constituting an 'extraction', within the meaning of Article 7 of Directive 96/9, to the extent that — which it is for the referring court to ascertain — that operation amounts to the transfer of a substantial part, evaluated qualitatively or quantitatively, of the contents of the protected database, or to transfers of insubstantial parts which, by their repeated or systematic nature, would have resulted in the reconstruction of a substantial part of those contents.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

The transfer of material from a protected database to another database following an on-screen consultation of the first database and an individual assessment of the material contained in that first database is capable of constituting an 'extraction', within the meaning of Article 7 of Directive 96/9 of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, to the extent that — which it is for the referring court to ascertain — that operation amounts to the transfer of a substantial part, evaluated qualitatively or quantitatively, of the contents of the protected database, or to transfers of insubstantial parts which, by their repeated or systematic nature, would have resulted in the reconstruction of a substantial part of those contents.

[Signatures]