THE IP PROTECTION OF ELECTRONIC DATABASES: COPYRIGHT OR COPYWRONG?

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ABSTRACT

The protection of the intellectual investments embodied in databases is of the utmost importance. Technological innovation has rendered databases vulnerable to unauthorised access, reproduction, adaptation and publication.

The copyright protection of databases is not always adequate to address the protection of non-original databases. Vast collections of data are thus vulnerable to information security threats. The European Union enacted a *sui generis* form of protection for non-original databases. A decade later a review of the first court decisions reveal paltry databases protection. The *sui generis* layer of IP protection in the EU has thus not led to innovation and growth in the European database industry. Courts' restrictions on the protection of "single-source databases" and the interpretation of the substantial investment requirement have contributed to the low level of database right adoption. The action of database owners against deep linking has proved to be much more effective than the database right. South Africa, as developing country, should devise its own strategies to cope with the proliferation of protectionism within the context of the widening digital divide. The database right seems to be "copy wrong" for now.

KEY WORDS

Database right; Copyright protection; originality; sui generis; deep linking

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1 INTRODUCTION

Electronic databases are collections of recorded data or information in an electronic or digital form. Databases form the core of information technology. Tremendous resources are often invested to assemble large quantities of information into databases. Still, the resulting products are vulnerable to piracy. Technological innovation has rendered databases vulnerable to unauthorised access, reproduction, adaptation and publication. The possibilities for the creation of recompiled and derived products are beyond the imagination, let alone the knowledge, of the original owner.[1] It has been noted that, from an economic point of view, all electronic databases have two characteristics in common --- "they are costly to produce, but they are easy to reproduce or copy".[2]

2 COPYRIGHT PROTECTION OF DATABASES

Traditional principles of copyright law require a measure of originality in the selection or arrangement of data in a compilation, before it will attract copyright protection. Article 2(5) of the Berne Convention for the Protection of Literary and Artistic Works grants copyright protection to collections of literary or artistic works (such as encyclopaedias and anthologies) which, because of the selection and arrangement of their contents, constitute intellectual creations. This protection arises without prejudice to the copyright in each of the works forming part of such collections. Bare facts cannot be protected by copyright, but compilations of facts are within the

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[1] Brown, Bryan & Conley 'Database Protection in a Digital World' (1999) 6 *Richmond Journal of Law & Technology* 2.

[2] Nelson 'Recent Development: Seeking Refuge from a Technology Storm: The Current Status of Database Protection Legislation After the Sinking of the Collections of Information Anti-Piracy Act and the Second Circuit Affirmation of *Matthew Bender & Co. v. West Publishing Co* (1999) 6 *Journal of Intellectual Property Law* 453 at 455.

subject matter of copyright protection if these compilations constitute original works of authorship.

Copyright protection has frequently been extended to compilations of non-copyright material because of the labour and skill involved in selecting and arranging the material. For example, protection has been granted to compilations such as a street directory;[3] a list of stock-exchange prices;[4] an alphabetical list of railway stations in a railway guide;[5] a trade catalogue;[6] a racing information service;[7] chronological fixture lists of football clubs;[8] a directory of telefax users;[9] and a catalogue and price list.[10]

Traditional copyright principles require a measure of originality or creativity in the selection or arrangement of data in a compilation, or other indications of creative authorship, for the compilation to attract copyright. The requirement of originality for copyright protection of compilations is interpreted differently in various legal systems. The United Kingdom and Commonwealth courts have favoured the "sweat -of-the-brow" approach to database protection.[11] If an author has expended labour and skill in creating the work, it will enjoy copyright protection, notwithstanding the bland nature of the work.

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[3] See *Kelly v Morris* (1866) LR 1 Eq 697.
[4] See *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147.
[5] See H Blacklock & Co Ltd v C Arthur Pearson Ltd [1915] 2 Ch 376.
[6] Purefoy Engineering Coy Ld & another v Sykes Boxall & Coy Ld & others (1955) 72 RPC 89 (CA.

[7] See *Portway Press Ld v Hague* [1957] RPC 426.
[8] See *Football League Ltd v Littlewoods Pools* Ltd [1959] Ch 637.
[9] See *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D.
[10] See *Payen Components SA Ltd v Bovic CC & others* 1995 (4) SA 441 (A.
[11] See *Waterlow Publishers Ltd v Rose* The Times 8 Dec 1989; *Waterlow Publishers Ltd v Reed Information Services Ltd* The Times 11 Oct 1990 as quoted by Morton 'Draft EC Directive on the Protection of Electronic Databases: Comfort After *Feist*' (1992) 8 *Computer Law & Practice* 38 at 39 n12; See also Cornish '1996 European Community Directive on Database Protection' (1996-1997) 21 *Columbia-VLA Journal of Law & the Arts* 1 at 2.

Under traditional German copyright principles, most factual databases do not qualify for copyright protection unless their "selection, accumulation and organization" has been the subject of expertise beyond that of the average programmer.[12] In terms of French copyright law, which requires original works to reveal something of the author's own personality, and Dutch Copyright law, most compilations will not enjoy copyright protection[13]

3 THE LEGAL PROTECTION OF DATABASES IN THE EU

The European Union adopted a novel approach in the Council Directive on the Legal Protection of Databases[14] after nearly eight years of deliberation. The Directive provides a two-tier form of protection. It strives to create a harmonised level of copyright protection for “original” databases.[15] A novel “sui generis” right to protect investments in databases was also introduced.[16] Both rights differ in terms of requirements for protection, duration of rights, scope of protection, the exceptions or limitations that apply and the determination of the right holders (both natural and legal).[17]

The Database Directive extends copyright protection to databases that constitute "the author's own intellectual creation" -- databases which evidence some measure of "originality" or "creativity" on the part of the author.[18] Article 5 states that compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. Article 5 adopts the

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[12] See *Incassoprogramm* decision of 9 May 1985 of the Federal Supreme Court; See also Pattison [1992] 4 *European Intellectual Property Review* 113 at 113-114)

[13] *Van Dale v Romme* Judgement of 4 January 1991 as quoted by Cornish (1996-1997) 21 *Columbia-VLA Journal of Law & the Arts*; See also Pattison ‘The European Commission’s Proposal on the Protection of Computer Databases’ [1992] 4 *European Intellectual Property Review* 113 at 114 n12-13.

[14] See Council Directive 96/9 of 11 March 1996 On the Legal Protection of Databases 1996 *Official Journal* (L 77) 20 (hereinafter the 'Database Directive'))

[15] See Articles 3-5.

[16] See Articles 7, 10 and 11.

[17] See Articles 6, 8, 9 and 15.

[18] See recital 15 and art 3(1).

approach of the American Supreme Court's decision in *Feist Publications Inc v Rural Telephone Services Co*[19] in which it was held that only the selection or arrangement of a compilation of facts, and not the facts themselves, can be protected under copyright. The Database Directive rejected the traditional approach of the United Kingdom and Ireland and raised the threshold for copyright protection.[20]

The approach chosen in the Directive was to harmonise the threshold of "originality". Those "non-original" databases that did not meet the threshold would be protected by a newly created right. A high standard for originality, akin to that of *droit d'auteur* countries were adopted. This new standard of originality had the effect of protecting fewer databases by copyright (which was now limited to so-called "original" databases).[21] Those databases that fell below the originality bar, but which were created through substantial investment attained a "sui generis" form of protection.

This database right prevents the extraction and reutilisation of the whole or a substantial part of the contents of a non-original database. While "original" databases require an element of "intellectual creation", "non-original" databases are protected as long as there has been "qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents" of a database.[22] The "sui generis" right is a Community creation with no precedent in any international convention and no other jurisdiction has adopted the sui generis right. The distinction between "original" and "non-original" databases is alos unique to the European Union.[23]

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[19] 499 US 340 (1991) at 344—348.
[20] See Brown, Bryan & Conley 1999 *Richmond Journal of Law & Technology* text at n 135.
[21] Commission of the European Communities "First Evaluation Of Directive 96/9/Ec On The Legal Protection Of Databases" *DG Internal Market And Services Working Paper* 12 Dec 2005 available at http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf (accessed 23 April 2008) (hereafter "EU First evaluation") at 3.
[22] *Ibid*.
[23] *Idem* at 4.

In essence, the Directive sought to create a legal framework that would establish the ground rules for the protection of a wide variety of databases in the information age. It did so by giving a high level of copyright protection to certain databases ("original" databases) and a new form of "sui generis" protection to those databases which were not "original" in the sense of the author's own intellectual creation ("non-original" databases).[24] The effect of the Database Directive has recently been evaluated.[25]

All 25 Member States have transposed the Directive into national law.[26] National jurisprudence evidences the adoption of a wide notion of the term "database", embracing listings of telephone subscribers; compilations of case law and legislation; websites containing lists of classified advertisements; catalogues of various information and lists of headings of newspaper articles under its ambit. The European Court of Justice (ECJ) has also embraced a broad interpretation of the definition of "database" in the Directive.[27]

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[24] *Idem* at 3.

[25] Article 16 of the Database Directive requires the Commission to submit to the European Parliament, the Council and the European 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 the application of the sui generis right...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".

[26] EU First Evaluation at 4 notes that Germany, Sweden and the United Kingdom met the deadline of implementation (1 January 1998); Austria and France adopted laws during the course of 1998 whose provisions apply retro-actively from 1 January of the same year. Belgium, Denmark, Finland and Spain implemented in 1998; Italy and the Netherlands in 1999; Greece and Portugal in 2000; Ireland and Luxembourg in 2001. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia implemented between 1999 and 2003. The EEA countries (Iceland, Lichtenstein and Norway) have also implemented the Directive.

[27] See Case C-444/02 (*Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE - "OPAP"*) n 20, 25.

4 CASE LAW IN THE EU

4.1 Substantial investment

The sui generis provisions of the Database Directive protect the contents of any non-copyrightable database that is the product of substantial investment in obtaining, verifying, or presenting the database's contents.[28] There are no specific standards for determining the substantiality of an investment. The test is quantitative as well as qualitative in nature.[29] The investment may concern the obtaining, verification, or presentation of the content.[30] Not every compilation of information will be considered a "database" for the purpose of the sui generis right. To qualify for protection, a database must be "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means".[31]

The precise meaning of the term “substantial investment” as contained in Article 7 of the Directive has become the focal point of the textual ambiguities of the “sui generis” right. On the one hand, the cost of collecting and maintaining up-to-date information concerning several thousands of real estate properties was held to be a “substantial investment” by a district court of The Hague.[32] On the other hand, the district court of Rotterdam regarded newspaper headlines as a mere “spin-off” of newspaper publishing and the court therefore held that it did not reflect a “substantial investment”.[33] “Spin-off” databases are databases that are by-products of a main or principal activity. Where the database is a single source database it is normally regarded as a spin-off database. In certain Member States, notably the Netherlands, the “spin-off” theory forms a bar against “sui generis” protection for “spin-off” databases.[34]

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[28] See Recital 39 and art 7(1)).
[29] See Brown, Bryan & Conley op cit text at n150.
[30] See Cornish op cit at 8.
[31] See Brown, Bryan & Conley op cit text at n153.
[32] *NVM v. De Telegraaf*, judgment of 12 September 2000.
[33] *Algemeen Dagblad a.o. v. Eureka*, judgment of 22 August 2000.
[34] See EU First Evaluation at 12.

"Deep-linking" through search engines are another source of divergent case-law.

A deep link is a special for of linking which enables the user to access content on an internal page of a web site, bypassing the home page of the web site.[35] In some cases, the heading, the Internet address (URL) and a brief summary of a press article have been held not to constitute a substantial part of a database[36] and the hyper linking of headings of press articles has been held not to infringe the owner's "sui generis" right.[37] However, in most cases the systematic bypassing of the homepage of the database maker (including banner advertisements) was found to be an infringement of the database maker's "sui generis" right.[38]

A Danish court in *Danish Newspaper Organization v Newsbooster*[39] held so-called "deep linking" is a breach of copyright. The case was brought by the Danish Newspaper Organisation (DNO) against the Newsbooster service, which linked to articles on 28 of the plaintiff's news websites without going through their home pages. The court held that the newspaper articles were copyrightable works. The court held as follows:

"The text collections of headlines and articles, which make up some Internet media, are thus found to constitute databases enjoying copyright protection pursuant to section 71 of the Danish Copyright Act. Under section 71(1) of the Act, the makers of the databases, i.e. the Principals, have the exclusive right protected by the said provision."

On liability for linking, the court held that by means of its search engine, Newsbooster offers its users regular relevant headlines with deep links to articles on Newsbooster's website or in Newsbooster's electronic

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[35] See Ebersöhn "Hyperlinking and deep-linking" Vol II part 2 *Juta's Business Man's Law* 73-74.

[36] See High Regional Court Cologne, 27 October 2000; District Court Munich, 1 March 2002

[37] See judgment by the German Federal Court of Justice, 18 July 2003 ("*Paper Boy*").

[38] See "*Berlin Online*" – District Court Berlin 8 October 1998; "*Süddeutsche Zeitung*" – Landgericht Köln 2 December 1998.

[39] *Danish Newspaper Publishers' Association v Newshooter.com*; ApS Copenhagen Court, 24 June 2002; Court Journal No F1-8703/2002.

newsletters. These links need to be supplemented and updated on a regular basis and consequently, Newsbooster' s search engine needs to crawl the websites of the Internet media frequently for the purpose of registering headlines and establishing deep links in accordance with the search criteria defined by the users. As a result, Newsbooster repeatedly and systematically reproduces and publishes the Principals' headlines and articles. Newsbooster has a commercial interest in this business and this activity is in conflict with section 71(2) of the Danish Copyright Act.

The court ruled that Newsbooster is prohibited from offering a search service with deep links from the websites newsbooster.dk and newsbooster.com directly to the plaintiffs' news articles; reproducing and publishing headlines from the Internet versions of newspaper articles; distributing electronic newsletters with deep links directly to the newspaper articles; and reproducing and distributing headlines from the newspapers.[40] A similar ruling was made in *Copiepresse v Google Inc*.[41]

Four cases concerning single-source databases of sports information in the areas of football and horseracing have been referred to the ECJ. The cases were referred from national courts in Greece, Finland, Sweden and the United Kingdom. The ECJ gave its judgments in these cases on 9 November 2004.[42] With respect to the extensive lists of runners and riders drawn up by the *British Horseracing Board* (the "*BHB*") in its function as the governing body for the British horseracing industry, the ECJ simply stated that:

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[40] The quotations from the court's ruling were obtained from "Translation of pages 29 - 42 of the ruling made by the Bailiff's Court on 5 July 2002 at http://www.newsbooster.com/?pg' judge&lan' eng) accessed on 22 July 2007.

[41] Court of First Instance, Brussels, 5 September 2006. A copy of the decision is available at http://www.chillingeffects.org/international/notice.cgi?action=image_7796 (as at 9 Oct 2006); *Contra Algemeen Dagblad BV et al v Eureka Internetdiensten* 2000 District Court of Rottendam) discussed by Ebersöhn vol 11 Part II *Juta's Business Law* at 76.

[42] Cases C-46/02 (*Fixtures Marketing Ltd v Oy Veikkaus Ab*); C-203/02 (*The British Horseracing Board Ltd and Others v William Hill Organisation Ltd*); C-338/02 (*Fixtures Marketing Limited v. AB Svenska Spel*) and C-444/02 (*Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairouAE -"OPAP"*) available at www.curia.eu.int (accessed 23 April 2008).

"The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears"

4.2 Obtaining or creating data for database

The ECJ thus distinguishes between the resources used in the "creation" of materials that make up the contents of a database and the *obtaining* of such data in order to assemble the contents of a database. Only the latter activity is protected under the "sui generis" right. This leaves little protection for bodies like the *BHB,* which "create" the data that makes up the contents of their database. Arguably, other industries like the publishers of directories, listings or maps, remain protected as long as they do not "create" their own data but *obtain* these data from others. The ECJ distinction between "creation" and *obtaining* of data means that sports bodies such as the *BHB* cannot claim that they *obtained* the data within the meaning of the Directive. Therefore, such bodies cannot license their own data to third parties.[43]

While going against the Commission's original intention of protecting "non-original" databases in a wide sense, the judgements have the merit of pointing to the serious difficulties raised by attempting to harmonise national laws by recourse to untested and ambiguous legal concepts ("qualitatively or quantitatively substantial investments in either the obtaining, verification or presentation of contents").

The ECJ's judgment would probably apply to the databases created by broadcasting organisations for the purposes of scheduling programmes: they would not be able to assert a "sui generis" right in the contents of such databases. In addition, the European Court ruled that on-line betting activities on football matches and horse races carried out by betting companies such as *Svenska Spel* or *William Hill* was not infringing in nature. The Court noted that such use did not affect the whole or a substantial part of the contents of the plaintiffs' databases, and they

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[43] Müller & Munz "Recent Case Law from Germany Concerning the Database Right" Vol 12 (No 2) 2007 *Communications Law* at 70-71.

therefore did not prejudice the substantial investment of the latter in the creation of their databases.

In *British Horse Racing Board v. William Hill*[44] the British Court dismissed the *BHB*'s arguments aimed at showing that its database was protectable by the "sui generis" right under Article 7(1) of the Directive. The court held that the scope of the "sui generis" protection does not include the "creation" of the underlying data.[45] A soccer fixture list would usually not be protected under the "sui generis" right.

5 THE POSITION OBTAINING IN SOUTH AFRICA

In terms of section 1(1) of the Copyright Act[46] the definition of a literary work includes tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer. This clearly includes electronic databases. The South African legislature has thus opted for the protection of electronic databases as a form of compilation, which is a species of literary work.[47]

Dean[48] submits that under South African law an electronic database, like any other work, should be "original". No higher standard or level of creativity is required. As noted above, in US law, a minimal degree of creativity or so-called "creative spark" is required to satisfy the originality requirement. In South Africa, on the other hand, creativity is not required to make a work original – the so-called "sweat of the brow" is sufficient. The requirement of originality is satisfied solely by the fact that the contents of a

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[44] Case No: A3/2001/0632 *The British Horseracing Board Limited; The Jockey Club; Weatherbys Group Limited and William Hill Organization Limited*.

[45] For example, the national football bodies establish the annual "football calendar" by pairing the teams, setting up home and away matches. It comprises the basic activity of organising soccer tournaments, involves the "creation" of data. The collection and verification of the data in order to set up the fixture list is only a by-product of this basic activity, but the by-product requires relatively little investment.

[46] Act 98 of 1978 as amended by section 50(*e*) of the Intellectual Property Laws Amendment Act 38 of 1997.

[47] See Dean O. H. (2003). *Handbook of South African Copyright Law* (Revision service 11) Johannesburg, Juta & Co Ltd at 1-8 to 1-8A, 1-14.

[48] Dean Handbook at 1-8A.

particular compilation must have been independently collected through the author's own skills or labour, and not copied from another.[49] In *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty)* Lt[50]d (supra) Streicher JA confirmed that, as our present Copyright Act originated from UK law, creativity is not a requirement for copyright in SA law. The court then confirmed the test for originality in SA copyright law to be as follows:

"Save where specifically provided otherwise, a work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour."[51]

The "sweat of the brow" doctrine is still firmly entrenched in South African copyright law.

Electronic databases were protected by copyright prior to the 1997 Amendment Act, as the material embodiment requirement could be met by digital embodiment. The South African database owner is in an advantageous position: the originality requirement is set so low that both original and non-original databases qualify for protection. The Database Directive has not been an outstanding success and the repeal of the sui generis database right has even been proposed.[52] International instruments are not likely to follow.

Stone and Kernick[53] note that a comprehensive database, which contains the entire universe of relevant data, may be commercially useful, but is not copyrightable, as "selection" requires the exercise of creative judgment in culling facts, and not using the relevant universe. In essence, this amounts to the protection of means to access information. Policy considerations underlying the regulation of access to information and access to knowledge should be heeded. It can never been seriously proposed that

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[49] See *Waylite Diary CC v First National Bank Ltd*.

[50] (2006) 4 SA 458 (SCA).

[51] *Supra* at 473A-B

[52] See conclusion to the EU First Evaluation.

[53] Stone & Kernick 'Protecting Databases: Copyright? We don't Need No Stinkin' Copyright' (1999) 16 *The Computer Lawyer* 17.

information itself should be protected (except by the law regarding trade secrets).

Information technology has become an indispensable development tool, and a crucial means of information and knowledge exchange.[54] Electronic databases are the tools that provide information about information; they are regarded as the new building blocks of knowledge.[55] Their importance cannot be too heavily underscored as they form the core of information technology and all information systems.[56] The copyright protection of such comprehensive databases remains problematic.

This may be especially problematic for digital databases such as those accessed through the Internet, since their very appeal is their all-inclusiveness.[57] Copyright law has emerged as one of the most forceful means of regulating the flow of ideas and knowledge-based products.[58] "Sui generis" protection comes close to protecting data as property. There is a long-standing principle that copyright should not be extended to cover basic information or "raw" data. However, as evidenced by the ECJ's differentiation between the "creation" of data and its *obtaining* demonstrate, the "sui generis" right comes precariously close to protecting basic information.[59]

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[54] Sun "Copyright law under siege: An inquiry into the legitimacy of copyright protection in the context of the global divide" 2005 (36) *International Review of Industrial Property and Copyright Law* 192.

[55] Pistorius "Copyright in the Information Age: The Catch-22 of Digital Technology" 2006 (2) *Critical Arts* 47 at 54.

[56] Bastian 'Protection of 'Noncreative' Databases: Harmonization of United States, foreign and international law' (1999) 22 *Boston College Environmental Affairs Law Review* 425 at 426; Lavenue 'Database rights and technical data rights: the expansion of intellectual property for the protection of databases' 38 (1997) *Santa Clara L Rev* 1.

[57] See Brown, Bryan & Conley *Richmond Journal of Law & Technology*, text at note 93.

[58] See Sun 2005 op cit IIC at 211.

[59] See Fieldhouse & Bolton "Copyright? Wrong! – Copyright protection of computer programs as literary works" 2003 *Copyright World* 22 at 25.

South Africa, as developing country, should devise its own strategies to cope with the proliferation of protectionism within the context of the widening digital divide.[60]

6 EVALUATION OF THE VALUE OF THE DATABASE RIGHT

Introduced to stimulate the production of databases in Europe, the "sui generis" protection has had no proven impact on the production of databases.[61] Nevertheless, as the figures discussed below demonstrate, there has been a considerable growth in database production in the US, whereas, in the EU, the introduction of "sui generis" protection appears to have had the opposite effect. With respect to "non-original" databases, the assumption that more and more layers of IP protection means more innovation and growth appears not to hold up.[62]

7 CONCLUSION

It has been noted that there is a risk that national courts applying the European Court's case law will conclude that relatively little of the investment in establishing a database appears to have been in collecting and verifying the information displayed on a website containing data on e.g. real estate or job advertisements.[63] On the other hand, the ECJ's narrow

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[60] Pistorius "Developing Countries and Copyright in the Information Age – The Functional Equivalent Implementation of the WCT″ 1-27 (2) *Potchefstroom Electronic L. J.* (2006) *at:* http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_2__Pistorius_art.pdf (accessed Feb. 28 2007).

[61] According to the Gale Directory of Databases, the number of EU-based database "entries" was 3095 in 2004 as compared to 3092 in 1998 when the first Member States had implemented the "sui generis" protection into national laws (EC First consultation at 20). It is noteworthy that the number of database "entries" dropped just as most of the EU-15 had implemented the Directive into national laws in 2001. In 2001, there were 4085 EU-based "entries" while in 2004 there were only 3095 (EU First consultation at 20). The "sui generis" right has helped Europe to catch up with the US in terms of investment but, at the same time, that the "sui generis" right did not help to significantly improve the global competitiveness of the European database sector. The data taken from the *GDD* reveal that the economic gap with the US has not been reduced (EC First consultation at 23).

[62] EU First Evaluation at 24.

[63] EU First Evaluation at 20.

interpretation of the "sui generis" protection for "non-original" databases where the data were "created" by the same entity as the entity that establishes the database would put to rest any fear of abuse of a dominant position that this entity would have on data and information it "created" itself (so-called "single-source" databases).[64]

The interpretation of the ECJ may also allay the fear of those who believed that the Directive would lock up information otherwise publicly available, at least with respect to those databases which contain data "created" by the database maker himself.[65] It is noteworthy that the ECJ and some national judges appear to fear that the balance between users and rightholders is inappropriate. Indeed, the interpretation adopted by the European Court may have been influenced by the concern that the "sui generis" right might otherwise significantly restrict access to information. Thus, for instance, the ECJ has ruled that the mere act of consultation of a database is not covered by the database maker's exclusive rights.[66]

As Brown, Bryan and Conley[67] so eloquently put it:
"Sweat equity is all that is left".

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[64] *Ibid*; See also Müller & Munz op cit 2007 *Communications Law* 70-71.

[65] EU First Consultation at 22.

[66] "However, it must be stressed that the protection of the *sui generis* right concerns only acts of extraction and re-utilisation as defined in Article 7(2) of the directive. That protection does not, on the other hand, cover consultation of a database. Of course, the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people. However, if he himself makes the contents of his database or a part of it accessible to the public, his *sui generis* right does not allow him to prevent third parties from consulting that base", case C-203/02, n. 54, 55.

[67] 1999 *Richmond Journal of Law & Technology*, text at note 205.

Brown, Bryan & Conley 'Database Protection in a Digital World' (1999) 6 *Richmond Journal of Law & Technology* 2

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