JUDGMENT OF THE COURT (Grand Chamber)
9 November 2004 (1)

(Directive 96/9/EC – Legal protection of databases – Sui generis right – Definition of investment in the obtaining, verification or presentation of the contents of a database – Football fixture lists – Betting)

In Case C-338/02,

REFERENCE for a preliminary ruling under Article 234 EC,

from the Högsta domstolen (Sweden), by decision of 10 September 2002, received at the Court on 23 September 2002, in the proceedings

Fixtures Marketing Ltd

v

Svenska Spel AB,

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 J. Ågren, advokat,

– Svenska Spel AB, by M. Broomé and S. Widmark, advokater,

– the Belgian Government, by A. Snoecx, acting as Agent, and P. Vlaemminck, advocaat,

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

– the Netherlands Government, by S. Terstal, acting as Agent,

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

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

– the Commission of the European Communities, by C. Tufvesson and K. Banks, 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 Svenska Spel AB ('Svenska Spel'). The litigation arose over the use by Svenska

Spel, for the purpose of organising betting games, of information taken from the fixture lists for the English and Scottish 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 The protection of databases is governed, in Swedish law, by the lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (law on copyright over literary and artistic works, 'the 1960 law').

7 Under Paragraph 49(1) of the 1960 law, as amended by law 1997:790, implementing the directive in Swedish law (the 1997 law), the maker of a catalogue, a table or similar work in which a large quantity of data has been collected or which is the result of substantial investment has an exclusive right to produce copies of the work and provide public access to it.

8 The 1960 law contains no provision equivalent to Article 7(5) of the directive. However, according to the *travaux préparatoires* for the 1997 law, Paragraph 49 of the 1960 law protects the work itself or a substantial part of it, and, accordingly, the exclusive right does not cover copies of specific data which form part of the work nor does it cover insubstantial parts of that work. However, according to those *travaux préparatoires,* a repeated use of insubstantial parts of a work may be regarded as amounting to use of a substantial part of the work.

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 and in Scotland by the Scottish Football League. Fixture lists have to be drawn up

for the matches to be played in the various divisions during the season, that is to say, about 2 000 matches per season in England and 700 matches per season in Scotland. The data are stored electronically and published inter alia in printed booklets, both chronologically and by reference to each team participating.

10 Work on the preparation of the fixture lists begins a year before the start of the season concerned.

11 The organisers of English and Scottish football retained Football Fixtures Limited to handle the exploitation of the fixture lists through licensing. FFFixtures was assigned the right to represent the holders of the intellectual property rights in those fixture lists.

12 In Sweden Svenska Spel operates pools games in which bets can be placed on the results of football matches in inter alia the English and Scottish football leagues. For the purposes of those games it reproduces data concerning those matches on pools coupons.

13 In February 1999 Fixtures, having first unsuccessfully offered Svenska Spel a licence to use the data in return for payment of a fee, brought an action against Svenska Spel before Gotlands tingsrätt (District Court, Gotland, Sweden), claiming reasonable compensation for the use of data from the fixture lists for the English and Scottish football leagues during the period from 1 January 1998 to 16 May 1999. In support of its action, Fixtures submitted that the databases containing data concerning the fixture lists were protected under Paragraph 49 of the 1960 law and that the use by Svenska Spel of data from those fixture lists constituted a breach of the intellectual property rights of the football leagues.

14 By its judgment of 11 April 2000 the Tingsrätt dismissed Fixture's case, ruling that although the fixture lists were covered by catalogue protection since they constituted the result of a substantial investment, Svenska Spel's use of the data from the fixture lists did not entail any infringement of the rights of Fixtures.

15 On appeal, the Svea hovrätt (Svea Court of Appeal, Sweden), by judgment of 3 May 2001, upheld the judgment at first instance. The Hovrätt did not expressly rule on the question whether fixture lists are protected under Paragraph 49 of the1960 law, but held that it was not proven that the data on Svenska Spel's pools coupons had been extracted from the databases of the football leagues.

16 Fixtures appealed before the Högsta domstolen, seeking to have the judgment on appeal set aside.

17 Pointing out that Paragraph 49 of the 1960 law, as amended by the 1997 law, must, as an implementing measure, be interpreted in the light of the directive, the Högsta domstolen observes that the directive does not make clear whether, and if so, to what extent, the purpose of the database should be ascribed importance in determining whether it is protected under a *sui generis* right. It also raises the question of what sort of human or financial investment can be taken into account in assessing whether investment is substantial. In addition, it raises the question of the interpretation of the expressions 'extraction and/or re-utilisation of the whole or a substantial part' of the database and 'normal exploitation' and 'unreasonable prejudice' in the case of extraction and/or re-utilisation of insubstantial parts of the database.

18 Against that background, the Högsta domstolen decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1.

In assessing whether a database is the result of a "substantial investment" within the meaning of Article 7(1) of the directive can the maker of a database be credited with an investment primarily intended to create something which is independent of the database and which thus does not merely concern the "obtaining, verification or presentation" of the contents of the database? If so, does it make any difference if the investment or part of it nevertheless constitutes a prerequisite for the database?

2.

Does a database enjoy protection under the database directive only in respect of activities covered by the objective of the database maker in creating the database?

3.

What do the terms "a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database" in Article 7(1) mean?

4.

Is the directive's protection under Article 7(1) and Article 7(5) against "extraction and/or re-utilisation" of the contents of a database limited to such use as entails a direct exploitation of the base or does the protection also cover use in cases where the contents are available from another source (second-hand) or are generally accessible?

5.

How should the terms "normal exploitation" and "unreasonably prejudice" in Article 7(5) be interpreted?'

The questions referred

19 As a preliminary point, it must be borne in mind that the protection provided for by Paragraph 49(1) of the 1960 law, as amended by the 1997 law, requires the existence of a catalogue, a table or similar work 'in which a large quantity of data has been collected or which is the result of substantial investment'.

20 According to the order for reference, the Högsta domstolen does not consider that the football fixture lists at issue constitute a catalogue of 'a large quantity of data' within the meaning of the above provision, which explains why it seeks clarification, by its first question, of the term 'substantial investment' as it must be interpreted under Article 7(1) of the directive.

21 By that question, the referring court asks, inter alia, whether investment by the maker of a database in the creation as such of data must be taken into account in assessing whether there was substantial investment in the obtaining, verification or presentation of the contents of a database. It also seeks to know whether the directive is intended to protect a database which is derived from a principal activity which necessarily entails the creation of data.

22 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.

23 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.

24 Against that background, the expression 'investment in … the obtaining … of the contents' of a database must, as Svenska Spel and the German, Netherlands and Portuguese 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. As Svenska Spel and the German Government point out, the purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.

25 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 51 to 56 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.

26 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.

27

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.

28 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.

29 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 24 to 27 of this judgment, required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.

30 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.

31 In the case in the main proceedings, the resources deployed for the purpose of determining, in the course of arranging the football league fixtures, the dates and times of and home and away teams playing in the various matches represent, as Svenska Spel and the Belgian, German and Portuguese Governments submit, 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.

32 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 constitutes a substantial investment in qualitative or quantitative terms.

33 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. As Fixtures itself points out in its observations, 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.

34 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. Such verification cannot, therefore, be regarded as requiring substantial investment.

35 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.

36 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.

37 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.

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

Costs

39 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.

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1 – Language of the case: Swedish.