Database right

ECJ provides further guidance on infringement of the database right

The Court of Justice of the European Communities has delivered its judgment in Case C-545/07, Apis-Hristovich EOOD v Lakorda AD, following a reference from the Sofia City Court in Bulgaria. This judgment gives further guidance on the interpretation of the terms "extraction" and "substantial part" in relation to infringement of the database right.

Business Impact

- Operators of databases consisting of independent subgroups may claim protection in the individual subgroups provided each qualifies as a protected database as of itself.
- The fact that a database consists partly or entirely of publicly available materials will not preclude protection, provided there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of its contents.
- The fact that physical and technical characteristics (e.g. hyperlinks) of a protected electronic database appear in an allegedly infringing database may be indicative (but is not determinative) of "extraction" having occurred.

Background – the relevant law

EC Directive 96/9/EC on the legal protection of databases (the "Directive") introduced an independent right in respect of databases.

The Directive defines a "database" 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" (Art 1(2)).

Art 7(1) provides 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." (Emphasis added.)

"Extraction" means "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" (Art 7(2)(a)). (Emphasis added.)

The facts

Apis-Hristovich EOOD ("Apis") operates a database of legal information consisting of separate modules, marketed independently. Apis claimed that Lakorda AD ("Lakorda") infringed its database rights in two such modules.
because ex-employees of Apis, who later founded Lakorda, extracted without Apis’ consent substantial parts of the relevant modules. Apis alleged the extracted materials were later used in the development of a legal information system marketed by Lakorda.

Apis claimed that the materials extracted and reutilised by Lakorda constituted 82.5% of the total number of documents in one product module which, they claimed, represents “a substantial part, evaluated quantitatively” of the contents of that module. In relation to the other module, Apis claimed that 2516 unpublished judicial decisions (which had been obtained by Apis with the permission of the relevant courts) were extracted by Lakorda, which represents “a substantial part, evaluated qualitatively” of the contents of that module. In addition they claimed the acts of extraction and reutilisation concerned features such as editor’s notes, references to translations of the documents into English, commands, fields, hyperlinks and the chronology of legislative measures.

Lakorda denied any unlawful extraction or reutilisation, contending that its legal information system is the fruit of an independent investment of around BGN 215,000 (approximately £100,000), involving software specialists, lawyers and managers. They claimed that the great similarity between the contents of its product and Apis’ modules is explained by Lakorda’s use of publicly accessible sources (official journals and websites of national institutions and courts). They also stressed that the great majority of editorial notes and hyperlinks (creating over 1,200,000 individually accessible data and more than 2,700,000 hyperlinks) resulted from Lakorda’s unique method of recognition and classification.

The questions referred to the ECJ

The Sofia City Court stayed proceedings and referred the following questions to the ECJ for a preliminary ruling:

1. How are the terms “permanent transfer” and “temporary transfer” to be interpreted and to be delimited in relation to each other for the purpose of:

   o determining whether extraction within the meaning of Article 7(2)(a) of Directive 96/9 from a database accessible by electronic means has taken place?
   
   o at what point in time is it to be assumed that extraction within the meaning of Article 7(2)(a) of Directive 96/9 from a database accessible by electronic means has taken place?
   
   o what is the significance, for the assessment of extraction, of the fact that the content of a database extracted in this way has served to create a new and amended database?

2. Which criterion is to be applied in interpreting the concept “extraction of a substantial part, evaluated quantitatively” if the databases are divided into separate subgroups and are used in these subgroups, which are independent commercial products? Is the size of the databases in the entire commercial product or the size of the databases in the relevant subgroup to be used as the criterion?

3. In interpreting the concept “a substantial part, evaluated qualitatively”, is the fact that a certain type of data allegedly extracted was obtained by the database maker from a source which is not generally accessible, so that it was possible to procure the data only by extracting them from the databases of that very database maker, to be used as a criterion?

4. What criteria are to be applied when determining whether extraction from a database accessible by electronic means has taken place? Can it be regarded as an indication that extraction has taken place if the maker’s database has a particular structure, notes, references, commands, fields, hyperlinks and editorial text and these elements are also found in the database of the person who has committed the alleged infringement? In the carrying out of this assessment, are the various original organisational structures of the two opposing databases relevant?

5. When determining whether extraction has taken place, is the computer program/the system for database management material if it is not part of the database?
6. Since, according to Directive 96/9 and the case-law of the Court of Justice of the European Communities, "a substantial part of the database from a quantitative and qualitative point of view" is linked to substantial investment in the obtaining, verification or presentation of a database: how are these concepts to be interpreted in relation to legislative measures, and measures having individual application, which have been adopted by executive State bodies and are publicly accessible, to their official translations and to case-law?

The ECJ's judgment

The Court chose to answer questions 1, 4 and 5 together on the basis that they deal with the concept of "extraction". Questions 2, 3 and 6 were grouped together because they deal with the concept of a "substantial part, evaluated qualitatively or quantitatively, of the contents of a database".

"Extraction"

Question 1

The Court noted that, following Case C-304/07 Directmedia Publishing [2008] ECR I-0000 (see previous IP newsflash dated 10 October 2008), the concept of extraction must be given a broad interpretation as referring to any unauthorised appropriation of the whole or a part of the contents of a database, the nature and form of the process used being immaterial.

In relation to the reference in Art 7(1) of the Directive to acts of "permanent" and "temporary" transfer, the Court noted that its objective was to expressly exclude any form of de minimis rule (although the permanence or otherwise of any transfer might be relevant to the national law regarding the assessment of the gravity of any infringement).

Therefore the delimitation of these concepts is based on the length of time during which materials extracted from a protected database are stored in a medium other than that database. The time at which there is an extraction from an electronic database is when the materials transferred are stored in a medium other than the protected database.

The fact that the content of a database extracted in this way has served to create a new and amended database (again following Directmedia) is irrelevant, since the purpose of the act of transfer is immaterial.

Question 4

The court held the fact that physical and technical characteristics present in the protected database also appear in the alleged infringer's database may be an indication of the fact that extraction has occurred, however it was for the national courts to determine whether that coincidence can be explained otherwise (e.g. the use of common sources). Equally, whilst not itself enough to prove extraction, the fact that both Apis' modules and Lakorda's product contained materials not available to the public may be circumstantial evidence of extraction.

Question 5

The fact that Lakorda used an original software programme to manage its database was not a relevant factor in assessing whether there had been "extraction".

"Substantial part"

Question 2

It is necessary to assess whether each independent subgroup of the database qualifies for protection as a database in its own right under Art 7(1) of the Directive. If yes, the volume of materials allegedly extracted and/or re-utilised from the subgroup concerned must be compared with the total contents solely of that subgroup. If no (assuming that the complete database of which the subgroup is part is a protected database under Art 7(1) of the Directive) the comparison of materials allegedly extracted and/or re-utilised is made against the total content of the complete database.
Question 3

The Court noted (citing the British Horseracing Board reference, Case-203/02, 2004 ECR I-10415 – see previous IP newsflash from 10 November 2004 and Case 46/02 Fixtures Marketing [2004] ECR I-10365), that the concept of a "substantial part, evaluated qualitatively" refers to the scale of the investment in the obtaining, verification or presentation of the contents the subject of the extraction and/or re-utilisation. Therefore, the fact that certain materials allegedly extracted and/or re-utilised were obtained from non-public sources may, according to the scale of such investment, affect the assessment as to whether they are a substantial part, evaluated qualitatively, of the contents of the database.

Question 6

The Court held that, the alleged extraction and/or re-utilisation from a collection of data which is official and publicly available does not relieve the national court of an obligation to verify (i) whether the collection is protectable as a database under Art 7(1) of the Directive or (ii) whether the materials extracted and/or re-utilised constitute a "substantial part, evaluated qualitatively and/or quantitatively".

Conclusions

This judgment (whilst not providing any real surprises) provides some useful guidance on some of the finer points of interpretation of Art 7 of the Directive. In common with previous decisions of the ECJ, the interpretation of "extraction" is broad and stresses that the assessment of "substantial part, evaluated qualitatively" refers to the scale of investment in the obtaining, verification or presentation of the contents which are the subject of the extraction or re-utilisation complained of.

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