

**DATABASE RIGHT AND THE ECJ JUDGMENTS IN *BHB V WILLIAM HILL* AND  
THE *FIXTURES* MARKETING CASES**

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## DATABASE RIGHT AND THE ECJ JUDGMENT IN *BHB V WILLIAM HILL AND THE FIXTURES MARKETING CASES*<sup>1</sup>

### A. INTRODUCTION

1. **ECJ Judgments of 9 November 2004.** The European Court of Justice gave its first judgments on database right, itself a creature of European Union law, on 9 November 2004 in a series of cases that included the long awaited decision in *The British Horseracing Board Ltd v The William Hill Organization Ltd*<sup>2</sup>. It is to be hoped that the Court of Appeal will salvage some coherence from this odd judgment when the case returns to that court.

2. **Database Right: The Perils of an Over-Zealous Approach.** The saga of database right, introduced by EU Directive 96/9<sup>3</sup> and the ECJ judgments, its latest chapter, amply demonstrate the risks to legal certainty in the copyright area of an over zealous legislative approach in the name of EU harmonisation as a reaction to technological change. It contrasts with and points up the wisdom of the longer term, more evolutionary (if more cautious) approach that has characterised the EU's intervention in the copyright area since 1991<sup>4</sup>.

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<sup>2</sup> Case C-46/02, *Fixtures Marketing Ltd v Oy Veikkaus Ab*; Case C-203/02, *The British Horseracing Board Ltd and Others v The William Hill Organization Ltd*; Case C-338/02, *Fixtures Marketing Ltd v Svenska Spel AB*; Case C-444/02, *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou AE* (OPAP). All judgments were delivered by the European Court of Justice (referred to here as the 'ECJ') Grand Chamber on 9 November 2004. They can be seen using the search form on the ECJ website at [http://curia.eu.int/en/content/juris/index\\_form.htm](http://curia.eu.int/en/content/juris/index_form.htm). Case C-46/02 was a reference under Article 234 EU Treaty from the Vantaan Käräjäoikeus of Finland. Case C-203/02 was an Article 234 reference from the Court of Appeal (England and Wales) (Civil Division). Case C-338/02 was an Article 234 reference from the Högsta Domstolen of Sweden. Case C-444/02 was an Article 234 reference from the Monomeles Protodikio Athinon of Greece. Article 234 EU Treaty provides a mechanism for national courts of the EU Member States to refer particular questions of EU law to the ECJ for a ruling about their interpretation. Here, Case C-46/02 is referred to as '*Fixtures Marketing (Finland)*', Case C-338/02 as '*Fixtures Marketing (Sweden)*' and Case C-444/02 as '*Fixtures Marketing (Greece)*' and together those three cases are referred to as the '*Fixtures Marketing Cases*'; and Case C-203/02 is referred to as '*William Hill*'.

<sup>3</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/1996 20, referred to here as the 'Database Directive'. The Database Directive can be seen at [http://www.europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=Directive&an\\_doc=1996&nu\\_doc=9](http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1996&nu_doc=9)

<sup>4</sup> The EU's first foray into copyright law making was Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/1991 42 ([http://www.europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=Directive&an\\_doc=1991&nu\\_doc=250](http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1991&nu_doc=250)). The most recent was Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, OJ L 167/2001 10 ([http://www.europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=Directive&an\\_doc=2001&nu\\_doc=29](http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2001&nu_doc=29)).

## **B. DATABASES AND ENGLISH COPYRIGHT LAW UP TO 1998**

3. **The Inherent Flexibility of Copyright.** Copyright, a ‘bundle of rights’<sup>5</sup>, has proved supple and adaptable to change, especially with the development of computer technology over the last generation. Prior to 1998<sup>6</sup>, a database was protected under English copyright law as a compilation, a type of literary work specifically recognised by the Copyright Designs and Patents Act 1988<sup>7</sup>.

4. **Compilation Copyright.** The old UK compilation copyright gave a relatively thin sliver of copyright protection to the compilation itself over and above the rights (if any) in relation to the underlying works or information that had been aggregated or compiled. That is what gave a list of Stock Exchange prices<sup>8</sup>, stud books<sup>9</sup>, football fixture lists<sup>10</sup> and football pools coupons<sup>11</sup> their copyright protection.

5. **Originality.** The standard of originality for compilation copyright was the traditional English copyright law requirement - that of independent skill and labour: essentially, that the compilation had not been copied from anywhere else<sup>12</sup>. Traditional UK compilation copyright might not have given a database a lot of protection, but at least we all generally knew where we stood.

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<sup>5</sup> Copinger & Skone James on Copyright, 15<sup>th</sup> Edition 2005, Sweet & Maxwell, §1-03 at page 2.

<sup>6</sup> The Database Directive was implemented into English law by the Copyright and Database Right Regulations, SI 1997/3032, referred to as the ‘CDRR’ here. They entered into force on 1<sup>st</sup> January 1998 (CDRR, Regulation 1(2)). The CDRR can be seen at <http://www.hms.gov.uk/si/si1997/1973032.htm>

<sup>7</sup> 1988 Chapter 48, Section 3(1)(a). The Copyright, Designs and Patents Act 1988 is referred to here as the ‘1988 Act’. The 1988 Act as originally enacted can be seen at [http://www.hms.gov.uk/acts/acts1988/Ukpga\\_19880048\\_en\\_1.htm](http://www.hms.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm). The version on the HMSO website does not show subsequent amendments, which are substantial.

<sup>8</sup> *Exchange Telegraph Co. Ltd v Gregory & Co* [1896] 1 QB 147

<sup>9</sup> *Weatherby & Sons v International Horse Agency and Exchange Ltd* [1910] 2 Ch 297

<sup>10</sup> *Football League Ltd v Littlewoods Pools Ltd* [1959] 1 Ch 637

<sup>11</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273

<sup>12</sup> To that extent, the old UK law originality standard was different from the originality standard under US copyright law. The US Supreme Court, in the leading case of *Feist Publications Inc. v Rural Telephone Service Co. Inc.* [499 U.S. 340; 18 USPQ 2d 1275 (1991)], about whether a compilation of names and addresses in telephone directories was copyrightable, held that in order to meet the originality requirement under Section 102(a) of the U.S. Copyright Act of 1976, ‘sweat of the brow’ was not enough to show originality and there needed to be ‘some minimal degree of creativity’. After noting the tension between the two propositions that facts were not copyrightable, but compilations of facts were copyrightable, the Court stated: “[t]he key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author... Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. ... the requisite level of creativity is extremely low; even a slight amount will suffice....Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”

### **C. THE NEW LAW: THE COPYRIGHT AND DATABASE RIGHT REGULATIONS 1997**<sup>13</sup>

6. **The CDRR; Definition of ‘Database’.** The changes to the legal protection of databases made by the CDRR did four main things. First, they adopted the definition in the Database Directive of a database as *‘a collection of independent works, data or other materials ... which are arranged in a systematic or methodical way and ...are individually accessible by electronic or other means’*<sup>14</sup>.

7. **Copyright: Database as Literary Work.** Secondly, they specifically excluded databases from the class of compilations referred to in Section 3(1)(a) of the 1988 Act<sup>15</sup>. Thirdly they introduced a database as a new class of literary work in which copyright subsists<sup>16</sup> and then applied a new and different originality requirement for this new class of database copyright by stating that a database is original *‘if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation’*<sup>17</sup>.

8. **Essentials of Database Right.** Fourthly, ‘database right’ was introduced as an entirely new property right, in implementation of the Database Directive<sup>18</sup>. Very briefly:

- **subsistence:** database right subsists in any database *‘if there has been a substantial investment in the obtaining, verifying or presentation of the contents of that database’*<sup>19</sup> where at the time it was made the maker was a national of an EEA

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<sup>13</sup> See note 6.

<sup>14</sup> CDRR, Regulation 6, inserting new Section 3(A)(1) into the 1988 Act and implementing Database Directive, Article 1(2). It is to be noted that all forms of databases – electronic and others – are covered.

<sup>15</sup> CDRR, Regulation 5(a), amending Section 3(1)(a) of the 1988 Act.

<sup>16</sup> CDRR, Regulation 5(c), inserting new Section 3(1)(d) into the 1988 Act.

<sup>17</sup> CDRR, Regulation 6, inserting new Section 3(A)(2) into the 1988 Act. This follows Article 3(1) of the Database Directive which provides that “[I]n accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection”. Although the standard of ‘author’s own intellectual creation’ is a traditional yardstick for the originality determination under a number of civil law jurisdictions of continental Europe, it is a new one for English law and has not yet been the subject of judicial interpretation in the UK courts. It is derived via Article 2(5) of the Berne Convention for the Protection of Literary and Artistic Works ([http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)) which provides that “[c]ollections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections”. As such, the US Supreme Court’s articulation of the US law originality requirement of ‘some minimal degree of creativity’ in *Feist* (see note 12 above) carries echoes of the ‘intellectual creation’ standard in Article 2(5) of Berne.

<sup>18</sup> CDRR, Part III, Regulations 12 to 25, implementing Database Directive, Chapter III, Articles 7 to 11.

<sup>19</sup> CDRR, Regulation 13(1), implementing Database Directive, Article 7(1).

member state or habitually resident in the EEA, or a company or partnership with its central administration, registered office or principal place of business within the EEA<sup>20</sup>;

- **ownership**: the first owner of database right is the maker<sup>21</sup> and the maker is the person who takes the initiative in and assumes the risk of obtaining, verifying, or presenting its contents<sup>22</sup>;
- **duration**: the first generation of a database right is of 15 years duration from the end of the year when the database was completed<sup>23</sup>. For later generations any *'substantial change to the contents ... , including a substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment'* qualifies the resulting changed database for its own term of protection<sup>24</sup>;
- **infringement**: database right is infringed if a person, without the owner's consent *'extracts or re-utilises all or a substantial part of the contents of the database'*<sup>25</sup> or carries out *'repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database'*<sup>26</sup>. 'Extraction' is defined as the *'permanent or temporary transfer [of the contents] to another medium by any means or in any form'*<sup>27</sup> and 're-utilisation' as *'making ... available to the public by any means'*<sup>28</sup>.

9. **The CDRR and 'Substantial'**. '**Substantial**' is defined *'in terms of quantity or quality or a combination of both'*<sup>29</sup>. This applies in the CDRR in relation to each of the *substantial* investment needed for the right to subsist, the degree of *substantial* change needed

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<sup>20</sup> CDRR, Regulation 18, implementing Database Directive, Article 11. Significantly, database right is a right 'made in the EU'. It falls outside the scope of the regimes of international copyright protection whereby persons creating copyright works created in one Contracting State broadly speaking enjoy equivalent protection for that work in the other Contracting States. So a database created by a person in the USA will not without more attract database right in the EU.

<sup>21</sup> CDRR, Regulation 15, implementing Database Directive, Article 7(1).

<sup>22</sup> CDRR, Regulation 14(1).

<sup>23</sup> CDRR, Regulation 17(1), implementing Database Directive, Article 10(1).

<sup>24</sup> CDRR, Regulation 17(3), implementing Database Directive, Article 10(3).

<sup>25</sup> CDRR, Regulation 16(1), implementing Database Directive, Article 7(1).

<sup>26</sup> CDRR, Regulation 16(2), implementing Database Directive Article 7(5).

<sup>27</sup> CDRR, Regulation 12(1), implementing Database Directive, Article 7(2)(a).

<sup>28</sup> CDRR, Regulation 12(1), implementing Database Directive, Article 7(2)(b).

<sup>29</sup> CDRR, Regulation 12(1). In the Database Directive, the term used in Article 7(1) is "qualitatively and/or quantitatively" in relation to both the investment needed for database right to arise and extraction/re-utilisation.

for second and later generations of databases to attract their own term of database right and the *substantial* part of the database extracted or reutilised for infringement to occur.

10. **Database Right and Copyright.** Database right is coexistent with copyright<sup>30</sup> so both copyright and database right (and indeed other rights) may subsist alongside each other in the same database (along with copyright and other rights in the underlying materials). Database is aligned with copyright as moveable or personal property and can be dealt with in the same way as copyright<sup>31</sup>.

11. **New Terms introduced by the CDRR.** Substantively, the CDRR introduced some new concepts and terms into English law and raised a number of important questions to be worked through, for example:

- in the new definition of ‘database’ based on ‘collection of independent works, data or other materials’ what does ‘independent’ mean? Collections of dependent or otherwise non-independent materials, etc are not databases within the new definition and so will continue to benefit from traditional compilation copyright;
- where the database met the requirements of the definition at Section 3(A)(1) of the 1988 Act, what does ‘author’s own intellectual creation’ mean? If that standard is not met, database copyright will not subsist in that database; and
- what do the new definitions of ‘obtaining’, ‘verifying’, ‘presenting’, ‘extracting’, ‘re-utilising’, ‘repeated and systematic’ and ‘substantial’ mean?

The ECJ in the three *Fixtures Marketing Cases* and in *William Hill* addressed a number of these questions for the first time<sup>32</sup>.

#### **D. DATABASE RIGHT AND FOOTBALL: THE FIXTURES MARKETING CASES**

12. **The Facts.** The facts of the *Fixtures Marketing Cases* are relatively straightforward. In the words of the ECJ press release<sup>33</sup>, “*Fixtures Marketing, on behalf of the professional football leagues, grants licences for the exploitation outside the United Kingdom of the fixture lists for the top English and Scottish football leagues. The fixture lists (for around 2000 matches per season) are drawn up at the start of each season by the organisers of the leagues; they are stored electronically and set out inter alia in printed booklets*”. The three

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<sup>30</sup> CDRR Regulation 13(2); Database Directive, Article 7(4).

<sup>31</sup> CDRR, Regulation 23. It is to be noted that future database right may be assigned in the same way as future copyright.

<sup>32</sup> Advocate General Stix-Hackl delivered her opinions on each case on 8 June 2004. Her opinion on William Hill is at <http://curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79959391C19020203&doc=T&ouvert=T&seance=CONCL>

<sup>33</sup> ECJ Press Release No. 89/04 of 9<sup>th</sup> November 2004 (<http://curia.eu.int/en/actu/communiqués/cp04/aff/cp040089en.pdf>).

defendants in the *Fixtures Marketing Cases* organised pools betting in Finland, Sweden and Greece and used data about English and Scottish football league matches without licence from Fixtures Marketing. Fixtures Marketing sued for infringement in the local national courts. The cases were referred to the ECJ, which gave judgment in all three cases on 9 November 2004.

13. **Meaning of ‘Database’.** In *Fixtures Marketing (Greece)*<sup>34</sup>, the ECJ considered what was meant by the term ‘database’ as defined in the Database Directive. It held that it referred “to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials”<sup>35</sup>; and accordingly that a fixture list for a football league such as that at issue constituted a database within that meaning.

14. **Purpose of Database Right.** In each of these three cases the ECJ went on to consider the scope of database right and in particular what investing in the ‘obtaining, verifying or presenting’ the contents of the database meant. Drawing on the recitals to the Database Directive<sup>36</sup>, the ECJ noted that the purpose of the database right was 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”<sup>37</sup>.

15. **Subsistence: ‘Obtaining’.** In relation to ‘obtaining’, the ECJ continued by pointing up the distinction between investing in creating the underlying materials themselves (irrelevant for database right) and collecting or aggregating them to create the database (relevant for database right). As the central feature of each judgment, it held that “[t]he expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of [the Database 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,

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<sup>34</sup> See note 2.

<sup>35</sup> ECJ Judgment in *Fixtures Marketing (Greece)* at §§ 32, 36, 53 and 55. §29, first sentence states as follows: “[t]hus, classification as a database is dependent, first of all, on the existence of a collection of ‘independent’ materials, that is to say, materials which are separable from one another without their informative, literary, artistic, musical or other value being affected”.

<sup>36</sup> In particular, Recitals 9, 10, 11 and 12, which provide as follows: “(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields; (10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems; (11) Whereas there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world’s largest database-producing third countries; (12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;”

<sup>37</sup> *Fixtures Marketing (Finland)* at §33; *Fixtures Marketing (Sweden)* at §23; *Fixtures Marketing (Greece)* at §39.

therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.”<sup>38</sup>

16. **Subsistence: ‘Presenting’.** The ECJ also considered what was meant by investing in ‘presenting’ the contents of a database. In two of the three cases ‘presenting’ was not specifically mentioned by the referring court and the ECJ held that “[t]he 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”<sup>39</sup>. However, it may not have made much difference as to whether or not ‘presenting’ was mentioned by the referring court, as the ECJ in *Fixtures Marketing (Greece)* stated the same thing, just omitting the words in bold in the previous but one sentence<sup>40</sup>.

17. **Cases Sent Back to National Courts.** With a resounding ‘no’ from the ECJ as to whether database right subsists in the fixture lists concerned, these cases now go back to the referring courts in the Member States concerned.

#### **E. DATABASE RIGHT AND HORSERACING: WILLIAM HILL**

18. **The Facts.** The facts in William Hill are again relatively simply stated. The British Horseracing Board (‘BHB’) managed horseracing in the UK. Its expenses were £16m a year. £4m of this was accounted for by its database of horse and race information. That database kept information on the million or so racehorses in the UK and about each race, including its name, place, date, distance and the fee payable and other entry criteria for it. The BHB contracted the running of the database to a third party, Weatherbys Limited. Weatherbys did three main things. They registered information about runners and riders; they decided on handicapping; and they compiled the list of riders. William Hill was a leading off-course bookmaker in the UK which at the end of the 1990s had launched an on-line betting service. It indirectly<sup>41</sup> obtained information from the BHB database via two sources; newspapers published the day before the race, and from a feed provided by Racing Pages Ltd (which is partly controlled by BHB) who was authorised to supply information to its members, which included William Hill. William Hill’s licence to use the information either as a reader of the newspapers or a member of Racing Pages Ltd was limited to ‘consultation’ and not extraction

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<sup>38</sup> *Fixtures Marketing (Finland)* at §51; *Fixtures Marketing (Sweden)* at §39; *Fixtures Marketing (Greece)* at §55.

<sup>39</sup> *Fixtures Marketing (Finland)* at §46; *Fixtures Marketing (Sweden)* at §35.

<sup>40</sup> “51. The presentation of a football fixture list, too, is closely linked to the creation as such of the data which make up the list. It cannot therefore be considered to require investment independent of the investment in the creation of its constituent data.”

<sup>41</sup> In the Directive extraction is 'by any means or in any form' and re-utilisation is by 'any form'. On appeal to the ECJ, the Court held that use of these expressions indicated that the Community legislature intended to give the concepts of extraction and re-utilisation a wide definition and could thus be interpreted as referring to an indirect act of appropriation or making available to the public as long as it is without licence and depriving the database maker of revenue. Thus the fact William Hill had no direct access to the Board’s database was not fatal to the Board’s case.

or re-utilisation. When it displayed the information on its online betting websites the BHC sued, claiming infringement of database right.

19. **UK First Instance.** The case came before Laddie J at first instance, who in his judgment of 23 February 2001<sup>42</sup> found for the BHB. The judgment is in the pragmatic, ‘what is worth copying is worth protecting’, tradition of the UK courts in copyright-type cases. Describing a database as a ‘*searchable collection of independent works*’, Laddie J. held that indirect extraction or re-utilisation counted as infringement and that even though the data re-used had been modified, it was still re-utilised if it remained substantially the same: unlike copyright therefore (which protects against reproduction in material form only), database right protects the contents of the database. For dynamic databases, substantial investment, not alteration, is the only criterion for renewed database right. And you need to assess the importance of the data to the user in assessing the ‘substantiality’ of the data extracted or re-utilised.

20. **UK Court of Appeal.** William Hill appealed to the Court of Appeal, which, following a hearing on 31 July 2001<sup>43</sup> in turn formulated eleven questions that it referred to the ECJ in Luxembourg under Article 234 EU Treaty, essentially as to the meaning of the some of the new terms introduced by the Database Directive, including (in relation to subsistence of database right) ‘obtaining’ and ‘verifying’ and (and in relation to infringement) ‘extraction’ and ‘re-utilisation’ and ‘substantial’<sup>44</sup>.

21. **ECJ – Judgment of the Full Chamber.** The judgment of the full chamber (nine judges) in *William Hill* was given on 9 November 2004, the same day as the judgments in the *Fixtures Marketing Cases*<sup>45</sup>. The substantive decision is at paragraphs 23 to 97 and runs to ten pages or so.

22. **Subsistence: ‘Obtaining’.** The ECJ judgment on the meaning of ‘obtaining’ in relation to the investment needed for database right to arise is co-extensive with, and couched in largely the same language as, that part of the decisions in the *Fixtures Marketing Cases*<sup>46</sup>. Accordingly, “[i]nvestment in the selection of the horses admitted to run in the race concerned relates to the creation of the data which make up the lists for those races which appear in the BHB database. It does not constitute investment in obtaining the contents of the

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<sup>42</sup> [2001] RPC 612.

<sup>43</sup> [2001] EWCA Civ 1268.

<sup>44</sup> See ECJ Judgment in *William Hill* at §22 for the complete list of the Court of Appeal’s questions.

<sup>45</sup> See note 2. In the case of Article 234 references about interpretation of EU directives, the ECJ delivers its judgment on the basis of the underlying directive not the national implementing legislation so the judgment in *William Hill* and the *Fixtures Marketing Cases* interprets the Database Directive itself.

<sup>46</sup> See note 40. In *William Hill*, see for example §31: the “purpose of database right 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”; and §42: “investment in ... the obtaining ... of the contents’ of a database refers 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”.

database. It cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial”<sup>47</sup>.

23. **Subsistence: ‘Verifying’.** Similarly, “[t]he 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 resources used for verification during the stage of creation of data or other materials which are subsequently collected in a database, on the other hand, are resources used in creating a database and cannot therefore be taken into account in order to assess whether there was substantial investment in the terms of Article 7(1) of the directive”<sup>48</sup>.

24. **Infringement: ‘Extraction’ and ‘Re-Utilisation’.** The judgment confirms that indirect as well as direct acts can constitute extraction and re-utilisation<sup>49</sup>; and also that exhaustion of rights does not apply to re-utilisation<sup>50</sup>

25. **Infringement: ‘Substantial’.** In response to the Court of Appeal’s questions “[w]hat is meant in Article 7(1)<sup>51</sup> ... by the expressions: “a substantial part, evaluated qualitatively ... of the contents of that database” .. and “a substantial part, evaluated quantitatively ... of the contents of that database”?” the ECJ responded<sup>52</sup> that “[t]he expression ‘substantial part, evaluated ... quantitatively, of the contents of [a] database’ in Article 7 of the directive refers to the volume of data extracted from the database and/or re-utilised and must be assessed in relation to the total volume of the contents of the database. The expression ‘substantial part, evaluated qualitatively ... of the contents of [a] database’ refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database. Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database”.

26. **Infringement: ‘Repeated and Systematic’.** Paragraph 95 of the judgment states that for repeated and systematic extraction or re-utilisation to be infringing, its cumulative effect

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<sup>47</sup> *William Hill* at §38.

<sup>48</sup> *William Hill* at §34.

<sup>49</sup> At §§ 53 and 67. See also paragraph 19.

<sup>50</sup> §67: “[t]he fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database”.

<sup>51</sup> Article 7(1) of the Database Directive provides that “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**” (emphasis added).

<sup>52</sup> At §82.

must be to “reconstitute and/or make available to the public, without the authorisation of the maker of the database, the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker”.

27. With a resounding ‘no’ similar to the *Football Fixtures Cases* on the questions whether database right arose and whether infringement had occurred, the case now goes back to the Court of Appeal.

## **F. IMPLICATIONS OF THE ECJ JUDGMENTS**

28. The four ECJ judgments in the *Fixtures Marketing Cases* and *William Hill* raise significant questions for developers and users of databases alike. Space does not permit an exhaustive analysis in this article, but a number of the more important points are illustrated here.

### **(i) The ECJ Judgments and Article 234 References**

29. **Scope of Article 234.** The ECJ in Article 234 references generally decides on the specific questions of EU law asked and not on the facts adduced as evidence in the national proceedings. Although in each of the four cases the ECJ has answered the questions it was asked to the extent it considered necessary (and the Court of Appeal in *William Hill* did ask the ECJ to decide whether the facts as pleaded were capable of amounting to ‘obtaining’<sup>53</sup>), the ECJ does appear to have gone further and effectively applied the law to the facts of the cases in certain instances. How the national courts will apply the judgments in each of the cases remains to be seen. Clearly, it is possible that one or more of the cases will settle, but from early comments it looks possible that the Article 234 point will be taken in the resumed UK proceedings<sup>54</sup>.

### **(ii) What is a ‘Database’?**

30. **Section 3(A)(1) of the 1988 Act.** The question what is a ‘database’ becomes more important as a result of the four judgments. A ‘database’ which falls within the definition of Section 3(A)(1) of the 1988 Act<sup>55</sup> - usefully described by Laddie J as ‘a searchable collection

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<sup>53</sup> *William Hill*, at §§ 14 and 22.

<sup>54</sup> The ECJ, in applying the Database Directive to the facts of the case, made findings which differed from the findings reported in the Court of Appeal’s judgment. For example the Court of Appeal noted that Laddie J. had said at first instance that “there was no substantial challenge to the pleaded assertions by BHB that the establishment of the database, at considerable cost, has involved and ... continues to involve, extensive work ... the annual cost of continuing to obtain, verify and present its contents being approximately £4,000,000 and involving approximately 80 employees ...” The Court of Appeal would be entitled following the (first instance – Laddie J.) decision in *Arsenal Football Club v. Reed* ([2003] RPC 39) to disregard any conclusions reached by the ECJ to the extent they were based upon a factual background inconsistent with its judgment. BHB’s lawyer was quoted in page 3 of ‘*The Lawyer*’ magazine of 15 November 2004 as saying that “the ECJ has gone one step further than it is empowered to do by applying the law to the facts of the case. We have looked at the way it has reasoned the case and it has misunderstood what the BHB database consists of”.

<sup>55</sup> See paragraph 6 and note 14.

of independent works'<sup>56</sup> - will need (for database right in it to be enforceable) to be consistent with the ECJ judgments and (in order to attract database copyright) to meet the 'the author's own intellectual creation' originality requirement of Section 3(A)(2) of the 1988 Act<sup>57</sup>. If however, a database does not fall within Section 3(A)(1) – for example, as not being a collection of 'independent' works, data or materials - it may still benefit from traditional compilation copyright protection under Section 3(1)(a) of the 1988 Act<sup>58</sup>. The ECJ considered the meaning of 'database', and particularly what is meant by 'independent' in *Fixtures Marketing (Greece)*. It held (in paragraph 29) that 'independent' materials are "materials which are separable from one another without their informative, literary, artistic, musical or other value being affected" and again (in paragraph 32) that the works, data or materials collected in the database should be "separable from one another without the value of their contents being affected"<sup>59</sup>.

31. **Independence of Works.** The gloss of 'separable without affecting value' on what is meant by 'independent' is not straightforward. In particular, what 'value' is to be considered when separating the contents one from the other? Is it the intrinsic value of each separate piece of 'material' considered in isolation, effectively construing 'other value' in paragraph 29 *ejusdem generis* with the preceding words ('literary, artistic musical ...')? Or do you include as 'other value' the extrinsic (greater) value that aggregation will confer on each piece of 'material'? In applying the test of independence to the subject of the case, the fixture list, the ECJ held that "the data concerning the date, the time and the identity of the teams in a particular match have an independent value in that they provide interested third parties with relevant information". However, the value in the database in *Fixtures Marketing (Greece)* was relatively straightforward: a football fixture has standalone informative value to all interested third parties, and a collection of football fixtures is a reference work of the same.

32. **Real-Time Databases.** But in the financial services sector, for instance, pinpointing the value is more complex. The supply of databases of equity, currency, index, bond, derivatives and other market data (in this sector, by way of instantaneous or 'real time' computerised 'feeds' of information) constitutes an industry worth many \$bn each year. Individual trades – showing details of security name, price, quantity, date and time, etc – are collected and aggregated at source (such as a stock exchange) and, via the real time data feed, supplied in turn for value to market participants and other customers.

33. **Severability of Market Datafeed from Constituent Trades.** Each trade – on one view, the 'material' which is aggregated - has value as a record of the underlying transaction to the parties to it. However, there is also value to persons not party to the trade. These include the stock exchange (or other source) - which supplies that record as part of the data feed - and the source's customers - who subscribe to and receive the data feed and who can then manipulate all or part of it (including that record) for their own business. This 'extra value' arises because customers typically use the data for analysis of blocks of trades over time, such as technical analysis (charting) or statistical analysis (e.g. regression testing of trading models), rather than by looking at a single individual trade.

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<sup>56</sup> See paragraph 19.

<sup>57</sup> See paragraph 7 and note 17.

<sup>58</sup> See paragraph 3 and note 6.

<sup>59</sup> See paragraph 13 and note 36.

34. **Intrinsic v. Extrinsic Value.** The distinction in interpreting ‘separable without affecting value’ between ‘intrinsic’ and ‘extrinsic’ value is significant in relation to market data feeds. If it means ‘intrinsic value’, then this criterion of the definition of database is met. If on the other hand it includes ‘extrinsic’ value, then in separating out the contents, the sum of the separated parts will be worth less than the value of the whole, ‘value’ has been ‘affected’ and that condition of the definition of database will not have been made out. The corollary of the latter case is that ‘databases’ fall outside Section 3(A)(1) and within Section 3(1)(a) of the 1988 Act as a traditional compilation literary work in which copyright subsists – effectively a return to the pre-1988 position.

**(iii) Difficulties with ‘Obtaining’ as Defined by the ECJ.**

35. **Anachronistic Interpretation of ‘Obtaining’.** It is remarkable that in expressly stating the purpose of database right as to promote investment in computer systems<sup>60</sup> - with their constantly increasing power to process more information more quickly - the ECJ should have shaped the keystone of its judgments in interpreting what investment in ‘obtaining’ means in pre-computer era terms. There is nothing wrong in saying that you need to separate the investment in creating the underlying contents from the investment in putting them into a database. This follows the traditional copyright analysis for compilation copyright. It’s just that it misses the point in the case of many (one is tempted to say most) computer databases. This is certainly so with real time databases described in the previous paragraphs, where the point is that the act of creating the ‘contents’ is essentially part of the act of, at the same time as and substantively inseparable (both economically and technically) from, the act of creating the ‘database’.

36. **What Database Developers Must ‘Show’.** As a practical matter, after the ECJ judgments, the maker of a database must now ‘show’ that there has been a ‘substantial investment’ in obtaining (or verifying or presenting) at a later stage which may be entirely hypothetical. The difficulties are compounded, where the maker of the ‘contents’ is also the maker of the ‘database’<sup>61</sup>. Database developers will need to consider:

- amending their processes so that they can demonstrate a substantial obtaining/verifying/ presenting investment at that later stage;
- amending internal and externally available documentation to show this;
- taking appropriate (or amending current) contractual/noticed acknowledgements and/or commitments from counterparties.

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<sup>60</sup> See paragraph 14.

<sup>61</sup> This is in spite of §35 of William Hill: “[i]n 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 31 to 34 of this judgment, required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials”.

(iv) 'Presenting'

37. **'Presenting' and Article 7(1).** For database right to arise under Article 7(1) of the Database Directive, there needs to be a substantial investment in 'either the obtaining, verifying or presenting' of the contents of the database. The use of the disjunctive 'or' makes it clear that showing a substantial investment in the 'presentation' of the contents alone will suffice. It is not fatal to the subsistence of database right that there has been no 'obtaining' or 'verifying' substantial investment at the right time so long as there is then a substantial investment in 'presenting'. It is a significant weakness of the ECJ judgments that they have not considered 'presenting' in any depth<sup>62</sup>. The only substantive statement is at paragraph 51 of the judgment in *Fixtures Marketing (Greece)* which provides that "[t]he presentation of a football fixture list, too, is closely linked to the creation as such of the data which make up the list. It cannot therefore be considered to require investment independent of the investment in the creation of its constituent data. There are three difficulties with this statement.

38. **Problems with Paragraph 51.** First, the judgment confuses presentation of a list with presentation of a database: when Article 7(1) speaks of investing in 'presenting' it is talking about presenting the contents of the database – Laddie J's 'searchable collection of independent works'. Creating a search function is arguably the essence of a database as a prerequisite to searching is the methodical/systematic arrangement of what is to be searched. So, it is difficult to consider that investment<sup>63</sup> in presenting what is searched, searching itself and presenting the results should not count as investing in presentation. Secondly, even though the 'presentation' may be 'closely linked' to the 'creation' of the list, 'presentation' must logically come afterwards: you can only present what you have created. On the ECJ's own reasoning, you therefore only have to 'show' that there were two investments – one at the creation stage (which doesn't count) and the other at the 'presentation' stage (which does). This may give rise to evidential difficulties, but it is to be anticipated that these can be overcome with appropriately drawn internal documentation. Thirdly, the second sentence of paragraph 51 is a non-sequitur from the first: it may be more difficult to show investment in content 'presentation' separately from that in content 'creation' but focussing on investment in searching may be able to overcome the difficulty.

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<sup>62</sup> In *Fixtures Marketing (Finland)* and *Fixtures Marketing (Sweden)* it was considered only to be dismissed: see paragraph 16 and note 39. In *Fixtures Marketing (Sweden)*, "presenting" was said (at paragraph 27) to relate to the resources "used for the systematic or methodological arrangement of the materials contained in th[e] database and the organisation of their individual accessibility". In *William Hill*, it was not considered at all substantively. Its only substantive consideration was in *Fixtures Marketing (Greece)*: see paragraph 16 and note 41.

<sup>63</sup> Recital 23 of the Database Directive provides that "[w]hereas the term 'database' should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs"; and Article 1(3) provides that "[p]rotection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means".

(v) **Infringement: ‘The Extraction and/or Re-utilisation of the Whole or of a Substantial part, Evaluated Qualitatively and/or Quantitatively, of the Contents’**

39. **Infringement in *William Hill* Generally.** This section of *William Hill* (paragraphs 68 to 82) amounts to a real narrowing down of database right as it had generally been considered to exist before the ECJ delivered its judgments.

40. **‘Substantial Part, Evaluated Qualitatively’.** By paragraphs 71 and 82 of the judgment, *‘substantial part, evaluated qualitatively’* refers to the *‘scale of the investment in the [O/N/P] of the contents the subject of the act of extraction and/or re-utilisation’*. So, you look at the scale of the investment in the part that was ‘lifted’ (extracted or re-utilised). You don’t look at *‘the intrinsic value of the data affected by the act of extraction and/or re-utilisation’* - the fact that the data lifted by William Hill were *‘vital’* to the races that BHB organised was irrelevant<sup>64</sup>.

41. **‘Substantial Part, Evaluated Quantitatively’.** This in turn means that more reliance needs to be placed on ‘quantitative’. Paragraphs 70 and 82 of the judgment state that *‘substantial part, evaluated quantitatively’* refers to the volume of data extracted/re-utilised as being assessed in relation to the volume of the contents of the whole of that database. Paragraph 70, second sentence states: *‘if a user extracts and/or reutilises a quantitatively significant part of the contents of a database whose creation required the deployment of significant resources, the investment in the extracted and/or reutilised part is, proportionately, equally substantial’*.

42. **Economic Assessment.** Having specifically fitted a prism of economic impact in this section of the judgment by referring (at paragraph 69) to the 42nd recital of the directive<sup>65</sup>, the court then expressly rejects the notion of full economic analysis in the ‘qualitatively substantial’ assessment by saying in para 78 that the *‘intrinsic value of the data’* is disregarded. This is a far cry from the UK copyright law rule of thumb that ‘if it’s worth copying, it’s worth protecting’. That this approach is irrational and potentially capricious can be illustrated in two ways, first concerning different database right treatment of databases of different sizes and secondly by considering the activities of ‘screen scraping’ operations.

43. **Big Database/Little Database.** If a similar amount of similar data (Dataset I) is ‘lifted’ both from a small database (Database 1) and from a large database (Database 2), then on the ECJ’s analysis person A, the maker of Database 1, is more likely to have a cause of

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<sup>64</sup> *William Hill*, §78.

<sup>65</sup> §69 reads as follows: “[i]n that connection, it must be borne in mind that protection by the *sui generis* right covers databases whose creation required a substantial investment. Against that background, Article 7(1) of the directive prohibits extraction and/or re-utilisation not only of the whole of a database protected by the *sui generis* right but also of a substantial part, evaluated qualitatively or quantitatively, of its contents. According to the 42nd recital of the preamble to the directive, that provision is intended to prevent a situation in which a user ‘through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment’. It appears from that recital that the assessment, in qualitative terms, of whether the part at issue is substantial, must, like the assessment in quantitative terms, refer to the investment in the creation of the database and the prejudice caused to that investment by the act of extracting or re-utilising that part”.

action (on the ‘quantitatively substantial’ test – clearly, the ‘qualitatively substantial’ test will need to be applied also) in database right than B, the maker of Database 2. This is because Dataset I is a larger proportion of Database 1 than Database 2 and so more likely to ‘quantitatively substantial’. B is effectively discriminated against and penalised. This is illogical, especially where B has (as could well have been the case as a practical matter) invested significantly greater resources to make his database ‘better’ – with more comprehensive and extensive materials, etc. In order to avoid this odd consequence, database makers will need to consider ways of disaggregating a large database into one or more smaller, separate ones so as to be able to show that any part taken is greater as a proportion of the whole. This is not a sensible database design criterion. Alternatively, with real-time or frequently updated databases, can you say that a new database is created per unit of time (whatever the unit) and take advantage of Article 10(3) of the Database Directive (and CDRR, Regulation 17(3)<sup>66</sup>)? This question remains unanswered as the ECJ did not consider it necessary to answer the Court of Appeal’s question on this very point<sup>67</sup>.

44. **‘Screen Scraping’<sup>68</sup> Operations.** Again, consider in terms of database right this illogical consequence of the ECJ judgment: C makes Database 3 and makes a substantial investment but at the creation, not the O/V/P stage, so C gets no database right in Database 3. D makes a substantial investment in ‘systematically and repeatedly’ extracting a substantial part of C’s Database 3 in order to make Database 4. D gets database right in Database 4 (which, to compound matters) can conceivably be enforced against C.

#### (vi) **Other Rights That May Subsist in Databases**

45. **Legal Protection of Databases Uncertain.** Seven years after the Database Directive was implemented in the UK, the ECJ judgments leave the legal protection of databases open to question. The scope of database right is uncertain. Difficulties with the meaning of ‘database’ and what is meant by ‘*author’s own intellectual creation*’<sup>69</sup> leave the scope of

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<sup>66</sup> See paragraph 8, third bullet and note 24.

<sup>67</sup> *William Hill*, §22(11): “Does Article 10(3) of the directive mean that, whenever there is a “substantial change” to the contents of a database, qualifying the resulting database for its own term of protection, the resulting database must be considered to be a new, separate database, including for the purposes of Article 7(5)?” And §96: “Against that background, it is not necessary to reply to the 11th question referred”.

<sup>68</sup> By ‘screen scraping’ here is meant the use of automated software tools to repeatedly search particular websites, extract information from them and compile the results for display or use on the host site. The technique is frequently used in the air travel industry to search for online information about flight schedules and fares from a particular airline, extract that data and aggregate it with similar data from other airlines, offering the aggregated data to users on the host site and using it for example to generate advertising revenue. See for example in the USA, *American Airlines, Inc. v FareChase, Inc.* [Cause No. 067-194022-02 (67<sup>th</sup> District Court, Tarrant County, Tex., Mar. 8, 2003)]. In the USA, screen scraping cases have tended to be grounded in trespass to chattels (unauthorised use of computer capacity), contract (website terms and conditions) and the Computer Fraud & Abuse Act, a federal statute making illegal various forms of unauthorized access to computers (Section 1030 of Title 18 of the U.S. Code: see [http://assembler.law.cornell.edu/uscode/html/uscode18/usc\\_sec\\_18\\_00001030----000-.html](http://assembler.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00001030----000-.html))

<sup>69</sup> The standard of ‘intellectual creation’ presents difficulties in the case of works that are computer generated (i.e. generated by a computer in circumstances where there was no human author of the work - Section. 178 of the 1988 Act). These difficulties can to some extent be addressed by emphasising human control or authorship.

database copyright open to doubt and leave open the possibility of making it desirable to claim traditional compilation copyright<sup>70</sup>. In addition to practical techniques of appropriately documenting internal processes and procedures, notices and contractual provisions in order to seek to entrench the rights concerned<sup>71</sup>, a number of other rights – especially confidentiality – are potentially important to database developers<sup>72</sup>. These rights are additional to copyright and other rights in and to the underlying works, data and materials compiled, collected or aggregated into the database.

46. **Confidentiality.** The UK rules on protection of confidentiality may operate to provide a remedy in circumstances that are relevant to databases. The line of cases starting with *Albert (Prince) v Strange*<sup>73</sup> show that where the structure of information in aggregated form is not publicly available then, even though underlying information may itself be in the public domain, the law of confidence will intervene to protect the information as aggregated. For example, in the *Extel* cases<sup>74</sup> which again concerned football league/pools information, the information traded was essentially public domain but the UK court held that what was protectable in confidence terms was the structure of the information in its aggregated form. Of course, it will be necessary to show that the database information concerned is not freely publicly available, which in turn points up the need for confidentiality provisions in website and other notices and contractual terms and conditions.

47. **Other Rights and Duties.** Finally for completeness, it worth mentioning these include software patents; that design right is now, following the recent Court of Appeal decision in *Lambretta Clothing Co*<sup>75</sup>, unlikely to be of assistance in the database context; the possibility of Computer Misuse Act 1990 proceedings<sup>76</sup>; and that, in the absence of other

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<sup>70</sup> On one view, the situation in the UK could be argued to be comparable with that in the USA – see note 12. With database right uncertain and traditional compilation copyright for Section 3(A)(1) databases removed, one is left with the ‘author’s own intellectual effort’ originality standard in Section 3(A)(2), which is not unlike the ‘minimal degree of creativity’ in *Feist*.

<sup>71</sup> So, consideration should be given by database makers to including in their employment agreements (and consultancy agreements with the requisite assignment) statements that work on databases constitutes the intellectual effort of the individual as author of the work or part concerned. Ownership will transfer to the employer by operation of law where the work was created in the course of the employee's employment (S. 11(2) CDPA) and by assignment (which may be of future copyright in the UK) in the case of consultants.

<sup>72</sup> Article 13 of the Database Directive states that “[t]his Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.”

<sup>73</sup> [1849] 1 M&G 25

<sup>74</sup> *Exchange Telegraph Co Ltd v Gregory & Co*, note 8 above; *Exchange Telegraph Co Ltd v Central News Ltd* [1897] s Ch 48; see also *Weatherby & Sons v International Horse Agency and Exchange Ltd*, note 9.

<sup>75</sup> *Lambretta Clothing Co Ltd v Teddy Smith (UK) Ltd and another*, [2004] EWCA 886

<sup>76</sup> 1990 c.18; see [http://www.legislation.hmso.gov.uk/acts/acts1990/Ukpga\\_19900018\\_en\\_1.htm](http://www.legislation.hmso.gov.uk/acts/acts1990/Ukpga_19900018_en_1.htm)

property type rights or enforceable legal duties, a ‘naked’ contractual restriction against extracting part of a database could be open to challenge on competition law grounds if the elements of the relevant competition law claim are made out<sup>77</sup>.

## **G. CONCLUSION**

48. The unfolding saga of database right is becoming a cautionary tale against excessive zeal in law making in the area traditionally served by copyright. The Database Directive, in the name of harmonisation of rights across the EU, was made in 1996<sup>78</sup>. Even then, the EU took a relatively aggressive international stance in that the new database right lay outside the international copyright conventions and there was no equality of treatment between databases made within and outside the EU: database right is for databases ‘made in Europe’ only. In the UK, the Parliamentary Draftsman characteristically made a fine technical job of inserting the new rules into the framework of the 1988 Act, although the UK’s implementation of the Database Directive by the CDRR necessarily introduced a significant number of new terms into English law. As the first interpretation of those terms at the highest EU level, the ECJ Judgments in the *Fixtures Marketing Cases* and *William Hill* have highlighted the difficulties in applying them for database developers and users alike.

49. From this standpoint, two or so months after the ECJ judgments were delivered on 9 November 2004, one is left with a sense that the judgments reflect a decision on a policy choice awkwardly implemented. On this basis, the policy decision was to raise the bar on database right in order to prevent the risk that this new property right would arise virtually everywhere there was a website as this in itself would become an impediment to the development of the information market that the Database Directive is designed to promote<sup>79</sup>. The awkward implementation is in the four ECJ judgments, which in a number of areas do not withstand practical, robust analysis. In the meantime, the Database Directive, whose very name is on the legal protection of databases, has left the scope of that protection uncertain.

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<sup>77</sup> In the UK, breach of Article 81 and/or 82 EU Treaty; and Chapter 1 and/or Chapter 2 of the Competition Act 1998.

<sup>78</sup> It had a long gestation: the EU Commission’s initial proposal was published in June 1992 - OJ C 156/1992 4 of 23 June 1992.

<sup>79</sup> Recital 9 of the Database Directive provides that “[w]hereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields”.