How Open Data Become Proprietary in the Court of Justice of the European Union

Maria Bottis(✉)

Department of Archives, Library Science and Museology,
School of Information Science and Informatics, Ionian University, Corfu, Greece
botti@otenet.gr

Abstract. Database protection has become a seriously debated issue in Europe and the United States since the 1990s. In Europe, the Database Directive of 1996 offered two-tiered protection, for original and non-original databases, instituting the database maker's *sui generis* right; the United States declined to change its steady position against protecting non-original databases. The Court of Justice of the European Union, interpreting the Directive, carved a narrow database right. While these decisions enjoyed universal acclaim from many theorists, suddenly in the 2015 *Ryanair* decision, the CJEU subtly blasted its prior database jurisprudence, highlighting contract as a means to enclose data into absolute proprietary models in a way completely unforeseeable until then. We are left behind to watch the enclosing of open data acquire a legitimization never before possible.

Keywords: Database right · Open data · European court of justice · *Contract v. copyright*

1 Introduction

Databases are omnipresent and valuable. They represent the tools without which a series of economy sectors and other fields, like research and education, are totally unable to function with any degree of credibility [1]. Their progeny was collections of facts, or lists with numbers or other data; the collector, and in the modern times, the maker of the database has always sought protection from copying [2]. The structuring of a functional and complete database is, indeed, a formidable achievement and the law should not, in general, leave it free for copying.

On the other hand, as the American jurisprudence has shown, it is crucial to examine the true nature of the contents of a database. One cannot collect data, facts e.tc. of an open and public nature, like telephone numbers, enclose them in a database available to the public and then, claim copyright, as if he was the author of Anna Karenina [3]. Copyright protects originality, not effort [4].

It seems, therefore, that database protection stood at the crossroads between copyright, unfair competition and contract from the beginning. Database makers have used a series of legal bases to claim protection for their databases, not always successfully [5]. In Europe, an important step to resolve this matter was the European Directive 96/9/EC on the protection of databases. In the United States, *Feist Publications v. Rural* [4] of the Supreme Court fully clarified in 1991 that non-original

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databases were and are still not entitled to any copyright protection at all. In this paper, we will examine these two different approaches and the 2015 judgment of the Court of Justice of the European Union which came to alter the picture dramatically.

2 The 96/9/EC Directive of the Protection of Databases

The model of protection initially examined by the European authorities for databases was a clear unfair competition model, disallowing significant copying of another's database for commercial purposes by a competitor [2]. However, as the works towards the Directive were proceeding, the model changed thoroughly and abruptly became an almost pure copyright model. Original databases, meaning databases original in the structuring, design and presentation of their content acquired copyright protection - a protection though certainly not extending to the content of the database, if this as not original in itself [6].

The jewel of the Directive was the protection of non-original databases, where content, design, structure, presentation etc. did not show any creative effort but which were the result of substantial investment of time, effort and capital (the most expensive legal, medical, economic and other databases fall into this class) [11, 12]. The Directive offered a sui generis right to the maker of the database (a new term, necessary as there is no author, no creator of a non-original database), lasting 15 years from the creation of the database or from any real update of the database (if a database is, as they usually are, constantly updated, the right lasts forever). All EU member states (very few on time, though) implemented the Directive, albeit in an almost provocatively non-uniform way [7, 9]. It seems, though, that database makers were content with the new rules; in their responses to the EU questionnaire to formally evaluate the Directive, as dictated by law, all database makers asked stated that they wanted the sui generis database right to remain for their benefit, even if most of them, five years after the Directive had never heard of it [8].

The obvious result was that database makers had the power to enclose data of a public nature (for example, courts' judgments and statutes) into protected databases, if they could prove that they had devoted substantial investment into the creation and presentation of these data [9]. In this case, and if the database was available to the public (digital or analogue, this was unimportant), lawful users (another new term in the intellectual property lexicon) of the database could not be contractually deprived of their right to extract and reutilize insubstantial parts of the database for any reason. This freedom was safeguarded by the Directive, as exceptions to the rule, so that no contract whatever could be valid between the database maker and the lawful user, if it disallowed this freedom of extraction and reutilization of insubstantial parts of the database [2]. This was the exception/limitation of the right, by analogy to the known exceptions/limitations to the copyright holder's rights, exceptions and limitations that aim to protect the public interest, and to calibrate the respective rights and interests of creators, users and the general public. As much as this little freedom was preserved in favor of the lawful user of a database and as much as this freedom may or may not be exercised when a database is technologically protected by Digital Rights Management schemes, this freedom did exist in the Directive and gave the impression that the public interest and the lawful user were not absent from the mind of the European legislator [9].

3 The 1991 US Supreme Court Decision *Feist Publications v. Rural Ltd. Co*

Database protection has its little history also in the United States. From the beginnings of the 20th century, the American courts had heard cases of illegitimate copying of another's lists of horses, or images of flowers' collections etc. and the like [2, 8]. They did offer some protection to these collections under the "sweat of the brow" doctrine, which recognized skill and labor as legitimate basis for copyright protection. However, in 1991, with *Feist Publications v. Rural* [4], the Supreme Court famously decided that copyright protects originality, not effort; and the total copying of the telephone directory of the defendant was deemed unprotected by copyright laws. Many other possible legal foundations remained open, of course, for the plaintiff, such as unfair competition (if the defendant was a competitor), contract (if there was one), tort (misappropriation) and so on [3]. But copyright was left to the protection of original works of the mind and a telephone directory was simply not amongst them. Actually, the 1991 decision of the US Supreme Court led to the intense pressures to the European legislator to enact a Directive on database protection, so that in his turn, the American legislator would be seemingly pressured to also offer similar statutory safeguards for the American database makers [8].

4 CJEU Jurisprudence of Database Protection Before 2015

The 1996 database Directive and especially, the *sui generis* right attracted adverse criticism [10]. The mandatory evaluation of the Directive by the European Commission even proposed banning, if not of the whole Directive, of the *sui generis* right, in the sense that it did not seem to have offered anything important to the European map of copyright protection. The propositions were left as such; probably, there is no power greater than inertia in these cases. The few cases that reached the European Court of Justice before 2015 had carved a limited database protection right for the authors and makers. In the *William Hill/British Horseracing Board* line of cases [15], the Court denied protection for databases with the *sui generis* right when these databases were not the immediate result of the substantial investment the Directive demands, but they were a by-product, a 'spin-off' [13], whereas the investment was directed towards a different main activity (such as organizing football games).

Taking one more step towards "domestication", with the *Football Dataco* case [16], the Court demanded an important element of creativity in the structure and presentation of a database, so that it could be held original and give rise to the (pure) copyright protection for databases of the Directive. And still, of course, this protection did not extend to the databases' contents, when they were not original in themselves (example: telephone numbers, lists of restaurants, real estate lists etc.). So, as it was successfully commented in the literature, the Court had "domesticated" the hotly debated *sui generis* right of the database maker to her database: any substantial investment had to do not with creating the data ("synthetic" data [18] in this case) but with obtaining them. Also, significant originality should be shown in the design,

structure and presentation of the database, if the database "author" sought the other route, of protection due to originality.

5 The 2015 Ryanair CJEU Decision

In 2015, all this subtly but decisively changed. In *Ryanair* [19], the database in question was again a database with "synthetic" data [18], meaning data *made* by the database maker and not obtained: data about the airlines routes, timetables, tickets' prices etc. This is a database in the same line as the database of the *British Horseracing Board* [15] or the *Football Dataco* [16]. Ryanair sued PR Aviation for using these data for its own database, which offered comparisons of tickets' prices and the possibility to buy a ticket. The main argument of Ryanair was that the database was a. original, triggering copyright database protection and b. if not original, the database was the result of substantial investment, hence deserving the *sui generis* right protection. Almost as an afterthought, the company also claimed that PR Aviation was also contractually bound not to use any of Ryanair's data into her database, as Ryanair had inserted in its site specific clauses prohibiting this use by third parties.

PR Aviation naturally claimed that Ryanair's database was a. not original in the design etc. of its contents b. not deserving the *sui generis* right, as the data it contained was the spin-off [13] of the main activity of the company (to organize air flights and sell air tickets). As the Database Directive expressly prohibits any contractual clause which would preclude a lawful user of the database from extracting and reusing insubstantial parts of the database, PR Aviation felt pretty safe that its behavior, certainly enhancing free competition between competitors for tickets' sales, was perfectly legal – especially since Ryanair was a "sole-source" database, available to the public [12].

Finally, an "afterthought" argument was added by Ryanair: that if the database was (diametrically appositively from its own arguments just above this one) not original, nor non-original in the Directive's sense, so this had to mean that the lawful user's rights were also irrelevant, therefore the Directive itself was totally irrelevant in this case. So any contractual clause could and would stand, if permitted by the Member State's statutes protecting consumers. There was no "database", no "lawful user", no substantial etc. investment; the whole case was quite surprisingly not a database maker's rights case at all: it was a contracts' case. And the Court of Justice of the European Union agreed: as if *William Hill/British Horseracing Board* and *Football DataCo* had never existed, it "threw" the whole case out of the intellectual property rules of databases and confined it into another field: contract.

6 The Sovereignty of Contract

Was this correct? There is indeed a seductive pure-logic argument: if we have a database which simultaneously is: (a) not original and (b) not non-original, both in the Directive's sense, then the Directive does not apply to it. The Court, let's say lacks jurisdiction. The Directive is not applicable. But the majestic failure or denial of the Court to take a step behind and explore what exactly *is* a database that is not original

nor non-original in the Directive's sense, is extremely disappointing. It is almost provocative. Does the fact of being both not original and not non-original, in the Directive's sense, dictate automatically that the database is a work able to be protected stronger than any other database falling into one of these two classes, or appositively, that it is not a database *at all*, that it deserves no protection of any kind at all-contract included? Why does the Court use the words "author" and "database" to describe this class of "databases" [19]? Do these datasets [20] have an "author"?

A simple examination of the data within this database would lead us to the inescapable result that they are the epitome of "synthetic data"; nothing could be further from an original work of our intellect than this. Moreover, these are data open to the public; one has unlimited access to the details of Ryanair's flights through Ryanair's own database. It is only when the same information, "flight Athens-Rome on 15.00 pm, 22/11/2015" becomes part of another website that Ryanair demands the enclosure of it. Open data, via contract, become proprietary, in the most strict sense, as contract, when freed from any consumers protection law there may be, can be tailored exactly as the "owner" of the data wishes: unlimitedly. And here, consumers' protection simply cannot "return" these data to their original situation, that is their complete freedom and openness, as they indeed should and had been, free and open to all.

7 Open Data no More

It is difficult to imagine a harder blow to the Database Directive than Ryanair, nor a more subtle one. It carries the innocent façade of a ruling leaving the Directive just "out of the matter", whereas it effectively negates its whole existence and subtracts from it any meaning at all. All "synthetic data" producers now can simply claim that their databases, full with previously thought as open and public data, are not original, nor non-original; they are further than this, albeit towards the wrong end: they are something one can contract in, or out, at the wish of the initial data "producer". And contract, once accepted as possible, carries within it the heavy justification of the empowerment of freedom-of the free will to dictate terms to the other side, as this side is supposedly free not to enter into the contract in the first place. Contract also is inherently mostly a private matter, one that the State should better leave intact to develop, so as not to hamper the sacred principle of economic freedom. All this, applied to enclose data previously open to all, seem (to the careful, behind-the-lines reader) contradictory, perverse, incapable of suffering the test of intellectual property's wisdom as it was been delivered to us since the Statute of Anne.

Not all commentators agree with this criticism of the decision [21]. But when we are outside the domain of copyright, but on the wrong side of the "outside", we lose in an instant the protection of fair use principles, or exceptions and limitations for the civil law world. We also lose the sense of what it really is that you are claiming exclusiveness to. We start to believe that indeed, the world of the protection of intangible goods has simply collapsed under the weight of a two-party private agreement, rendering this whole world evanescent. The same rule here applied with (previously) open data in databases could apply, in the future, in trademark or patent disputes. As long as we have in our hands something that could be seen as not an invention (not a new,

useful etc. technical solution to a problem) or not a trademark (not a sign carrying distinctiveness etc.), but still *something* which can be contracted out, then we are free from any patent and trademark law limitations and we are left with contract. We need to think very carefully whether this is a legal result that will be, in the end, beneficial to society [10].

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