DATABASES AND THE SUI-GENERIS RIGHT – PROTECTION OUTSIDE THE ORIGINALITY. THE DISREGARD OF THE PUBLIC DOMAIN

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Abstract

This study focuses on databases as they are regulated by Directive no.96/9/EC regarding the protection of databases. There are also several references to Romanian Law no.8/1996 on copyright and neighbouring rights which implements the mentioned European Directive. The study analyses certain effects that the sui-generis protection has on public domain.

The study tries to demonstrate that the reglementation specific to databases neglects the interests correlated with the public domain. The effect of such a regulation is the abusive creation of some databases in which the public domain (meaning information not protected by copyright such as news, ideas, procedures, methods, systems, processes, concepts, principles, discoveries) ends up being encapsulated and made available only to some private interests, the access to public domain being regulated indirectly. The study begins by explaining the sui- generis right and its origin. The first mention of databases can be found in "Green Paper on Copyright (1998)," a document that clearly shows, the database protection was thought to cover a sphere of information non-protectable from the scientific and industrial fields.

Several arguments are made by the author, most of them based on the report of the Public Consultation sustained in 2014 in regards to the necessity of the sui-generis right. There are some references made to a specific case law, namely British Houseracing Board vs William Hill and Fixture Marketing Ldt. The ECJ's decision în that case is of great importance for the support of public interest to access information corresponding to some restrictive fields that are derived as a result of the maker's activities, because in the absence of the sui-generis right, all this information can be freely accessed and used.

Keywords: *databases, sui-generis, copyright, lack of originality, public domain, free uses, Directive on databases.*

1. Introduction.

Legal ground:

- Directive 96/9/EC regarding the legal protection of databases;
- Romanian Law no.8/1996 regarding copyright and neighbouring rights – chapter VI – articles 122^1 – 122^4

The copyright legislation offers protections to certain materials even outside of the originality criteria. As far as databases are concerned, law identifies a double protection, because databases are protected not only by copyright but also by the **sui-generis right**, correspondent not only to exceptional (original) collections, but also, apparently, to any database. We can, in this context, take into consideration the sui-generis protection for databases that benefit from this hybrid legal formula also, which is granted as an additional measure of protection for collections, also called compilations of materials resulted from qualitative and quantitative investments.

Protection outside originality was conferred on the European front to any "collection of works, data, or other independent elements," whose characteristic is indicated as being "disposed in a systematic or methodical manner," being "individually accessible through electronic or other means." Directive no. 96/9/EC regarding legal protection of databases identifies in its preamble, paragraph (38), the reasons that justified the creation of this system of protection of databases aside of copyright, as being:

"Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorization, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;"

If databases with content protected by copyright could have benefited from all the prerogatives of copyright law, previous to the uniformity of the sui-generis right at a European level, collections with **unprotected content** were, in the eyes of the Community legislator, exposed to risks of its duplication and electronic adaptation, through the creation of the so-called parasite products and services.

The sui-generis protection is motivated, therefore, by the need to protect databases with content that is free to use, since it's the only type of content that does not benefit from copyright protection and this is the only type of content to which there cannot be imposed any limitations and obligations regarding a correct usage. We mention this because treating the subject of databases in this study will be explained exactly by the analysis of certain effects that the sui-generis protection has on the public domain.

We consider also that, despite the internal and European regulation regarding this type of protection through copyright law, databases that fall under the sui

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generis protection cannot be integrated in the sphere of copyright.

2. Protection outside originality

If the basis of copyright is originality, the creation of intellectual source, the sui generic protection has a purely economic basis, being tied to the investment and the resources allocated by certain companies to create some databases. The sui-generis protection has to be extremely well understood as referring exclusively to content that **cannot be protected** and not to the structure of the database, as this, by choosing and disposing the material, could benefit from copyright insofar as it presents originality.

The main differences between copyright protection and the sui-generis protection of databases, and the way in which they affect the public domain:

I. **The condition** of the enforcement of copyright protection consists mainly in originality, as the work needs to be an intellectual creation. But the materials protected by the sui-generis right are not conditioned by originality, the natural conclusion being that the materials contained by the database can, therefore, lack originality, as also the structure itself, which does not need to stand out as bearing the name of a certain author. The databases that are protected by copyright have a content and/or structure that presents originality, whereas databases protected by the sui-generis right can lack originality and have content that is unprotected, meaning it is free to use, most of these types of materials being, as I mentioned, from the sphere of the public domain. We can remember, as a first differentiation between copyright and sui-generis, that while the former refers to databases that are the object of copyright, **the sui-generis protection regards databases that, through their content, are part of the public domain.**

II. **The object of copyright protection** relates both to the content of the database as well as to its structure, the sui-generis protection being exclusively related to content, materialized, as is clear from the above analysis, in works belonging to the public domain.

III. **The legitimacy of usage** of the sui-generis protected databases presents significant differences to the sphere of usage allowed in the case of public domain materials. If the materials located outside of the copyright's object are considered free for any use, of any nature, commercial or not, and without considering qualitative and quantitative aspects, the usage of materials that belong to sui-generis databases is limited as a sphere, the internal law allowing only certain acts, which, basically, should not affect the activity and interests of the database's producer.

The law considers, also important, to give priority of usage to acts of extraction and reuse that are not substantial, **this quantitative reference marking the first major difference**, which takes into account materials that are supposedly for public use. Referring to this aspect, although the regulations are assumed to take into account technological development and innovation interests, we must not forget the fact that the entire content of the databases that benefit from the sui-generis right pertains to the public domain.

If we were to disregard this abusively implemented right, we would have, at a legislative level, a copyright whose existence would not prevent unrestricted forms of access to materials that are free to use. Copyright, both in the form that covers the content as well as the one in which the structure of the database is taken into account, is not as such to affect the use of materials that belong to the public domain but, on the contrary, can only affirm corresponding rights such as the right of access, including through the dispositions that make evident the exclusion from protection of some materials like ideas, theories, simple data and information, a.s.o. The general public, beneficiary of the right of access to any material that pertains to the public domain, makes use of it in any way, being able to use the public domain in its entirety, if this was possible, **no quantitative prohibition being able to be imposed**. But the sui-generis right not only prohibits any forms of substantial extraction and reuse, but also unsubstantial extractions if they are *"repeated and systematic"* and if they "*imply acts contrary to normal use of this database or could cause undue damage to the legitimate interests of the database's maker."*(art. 122^2 paragraph (5)).

The database producer's interest is also supported and motivated at a European level, through the indications made in the Database Directive, article 6, paragraph (3):

*"In accordance with the **Berne Convention** regarding the Protection of Literary and Artistic Works, this article cannot be interpreted in such a way as to allow the use of its application in a way that would bring forth **unduly prejudice to the legitimate interests of the owner of the right or that contravenes normal exploitation** of the database"*

It remains unexplained why a referral to an act **that refers to copyright protection** of certain works is available, in the context in which the regulation regarded the sui-generis right whose existence was justified by completely different interests than those having to do with the necessity of copyright protection. It must not be omitted the fact that the interest of awarding copyright to the works' creators is founded on intellectual creation, copyright not being conceived outside the concept of originality. **Therefore, the existence of a creation that has an intellectual source, which has justified the protection through copyright in its current normative form, cannot be brought as a justification for protecting some rights whose justification is strictly pecuniary.**

Returning to the sphere of allowed uses, through a denaturation of what a **normal** exploitation of public domain works should be, it's considered that an act of prejudice is also that through which "acts that come in conflict with the normal usage of this database." The first conclusion that one comes to as a result of the interpretation of this syntagm, is the disposal to opposite extremes of two users of public domain works, a database user being considered as being in a position of opposite interests to the database's manufacturer, whom, we must not forget, is also a public domain works user. The second conclusion one comes to is the re-confirmation of the existence **of a distinct sphere of normal exploitation of the same type of public domain material**, a sphere created exclusively only as a result of the integration of these types of materials in certain databases. Therefore, the **normal** exploitation of the public domain is different than the **normal exploitation** of the public domain integrated in databases, as in the case of the latter, the usage has common ground with the individual interest and not with the public interest, which means that, in this case, the public interest is considered as not having the value of the economic interest of a single individual.

Reducing the sphere to what was supposed to be maintained as normal usage of public domain, regulating the sui-generis right has practically pushed outside legality multiple acts that were ensuring the public's access to materials that were free to use.

The disadvantage to innovation is much greater than the advantage that the initiators of the Database Directive invoked, and this is confirmed even in the first reports[1] of the European Institution, through which it was admitted that the economical impact that was desired is not at all what they were hoping for. Nor could it have been, in the context in which, the acts through which similar databases that could have been developed were able to be forbidden on the grounds of an identity or similarity in content.

Due to the same abusive regulation, the right of access over the public domain risks not being able to be exercised independently but only in correlation with what the database legislation calls **normal usage**. According to art. 122^3 from the internal law, acts of reproduction and public communication can be made without the consent of the databases' manufacturer, **only if they are necessary for normal usage and access to the database**. According to this disposition, the act of reproduction of a public domain material is conditioned by two circumstances that need to be met **cumulatively**, the reproduction having to be both an act of normal usage, as well as justified by the access to the database. The conclusion is even more interesting when we realize that **normal usage** represents a sphere of actions considered by paragraph (2) of the same article as being different from the one in which **the database manufacturer's interests are harmed or not**, one being able to sustain that an act, even without concretely causing harm to the manufacturer, could be considered outside what we call normal usage. The act of normal exploitation is different from the non-prejudicial one:

"(2) The legitimate user of a database, which is made available to the public in any way, may not perform an act that comes in conflict with the normal use of this database ***or*** *that unjustifiably undermines the legitimate interests of the database's manufacturer"*

IV. Considering the previous mentions regarding the particular legitimacy that acts of access over information conserved in databases has gained, we need to mention again that all of these only neglect the interests correlated with the public domain. The effect of such a regulation is the abusive creation of some databases in which the public domain ends up being encapsulated and made available to some private interests, the access to public domain being regulated indirectly.

The situation is even more disadvantageous if we take into account particular databases, which, although created on platforms owned by certain companies, end up being consolidated through the action of the general public, among these being User Generated Content (UGC) platforms. Another atypical situation, having been considered or not when the Directive was created, is that in which databases are created as an effect of activities specific to certain companies or entities, among which are museums, which have the possibility to exclusively gather and combine certain data and materials from the public domain. The ability to gather or collect certain information will largely depend in this case on the type of information in question, which is less accessible to the general public. An investment in collection of such information, even if it could be proven, is not exclusively allocated to creating the database, being specific to the manufacturer in question and only to him. Moreover, considering the aforementioned particularity of information, another manufacturer outside of the museum in question, would not have even been in a position to gather the information, which are not accessible to the general public. There is, therefore, a social and economical disadvantage because of which only certain entities will be in the position of database manufacturer, if we take into account certain materials. The case of museums, which, through their activity have come in possession of the multiple photographs of works from the public domain could be an example that highlights the situation of profound disadvantage of the public, who has not only the limited possibility of taking photographs inside the museum, but who is also prohibited from using (systematic or sustained) such

[1] DG INTERNAL MARKET AND SERVICES WORKING PAPER - First evaluation of Directive 96/9/EC on the legal protection of databases http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf

images, if they are in online databases created by museums.

Cases[2] brought to the Supreme Court in Europe have shown, however, that the above-mentioned examples were not taken into account when drafting the Directive.

In all of these cases, the European Court of Justice (ECJ) held that "the investment in obtaining, verifying and presenting the contents of the database refers to resources that sought the collection of existing materials independently and not to resources used for the creation of such materials." In other words, it was decided that the sui-generis right will not be applied if the database is a product that is incorporated into the main activity of its maker, in this case, being considered that the investment was made with the purpose of supporting that activity and not for the collection of pre-existing materials.

V. But what the Directive doesn't manage to regulate can be less important to take into account comparatively with the real legislative "goals" that it ends up covering. Aspects not only unregulated, but which are controversial because of the way in which it affects the public interest, end up being indirectly "resolved" by the sui-generis right, due to which certain limitations of copyright are abolished (canceled).

We're especially referring to the time limitation specific to copyright, which is not perpetual and benefits form a specific protection period. The mentions regarding the protection period are considered to be imperative, no law may impede the reaching of the term or the rights that would arise after it. The sui-generis right, although, apparently, regulated to take into account a shorter period of protection compared with copyright, of 15 years, has the capacity to be renewed multiple times, including an infinite number of times, creating the possibility of some perpetual protections. The proof of this lies in the following paragraphs available in the internal legislation:

"Art. 122[4] (3) Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any 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, evaluated qualitatively or quantitatively, ***shall qualify the database resulting from that investment for its own term of protection.****"*

The internal text represents the implementation of art. 10 paragraph (3) from the Directive, with which it is identified as a law text. The interpretations of these provisions allows the museums of public database creators to extend their banning periods beyond the 15 years by periodically updating the information they already have.

If a substantial modification that is based on a sizeable investment, can be contested as being made regularly, at least at a general level, the 15-year term itself is **a non-recommended plus**, a period abusively added to the duration already quite long of protection if we take into account the author's years of life plus the following 70, generally applicable in the copyright domain. The works that naturally would have ended up in the public domain, **being available freely by any person**, could be integrated in specific databases, ending up enduring the restrictive system for an additional period of 15 years, at least. That's exactly why we must rethink the position regarding the current "effort" made by so many curators and collectors, which, aside from the noble purpose of easing the access to public domain works, could, at any point, make use if their status as database manufacturers, the resources involved ending up actually supporting a right in disconsidering the public domain.

If the law itself, in its current form, creates the possibility of circumventing the provisions of time limitation of copyright and the prohibitions specific to it, the law also creates situations that are just as unbalanced in regards to other aspects, such as that of the controversy regarding digital reproduction of works of art. The problem of artwork photographs, although it's created and still creates multiple discussions, being able (at least theoretically) to affirm rights of both the author of the work, as well as the photographer's, was resolved at a European level and reaffirmed through public declarations of the United Kingdom Intellectual Property Office[3], an institution that said **that "the simple photographing of a work of art does not create distinct rights."** The decision of the British office regarded digital reproductions of works that are in the public domain, with the following argument:

"According to the European Court of Justice, copyright can be affirmed only in regards to original materials, in the sense in which these are the personal intellectual creation of the author. Considering this criteria, it is very unlikely that ***a simple digital image*** *of an older work to be considered original."*

The sui-generis right, without contradicting that which, obviously, can be concluded from the interpretation of the laws in force, can create interdictions in access to the photographs of the works of art that are in the public domain, if these photographs end up being part of a certain database. It's true that, based on the latest decisions of the European Court of Justice, a photographer that photographs works of art from the public domain, does not benefit from any distinct right over his photographs, not being able to affirm his interests/rights to any other person. This

[2] The Fixtures Marketing and William Hill cases: http://curia.europa.eu/juris/liste.jsf?num=C-444/02 ,http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30db69b7d830bae8429b94abdb00633a041d.e34KaxiLc3qMb40Rch0SaxuKa3f0?text=&docid=64575&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=26560 ,http://curia.europa.eu/juris/liste.jsf?num=C-203/02

[3] The United Kingdom Intellectual Property Office"Copyright Notice: digital images, photographs and the internet" - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf

photographer will not be able to prohibit the usage of his photograph because its subject is free to use, belonging to the public domain. If, however, that photograph ends up being part of a collection, there is a new set of limitations and interdictions created to its use as a direct effect of the sui-generis right, thus diminishing, as consequence, the possibility to affirm the right of access to that public domain photograph.

3. The genesis of the sui-generis right. Short historical presentation.

But what is the sui-generis right actually, and what justified its appearance? Beyond the clear interests that this right protects, its historical journey is interesting to study, especially through the fact that it brings back into discussion the basic principles of copyright.

The first mention of databases can be found in "Green Paper on Copyright...(1998)[4]," a document that looked at the "importance of databases that need to be perceived exactly as deposits of content from the information era." It was also mentioned that we "need to encourage and protect the investment in databases."

In the chapter dedicated to databases, it was mentioned that "the most frequent use of databases was, at that time, predicted as being in the scientific, industrial, and business domains, whose **potential was not given by originality** but by content rich in unprocessed information, which could be easily recovered and updated. This factor can have an impact over the selection of materials that will become part of the database if we take into account that, in some scientific fields, short extracts from scientific publications, such as formulas, can be enough to deliver essential information, this means that, in the case of the compilation of certain types of information, **the form of expression is of much lower importance compared to the substance of the information itself."**

As the text clearly shows, the database protection was thought to cover a sphere of information non-protectable from the scientific and industrial fields. The distancing from the originality required by copyright is motivated by the potential that some information is likely to have, but not because of the form under which they could present themselves.

The interest in the necessity of protecting databases was expressed, therefore, long before the adoption of the Directive regarding databases. The above-mentioned texts are proof of the fact that the main interest was given by the potential that they had to incorporate information that could not be protected through copyright.

The texts from the European communication also gave expression to an already-existing doctrine in the United Kingdom and the Netherlands ("sweat of the brow"), according to which, the author of a compilations, even if unoriginal, was protected for its effort and investment. In England, although the statutory legislation[5] expressly provisioned that the protection of a work through copyright necessitates originality, in practice, there was no ad literam interpretation of this law, because the British courts had held, for a hundred years, that "including labor and effort investment is sufficient to provide protection." The basis of these assertions was, in fact, one of the principles of copyright, namely that which confirms **the protection of the idea only in its forms of exteriorization.** Taking into account the exclusion from protection of the idea itself, it's considered that, in the case in which subject A creates a protectable work, subject B can add to it his own skills, resources, and interpretations, modifying A's work (idea) in a manner that would create an independent protectable work. This protection was based on the taking of the idea, but in a form that was not conditioned by creativity and inventiveness. Obviously, this doctrine could not survive in the digital era and, in truth, in 2012[6], the European Court of Justice, on the basis of the interpretation of the British legislation, excluded the protection based solely on work and skill, sustaining that *"in the case in which the creation procedures of the lists are not supplemented by elements that reflect originality in the selection and arrangement of those lists, these cannot be protected by copyright."*

In reality, the interest was not to support independent forms of taking over ideas because these also had the risk of being, in practice, real formulas through which copyright over the initial work ended up being breached. What has been preserved, however, at a European level, as an extension of the "sweat of the brow" doctrine, was the interest of a protection with a purely economic justification. Unlike copyright, whose protection is justified through intellectual resources allocated by each author in his creations, sui-generis is explained only by the material contribution of the database's maker. And if initially, as we noticed, the database protection outside originality was thought out to cover only information in the scientific and industrial field, **by consolidating the sui-generis right, the protection sphere has become a lot greater, ending up covering any unprotectable material, including materials that have become unprotectable as a result of the expiration of the term of protection, which basically means the entire public domain.**

We mention that the sui-generis right, this exclusively European creation, could not have been extended in the U.S. as well, a legislation that has

[4] Full title – "GREEN PAPER ON COPYRIGHT AND THE CHALLENGE OF TECHNOLOGY- COPYRIGHT ISSUES REQUIRING IMMEDIATE ACTION" Communication from the Commission Brussels, 7 June 1988. The full text of the paper can be read here: http://aei.pitt.edu/1209/1/COM_(88)_172_final.pdf

[5] UK Copyright, Design and Patents Act - 1988

[6] Decision in the case of Football DataCo

maintained as relevant the Feist[7] case, in which it was established that "**the information as such, without any minimal creativity, cannot be protected."**

4. Public consultation. The participants' arguments in regards to the necessity of the sui-generis right.

Coming back to the evaluation report of the Directive (2005), we make the mention that the already proven failure of this regulation has led to the need of public consultation concentrated around 4 options, which the participants needed to take into account to identify a solution. We find it relevant to present them as they were taken into account by the 2005 report, as well as by the acts that followed it, from March 2006.

1. Repeal the entire Directive;
2. Withdrawing the sui-generis right, while, however, maintaining unchanged the original database protection;
3. Modifying the provisions corresponding to the sui-generis right, in order to clarity its applicability;
4. Maintaining the current situation.

The options put forward by the commission have led to responses that were found to be favorable, especially **options 3 and 4**, but this is understandable considering that, among the entities called to participate, the majority[8] was made up of database production companies, press agencies, editors, betting companies, which considered the regulation favorable to their own interests.

In support of those interests, we show the following excerpts from the claims of certain participants who supported the sui-generis right, with some of them also exhibiting possible counter arguments:

- **Software & Information Industry Association ("SIIA[9]")** SIIA "Database editors do not just collect, combine, and organize information, but they also keep it updated and safe. These investments are worth benefiting from a legal protection." In order to counteract with the consumer's interest, the same association makes the following statement: "Consumers need quality databases that contribute to the comfort of their activity and their productivity. Finding a needle in a hay stack from the many, and poorly organized sources, could take weeks or even months. Thankfully, database editors provide a fast and secure access through databases."
- The France Press[10] **press agency** ("The Agency") has made many references to the issue of extending the exceptions corresponding to the sui-generis right, considered as being "risky proposals" to the interest of the database maker. In response to the opinions that the sui-generis right would lead to real information monopoly situations, the Agency argues that "it is generally recognized that the sui-generis right is applied to the database's content and not to the individual components within it (i.e.: the information itself)," so the accusation of monopoly cannot be considered.

We mention that the Agency's argument cannot be held in the context in which the law provisions restrictions in the use or the extraction of (even) **non-substantial** parts, when it is repeated and systematic. **The regulation of the use of non-substantial parts of the database is equal to regulating of the use of every piece of information within the database.**

In regards to the proposals of enlarging the exceptions sphere of the sui-generis right, the Agency sustains that "the Directive seeks to create a balance of interests between those belonging to database manufacturers and those of the databases' users. It's also considered that the purpose is achieved in a satisfactory manner by the Community regulations and that the widening the exceptions sphere would do nothing but jeopardize this balance."

In supporting its arguments, the Agency omits to consider and to properly address the users' interests and rights of access and free use of the public domain. **The rights of these users are not only a priority but also precede in constitution those of the database makers',** since the public domain, from the resources of which the databases are created, is necessary to exist prior to the indexation of certain materials. sui-generis itself should be provided in the legislation as an exemption granted to manufacturers on the basis of the investments made, and not as a stand-alone right, since its exercise impedes the exercise of the right of access and free use of the public domain.

The Agency also states that the "widening of the exceptions sphere to the sui-generis right presents the risks of leading to thefts and acts of piracy." The Agency's note refers to inadequate legal institutions because the sui-generis right, **even if it's treated as part of the copyright legislation, must not be confused with it, as the provisions regarding piracy cannot be applied to it, because they represent an act of copyright infringement.** Theft is also out of this discussion, because it can only refer to goods that are in a person's possession or detention. At most, the possibility of theft could be accepted in the exclusive case in which a database would be copied in its entirety, both in structure and form, as well as its content.

The takeover of information to which the Agency refers, in fact, has as its object content over which the database manufacturer does not own any rights, because that information belongs to the public domain. The database manufacturer is also just a user of public domain information. Even if, through his frequent and systematic usage, a database could be formed, he must

[7] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)
[8] The list of participants to the public consultation: https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp
[9] https://circabc.europa.eu/sd/a/3de4cab2-2379-40a1-8862-57004a446467/siia_en.pdf
[10] https://circabc.europa.eu/sd/a/8741416a-ebcb-4c08-b0ae-65cf9322e55b/afp_en.pdf

not be viewed as anything more than a user of resources that should remain in public usage. **Therefore, the database manufacturer's status as a public domain information user, and not owner, MUST NOT be forgotten, any arguments or interpretations of the sui-generis right must be made with consideration to this status from which the database manufacturer cannot separate himself just because the information he gathered is greater than others', or just because he was the first to have access to certain data that, precisely due to this circumstance he had the possibility of collecting.**

It is unnatural, to say the least, that the systematic and repetitive acts of taking from the public domain end up being legalized to certain people to the disconsideration of acts of the same type exercised by other people just because the latter are made **after** those made by the database manufacturer. Principles applicable to other exclusivist protections (first come, first served in the field of trademarks) is also found in the field of copyright, but not to serve the interests of the creators, but, on the contrary, to block the entire access to the public domain assumed to be for the use of the general public.

At least questionable is the fact that this manner of fructifying the public domain has come to be considered as treating the interests of the database manufacturers and those of the users equally. The Agency's arguments, as well as those of other companies with interest in the disadvantageous fructifying of the public domain, omit to speak from the perspective of a user of some public information, on the contrary, their arguments highlight rights similar to those of property, whereas the property of the public domain must not exist, being a contradiction with the very notion of public domain. Moreover, there should be avoided any possibilities through which the interdiction of public domain material appropriation is eluded.

- **Data Publishers Association**[11] ("DPA") - makes mentions of the applicability of the sui-generis right in light of the European Court of Justice ruling[12] from 2004:

"The sui-generis right is difficult to understand. The ECJ's decision from November 2004 made a distinction between creating and obtaining information. The court's argument was helpful in the given cases, but has created the possibility of misinterpretation through the fact that it suggests that publishers should make a distinction between separating certain data and obtaining them. Many DPA members do not recognize the difference and have asked for guidance and clarification. The DPA considers that the Commission should strengthen the sui-generis right to ensure that investments in databases combined with the data created will benefit from the same protection as the obtained data."

In regards to the DPA's argument, we consider it appropriate to re-highlight the **ECJ's Decision from 2004 in its main points.**

The DPA's submission takes into account the opinion of the European Supreme Court, according to which, the Directive 1996/9/EC cannot protect databases that are created only as a direct result of the manufacturer's own activity. In order to benefit from the sui-generis right, the court states that the "**investments needs to have as its sole purpose, or its main purpose the collection, verification, search, and presentation of materials that already exist."**

For a better understanding of the ECJ's decision we can even take into account one of the cases that were considered by the ECJ, namely **British Houseracing Board** vs William Hill and Fixture Marketing Ldt. The European court considered that the "football matches lists necessitated no particular effort to be created by the professional league. These activities are invisibly linked to the creation of the data in question, in which the league directly participates, as its responsible for organizing the football matches."

The court's decision is of great importance for the support of public interest to access information corresponding to some restrictive fields that are derived as a result of the maker's activities, because in the absence of the sui-generis right, all this information can be freely accessed and used. The corresponding information to such restrictive fields are not independently and easily accessible by the public, the only option of access and use being the consultation, verification, use, or possibly extraction of the information from the database that contains them.

The ECJ's decision is of general applicability, the court's expression being of a manner of creating a misinterpretation that does not exclusively regard football matches lists. And, we consider it fair to have such an interpretation because, it's true, in such a case, the database manufacturer cannot prove any investment in finding and collecting some preexisting data, and this condition clearly derives from the concrete interpretation of the law's text.

In continuation, we will look at art. 122^1 (4) from the internal law:

"(4) For the purposes of the present law, the database manufacturer is the natural or legal

person that has made a qualitatively and quantitatively **substantial investment** for the

obtaining, verification or presentation of the contents of a database."

The corresponding article in the Directive is even clearer in highlighting the link between the sui-generis right and the investment in obtaining the data.

"(1) Member States shall require the manufacturer of a database to have the right to prohibit the extraction and reuse of the whole, or substantial part, evaluated qualitatively and quantitatively, of its

[11] https://circabc.europa.eu/sd/a/5abf4db2-4a5f-4893-a5ef-b6a790e4eca7/dpa_en.pdf

[12] European Court of Justice press release (08.06.2004) http://www.curia.eu.int/en/actu/communiques/cp04/aff/cp040046en.pdf Case numbers C-46/02, C-203/02, C-338/02, C-444/02 http://www.curia.eu.int/

contents, **when obtaining, verifying, and presenting this content demonstrates a substantial qualitative and quantitative investment**."

– **The European Direct Marketing Federation** (FEDMA[13]) is another supporter of option 4 among the options made available to the participants through the 2005 public consultation. And this entity expresses worry in regards to the above-mentioned ECJ decision, which, according to FEDMA, would have misinterpreted the sui-generis right, creating applicability issues.

FEDMA, like other supporters of the option to maintain the status quo, challenged the ECJ's decision, but not in its entirety, but only in regards to the limitation of the application of the sui-generis right. The perception of this false inequality that these types of entities intend to create can easily be overturned if we were to consider not only the aforementioned conclusion of the court, but the entire content of the decision in its main points, which will surprise with aspects that are in disadvantage not of the database manufacturer, but, on the contrary, to the user himself.

I. "the simple generation of data is not covered by the Directive but "where the creation of data coincides with its collection and verification and creates an inseparable body, then the Directive will be applied." As can be seen, even if the sui-generis right will not be applicable to created data, in the cases in which they will present an inseparable collection of both created data and obtained data, the sui-generis right can be exercised, thus becoming applicable also to the data created through the manufacturer's activity itself. **In light of this assertion the inapplicability of the sui-generis right will be found in the circumstance in which between the activity of creation and that of obtaining there is a clear and obvious demarcation, or in the context in which the database contains only created data.**
II. "the Directive prohibits the rearranging of the databases' contents."
III. "there is a general interdiction in regards to the extraction and reuse of a substantial part, considered as being, for example – **more than half of the database**."
IV. "Extraction and reuse of some unsubstantial parts is prohibited if it represents a repeated and systematic act, and it prevents the economic exploitation of the database by its manufacturer."
V. "Reuse is also forbidden when the data is taken from independent sources (for example, the internet)."
VI. "Substantial modifications give birth to a new database and a new protection term. For dynamic databases, the new database benefits from a new protection term when a certain modification is made."
VII. "The base term needs to be interpreted broadly."

"it is left to the interpretation of the courts from the Member States to verify in each case if the investment was a substantial one."

As can be seen, points v. and vi. indicate an interpretation that serious prejudices the interests of the general public, extending the applicability of the Directive over some situations that the law maker did not take into account in the text of the Directive. And which, it must be mentioned, could not have been taken into account reasonably, as it makes a protection of information beyond the sphere of the database. At least that's what point vi. expresses, through which the reuse of the information is prohibited, even when the information is taken off the internet and not from inside the database. But, the only justification of the sui-generis protection is exactly the existence of information as part of the database, because outside of this data structure, it will still be public information, meaning unprotectable.

It must be noted that, aside from the particular situations brought into question by the concrete cases in respect of which the court was called to express itself, the database content that is supposedly subject to the sui-generis right, is made up of data and materials that are not subject to copyright, which belong largely to the public domain. This decision of the court not only widens the Directive's sphere of applicability, but makes the sui-generis right a much more restrictive right even than copyright itself, as it's known that copyright presupposes a protection that can be given to identical works created independently by its authors.

Aside from the possibility, or rather the real impossibility of such a circumstance, in which two different people could have identical forms of creative representation, this is however admitted, at least in theory, in certain creative fields, such as plastic art, in which two painters, having the same theme, could create identical original works and, therefore, **protectable.**

Independent protection represents a direct consequence of the relativity and subjectivity of copyright, whose originality needs to be appreciated outside of the sphere of "novelty", considered an objective notion specific to the domain of inventions and not of copyright.

Creativity itself represents a direct consequence of the unaltered preservation of these principles of law, as a protection conditioned on novelty or perceived absolutely would have the effect of blocking subsequent developments on the grounds of identical or similar content. Whereas, according to copyright, originality does not need to be absolute, it not being necessary for protection that the works to not have been inspired from previous creations. In addition, the very concept of inspiration is worth treated in association with the idea and not with the form of its expression.

[13] https://circabc.europa.eu/sd/a/cd9b9360-bb3d-4215-84dc-c3dc54c0b640/FEDMA_en.pdf

Per a **contrario, a copyright protection in which originality was understood in its objective and absolute form, would lead to situations in which protection would extend not only on the form of expression, but on the idea itself**.

The idea as a foundation for inspiration, must circulate freely and be capable of being exploited by any person, just as with the public domain. **The reasons used to justify non-protection of the idea are also valid for the case of the public domain's non-protection.** A restraint of this goal would lead to situations identical with the ECJ's decision itself, in **which information from the public domain cannot be used freely because it can be ALSO found in a certain database.** To accept such a position coincides with affirming that an idea cannot be used by two or more people only because, at some point in time, it ended up being, one way or another, part of a work belonging to a different author.

– **The European Consumer Organization** (BEUC[14]) is one of the few participants to the consultation that stated its position against both the Directive as well as the aforementioned ECJ decision:

"As mentioned, the rulings of the ECJ limits the ambit of the "sui-generis" right. However, the consequences of these rulings should not be underestimated. Even after these rulings, the Directive has a significant impact on competition in the database market. In a recent article published in European Intellectual Property Review, Davidson and Hugenholtz argues that the database industry will develop different strategies to circumvent these decisions. The authors mention two such strategies: database manufacturers could invest more in the presentation of the data, or they could prevent the data from being publicly available, and sell the exclusive right to them. Arguably, purchasing access to data might be deemed a substantial investment."

5. De lege ferenda – repealing the Directive and/or eliminating the sui-generis right. As the European Consumer Organization has also expressed, the Directive creates multiple inconveniences in its enforcement and the sui-generis right jeopardizes competition and innovation. In addition to the BEUC statements, as it's been shown earlier, the existence of the sui-generis right greatly affects the right of access to the information corresponding to the public domain and we consider it to be a particularly important aspect, especially in the context in which the position of the lawmaker, as far as the public domain is concerned, is rather deduced than expressly formulated, at a legislation level there being no texts that would express any guarantee in regards to exercising the access right.

Moreover, even in the absence of the sui-generis right, copyright over database structures may continue to be exercised by owners of such collections, its exercise not having the nature of bringing into question the database's content and information contained within said compilation.

It must be mentioned that, as it's said in the Directive and in its implementation laws, the sui-generis right represents, concretely, a real right of property expressed in a completely inadequate context, if we consider that the object of this protection is made up exactly of works that cannot be protected, meaning that cannot be proprietary, or over which one cannot assume ownership. An inadequate context is also that of copyright, whose protection presents serious differences from private property, only the latter being of the nature to be exercised exclusively. The specific non-exclusivity of copyright is sustained not only by the limited protection term, but also by the existence of a sphere of materials that cannot be appropriated. The exercise of the right itself is subject to certain limitations, beyond which there is no copyright, but other rights corresponding to the public's interest, such as the right of access. This is the specific balance of copyright, according to which the author or the owner has only **certain rights**, for a **certain period of time** and intended to be exercised only within **certain limits**. If the reinvention of other rights, such as the sui-generis rights, threatens to affect this balance, the position of this right in the legislation must be rethought.

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[14] https://circabc.europa.eu/sd/a/731270d1-278c-462d-8038-e1256899586a/beuc_en.pdf