CRIMINAL LAW PROTECTION OF DATABASE AT A GLANCE

LUCIAN T. POENARU*

Abstract
Database protection is provided in Romania by the general law on copyright no. 8/1996. According to the law, it is considered to be a crime making available to the public, by any means, the special rights attributed to database owners or copies thereof. This paper will focus on, one hand, presenting the way database and database related products can be subject to a copyright general protection and, on the other, revealing the special sui generis right attributed to database owners. In such a context, criminal instruments for protecting such rights seem to be quite annoying for the perpetrator, but less effective when it comes to a proper enforcement by the criminal bodies. This paper will therefore try to compare the way guilty actions of the culprit are effectively sanctioned by the criminal instruments provided by the law.And because the Romanian law on copyright does follow at least the letter of the European Directives on copyright and the protection of database, this paper will also search the spirit of the relevant European case-law and its applicability by the Romanian authorities.

Keywords: *Law 8/1996, copyright, database, sui generis right, criminal sanction*

Introduction

The database protection appears to have long been a topic of general debate. Originating from the US copyright vision and sliding towards the European protection, the debate usually focused on trying to find a suitable answer to the way a database is effectively protected.

While the US had a real problem in framing database protection (out)side copyright, on March 11, 1996, the European Union structured database protection and launched a new form of intellectual property protection by passing the database directive no. 96/9/EC[1] (the Database Directive).

According to the aftermath of a well-known US *Feist* case-law[2], the reliance on copyright law as a comprehensive form of database protection has clearly diminished. Before such case-law, the US courts wanted to include database in general copyright protection, showing that, irrespective of their originality, all hard work authorship must be protected by the bias of copyright (the "sweat of the brow" doctrine[3]).

What led to the diminishing of the mere copyright for database was the concept of originality as the basic, yet constitutional for the US, requirement for copyright, even in case of compilations[4].

As a consequence, simple facts are not original. They lack the creativity and they do not stand to copyright protection. *Feist* wanted to make this very clear in the US and provided that copyright protection shall stick to originality.

On the other hand, EU Database Directive moved things forward and provided a *sui generis* form of database protection. Wanting to further solve the concern of protectable copyright fact (or row data), the Database Directive divided the protection into two distinctive elements: (i) database

* Lawyer, Bucharest Bar; Ph. D. Candidate, Faculty of Law, University of Bucharest (email: lucian-traian.poenaru@drept.unibuc.ro).

[1] Council Directive no. 96/9/EC, O.J. L 77/20 (1996).

[2] *Feist Publications, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340, 363 (1991).

[3] This doctrine protects factual compilations. As a general rule of this doctrine, labor done in compilation overcomes the requirement of creativity in a work.

[4] W. Matthew Wayman, "*International Database protection: a multilateral treaty solution to the United States' Database Dilemma"*, 37 Santa Clara L. Rev. 427 1996-1997, p. 432.

shall be protected under copyright law to the extent that the selection and arrangement of the data is original, and (ii) database shall be protected by a special *sui generis* right against the unfair extraction of all or a substantial portion of the database's contents.

In fact, the Database Directive has it all. It protects both the original format and unoriginal data within a database.

In this context, Romania fully benefits from the (clear) protection provided by the Database Directive. And because joining the EU in 2007 required some amendments to the internal laws, the Romanian law 8/1996 on copyright and related rights (the Romanian Copyright Law) did copy the "facts" of the Database Directive in a less "original format".

As such, Romania provides a distinctive protection to database on both copyright and special *sui generis* rights, making the best out of such protection, even by pure criminal protection. It goes without saying that "database" refer not only to paper based compilations but also to electronic databases; the latter being a collection of information stored so that they can be selectively searched and the desired information retrieved using a computer[5].

But is such criminal protection of database proper for the economical and/or money needs of the right holders? This paper will try to argue this question presenting both the way database is protected against copyright crimes (I), as well as against criminal infringements to the special *sui generis* rights (II). The criminal liability for database rights infringements becomes important especially in relation with the Romanian efforts to have general copyright protected by all means. Such efforts were visible before Romania joining the EU and were slightly tempered after 2007.

Because database criminal protection in Romania was poorly debated, this paper will try to shortly present the implications of such a criminal protection in this domain.

I) COPYRIGHT PROTECTION FOR DATABASE FORMAT. PROTECTING DERIVATIVE WORKS

This section will firstly define databases and place them in the general concept of copyright (A), showing then the way criminal copyright protection stands for database infringements (B).

A) Placing database in general copyright

As a general rule, all databases consist of two basic elements: the selection and arrangement of data and the data itself[6].

According to the Database Directive, "database" means a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means[7]. The Database Directive does not apply to computer programs used in the making or operation of databases accessible by electronic means[8].

Moreover, as per the Database Directive, "the term <database> should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data. [I]t should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed. [T]his means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of the Directive"[9].

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[5] Terry M. Sanks, *"Database protection: national and international attempts to provide legal protection for databases"*, 25 Fla. U. L. Rev. 991 1997-1998, p. 992.

[6] W. Matthew Wayman, see *supra* note 4, p. 431.

[7] Art. 1 para. 1 of the Database Directive.

[8] *Id*. para. 2.

[9] *Id*. recital point 17.

The above definition appears to be broad enough to provide protection to any sort of compilation. Because there are no limits to the medium of the database, any compilation should be protected under the Database Directive.

On the other hand, the Romanian Copyright Law defines the database (in translation) as a compilation of works, data or other independent elements, protected or not by copyright or related rights arranged in a systematic or methodical way and individually accessible by electronic or other means[10].

At a glance, one could say that the above provision related to database in the Database Directive and the Romanian Copyright Law is similar. In fact, it is identical, making it easier to understand the rationale behind the Romanian legislator's intentions.

As per the provisions of the Romanian Copyright Law, database is expressly a subject to the pure copyright protection. According to the law, all derivative works (compilations) are considered to be protected by copyright but only as it regards the way the material is selected or displayed[11].

As a consequence, all compilation of work is protected in Romania by copyright, provided that the selection and arrangement of data forming the database is original, therefore representing the author's own intellectual creation. Thus, the Romanian copyright retakes once again the general principles laid down by the Database Directive.

On the other hand, the Romanian law provides that it shall not be subject to copyright protection the simple facts and data. Consequently, data is not protected, even though it is included in a compilation or data base.

Protecting database by copyright is therefore possible provided that the database is what the Romanian law on copyright calls *derivative work*. Database will be a derivative work if it is original by the way the data is selected or displayed and it will be legal to create such derivative work if the author (or the right holder) agrees to such a work.

This is why article 13 of the Romanian Copyright Law provides that one of the patrimonial rights of the author is to authorize or to prohibit third parties the making of derivative works[12].

It seems to us important to note that the provisions related to derivative work in the Romanian Copyright Law are at least confusing as it regards the way such (original) work can be made. As mentioned above, derivative works can be made (and once made, will be protected by copyright) only *if they do not prejudice the rights of the authors* of the original (prior) work[13]. Such derivative work will always refer to another original work, because the law expressly requires this.

On the other hand, the same law provides that it is up to the author (or the right holder) to authorize or to prohibit the creation of derivative work. As such, it can result that derivative works can be made only if there is an authorization from the author (or the right holder) of the work based on which the derivative work was performed.

It results from the above that not having the consent of the author of the original work creates a legal presumption that the rights of the latter author were damaged by the simple creation of the derivative work. The law, therefore, cannot imagine a situation in which the database resulted following a compilation of copyrighted data can be made (in such a way that constitutes a new original work) without prejudicing the patrimonial rights of the author by not requesting the latter's consent.

We, do, however imagine such situations which basically refer to any data compilation of artistic work (i.e. movies) duly arranged in a systematic or methodical way and individually accessible by electronic or other means.

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[10] Art. 122[1] para. 1 of Romanian Copyright Law.
[11] *Id.* art. 8 let. b).
[12] *Id.* art. 13 let. i).
[13] Art. 8 of the Romanian Copyright Law.

It is therefore difficult for us to understand why in such an example one would need the consent of the authors of the respective work that was compiled or how are such databases prone to prejudice the right holders if they are, for instance, used in a private environment (i.e. my movie database, creatively organized and arranged), or even made public, as a creatively new work (in all cases, without including the copyrighted content, i.e. the movies themselves).

The relevant legal literature[14] timidly tried to detail the dependence of the prior original work to the derivative work[15]. According to such literature, in case of derivative works, the originality criteria for the derivative work can absolutely be fulfilled only if the dependence of the derivative work to the original work was maximum, meaning that without the original work, the derivative work could not have been created. This is the classic example of literature (the original book) and a booklet about a book (the derivative work).

We do agree that in the above example, the consent of the author for producing the derivative work is essential, since without the original, the derivative would not have existed (as such).

On the contrary, if the original work was just a support to the derivative work meaning a simple impulse to create a (separate and original) work, the latter, even though derivative, will not require the consent of the first original work. This is why we consider that an original and highly creative database about movies in a library, for instance, would not require the consent of every right holder that can, at some point, exist in the library.

Database will also be subject to protection by copyright if the raw data was public and free and was arranged in such a way that is creative and original. There is case law[16] on the subject. The typical example refers to public data available on the internet (i.e. site names on different subjects). If one would compile such data in a format that is by far original, creative, easy to reach, etc, the resulted work will be derivative and will be subject to copyright protection.

The copyright database protection is of utmost importance in respect of the criminal liability as it will be shortly detailed.

B) General criminal database protection

Facing criminal charges for copyright infringement is something not out the blue anymore. The criminal liability for copyright infringement was mainly envisaged back in 2004 by the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Directive 2004/48/EC)[17].

According to the Directive 2004/48/EC, "without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, *Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed*[18] (emphasis added)".

And because the same Directive 2004/48/EC observed that infringements of intellectual property rights appear to be increasingly linked to organized crime[19], the only other appropriate sanctions legislators could think of were the criminal ones. Moreover, it was also noticed that the increasing use of the Internet enables pirated products to be distributed instantly around the globe. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the internal market.

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[14] Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *"Copyright and related rights. Treaty"*, All Beck Publishing, Bucharest, 2005 p. 173.

[15] Yolanda Eminescu, "*Tratat de proprietate industriala*", vol. I, Ed. Academiei, 1982, p. 87.

[16] Cass. Fr. Criminal Section, November 27, 1869 in Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *see supra*, note 14, p. 184.

[17] O.J. L 157, 30.4.2004.

[18] Art. 16 of the Directive 2004/48/EC.

[19] Recital 9 of the Directive 2004/48/EC.

As a consequence, Member States did regulated (in)appropriate criminal sanctions for intellectual property rights infringements. For the scope of this paper, we will focus only on those criminal sanctions related to copyright and, in particular, to copyright database criminal protection as provided by the Romanian Copyright Law.

At a small glimpse on how the criminal protection of copyrighted database works in Romania, we will notice that, according to the Romanian Copyright Law, it is considered to be a criminal offence[20] and will be punished with imprisonment ranging from one month to two years or with a fine, (with relevance for this paper) any performance of a derivative work, without the authorization or consent of the relevant right holder[21]. Because a database is a derivative work according to the law, the felony will be applicable to such databases.

As detailed above, the relevant right holder has the patrimonial right to authorize or to consent to the making of a derivative work. As such, infringing that particular right of the author, meaning the making of a database based on the original work without the consent of the author, will be considered a criminal offence and will be punished in accordance with the law.

Keeping in mind our examples above, it is, for us, strange how easy the legislator went for a criminal liability with a case-by-case situation, creating only the ground general rule for the liability, without any exception. It would have been however more strange if we would have found relevant case-law in Romania on the particular issue. The reality is that such a criminal copyright liability for third parties creating a database without the consent of the author of the original work is excessive and, if not properly interpreted, can lead to serious misjudging.

What it is protected by criminal instruments is not the creativity of the selection and arrangement of the data, but the mere infringement of one patrimonial right of the author (or the right holder) of an original work. This is why the object of the felony is represented by the general social relations related to the protection of the author's patrimonial rights.

From a technical standpoint, the material object of the felony is the original work itself based on which was illegally created the derivative work. The author of the crime is any person who makes a derivative work based on the original work of the right holder. It goes without saying that, starting 2006, the subject of the crime can also be a moral person – a company. In respect of penalties that can be applied to companies, there are two such categories: the main penalty and complementary penalties. The single main sanction that can be inflicted on companies is the fine[22].

Because there is the money element in all intellectual property construction, imagine that the criminal liability for companies will fully work in our case. The typical felony is that, for example, a limited liability company (LLC) dealing with the editing of translated works does this job without the authorization or consent of the author of the original work (or the right holder).

In this case, the LLC who illegally makes the derivative work can face criminal charges and fines can be inflicted in an amount ranging from RON 2,500 to RON 2,000,000. As a general rule, the amount of the fine for companies is established taking into account the penalties applicable to natural persons.

The felony is conditional on the existence of an original work, irrespective if it was made public. Such an original work will be protected by its simple creation, even if not yet finalized[23].

From an intentional standpoint, the felony can be committed by direct or indirect intention, which means that the culprit must either foresee the result of his action wanting to produce such

[20] For the purpose of this paper, it will be named "criminal offence" or "felony" all what the Romanian Law calls "infracțiune".

[21] Art. 140 let. f) of the Romanian Copyright Law.

[22] A.R. Ilie, "*Considerations regarding the criminal liability of corporations – the Romanian way*", Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, 5th Edition, p. 127.

[23] Ciprian Raul Romițan, *"Intellectual property criminal protection"*, C.H.Beck Publishing, Bucharest, 2006, p. 153.

result by committing the guilty action or, foresees the result of his action and, although he does not wants to commits the action, he accepts the possibility that the result will be produced.

In our case, the illegal making of a derivative work will always be committed by intention, either direct or indirect, meaning that the natural person or the company will always seek to create a derivative work from the original creation of the author, without searching the authorization or consent of the right holder.

As such, the law criminally sanctions the making of a database without the consent of the right holder of the original work. This is a fact under the Romanian Copyright Law. In practice, however, the applicability of such a felony can be subject to serious concerns due to the general wording related to the illegal actions of the culprit.

As anticipated above, we do consider that making a derivative work does not always require the authorization of the original work right holder and it should be more carefully established the most suitable ways to protect creative derivative works, instead of strongly prohibit the general use of related works.

According to the Romanian Copyright Law, *sui generis* rights intend to protect database owners against the unfair extraction of all or a substantial portion of the database's contents. As it will be detailed below, the Romanian legislator wanted to criminally sanction the extraction and/or re-utilization of the database contents made without the owner's consent.

II) A *SUI GENERIS* RIGHT FOR DATABASE PROTECTION

This section will firstly present the meaning of the special *sui generis* right (A) and will secondly try to understand how one can face criminal charges for making available to the public the content of a database (B).

A) The relevance of special protection attributed to database owners

Articles 122^1 to 122^4 of the Romanian Copyright Law provide special *sui generis* right protection of database. The provisions were introduced in 2004 by law no. 285/2004 for the modifying of the Romanian Copyright Law[24]. According to the law, the creator of a database (database owner) is either a natural person or an entity which made a substantial quantity or quality based investment in order to obtain, verify and/or present the content of a database.

As a general rule, the database owner has the patrimonial right to authorize and to prohibit the extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively or quantitatively, of the contents of that database.

Up to this point, it is obvious that the special *sui generis* rights do not require any level of creativity attributed to databases. Even if the provisions on the special *sui generis* rights are copied from the Database Directive, neither one of the instruments provide a definition for "qualitatively or quantitatively" investment, nor for "substantial investment".

The "extraction" and "re-utilization" are however defined both by the Database Directive and the Romanian Copyright Law. The "extraction" means the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form and "re-utilization" means any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission[25]. The law also expressly provides what is not considered to be an extraction or re-utilization, and that is the public lending (although not defining the terminology).

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[24] Law. no. 285/2004, published in the Official Gazette no. 587 of June 30, 2004. The law retakes the provisions of the 1996 Database Directive.

[25] Art. 7 point 2 of the Database Directive. Art. 122^2 para. 2 of the Romanian Copyright Law retake the definitions with some minor wording adjustments.

Both the Database Directive and the Romanian Copyright Law duly establish the exceptions to the *sui generis* right.

As such, lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: (a) in the case of extraction for private purposes of the contents of a *non-electronic database* (emphasis added); (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; (c) in the case of extraction or re-utilization for the purposes of public security or an administrative or judicial procedure.

The law allows therefore the extraction for private purposes but only of non-electronic database. Even though "private purposes" are not expressly defined by the Database Directive, we consider that private purposes do refer to the general possibility to make a private copy, without the consent of the right holder, provided by the Directive 2001/29/EC on copyright.

Such private copy is however possible only for non-electronic database, which means that any substantial extraction of the contents of an electronic database, even in private purposes, is fully prohibited by the law. Without going into much detail, it was interpreted by the relevant doctrine that "private use" may refer to the normal family circle, including friends[26].

Such findings are essentials considering that the majority of available databases are electronically created and refer to data made and available on the internet (or some other electronic networks).

On the other hand, European courts have formulated different factors in determining what constitute a substantial investment in the creation of a database which will qualify for a *sui generis* protection. It goes without saying that such factors usually refer to money.

The Database Directive expressly states it that the making of databases requires the investment of considerable human, technical and financial resources[27]. Recital 39 speaks more generally of the financial and professional investment and recital 40 in the Database Directive assures that the investment may consist in the deployment of financial resources and/or the expending of time, effort and energy of the database maker.

Summarizing the provisions in the Database Directive pertaining to the investment, it results that the investment can be material, financial or human. "Financial" means money, "human" means time, effort and energy for the maker and "material" basically represents the buying of materials and equipment necessary for creating the database.

Courts have generally been confronted and interpreted all types of investments which trigger *sui generis* protection of database. For instance, employing a number of persons to collect data was qualified as a human investment[28] and the acquisition of computer equipment has been seen as a material investment[29].

The substantiality of the investment is only indicated by the Database Directive. As such, "as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because *it does not represent a substantial enough investment to be eligible under the sui generis right*" (emphasis added)[30].

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[26] P-Y. Gautier, *"Propriété litteraire et artistique"*, Presses Universitaires de France, Paris, 1996; C. Colombet, *"Propriété littéraire et artistique et droits voisins"*, Dalloz, 1997; André Bertrand, *"Droit d'auteur et les droits voisins"*, 2eme édition, Dalloz, Paris, 1999.

[27] Recital 7 of the Database Directive.

[28] See for example, *Union Nationale des Mutualites Socialistes v./ Belpharma Communication*, TPI Bruxelles, 16 March 1999; *British Horseracing Board v./ William Hill*, 2001.

[29] See for example, *British Horseracing Board v./ William Hill, 2001*.

[30] Recitat 19 of the Database Directive.

We therefore tend to react to such a provision by saying that all what it is above such a (minimum) level of investment will have to be considered substantial. As a consequence, if a compilation of musical performances on a CD is, *as a rule*, insubstantial investment, what happens to compilation of data on a server, for example, or a relatively large compilation of movie based data that apparently just fit a DVD? Are such systematic works substantial? In fact, the answer will have to be on a case by case basis answered in court.

In a *Spot* case[31], company Spot explored a cinema based internet site which was used to reveal the programming of theatres in Belgium. In September 2000, Spot concluded with Numedia Channel a contract according to which the latter company monthly purchased the programming of theatres from Spot. The contract was terminated in May 2001.

However, Numedia Channel continued to extract information from cinebel.be, making them available on its own website, allocine.be. As part of the Numedia Channel defense in court was that cinebel.be is not a substantial investment in accordance with the provisions of the Database Directive.

The ECJ established however that in order to argue the insubstantiality of the database investment, it must be taken into consideration not only the prior and preliminary investments for creating the database (even if the expenses were amortized), but also any current expenses necessary to maintain and update a database.

In such a context, think, for instance, any job site that offers a variety of workplace offers. Is such a site a real database which should benefit from a *sui generis* protection provided by the law?

The answer will in fact depend on the way the job finder site was created and if such a database reflects an investment. What happens in practice is that the job finder site usually means a compilation of job announcements gathered on the site by the applications (job offers) sent by employers. The investment in this case is therefore the one associated with the financials and technology for creating the site (i.e. domain name, servers, personnel, etc.).

Because the information in the site goes public, the risk for the creator/ owner of the database will always refer to the general possibility for illegal extraction and / or re-utilization of the database content. Such illegal actions are basically made by so-called aggregators (search engines) which collect the information available on different specialized sites and put it together so as third parties can easily find it.

Even if such a practice can be favorable to end-consumers, the problem raised refers to the (illegal) extraction of the information contained in the database. According to the law, criminal liability is therefore foreseeable.

B) The illegal making available to the public of database content

As a general observation, the Database Directive does not provide a clear guideline for determining if a database qualifies for the *sui generis* right. This is without a doubt applicable for the Romanian Copyright Law dealing with this special right.

It is essential to observe that the Romanian Copyright Law chooses to criminally sanction the infringements to the protectible databases. We find this yet shocking in such a context where European Courts have not found a definitive test for database infringement. We consider this approach a little too drastic to cope with.

According to the Romanian Copyright Law, it is considered to be a crime and it will be punished with imprisonment ranging from one to four years or with a fine, the making available to the public, including by internet or by other computer networks, without the consent of the right holder, of *sui generis* rights *or copies thereof* (emphasis added), irrespective of the medium, so that the public can access them in any place or moment individually selected[32].

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[31] *Spot (cinebel.be) v/ Canal Numedia (allocine.be)*, Bruxelles January 18, 2002.

[32] Art. 139^8 of the Romanian Copyright Law.

Carefully analyzing the *verbum regens* of the above felony, it will be noticed that the crime retake the content of the patrimonial right of the database maker to re-utilize the entirety or the substantial part of a database. As detailed above, the re-utilization of a database content means, in particular, any form of making available to the public the content of a database by distributing copies, renting or making available to the public the content of the database.

According to the ECJ case law, the extraction and re-utilization which affects the totality or a substantial part of the database require without a doubt the authorization of the maker of the database even if the database is partially or totally made available to the public or if the maker of the database authorized third parties to distribute to the public the database[33].

From a criminal law standpoint, the object of the felony is represented by the social relationships assuring the protection of database right holders[34]. Such a protection will obviously be activated if the compilation of data is a database as defined by the Database Directive and the Romanian Copyright Law.

The material object of the felony is represented by the database itself or, as expressly provided by the law, by the copies of the database.

In this way, it is important to note that according to a largely debated Google case law[35], as a general rule, Google automatically index all web pages by the "Googlebot" program and, in addition, creates a copy of every page that it indexed and stores it in a file called "cache" file.

Alongside the results of a search in Google, such results will also include the results of the cached pages. Accessing the cache page will redirect the user to the copy of the webpage made by Google and not to the original webpage. *Field* claimed in front of the court that Google infringed its rights by the fact that user accessed the cache pages and downloaded information thereof.

Without going in to much detail, Google won the *Field* case and the arguments of the court referred to the general "fair use" principle in the US Copyright Act as it regards the copying and distribution of protected works by cache indexing.

Such a "fair use" principle is not however fully applicable as per the provisions of the Romanian Copyright Law. The Romanian law does not contain a general fair use principle to justify the copying (extraction) of the contents of a database. Consequently, according to the letter of the law, it will be a felony any making available to the public of the contents of a database or the copies of such data, without the consent of the right holder.

In this way, it doesn't really matter the scope of usage of the indexed data as long as such data was illegally extracted or re-utilized without the proper consent. However, according to the ECJ case law, they tend to measure the substantiality of the extraction by looking at the data's value or at the infringing activities from a database maker's perspective[36].

Thinking again of our dedicated search engines (aggregators) it was observed in practice that such a search engine infringed an online telephone directory owner's database right, because it provided its users the extracted data without referring them to the original directory[37].

As such, for both the extraction and the re-utilization, their scope lies in the breadth of the definition of substantial part. Only knowing if the extraction and/or re-utilization were substantial can make the action illicit and (probably) request criminal charges for the culprit.

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[33] ECJ, *The British Horseracing Board Ltd and others v/ William Hill Organization Ltd*, para 61.

[34] Constantin Duvac, *"Analysis of the felony provided by art. 139[8] on Law 8/1996"*, RRDPI, 4/2007, p. 45.

[35] Nevada Districtual Court, US, *Blake A. Field v/ Google Inc.*, January 19, 2006.

[36] Xuqiong (Joanna) Wu, *"E.C. Database Directive, Foreign & International Law: Database protection"*, 2002 Berkeley Technology Law Journal & Berkeley Center for Law and Technology, Vol. 17:571, p. 583.

[37] See P. Bernt Hugenholtz, *"The New Database Right: Early Case Law from Europe"* (paper presented at Ninth Annual Conference on International IP Law & Policy, Fordham University School of Law, New York, Apr. 19-20 2001), available on http://www.ivir.nl/publications/hugenholtz/fordham2001.html (visited on January 31st, 2012).

Conclusion

It goes without saying that the Database Directive has primarily set the agenda for national and international database protection. This happened back in 1996 and managed to internally influence the protection granted by the Romanian Copyright Law since 2004.

As a consequence, the Database Directive and the Romanian Copyright Law provide a two-pronged test to determine if a database is eligible for protection[38]. Firstly, the database will qualify for the protection by copyright if it contains information arranged and/or structured in an original, yet systematic way. Secondly, the database will benefit from a special *sui generis* right if was created by a substantial investment.

In both cases, the Romanian criminal protection of database appears to us excessive. Even though there isn't much Romanian criminal case law on the issue, the consequences that may appear by interpreting the provisions of the law are huge and can lead to disproportionate criminal charges.

In a pure internet era, criminal liability attributed to almost any data exchange or "extraction" can cause damages not only to the public data exchange process, but also to the private use of households, those individuals that can, at some time, be original and create their own work, being further protected. The recent debate triggered by the adoption of ACTA provides an argument in this line.

This paper only tried to draw the attention on the practicalities around having database infringements criminally sanctioned. The herein presentation is thus intentionally non-exhaustive. It will take more than a study to help the criminal authorities understand that the special *sui generis* right infringements are naturally related to the rationale of general intellectual property rights: creativity generating money.

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