THE LEGAL PROTECTION OF DATABASES

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Abstract

The databases are a part of our everyday life and we use them almost without noticing how many and how valuable they are. Without them, our life would be extremely difficult. Just as difficult as a life without computers. There are many advantages that the databases provide to their users: quantity and quality, the ease in identifying the sought information, the possibilities of retrieving the sought information and, last but not least, the user costs, which are much lower than those required for the individual identification of the same information. These are the reasons for which the efforts for creating databases should be compensated by specific means of protection, which ensure both the investment recovery and the expected return and encourage the investments in this field. The lawmaker chose the protection by means of copyright and sui generis right, based on the originality or lack thereof. Below we shall address these means of protection.

Keywords: *databases, copyright, sui-generis right, originality, lack of originality, cumulative protection.*

1. Introduction. The general status of databases

According to some authors, the presence of databases in the French Intellectual Property Code, in the section dedicated to copyright, is explained by the fact that a French minister of culture wanted to keep them in his/her area of competence[1]. However, I believe that this statement is an exaggeration, given that **the protection of databases under** copyright has a long tradition and is internationally enshrined. Still, it is true that **the protection of databases under sui generis right is recent enough**, as Directive no. 9/1996 on database protection is only 20 years old.

Thus, the Berne Convention of 1886 for the protection of literary and artistic works, under art. 2(5) refers to the **collections** of literary or artistic works, **encyclopaedias and anthologies** which "*by reason of the selection and arrangement of their contents constitute intellectual creations*".

The WIPO Treaty of 1996 on the copyright refers in art. 5 to the **compilations of data**, which by "*reason of the selection or arrangement of their contents constitute intellectual creations*" and declares them subject to copyright protection.

And the TRIPS Agreement of 1994 states in art. 10.2 ("Compilations of data") that the "***compilations of data or other material,*** *whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself*" are subject to copyright protection.

We may find similar statements in art. 8 letter b) of Law no. 8/1996, which declared as subject to copyright protection the anthologies, encyclopaedias, compilations of materials or data, including the **databases**, if, by ***reason of the selection or arrangement of their contents they constitute intellectual creations***.

Our law, harmonising the protection of databases, as it happened in all European Union member states, also provides protection for the databases **that are not intellectual creations**, but which meet the requirements set by art. 122[1], **under a sui generis right**. This is the case of the databases in which the elements forming their contents are ***systematically or methodically arranged*** *and may be individually accessed by electronic means or otherwise*.

However, we must note the fact that, by regulating the legal protection of databases, Directive no. 96/9/EC allowed for the possibility of protecting by other means the databases that are not protected under copyright, since they are not intellectual creations, and that cannot be protected under sui generis right either, as they do not meet special conditions. This way, by means of the Decision of 15 January 2015, rendered in case C-30/14, **Ryanair Ltd** vs. **PR Aviation BV**, the CJEU decided that "*Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases* ***must be interpreted*** *as meaning that* ***it is not applicable*** *to a database which i****s not protected either by copyright or by the sui generis right under that directive****, so that Articles 6(1), 8 and 15 of that directive* ***do not preclude the author of such a database from laying down contractual limitations on its use by third parties****, without prejudice to the applicable national law."*

It may be observed that we have **three categories of databases**: some are subject to protection under copyright, some are subject to protection under sui generis right and another category of databases that may be protected under

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[1] Quoting Polloud-Dulian Frédéric, *Le droit d'auteur*, Editura Economica, Paris, 2005, p. 981, who quotes "La Codification de la propriété intellectuelle – Etude critique et prospective", namely Valérie-Laure Benabou and Vincent Varet.

provisions, by means of the agreements concluded between their producers and users. However, Directive no. 96/9/CE and Law no. 8/1996 only deal with databases protected under copyright and sui generis right.

2. Definition of databases

The databases could be defined as optimised management methods for works, information, knowledge, texts, any elements deemed to be perceived and used by people, in all areas and wherever they were. Therefore, the databases have the purpose of managing what is generically known as "data", which are centralised in collections (bases) and, if required, they are updated and set on all sorts of media accessible to the authorised users, as the final purpose is that of satisfying, on request and even simultaneously, several users, according to their needs, in a selective and timely manner.

The data, the information (categories in which we include all elements that may be centralised, arranged by certain criteria and accessed by the users) are processed per interest areas and categories, following criteria predetermined by their authors, in order to form databases for various domains (technical, legal, financial, commercial, etc.) and of various sizes. Even if nowadays we relate the databases with the electronic means used to access them, they are in fact not a recent creation of mankind: collections of data, information and works have been created and arranged for a long time now, in the beginning on paper (whose accessing requires a longer time) and, today, usually on electronic media, which is why they are also supplied under the name of "information products". Nowadays, life would be hard to imagine without databases (or without computers), even though most of the time we are not even aware of the fact that we use them.

As the bases we use become more and more complex, their production costs and the use of human and technical resources also increase. However, our interest in them has also increased and is still increasing, given the facilities they provide in the quick identification processes for the data of interest, works (when these are formed of works), documentation, research, etc. We have and we use databases starting from the simple phonebooks (which are personal databases), the summary table with the train or airplane ticket reservations, the catalogues in libraries or the inventories of products that may be purchase online, to the information and data collections of medium size, which are used in the management of companies, or those of large sizes, such as the information collections containing scientific works in various research fields[2] or those intended for the general public, with highly varied contents. Furthermore, the online information search engines are nothing more than search tools for information made available to the interested parties in enormous databases[3].

The processing and organisation of data/ information/ elements, comprised in databases, are usually performed with computers and computer programs and often enough represent more complex, difficult and costly activities than the creation of computer programs. And, as we shall see below, the databases and the computer programs are tightly linked. Sometimes it is incorrectly claimed that the databases are in fact computer programs. The best know such example is the case of legal databases. And it is true that, sometimes, the difference between the databases and the computer programs is not easy to reach[4].

A database contains the elements, information (data) required in one or several fields, the logical relations between said elements or information and the processing, updating and query techniques of said elements. Both the electronic format and the non-electronic format databases are protected (art. 1.1 of Directive 96/9), as the database accessing method does not represent a criterion in terms of their protection, as long as the access is possible at individual level and by any electronic means or otherwise.

The contents of the databases may ease the intrusion in the privacy of persons and may represent elements that may be used to threaten the freedom and privacy of everyone. This is the reason behind the adoption of Directive no. 95/46/EC on the on the protection of individuals with regard to the processing of personal data and on the free movement of such data[5], which states the principles

[2] For example, SpringerLink, is one of the most used electronic resources for scientific documents. It contains specialised books and journals, edited by Springer-Verlag, Kluwer Academic Publisher, Urban and Vogel, Steinkopff and Birkhauser. This database was created on the grounds of a project called "National Electronic Access to the Research Scientific Literature - ANELiS", a project with a value of RON 97,431,792.32, of which 83% represented the non-repayable eligible value of FEDR.

[3] The stated mission of Google is **organising the information available in the world and making it accessible and useful for everyone".**

[4] To this end, see civil Decision no. 955 of the High Court of Cassation and Justice, Division I of the Civil Court and the decisions preceding it, which lead to the fact the parties themselves confuse the databases with the computer programs. The fact that the protection of databases was not regulated by means of Law no. 8/1996 on the date on which it is alleged that a legal software was contracted (2001) instead of a legal database, does not excuse this confusion, given that, at the time, Directive no. 9/1996 on the legal protection of databases was in force,

[5] By means of the Decision of October 1st, 2015, rendered in case C- 201/14 Smaranda Bara et al. vs. the Chairperson of the National Health Insurance Fund, the National Health Insurance Fund, the National Agency for Tax Administration (ANAF). By means of the rendered decision, the CJEU provided that "Articles 10, 11 and 13 of the European Parliament and Council Directive 95/46/CE of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data **must be construed as opposing certain national measures, such as those discussed under the main dispute, which allow an authority belonging to the public**

of the use of personal data. According to the principle of Directive 95/46/EC, the personal data processing systems must service the people, must observe the human rights and fundamental freedoms, particularly the right to privacy, and must contribute to the economic and social progress, to the development of trade and to the wellbeing of people.

The databases **protected under sui generis right** are neither technical innovations, nor distinctive trademarks. And yet, they are subject to protection under intellectual property right. Admittedly, by placing the sui generis right under Law no. 8/1996 at the limit of the copyright; however, we must not forget that the sui generis right may also have effects, in the case of cumulative protection, in relation to the databases protected under copyright.

According to the Romanian law, when the databases are formed of works or other elements protected by copyright and when they are also intellectual creation works (they are original), said databases are derivative works (art. 8 letter b) of Law no. 8/1996).

The fact that a database is formed of works that are protected under copyright does not automatically grant originality and the status of intellectual creation subject to protection under copyright to said database. For example, a database that contains all the alphabetically ordered information on the books in a library. Certainly, the database content is important, but a database is an intellectual creation if it reflects the personality of its author.

On the other hand, a database formed of elements found in the public domain and which have not been protected under copyright may be an intellectual creation if the personality of the author is reflected in the selection or arrangement of its content. In this case, the database cannot be considered a derivative work and its protection cannot be refused on the grounds that the Romanian law views databases as derivative works and that these must be based on pre-existing works.

3. The usefulness of databases and the justification of their protection

In the information society, in the knowledge economy in which we live and evolve, the databases occupy a very important place. They represent considerable economic values. They are the drive behind our daily activities and represent precious assets for the economic and social development of all countries and for the progress of humanity by means of knowledge and information. We have also shown that in this day and age the volume of available information is doubled over shorter and shorter periods of time (a few years, by comparison to 500 years, as it was a few centuries ago). This exponential increase in the amount of information implies their focus on areas, a processing manner meant to facilitate their identification, the access thereof and the permanent updating, because the useful information is updated one.

The usefulness of databases is unchallenged nowadays. Building databases involves considerable financial investments in information storage and processing systems (entry, update, deletion, query), as well as human-related investments, as the creation of databases requires certain important human and creative resources. However, the advantages granted by databases to their users are important ones, from various perspectives: quantity and quality, the ease in identifying the sought information, the possibility of retrieving such information from the built bases and, last but not least, concerning the time-related and financial costs for the user that is intended to use said databases, much lower costs, by comparison to the situation in which said user would have to find the required information on his/her/its own.

The effort made for building databases must be compensated by specific protection means, which ensure the investment recovery and the expected return and which encourage future activities in this field. The usefulness of databases that are processed and made available to users, on one hand, and the investments involved in building them, on the other hand, represent the reasons behind their protection. Often enough, the databases created in one country are used in other countries as well. And these databases must also be protected beyond the borders of the countries in which they were created. Given that the databases are formed of information that go beyond the individual interest and the borders of their producers' country, and that building an internal market represents a European challenge, it was necessary to harmonise the legislations regulating the protection of databases, at European Union level.

The adoption of (EC) Directive no. 9/1996 on the legal protection of databases (whose statement of reasons established **their importance for the international market, trade and industry and drew attention to the high costs** required for their creation (important technical means and human resources), costs whose profitable recovery is important for the authors of said databases – represented an important step in harmonising the legislations of the EU member states regarding the protection of databases, those protected under both copyright and sui generis right.

Although **it is inspired from the copyright** and it somewhat follows the copyright structure, **the sui-generis right** that protects a database **is neither**

administration of a member state to send personal data to another authority of the public administration and the subsequent processing thereof, without informing the targeted persons of said transmission or said processing".

a copyright, as it **is not related to intellectual creations** (those which are intellectual creations are also protected under copyright), nor **a right related** to the copyright, because it **does not protect a creation auxiliary activity**.

The databases protected under sui generis right represent compilations of elements which usually belong to the public domain. Still, there may exist certain **databases that contain elements protected under copyright**, but which **are not intellectual creations by reason of the selection or arrangement of their contents**, so that their potential protection may only be achieved by means of a sui generis right. However, this requires the presentation, in a systematic or methodical manner, of the elements included in the database.

The legitimacy of the prerogatives recognised for the database producers is a controversial problem, while in the literature it was alleged that it is difficult to understand why, in order to protect the investments for building a database, a limiting right, a monopoly, is recognised in the favour of the investors on an "object" that sometimes does not represent an intellectual creation and other times (when the "selection or arrangement of contents" takes place in an original manner) represents an intellectual creation in the meaning of art. 8 letter b) of Law no. 8/1996. In order to find the answer to this question, we must recall that in the ***copyright*** initial classic system, the right was also recognised in the favour of the investors and was subordinated to the stated interest of education. The solution for recognizing certain rights in the favour of those that invest in the creation of artworks is known even in the Berne Convention system: for example, in the case of audio-visual artworks, phonograms, computer programs and joint works, the institution of the producer, of the employer or of the commissioner that has the patrimonial copyright recognised, is a reality which, despite being sometimes severely criticised in the literature, belongs to the legal life, to the law, and must be accepted as such.

Creating this sui generis right and recognising it in the favour of database producers that may prove the substantial, qualitative and quantitative investments made, as shown in the hostile literature concerning this right, leads to the reduction of the public domain related to the copyright, which includes creations that are free to use, whenever the elements used by the databases are included in the category of works excluded from protection under copyright! It leads to the limitation of the field which includes, for copyright, the creations that the law excludes from protection for reasons concerning education, safety, order policies (political, administrative, legal texts that must be available to all and that must also be known – such as the laws) or those that must be available to everyone (means of payments, ideas, theories, concepts, etc.) or those that lack originality, such as the simple information, data, facts etc. and which may be freely used by the interested parties.

Once included in databases, the creations from the public domain may be retrieved from said databases only with the authorisation of the database producer. Certainly, if the same elements are found under other accessing options, the user may retrieve them from other places. For example, a law may be accessed by searching for it in the Official Journal, may be purchased for a price or may be retrieved from the databases in which it is provided by the database producers. An information, a study, an article, a scientific communication may be accessed in the publications in which they appeared and which are purchased for a price, or in databases, which do not provide just the quicker identification and access, but the possibility of accessing them as they were updated, accessing links to other elements from the same category or from related categories, etc. Obviously, the database accessing takes place with the authorisation of the person holding the rights to the database and which is granted for a price[6].

Taking over elements from the public domain, with free access and use, as a principle (although they may prove to be more costly in terms of time and price), and selling them to the interested parties within databases represents the reason for which the right of the database producers was viewed with hostility in literature. At the same time, the right of the database producers was defended, and not just by the producers, but by the interested parties as well, because it answers to certain pragmatic needs and because it encourages the processing of information, data, to the benefit of more and more users. Try to imagine that you would need all the versions of the Tax Code, from 2003 and until today! The effort, in terms of time and money, for identifying all the versions in which it was republished and all the amendments brought to it shall exceed by far the effort of purchasing the access to a legislative database.

We must also note the fact that this sui generis right allows for a clearance of the copyright, as it leads to avoiding the protection, under copyright, of databases of a greater practical usefulness, but which

[6] For example, the online search for Directive no. 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides multiple addresses (databases) in which it may be found. For the full access and download, in one of these databases you will find two notifications on the first opened page. The first, in the header, announces that the "Documents from the European legislation section are available only to subscribers (…)" and a second one, at the bottom of the first opened page, informs you that "this is a partial text. For the complete text you require a subscription to (…) or you may purchase online the entire document, in PDF and Kindle format". Obviously, these kinds of announcements accompany all the databases available online.

lack an intellectual creative contribution and originality or which show a very low degree of originality.

4. The cumulative protection for databases

The sui-generis right of database producers is a community creation and it was transposed in the internal law by means of the Law on copyright and related rights. The sui generis right created by the directive **protects the investments and not the creative act**, as the right is recognised in the favours of the database producers, regardless of whether these are protected under copyright or not.

If a database is also an intellectual creation and if it may be protected under copyright, it may also benefit from a cumulative protection, under the copyright, under the sui generis right and even by means of contractual provisions agreed upon with the user outside of the regulations of the copyright and sui generis right.

The rule is set in art. 122^2(4) of Law no. 8/1996, which states that **the sui-generis right** "*is applied independently of the possibility of protecting the database or its contents under copyright or other rights*".

The solution is a logical one: the database protection under copyright and under sui generis right takes into account different protection conditions and has different effects. However, in both protection systems, the creation of databases involves financial, human and technical investments. In the case of databases protected under copyright, the (quantitative and qualitative) investments are usually greater than those in the case of databases protected under sui generis right. However, one of the Directive purposes was that of protecting the investments made for creating the database, while the protection of investments must be secured even more so in the case of databases that represent intellectual creations, and not just for those that lack originality. Protecting the investments made for creating a database that lacks originality under sui generis right and refusing to protect the investments in databases that are intellectual creations and which are superior in terms of quality represents both an infringement of the Directive purposes and a discrimination between the two database categories.

On the other hand, we must note that the protection of databases under sui generis right must not prejudice the rights already existing on their contents (art. 122^2(4) the second sentence of Law no. 8/1996). In other words, if the database contains elements protected under the limiting right of another person, these may be included in the database only with the agreement of said person, while the limits of using the database elements shall be agreed with the holders of the rights concerning said elements.

However, the rule is also valid for the databases protected under copyright, as it is presented in art. 8 of Law no. 8/1996, which establishes that the derivative works (which include the databases) are protected, without prejudicing the rights of the authors of the original works.

Art. 122^2(4) and art. 8 of Law no. 8/1996 shows that, when a database is protected under copyright or sui generis right, or when the database benefits from cumulative protection and it (also) includes works protected under copyright, said works also benefit from cumulative protection: under the copyright recognised in the favour of the work author and under the copyright of the database that included the work with the author's consent.

The cumulative protection rule is also valid for other elements included in the database and on which a person may claim or already has a limiting right. This right may be an intellectual/industrial property right (a collection of drawings or models – for example, the database of a fashion designer, which may include all the designs created by said designer and by other designers from the same field; a collection of trademarks, geographical indications etc.), a right on certain elements which, without being protected under intellectual property rights, belong to a person (for example, a collection of ideas, theories, concepts, laws, the set of works belonging to collective management bodies, a collection of maintenance works for various types of automobiles, etc.).

5. The legal system established by (EC) Directive no. 9/1996 and its comparison to the Romanian national law

(EC) Directive no. 9/1996 on the legal protection of databases shows, in an ample statement of reasons, why it was created and why it was considered necessary to harmonise the protection of databases at European Union level and the reasons behind their special protection under sui generis right.

But we must begin with the fact that, although it creates **a sui generis right in the favour of the database producers**, the Directive still preserves **the principle of the database protection under copyright**, setting several special rules for the latter and stating that the databases that are intellectual creations that may benefit from cumulative protection.

Summarising the Directive arguments concerning the need to protect databases (under copyright and/or sui generis right), they may be expressed as follows:

The databases are protected under copyright in the EU member states, but the copyright legislation is not sufficiently harmonised and the inconsistencies, particularly in the field of unfair

competition, may cause the prevention of the free movement of goods and services and the market distortion;

The databases represent essential tools for the EU economic and social development, while the volume of data that requires processing, in order to be made available to users, is ever-growing;

The creation of databases involves the use of considerable human, technical and financial resources, while these databases may be copied or accessed for much lower costs than those required by an autonomous design, as the unauthorised retrieval has severe economic and technical consequences for the authors, as they are unable to recover their investments and shall not be encouraged by the activities in this domain as long as there are no adequate rights;

An investment-related imbalance exists in this field, in the EU member states, and there will be no future investments in modern data storage and processing systems made within the Community as long as there is no stable and homogeneous legal system to protect the rights of database authors;

The usefulness of databases, the prevention of unfair competition in this field and the recovery of the investments made by the producers are the reasons for protecting said databases under sui generis right as well; however, these arguments are closer to those for protecting industrial creations, than they are to those for setting the copyright protection. The situation is somewhat similar to that of the computer programs, which are utilitarian and not literary creations, much like the databases.

We must also mention that **the Directive recognises copyrights, in terms of expression, for original database authors; these rights are different from the ones of the producers, who receive sui generis rights**. Certainly, the author of a database may also be its producer and in this case said author shall have the rights of both categories of holders, if they shall be simultaneously invoked. When the original databases represent collective creations, we believe that the special provisions regarding the collective works are applicable, while rules concerning joint works shall be applied for works created jointly (still, separating the contributions is something hard to imagine).

There are authors that severely criticise (EC) Directive no. 9/1996 on the legal protection of databases, under the belief that the Directive writers have committed a serious confusion between two different legal techniques: the intellectual property and the unfair competition. It was shown that "if the action for unfair competition is meant to sanction the incorrect practices by means of which the investments made by other people are unfairly taken advantage of, also serving to the cause against parasitizing data banks, after adopting (EC) Directive no. 9/96 and implementing it in the national legislations, the rules have changed. However, the intellectual property rights are limiting rights which, by their nature, cannot have as object elements from the public domain or information (data). Fundamentally, the investments, regardless of their importance, cannot be and are not assimilated to neither the creation, nor the innovation, the only two things that justify the recognition of a limiting right. And the case law proves that the sui generis right intervenes only in the cases concerning the freedom of trade or the unfair or parasitizing competition"[7], as the example provided by the quoted author is that of the download of a company telephone directory by a competitor, in order to constitute, with much lower costs, an inversed telephone directory.

This point of view is difficult to accept, because, despite the principle stating that it is fair for some databases to be composed of elements from the public domain, not all databases are in the same situation. On the other hand, even if they are composed of elements from the public domain, some databases with such contents may be original ones. And last, but not least, the usefulness of these databases cannot be challenged. If these databases did not exist, our access to information would be highly limited or extremely difficult to accomplish. Either way, as taken over from the primary sources, these data are still available to the interest parties. The costs of the personal identification of the information of interest shall be much greater if the individual retrieval of all information of interest shall be attempted at a certain time, by comparison to their quick retrieval, with the related costs, from a database.

As shown before, the Directive creates the sui generis right for the data producers, sets the requirements that must be met by the databases protected under copyright and those which must be met by the databases protected under sui generis right and states the rights recognised to the authors of databases representing original creations, as well as the right recognised in the favour of the producers of databases that are not intellectual creations and that protected only under sui generis right.

Given that it is flawed from the legislative technique perspective (in our opinion), the Directive has established a set of uniform rules for the protection of databases. And we recall that **according to the interpretation granted by CJEU**, the Directive **opposes a national legislation that grants certain databases**, which enter the scope of the definition found in art. 1 paragraph (2) of the Directive, protection under copyright in conditions

[7] Polloud-Dulian Frederic, *op. cit.* p. 981.

that are different from those provided in art. 3 paragraph (1) of the Directive.[8]

These are the reasons for which we shall examine the protection of databases, as governed by Directive no. 96/9, when Law no. 8/1996 does not fully take over the Directive provisions.

6. Database protection requirements

As shown above, the Directive refers to two database categories: some that are intellectual creations and **are subject to protection under copyright**, and others that lack originality and for which **a sui generis right** is recognised in the favour of the producer. Those that do not meet the requirements for protection under copyright or sui generis right may still be protected under the contractual provisions set by their producers and users. However, as previously shown, the Directive also leaves room for the protection of databases that cannot be protected under copyright or sui generis right.

The collection is conditioned by the existence, in its content, of independent elements, elements that may be separated from each other without damaging the value of their information, literary, musical or any other kind of content. The issue at hand here involves the database content, the elements integrated in databases and the relation between said elements and the databases in which they are integrated, as well as the relation between the holders of the rights and the users. From this perspective, we distinguish between:

The databases **containing elements protected under copyright, which are also intellectual creations protected under copyright** (these are databases which, by reason of the selection or arrangement of their contents, represent intellectual creations);

The databases that, w**ithout containing elements protected under copyright**, as the content is **formed of elements from the public domain**, are **intellectual creation by reason of the selection or arrangement of their contents** and are subject to protection **under copyright**;

The databases that are formed of elements protected **under copyright or unprotected under copyright** (from the public domain) and **which are not intellectual creations**, but, b**y means of the systematic or methodical arrangement of elements, which allows for their individual accessing**, are databases **that may be protected under sui generis right.**

Data (bases) compilations that are not protected under copyright or sui generis right, but which may be protected under contractual provisions. For example, by means of a contract in which the author of an unprotected database agrees with a co-contractor to make available the elements of said database for use, establishing the access method, the price, the manner of using said information, etc. In this case, the violation of the contractual obligations may be sanctioned by means of a lawsuit based on the common law provisions.

7. Original databases subject to protection under copyright

The first category of databases are those protected under copyright. Truly, Law no. 8/1996 on the copyright, as well as Directive 96/9/EC, mainly refers to these: our law views these **databases as derivative works**, when the selection or arrangement concerns creations protected under copyright; however, as shown above, there may be databases that include unprotected elements and that were not protected under copyright, but which are intellectual creations. Therefore, the fact that the database representing an intellectual creation must be exclusively based on pre-existing works is not a *sine qua non* condition.

This way, according to art. 8 letter b) of Law no. 8/1996, the **derivative works**, protected as such, include, among others, **databases that by reason of the selection or arrangement of contents represent intellectual creations**. Here we note that the lawmaker avoided addressing the **originality of databases** and preferred to state the rule that these (databases) are subject to protection under copyright **if they are intellectual creations**. However, in order **to be considered intellectual creation works** and **subject to protection**, the law requires for **the works to be original**. If this condition is not fulfilled, namely if the database is not an intellectual creation (by choice or arrangement of materials), in other words if it is not original, then said database cannot be protected under copyright. However, it may be protected under sui generis right, if it meets the requirements set for the protection under said right.

Concerning the **originality** of the creations – databases, both the Directive, in considerations (15) and (16), and the Romanian copyright law, in art. 8 letter b), state that, for the copyright protection of databases, **the criterion to be fulfilled is that of the originality, excluding any qualitative or aesthetic criteria**.

According to art. 8 letter b) of Law no. 8/1996, the databases **are derivative works** and the **condition regarding originality**, **the one granting**

[8] CJEU, the Decision of March 1st, 2012, pronounced in case file C-604/10 Football Dataco Ltd et al. v.Yahoo! UK Ltd et al. Thus, CJEU decided that: *"Directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, **it precludes national legislation which grants databases**, as defined in Article 1(2) of the directive, **copyright protection under conditions which are different to those set out in Article 3(1) of the directive**".*

the status of intellectual creation, namely that of a work that is subject to protection, is reflected in the "***selection or arrangement of their contents***". We do not believe that the selection **or** arrangement (and not the selection **and** arrangement! – our note) **implies a high enough level of creative activity!** However, the law is absolute regarding the established condition. For this reason, we must admit that, in order to be protected under copyright, a database must be original, in the meaning that it reflects the personality of its author by means of the selection and classification work for the information contained, and that no other qualitative or aesthetic criterion may be taken into consideration.

Regarding this qualification of databases (as derivative works, according to the Romanian law, n.n.), we believe that the opinion expressed in our case law is somewhat justified, in the meaning that in order to have a database protected under copyright, it must be created **starting from pre-existing works**. However, this qualification, whose consequences are the exclusion from protection of certain databases when the contained elements are not represented by pre-existing works, does not comply with the one of the Directive, which must prevail. We believe that there **may exist original databases that are not necessarily derivative works**. In other words, we believe that there may exist databases that are intellection creation works, and not derivative works, because they are formed of elements from the public domain and which were not and are not protected under copyright, but which **represent intellectual creations by reason of the selection or arrangement of their contents**.

The French case law established that the databases, **even those formed of elements from the public domain**, **may represent creation works** through to their form and structure, given that these "showcase" the personal brand of the author, which surpasses the logical restrictions. It is true that it is sometimes difficult to overcome these constraints and that it must be acted upon not just the visible arrangement, namely the televisual characteristics or those of the presentation on paper, but on the truly original presentation as well, which is not required by its object or by the database type[9].

The French case law stated that "the information that form the database may only claim protection in so far as the overall plan, content, form, structure or language prove a creative contribution that exceeds the inclusion in the work of an automatic and constraining logic for the creation of said database. Therefore, a so-called "Greek" directory is subject to protection under copyright if its data do not represent the simple listing of data taken over from public documents and classified according to an automatic logic, and reflect the creative contribution of the author in the specific presentation manner, column setting, statements regarding the persons included in this directory. Or: "the presentation text of Senegal and the databases concerning the holidays and/or public holidays in Africa, as presented in a Senegal-themed schedule, are subject to protection under copyright, given that these texts concerning the geographical, climatological and technical characteristics of Senegal bear the mark of their author's personality, by means of composition and style, which are personal (…)"[10].

According to art. 3(1) of (EC) Directive no. 9/1996, the condition set for database protection under copyright is the originality and it is considered to be fulfilled if the database is the author's own intellectual creation "by the selection or arrangement of its contents". However, unlike the Romanian law, **the Directive no longer considers the databases as derivative works**. Thus, according to the Directive, the database may **also** contain **elements that are not protected under copyright**.

What is the consequence of this regulatory difference? We find a disagreement between the Romanian copyright law and (EC) Directive no. 9/96 in terms of the qualification of databases as derivative works. However, the Directive must be fully and accurately implemented in the internal law, by requalifying the databases protected under copyright **or by simply accepting the interpretation resulted from the Directive, according to which the databases may be original and, in order to be original, they must not be based on pre-existing works**. If they include pre-existing works they shall obviously be considered derivative works.

This problem is an important one, as the **case law decided that a legal database is not protected under copyright**, for two reason:

The first is that the elements contained by the database, namely the laws, are not protected under copyright; however, Law no. 8/1996, by means of art. 8, qualifies the databases as derivative works, which are created based on one or more pre-existing works. The literal interpretation of the legal text is truly meant to lead to this conclusion, which is contrary to Directive no. 96/9, which does not state such a condition. This opinion was supported by the Bucharest Court of Law and invalidated by the Bucharest Court of Appeal and by the High Court of Cassation and Justice, by means of Decision no. 955 of March 25th, 2014: the High Court correctly considered that there may exist databases that represent intellectual creations, even if their elements are not protected under copyright. The opinion of the High Court of Cassation and Justice complies with the CJEU case law, which, under the Decision of March

[9] See Bertrand Andre, Droit d`auteur, Dalloz, 2010, p. 583.
[10] Bertrand Andre, op. cit., p. 584.

1st, 2012 in case file C-604/S05, *Football Dataco Ltd. et al. vs. Yahoo! UK Limited et al.*

The second was the one according to which the person requiring protection for "**an information product containing legal acts** published in the Official Journal, (….) must refer to *the **database structure originality** elements, regarding t**he selection or arrangement of its contents**, given that the processing, systematisation and updating stages of the texts published in the Official Journal – as indicated in the case as representing an intellectual creation – **are followed in all legislative programs existing on the profile market** in Romania **and cannot be considered as elements of originality"** and that in this situation **"the originality criterion is not met when the database creation is enforced by technical considerations, rules or limitations which leave no room for creative freedom".***[11]

Regarding the rights of the authors of databases protected under copyright, we find that they are explicitly stated by (EC) Directive no. 9/1996 and that they are, in terms of content, **partly different from the patrimonial copyrights**. Thus, according to art. 5 of the Directive, **the author of a database** benefits, in relation to the expression[12] of said database, **which may represent the object of protection under copyright**, **from the exclusive right of executing or authorising**:

(a) the permanent or temporary, total or partial copy, by any means and in any form whatsoever;

(b) the translation, adaptation, arrangement and any other transformation;

(c) any form of public distribution of the database or its copies. The first sale of a database copy within the Community, by the holder of the right or with his/her/its consent, exhausts the right to control the resale of said copy within the Community;

(d) any communication, display or representation in relation to the public;

(e) any copy, distribution, communication, display or representation, in the relation to the public, of the results of the actions mentioned at item (b).

As regards the terms of the Directive, which, in Article 5, stipulates that the original database can be the subject of copyright protection, we believe that the holder is free to choose between copyright protection and the *sui generis* right.

As regards the databases protected by copyright, the following questions of principle arise:

If the elements of the database (all or part of them) **are also protected by copyright, the rights of the authors of these creations may not be affected by the inclusion of their works in the databases**, as the inclusion of protected works in databases may only be performed **with the authors' permission**. The inclusion of a work protected by copyright in a database, on a digital medium or in a computer memory constitutes a reproduction, which allows public communication, within the meaning of Articles 13(a) and 14 of Law no. 8/1996. Consequently, such an introduction of the protected work in a database is subject to authorisation by the copyright holder.

Furthermore, Recital (18) of the Directive stipulates that the **authors of works are free** 'to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive.' But in such a situation (a database constituting an intellectual creation), the database protection shall be take place as a derived work, by copyright, if the database is an intellectual creation (is original) pursuant to Article 8

[11] Expanding the justification, the High Court of Cassation and Justice, by means of Decision no. 955 of March 25th, 2014, showed the following: "Concerning the creation of a database, **this criterion of originality** is fulfilled, according to the constant ECJ case law, ***when, by means of the selection or arrangement of the contents, its author originally expresses his/her creative capacity, making free and creative choices***. The selection and arrangement of data in a database should be capable of reflecting the personality of the author: this situation takes place when the author is allowed to make free and creative choices to this end. ECJ also specified that, in general, the **required originality** is missing if the characteristics of a work are established by its technical function. In this case, ***the characteristics of the "Indaco Lege" database are established by its technical function***. This technical function helps the user (the legal practitioner) identify the legal acts regulating a certain area in social relations, the repeals and amendments thereof over time. The database ***also contains 135,000 cases*** from all the courts in Romania, **which may be accessed** by means of an internal search engine, **on the grounds of a finite set of criteria that may be chosen by the user**. The legal practice in the Indaco database is not selected according to a theme-related criterion, but contains judgments and decisions from absolutely all public and private law domains, was previously published by third parties and does not contain comments and notes of the respondent. **In other words, the Indaco database automates all the routine operations that a legal advisor would have performed 20 years ago, only with the help of the Official Journal, in order to find out the positive law regulations applicable to a certain factual situation and the form of a legal text on a certain date.** At the same time, the database permits finding the relevant case law of certain courts regarding a certain law issue. All these operations, described by the judicial review court (mentioning within the document the date of entry into force, the amendments brought from the publication, mentioning the amending acts, the correlation with other legal acts, stating (for certain legal provisions) certain decisions rendered by the Constitutional Court on the unconstitutionality exceptions and the access to the text of said decisions, as well as all the acts repealed by means of the legal act), involve "work, competencies or effort" and *do not reflect originality in choosing or arranging said data and, thus, the authors' personality; on the contrary, they are repetitive due to the strict rules that must be obeyed.* In conclusion, *the databases, although involving significant work and know-how, may be protected under copyright only in terms of the information selection and arrangement system contained; only subject to the condition that these databases are an original expression of the creative freedom of their author.* However, given that the respondent is only the holder of the sui generis right on the "Indaco Lege" database, it cannot be considered the case of the application of the provisions of art. 12 and 139 of Law no. 8/1996, as their scope is limited to intellectual creation works, the object of the copyright protection; the provisions of art. 122/1 - 122/5 of Law no. 8/1996 were not invoked as grounds of the action, by means of the statement of claims or by the end of the debates in the lower court; the conditions provided by art. 122/2 item 5 of Law no. 8/1996 are not met".

[12] Our law uses the word "notion", which we find to be incorrect.

(b) of Law no. 8/1996, instead of the *sui generis* right defined by Article 122[1] of the Law.

If the work is in the public domain due to the expiry of the term of protection, then its inclusion in the database is free, but the moral rights shall continue to be observed.

The downloading of the work from a database constitutes a distribution of the work within the meaning of Articles 13(b) and 14 of Law no. 8/1996. This download is lawful if done with the consent of the database right holder. Obviously, if an **author** or holder of a related right **authorises** the insertion of some of the works or services thereof **in a database**, pursuant to a **non-exclusive licence agreement** (agreed with the database maker, instead of the creator, who lacks the financial means and does not hold the investment), **a third party may use these works or services through the authorisation acquired from either the author or the holder of related rights**, but the *sui generis* right of the database maker may not be enforced against it, **provided that those works or services are neither extracted from the database** or re-used starting from it. It is only natural since, for a non-exclusive licence, the copyright holder retains the right to use the work personally and to also transfer the non-exclusive right to another person (Article 39 (5) of the Law).

In case of including works in databases under **exclusive licence** agreements, the provisions of Article 39 (4) of Law no. 8/1996 shall apply: so, the copyright holders may no longer use their works in the ways, within the term and for the territory agreed with the assignee, and the user will extract the work from the database subject to the conditions directly agreed with the holder of the *sui-generis* right to the database. Obviously, **if the copyright holder grants an exclusive license to the database maker**, the database maker **may oppose its exclusive right against a user who uses the work from the database**. But this right may also be opposed against the author who has assigned the exclusive right to use the work.

8. Databases lacking Originality and protected by a *Sui-generis* Right

The protection of **databases by copyright is subject to the condition of originality**, which covers either the choice of materials or the arrangement of the materials (it seems clear that the condition is fulfilled even more so when both the selection and arrangement of the materials 'betray' originality), which is equivalent to the originality of the database structure. But, sometimes, it is difficult not only to prove, but even argue that there is originality. This is the case, for example, of the information classified in a base in an ascending, descending, alphabetical or historical order, all of which are customary methods of processing and arrangement of the elements making up the base and which do not show creative activity or originality.

But may a *sui-generis* right, which is also different in its contents from copyright, protect a database lacking originality? May one acknowledge *sui-generis* rights in favour of the maker of databases lacking originality? And what is then the meaning of the provision of Article 122[1](2) and Article 1(2) of the Directive which, when on defining the scope, refers to databases consisting of collections of independent works, data or other materials **arranged in a systematic or methodical way**?

The obvious answer is yes, because the Directive itself considers the two categories of databases, because Law no. 8/1996 refers, even if not explicitly enough, to both categories of databases, because these are the reason and logic behind the regulation of the *sui-generis* right.

Moreover, please note that, on the one hand, Chapter VI of Title II of Law no. 8/1996 entitled '*Sui Generis* Rights of Database Makers' **makes no reference to the condition of originality of the databases for the recognition, in favour of the makers, of *sui-generis* rights**, and, on the other hand, although the idea is not explicitly expressed, it arises from the interpretation of Article 122[2] (1) and (4) of Law no. 8/1996. Thus:

- According to Article 1222(1) of the Law, '*the maker of a database* ***has the exclusive economic right to authorise and to forbid the extraction and/or re-use of all or a substantial part of it, assessed either qualitatively or quantitatively***.' This is, basically, the *sui-generis* right of the database maker, the method of use of the base, which may only be performed with the database maker's authorisation although the maker is not the creator.

- According to Article 1222(4) of the Law, '*the right provided for in paragraph (1)* ***shall apply irrespective of the ability to protect the database*** *or its contents* ***by copyright or other rights. Database protection under the right provided for in paragraph (1) shall not prejudice the existing rights concerning database contents***.'

As regards the scope of the Law and the Directive, namely the *sui-generis* right, they consider databases consisting of collections of independent works, data or other materials arranged in a **systematic or methodical way** and individually accessible by electronic or other means[13]. The

[13] The concept of *database*, as described in Article 1 (2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, covers any collection which includes works, data or other elements that can be separated from one another, without affecting the value of their contents, and which has a system or method of any kind that allows finding of each of its constituents. Judgment of the CJEU of 9 November 2004 issued in Case C-444/02, Fixtures Marketing Ltd v Organismos prognostikon agonon

provision seems just as vague as the one covering the '***selection or arrangement of the contents***' (Article 3 of the Directive, Article 8 (b) of the Law), and we are unable to identify a difference of substance between them.

The protection covers **both electronic and non-electronic databases**, as the form in which the databases are secured on a medium and are presented has no relevance for the protection. The provision is likely to allow even the protection of databases created on paper, for which the identification of the information sought is more difficult than for searches using technical means.

The collection is conditional upon the inclusion in it of independent elements, which can be separated from one another, without affecting the value of their informative, literary, artistic, musical or other content.

9. The *Sui-generis* Right Holder

The sui generis right holder is the **maker of the database**, i.e. 'the individual or legal entity who has made a substantial quantitative and qualitative investment in view of obtaining, verifying or presenting the contents of a database [Article 122^1 (4)].' Recital (41) of the Directive defines the maker, in similar terms to the producer or originator of the collective work, as the 'person who takes the initiative and the risk of investing.'

Protection is granted to a database in which substantial qualitative and quantitative investment has been made and its maker[14]. The sui generis right is founded on investment protection and return. The foundation of the sui generis right is clearly stated in Recital (39) of the Directive, under which 'this Directive seeks **to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collecting the contents**.' As for the Romanian law, although less explicit, it also refers to the maker, thus the right holder, as the person who has made a substantial qualitative and quantitative investment in view of obtaining, verifying or presenting the contents of a database.

This investment must be proven by the one making use of it and claiming the recognition of the sui generis right.

Public institutions are not undertakings within the meaning of Article 102 of the Treaty on the Functioning of the European Union. The activity of a public authority, which is to store, in a database, data which undertakings are required to submit on the basis of legal obligations, and to enable the interested parties to check these data and/or to provide them with copies of these on paper, does not constitute an economic activity and, consequently, within this activity, this public authority should not be considered an undertaking within the meaning of Article 102 of TFEU. **The fact that this consultation and/or provision of copies is/are made in exchange for the remuneration provided for by law and not determined, either directly or indirectly, by the entity in question is not likely to change the legal classification of the activity**. Additionally, even if such a public authority prohibits any use of the data thus collected and made publicly available, relying on the sui generis protection afforded to it, as the maker of the database in question, pursuant to Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases or other intellectual property rights, it does not pursue an economic activity and, therefore, should not be considered, within this activity, an undertaking within the meaning of Article 102 of TFEU[15].

10. The Content of the *Sui-generis* Right

The principle of protection of databases by the *sui generis* right is that, even if a data collection is not original in light of the selection or arrangement of the materials and cannot claim protection under copyright, since its implementation has required material, human and financial investment, **no one may use this achievement** (the database), **without the authorisation of its maker, without committing an act of unfair competition.**

The ***sui generis* right** of the maker of the database is a monopoly and consists of the exclusive economic right to authorise and to prohibit the extraction and/or re-use of all or a substantial part of it, assessed qualitatively or quantitatively, but the rights to the database or its contents are also subject to protection by copyright or other rights [Article 122^2 (1) and (4)].

podosfairou AE (OPAP) and the Judgment of 9 November 2004, issued in Case C-203/02, The British Horseracing Board Ltd e.a. v William Hill Organization.

[14] The concept of investment in obtaining the contents of a database, within the meaning of Article 7 (1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, must be understood as designating the resources dedicated to searching for existing elements and collecting them in that database. This does not include the resources used for the creation of the elements that make up the contents of a database. In the context of developing a schedule of matches, in view of organising a football championship, therefore, this does not cover the resources devoted to establishing the dates, timetable and pairs of teams for the various matches of the championship in question. Please see CJEU Judgment of 9 November 2004 issued in Case C-444/02, Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP).

[15] CJEU Judgment of 12 July 2012, issued in Case C-138/11, Compass-Datenbank GmbH v Republik Österreich.

- **Extraction** means the permanent or temporary transfer of all or a substantial part of the contents of the database, assessed qualitatively or quantitatively, to another medium, by any means or in any form;

- **Re-use** means any form of making available to the public all or a significant part of the contents of the database, assessed qualitatively or quantitatively, by the distribution of copies, by renting or other forms, including making available to the public the contents of the database so that anyone might access it, at the place and time chosen individually.

The extraction or re-use, both repeated and systematic, of insubstantial parts of the contents of the database is not allowed if it involves acts contrary to a normal use of the database or causes wrongful damage to the legitimate interests of the database maker.

The public lending of a database is not an act of extraction or re-use. The first domestic sale of a copy of the database by the *sui generis* right holder or with the consent thereof **exhausts the right** to control the resale of that copy [Article 122^1 (2) (b)].

The maker of a database which is made publicly available in any manner may not prevent its **legitimate use**, by the extraction or re-use of insubstantial parts of its contents, regardless of the purpose of the use. A lawful user of a database which is available to the public in any manner may not perform acts that are in conflict with the normal use of that database or unreasonably harm the legitimate interests of the database maker. Furthermore, a lawful user of a database which is available to the public in any way may not harm the holders of a copyright or related right to works or services contained in that database [Article 122^3 (1), (2) and (3)].

A lawful user of a database which is available to the public in any manner may, **without the authorisation** of the maker of that database, extract or re-use a substantial part of its contents:

a) If the extraction is done for the private use of the contents of a non-electronic database;

b) If the extraction is for purposes of education or scientific research, provided that the source is acknowledged and to the extent justified by the non-commercial purpose pursued;

c) If the extraction or re-use is intended to defend public order and national security or as part of administrative or jurisdictional proceedings [Article 122^3 (4)].

11. The Term of Protection of Databases

Sui generis rights of the maker of a database arise at the same time as the completion of the database **and the term of protection is 15 years** as of the 1st of January of the year following the completion of the database.

The substantial changes, assessed qualitatively or quantitatively, of the contents of a database, by additions, deletions or successive changes, for which substantial investment can be deemed to have been made, assessed qualitatively or quantitatively, shall allow the allocation of a specific term of protection for the database resulting from such investment. This way, the monopoly can become perpetual.

12. Conclusion. The Relation between Databases and Computer Programs

Databases also exist on a conventional medium, paper, and they are still current and the Directive and the Romanian law on copyright grant protection to databases regardless of the form in which their contents is secured.

However, nowadays, for creating databases, technical means of collection and processing, computers and computer programs are usually used and, more often than not, the medium of databases required for making or operating such programs is technical par excellence. **But there is no dependence between databases and the computer programs used** (without excluding the fact that, for a particular database, a special program may be created); our Law, under Article 122^1 (3), the same as Directive (EC) no. 9/1996, under Article 1 (3), stipulates that the protection of the computer programs used as medium for making or operating databases is independent from the protection of the databases accessible by electronic means and that the special provisions relating to databases do not apply to computer programs.

Nonetheless, the link between databases and computer programs is strong. Not infrequently, the completion of databases is a broader and more difficult and more costly activity than creating computer programs, and the distinction between databases and computer programs is not even made by informed database, computer or computer program users.

Indeed, sometimes, making the distinction is not easy. What characterises a computer program is that it contains a set of instructions and is operational with it. **The set of instructions and their effects can be protected in the case of computer programs.**

As opposed to computer programs, **databases process data, information, works, other elements, but they are static**. And unlike computer programs, these data, information and elements **can be dissociated from their medium and exist independently of it**. Of course, even in the case of databases, there are various nuances. For example, in the case of tables, their dissociation from the medium on which they are secured is hard to imagine.

Nowadays, the huge databases to which we have already grown accustomed are hard to imagine

without computer programs to operate them or without special programs designed to make the database more accessible, more easily updatable, fuller of information, cheaper and faster. But, seeing as there is continuity between computer programs and databases, a connection which makes them inseparable, their separation is becoming increasingly artificial.

It is obvious that a database query and the effectiveness of the query depend on both the computer program, and the arrangement of the elements making up that database, the connections between these elements and the logic of their processing and arrangement. Moreover, under Recital (20) of the Directive, the boundary between computer programs and databases is eroding since it is argued that '*protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus*[16] *and indexation systems*.'

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- *High Court of Justice Decision no. 955 of March 25th, 2014.*

[16] The Romanian version of the Directive uses the word 'repertoriu'. The English and the French versions, which we consider preferable, use the word 'thesaurus'. And thesaurus means the whole of the information grouped together by a database.