THE CONCEPT OF LAW AND CONTEMPORARY PHILOSOPHICAL REFLECTION

Bjarne MELKEVIK*

Abstract: *Historically, the philosophy of law has provided a dynamic and influential framework in which to identify, explain, produce and develop the rationality needed so as to come to terms with the fundamental issues and questions raised by the democratic experience. Currently, far reaching policy questions are being raised throughout the world concerning the present and future of democracy; and specifically the role of the law in the formation of the democratic experience; but the foundations and horizons of the problems appear to be left on edge. Legal students, researchers and practitioners are expected to produce knowledge and perspectives capable of addressing such needs. In such a historical context, the relevance of the philosophy of law to explore and contribute to the ongoing formative and transformative processes of democratic legal cultures needs to be reconsidered. Accordingly, this article reviews briefly the historical role of the philosophy of law in the processes associated to the conceptual understanding of the law, so as to reveal its identity as a legal discipline and its relevance as a framework for analysis and deliberation on the nature and role of the law. In so doing, the article reconsiders some of the traditional ontological, epistemological and ethical questions which characterize the exercise of the philosophy of law, and depicts the importance of inclusive, communicative and participatory experiences, as necessary conditions in the emergence of the legal philosophical framework needed so as to contribute to the needs of contemporary democracy.*

Keywords: Philosophy of Law, Law, Ontology, Epistemology, Ethics, Democracy

This essai provides a general insight into the controversies examined in the realm of legal philosophy. Those who have been exposed to this challenging path, realize that traveling it requires understanding the historical settings, as well as the detailed analysis of the conceptual and argumentative content of specific theoretical positions and debates. From the outset, it is important to bear in mind that learning legal philosophy requires an individual effort to understand the historical and current ideas and practices committed to determining the role and extent of the law. Advancing in such a path, posits to both the student and the researcher a challenge to come to terms with what philosophers of law think and teach about the law in democratic settings. But the task should not be reduced to an isolated experience, devoid of thoughtful and even material engagement in the concrete scenarios in which fundamental and all too often subtle issues and questions are raised concerning the law. Accordingly, it should not come as a surprise that we emphasize the problems depicted in the nonpositivists considerations of contemporary legal philosophy. Indeed, we dwell on the concept of law itself, and address issues regarding the philosophical inception of law as an object of thought. Such topics constitute the classical approaches to legal philosophy.

Given the general perspective that informs our exercise, the account will be compelled to choose priorities and objectives, so as to be able to uncover and focus upon what we will contend to be of the essence. Traditional and contemporary questions will emerge, and some will have to be left unanswered. The need to choose – as such a methodological decision- should not be taken for granted. Inevitable as it is, in theoretical work, exclusion is always a risk; the quality of which can form and shape, in due course, a responsible intention, enabled through communication and argument. So, before tackling the specific controversies in philosophy of law, we think it is useful to put forward a few words on the very concept of "philosophy of law"; because, it is a fundamental intellectual framework that students and researchers are called upon to engage, only then can their options and positions assume risk and acquire meaning. In that direction, we are obliged to consider the conceptual distinction implicit in the two angles that operate therein: the law of the philosopher and the law of the jurist. Accordingly, we will dwell first on the perennial question of the definition of law – the ontological question –, and then we will turn our attention to the way one can know the law – the epistemological question. We will try thereafter to define the law in the context of the "ought" (teleology) – the question of the natural law or the ideal of law. And finally, of course, we will analyze the particularly uneasy question of ethics and law.

1. An approximation to the concept of philosophy of law

Generally, when we review the concept "philosophy of law", its object is, for philosophers of law, not "the notion of law" properly said. Usually, a philosopher of law does not make a living as a practicing lawyer or a judge, and should it be the case, his discourses will be situated on a philosophical, that is, a universal level. In this sense, legal philosophy is not concerned with considerations related directly to the practice of law. To be sure, it often makes use of commonly acknowledged general considerations, which are independent of law and do not, normally, advance the sort of analysis geared toward clarifying the current state of legal norms: validity is normally implicit within what should be appreciated as law. In other words, it's wise to take care of the separation of work between those who write legal dogmatic (or the doctrine of law) and those who do philosophy of law. Confusion on this foundational level is counterproductive philosophy, even if this is done in reference to the concept of "positive law"! It is thus advisable to point out that the philosophy of law is different from any treatment of law within a positivist framework, from any approach handling law or any phenomenon related to the reign of law as a scientific object, as this is understood in legal anthropology, the sociology of law, the history of law, among others. These legal sciences are also somewhat consideration-oriented, and remote with regard to the object of law, which they view as "given," as part of a factual world. But unlike these legal sciences, which can be evaluated according

to descriptive criteria, the philosophy of law has law as its object of thought. In other words, it lays it out in the "mind." Thereby, the philosophy of law remains fundamentally universal in its design.

Now, let us turn towards the two angles that are implicit in such a concept of philosophy of law. We should keep in perspective that the philosophy of law can be defined from both a philosophical and a legal standpoint, as the law of philosophers or as the law of lawyers.

The first angle, generally adopted by philosophers by profession (as well as by vocation), is characterized by the philosophical investigation of the object of law starting from a philosophical position that can be a school of thought, a system, a method, an issue, or a philosophical concept, among others. In general, and surely as a tendency, the law becomes here the application of the philosophical position, thereby showing that the position itself can be adequately used to equally clarify one's way of conceiving law. In this way the philosophy of law worked out by philosophers often prone the development of an axiomatic system in order to explain their views about "law".

The second angle is generally adopted by jurists who feel the need for more basic thoughts about law. The ground for such an approach rests above all upon their experience, which determines the breath of their thinking on the subject. The trend known as "juristic philosophy," as well as the one that several authors call "the general theory of law," often curbs philosophical considerations because the latter is used only to legitimate specific positions relating to the concept of positive law itself. Consequently, the jurists' philosophy is characterized by a marked concern for legal doctrine or legal dogmatic, and by the effectiveness of the procedures and mental patterns which it proposes. Nevertheless, this is a constructive reflection that lacks rigour.

When taken separately, these two angles favour a superficial analysis of the philosophy of law: to study the philosophy of law without "philosophy" or without "law" would betray to some extent the one as well as the other! In fact, these two distinct angles clearly show the rupture at the heart of the philosophy of law. In fact, it is similar to the debate surrounding the nature of "God". Recall the classic and ongoing polemic between philosophers and theologians: the "God" of philosophers does not require any act of faith, it is a "God" emanating from reason, contrary to the "God" of theologians who is built above any authority or reason – it is the "God" of faith. In the same way, the rupture of the philosopher's law is utilised as a justification that works out the formation of a "Schematic (or Organizing) Reason" and of the different forms of "Idea-Law" resulting from it. On the other side of the debate, the justification of the jurists' philosophy of law is essentially connected to the axis of an equally "Schematic (or Organizing) Experience" but in their case by working out forms of "true" law, thus triggering the aforementioned quarrel.

Although the philosophy of law is divided between these two perspectives, the fact remains that the creative energy emerging from this rupture is extremely profitable, because it makes it possible for the two disciplines to mobilize and then confront whatever is specific to both: behold the contemporary philosophy of law with all its diversity and richness.

We are however personally of the opinion that the next turn in the philosophy of law ought to be done by giving up any "schematic" or "organizing" claim, both from a philosophical and from a legal perspective, so as to allow the development of the philosophy of law between the concepts of "Reason" and "Experience". In this article, this perspective can only be indicated, and its full development should be the object of a future essay[1].

2. The Ontological Question

First, the philosophies of law generally examine the question, or simply make an inquiry into what law "is." This inquest requires a careful examination about the essence of law beyond the notion of legal positivism. A short incursion into the history of the philosophy of law suffices to discover that for a long time this has been a fundamental question. Historically, law was conceived either as being in "the things" or in "the minds"[2]. Consider the Ancients defence of an understanding of law as a "Verb", whereas the Moderns lean toward an understanding of law as a "Subject".

Aristotle views law as an art. For him, as for Roman lawyers, law is essentially synonymous with communicative justice. It is an art which consists in determining, in an orderly city, what is truly due to each citizen. Thus, law becomes part of the structure of the city and represents the word of justice, firmly rooted in the political community. If this "Verb-Law" is characterized by Aristotle through the existence of a well-ordered city or society, for other ancient philosophers, its essential characteristic remains the cosmological nature or the world of ideas.

The lesson to be learned from modern philosophy of law is to be found on the concept of "Subject-Law," which, of course, identifies law with the philosophical construction of a subject and its intrinsic qualities such as autonomy, dignity, will, etc. The German philosopher Kant is considered to have worked out the most sophisticated of the systems of "Subject-Law". By identifying law with a philosophical subject understood as self-legislating will, Kant submits law to the court of reason and hence infers a postulate of the *a priori* reason of these subjects. The ontology of law joins here the metaphysics of subjects.

In the contemporary philosophy of law, the controversy between "Verb-Law" and "Subject-Law" still persists. And it should be specified that this controversy is often paralleled to theories which pretend to be "empirical" about law. In fact, the "empirical" trends, such as the theories of A. Ross and H. Hart, situate the question of the ontology of law in the predictability of people having the competence to set out

the law[3]. This last perspective swung several topics of the philosophy of law over to the legal sciences where the ontological question of law rests only on the commonly accepted definitions characterizing law as a set of rules or norms. Thus, the problem whether these are truly "empirical", or rather "psychological" theories of law?

Given the current state of philosophy of, contemporary attempts to redefine the ontology of law, along the lines of the quarrel between the Ancients and the Moderns, do not appear sufficiently relevant to us. Consideration of the various forms of ontology of law, like the systemic or autopoïetic theory[4], the new theory of the institutionalization of law[5], and other theoretical frameworks, allows one to realize that they simply contend that the theoretical outcomes of the past are not convincing, because their metaphysical horizon is not ours any more.

Thanks to the linguistic turn, the ontological question of law ventures today onto new horizons, such as pragmatism. It appears to us that the philosophical investment in language and its pragmatic use in the philosophy of law may prove to be much more profitable than any "ontology" has never been. These new philosophical considerations could serve to put aside the metaphysical question of the Ancients and the Moderns, so as to pragmatically or "linguistically" develop the content and extent of the philosophy of law.

3. The Epistemological Question

The philosophies of law also work upon the question of how to obtain "knowledge" about law and what is implied in such "knowledge". Is "law" an object of knowledge? Should the word knowledge be used concerning a practical issue as "law"? It should thus be emphasized that considerations about legal epistemology necessarily refer to preestablished views on scientific content and rationality. For instance, the legal philosophical thinking consists mainly in elucidating the relation between the specificity of law and the possibility of knowledge as developed by a specific epistemological theory. Two trends are confronted here, the epistemology of the observer and the epistemology of participation.

On the one hand, the legal epistemology of the observer is based on the paradigm of an individual who pretends that he (or she) "observes" his (or her) object, and according to scientific rules more or less established among the various theories of scientific knowledge, could proceed to explain the object itself. Today, this generally means that it is necessary to identify law as a scientific object of knowledge before entering any process of "observation". Concretely, the knowledge of law is attached to a significant aspect of law, to its concepts, or the legal language in general, or even the psychological attitudes of legal actors. We are referring especially here to epistemological trends such as empiricism or the analytical school of philosophy[6].

On the other hand, the legal epistemology of participation rests on the paradigm according to which we cannot "observe" law and this because it receives all of its meaning in a context which also defines us. Law is not "nature," but "culture" and it must be recognized as such and situated in its practical realisation. Legal

hermeneutics, as a contemporary philosophy of law, favours this perspective[7]. This approach also claims that in any kind of knowledge the person who knows is already involved. Thus the hermeneutic perspective makes it possible for us to leave aside the paradigm of observation that dominates legal epistemology, and forces us to wonder about law from the point of view of the knowledge that a person can acquire in a context which defines him or her as well.

In fact, the question of one or the other of these approaches is not only epistemological so as to account for the object of study, but it is often also implicated with "epistemological interests." Thus, the epistemology of observation preaches "neutrality," while the epistemology of participation takes a necessary position on the social and political level.

Legal epistemology also involves an interrogation of legal rationality (or the rationality engaged in the legal realm). For legal epistemology, the question about how to define and how to understand the type of rationality who fits best the legal enterprise occupies a place of first importance. It is a "traditional" question whose importance for law increases in our modern culture impregnated with perspectives of "scientificity," utility, effectiveness, etc. Here, the philosophy of law focuses on the possible discourses of legal rationality and, indeed, when Max Weber defines legal rationality as a rational purposeful activity, and makes this form of rationality the conceptual key of the understanding of law, he makes us believe that he is probably a very good analyst of the tendencies of society in his time, but as a philosopher, he engages this understanding of law only on the way of the rationalization of these means[8]. The success of this discourse on rationality allows us to understand why the philosophy of law is so interested in the question of the discourses of rationality and why this also implies our conception about legal modernity.

The philosophical movements that seek the introduction of a concept of communicative rationality – as in Habermas's case – or the revaluation and the shifting of the rationality known as aesthetic –a significant trend in the philosophy of law - bear witness to this increasing concern for the question of the rationality of law.

4. The question of the "Ought"

The third aspect examined by legal philosophy is related to the question of the "ought" (or the teleology) of law or in legal practice. In other words, the establishing of what law should be is here more exactly a search for the *lege ferenda* and the normative evaluation (or teleology) inherent in any question of law. Even if this question has long been confused with the ontological definition of law and with the epistemological question related to the knowledge of law, it seems advisable to clarify the specificity of this question only as an "ought" in the realm of law. If this "ought" is surely related to conceptions of "natural law", in its multiple variants, or of

"ideal law" (and even to legal positivism if this includes a conception of obligation for individuals), it is all too fair to conclude that there is significant benefit to analyse this tendency in and of itself. Today, we can affirm that the dividing line is located between those who seek a complete and global theory of law build on the notion of the legal "ought" and those who seek only particular reference marks as to this "ought."

We can identify the first perspective with the revival of the "jusnaturalist" thought. Indeed, we notice first of all that the natural law of the Ancients, like that of the Moderns, has made remarkably great strides for about twenty years[9]. Beyond the particularities of each vision, they worked out together the principle of the "Idea-Law", which claims to explain the reality or authenticity of law. In fact, their works tend towards the development of a global theory making it possible to evaluate and judge the existing law. It is historically the concept of "Justice," or simply of the "Just," which was used as cornerstone in the development of this theory. The Moderns much sooner privileged concepts like "Reason," "Will," "Autonomy," "Social Contract," and many others, but in general, it is the paradigm of subjective rights which is used as a modern ideal measurement. The last remark leads us, moreover, on the track of the essentially idealistic character of the formation of the modern social order, built on the pillar of an "Ideal" meant to be accomplished.

Secondly, we can also, examine the recourse to the principle of a legal "ought," but in a much more modest way, as in the various trends known as "legal criticism". It is not directly a question of developing an "Ideal-Law" here, but rather one of supposing more particularly and philosophically the existence of an ideal of law. This "ought-ideal" is never explicitly developed as philosophy of law but is found in solutions and avenues considered to be righter, more rational, fairer, more equal, more democratic, etc. Besides, we can observe trends known as legal criticism which make this normative evaluation their raison d'être, such as the movement of legal feminism, and partly, the movements that are part of the "Critical Legal Studies Movements."

In several respects, the theories of natural law and those of legal criticism are complementary. Both are characterized by their desire to mobilize the "ought" of law while referring to factual or contextual analyses about law.

The question of the "ought-in-law" is often related to thinking about law as an institution. It is thus a question that is closely related to that of knowing the nature of a "good institution," such as it is worked out by political and social philosophy. It seems to us that today the great debate dwells on the cogency of our institutions, according to an understanding either of "justice," or of "just," or of "good." "Communitarians" like Sandel and Charles Taylor preach a justification according to the understanding of the "good," whereas a liberal thinker like Rawls insists much rather on a justification according to the understanding of the "Just." Perhaps, the most promising courses of action will consist in drawing the best from these two positions, as the communicational theory of Habermas subtly proposes.

5. The Question of Ethics and Law

If we must seek a constant concern in the philosophical reflection on law, it seems that it resides within the realm of Ethics. It is then a question of understanding law from the point of view of what we must do and of the acts that we must advance. The followers of legal positivism are not entirely wrong to associate this question with the reflections about the "ought" of law; this association results either in a rejection of any ethical consideration (Kelsen), or in the confirmation of some superposed minimal ethical rules (Binder). For our purpose, we can see Ethics in "law" as a preestablished philosophical form of an "ought" coming from the outside. Ethics thus capture the question of "law" as an emanation of its supposed righteousness.

Since Socrates, it has been a constant in the philosophy of law to insist on this fundamental question: what should be done? This question is thus engaged from a perspective that emphasizes both the agents of law and a model of normative acts. We can, in fact, understand Ethics as imposing a rational justification of our individual and collective choices. As legal actors, on the legal and social levels, we constantly have to justify our acts in a rational way and to clarify the finality of our behaviour. Consequently, the capital problem consists in distinguishing between Law and Ethics. As to this distinction between Law and Ethics, the conception according to which ethics refers to the conscience or the interiority of a subject, and that law is associated with social acts or the externality of subjective behaviour, has long been regarded as the traditional criterion. This type of explanation is more and more disputed and forsaken in favour of several others. Let us mention in particular the models developed by Herbert Hart and Jürgen Habermas.

The current debate in legal philosophy tends, generally, to reactivate Ethics in law. An observer of the contemporary legal philosophy can only be struck by the existing antagonism between those who seek to instaure a fondationnalistic discourse about legal standards, and those who are opposed to it entirely. On the one hand, we observe how the legacy of the Enlightenment is included in the various philosophical projects in order to ensure the ultimate basis for legal standards. These are chiefly various forms of legal Kantianism. On the other hand, we notice an unfounded discourse on standards. This discourse easily adopts Habermas's communication philosophy, which we have examined earlier[10].

There are in fact various philosophical programs showcasing designs about the ethical models of social acts as well as on the role of justice, of the good life, and many others. These are considered of paramount importance for law since they offer us the opportunity to open our mind towards the various cultural horizons of law which can be, in many respects, so distinct from ours.

The fields of law and ethics are often the subject of innumerable debates. The ethical problems facing humanity thus have often direct effects on the field of law. We have only to think of bioethics, abortion, assisted suicide, ecology, etc.

6. Conclusion

The contemporary philosophy of law confirms the initial concern for the concept of law. Crucial works by Kelsen (*Pure Theory of Law*), of Binder (*The Concept of Law*) and of Dworkin (*Taking Rights Seriously*), do nothing but take up again and again the problems relating to the concept of law in attempting to give coherent answers. Nevertheless, if we must trace a certain tendency, we could affirm that the current scenario gives more and more weight to a normative thought in relation to other disciplines, such as social, political, or anthropological sciences. In our view, the fact that the results of the philosophical considerations about law are put to the test, and thus validated, is a sign of the vitality of this field of reflection.

We mentioned that the philosophy of law remains a rather open field, offering many possibilities and bearing on both the current and the future legal culture of our modern societies. Now let us specify the range of the concept of law as clarified by a modern (or modernist) philosophy of law. This philosophical project is addressed at the legal culture available in a society that has made modern law the horizon of its choices and actions. In fact, the sought-after goal is to renew and enrich this culture. We can say, paraphrasing Habermas that the philosophy of law pursues the goal of "locating and preserving the places" that are potentially occupied by the legal practices and theories of this culture, of the unfinished modern legal project.

Lastly, we could also make a point of underlining the ethical and political aspects of the philosophy of law.

Let us so first stress the sense of responsibility that is required of any person that deals with the philosophy of law. The philosophy of law represents an extension and an enrichment of the legal culture. It meaning as well as its role consist in opening new horizons to our culture. Since the philosophy of law is devoted to addressing the legal culture, it is connected with a field of the social and human life of major importance for all. Every philosopher of law must therefore evaluate the ethical implications arising from his or her work, choices and options are unavoidable.

The philosopher of law has a responsibility with regard to society. He must lend an ear to society and to the individuals that make it up. Injustices, oppression, ostracism, among other things remain always present within our modern societies; the international scene seems rather dark. Doing philosophy of law is also a commitment, a commitment for law, for the settling of our quarrels by means of modern and democratic law.

In this sense, the philosophy of law is characterized more by the horizon that it opens up and by the possibilities that it contemplates than by its past, however glorious.

* **BJARNE MELKEVIK**, Professor, Faculty of Law, University Laval (Québec), bjarne.melkevik@fd.ulaval.ca.

[1] Cf. Bjarne Melkevik, *Horizons de la philosophie du droit*, Paris, L'Harmattan et Québec, Les Presses de l'Université Laval, 1998 (2004); idem, *Réflexion sur la philosophie du droit*, Paris, L'Harmattan et Québec, Les Presses de l'Université Laval, 2000; idem. *Rawls ou Habermas: Une question de philosophie du droit*, Québec, Les Presses de l'Université Laval, 2002; idem, Considérations juridico-philosophiques, Québec, Les Presses de l'Université Laval, 2005; idem, Tolérance et modernité juridique, Quebec, Les Presses de l'Université Laval, 2006. In arabic language: "حديث"القانوني مشروع بناء في إسهام :القانون فلسفة على أضواء » [Ada ala falsafat alqanoun: Isham fi binaa machrou qanouni hadith /Lumière sur la philosophie du droit: contribution à la construction d'un projet juridique moderne], Éditions Al-Najoie et l'Association libanaise de philosophie du droit, Beyrouth (Liban), Traduction by Georges Saad and al., 2007 ; idem, «نصوص في فلسفة القانون» [Nusûs fî falsafat al-qânûn/Textes de philosophie de droit], Beyrouth, Édition Al Najoie et l'Association libanaise de philosophie du droit, Traduction by Georges Saad et al., 2005.

[2] See Michel Villey, "Le droit dans les choses"and Paul Amselek, "Le droit dans les esprits," in P. Amselek and C. Grzegorczyk, *Controverses autour de l'ontologie du droit*, Paris, PUF, 1989, p 11-26 et p 27-49. (Paul Amselek and Neil MacCormick (dir.), Controversies about Law's Ontology, Edinburgh, Edinburgh University Press, 1991).

[3] Alf Ross, *On Law and Justice*, London, Stevens and Sons, 1958; H.L.A. Hart, *Le concept de droit*, Bruxelles, F.U.S.L., 1976 (H. L. A. Hart, The Concept of Law, Oxford, Oxford University Press, 1961, 2nd edition 1994).

[4] André-Jean Arnaud and Pierre Guibentif (eds.), *Niklas Luhmann observateur du droit*, Paris, L.G.D.J. 1993; Gunther Teubner, *Le droit, un système autopoïétique*, Paris, PUF, 1993 (G. Teubner, Law As an Autopoietic System, London, Blackwell, 1993).

[5] Neil MacCormick and Ota Weinberger, *Pour une théorie institutionnelle du droit. Nouvelles approches du positivisme juridique*, Paris, L.G.D.J.1992; (Neil MacCormick and Ota Weinberger, An Institutional Theory of Law: New Approaches to Legal Positivism, Berlin – New York, Springer, 1986).

[6] See Cristophe Grzegorczyk, Françoise Michaut and Michel Troper (eds.), *Le positivisme juridique*, Paris, L.G.D.J., 1993.

[7] See *Herméneutique et ontologie du droit*, numéro thématique de la Revue de métaphysique et de morale, no 3, 1990, p 311-423; Patrick Nerhot, *Law, Writing, Meaning. An Essay in Legal Hermeneutics*, Edinburgh, Edinburgh University Press, 1992.

[8] Max Weber, *Sociologie du droit*, Paris, PUF, 1988. (Max Weber, Max Weber On Law in Econoy and Society, Cambrigde, Mass., Harvard University Press, 1954).

[9] See Alain Renaut and Lukas Sosoe, *Philosophie du droit*, Paris, PUF, 1991.

[10] B. Melkevik, "Le modèle communicationnel en science juridique: Habermas et le droit", *Les Cahiers de Droit*. vol 31, no 3, 1990, p 901-915; id., "Transformation du droit: le point de vue du modèle communicationnel", *Les Cahiers de Droit*, vol 33, no 1, 1992, p 115-139 (reprinted in Jean-Guy Belley and Pierre Issalys (eds.) *Aux frontières du juridique. Études interdisciplinaires sur les transformations du droit*, Québec, Geptud, Université Laval, 1993, p. 111-135); id., «Habermas et l'État du droit. Le modèle communicationnel du droit et la reconstruction réflexive de l'État de droit contemporain», dans J. Boulad-Ayoub, P. Robert and B. Melkevik (eds.), «L'amour des lois. La crise de la loi moderne dans les sociétés démocratiques», Québec, Les Presses de l'Université Laval, 1996, p 371-387. This tree essays are republished in, B. Melkevik, Horizons de la philosophie du droit, Québec, Les Presses de l'Université Laval, Québec, 1998 (2004), p 93 – 150.

PROTECTION OF DATABASES - *THE SUI GENERIS* RIGHT

Andrea Annamaria CHIS[*]

Abstract: *Member States' national law, which had provided a different protection of databases according to their level of originality determined the adoption of a communitarian directive, namely the European Parliament and the Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases. The scope of this directive was to ensure legal protection for the so called "non-original" databases (simple lists of information). However, ECJ did not change its jurisprudence after the directive, refusing legal protection for "non-original" databases, which fact curtailed significantly the scope of the provision, inducing legal uncertainty on the EU and national level as well.*

Rezumat: *Legislația statelor membre, ce acorda o protecție diferită bazelor de date în funcție de gradul lor de orginalitate a determinat adoptarea unei directive comunitare, respectiv a Directivei 96/9/CE a Parlamentului European şi a Consiliului din 11 martie 1996 privind protecția juridică a bazelor de date, în vederea asigurării unei protecții legale şi a aşa numitelor baze de date neoriginale (simple liste de informații). CJE, însă, nu şi-a modificat jurisprudența ulterior directivei, în sensul că a lăsat în continuare bazele de date neoriginale lipsite de protecție legală, ceea ce limitează considerabil scopul reglementării, creînd o stare de incertitudine juridică la nivel comunitar şi național.*

Keywords: protection of databases, database legal protection, "spin-off" databases, "sweat of the brow" (doctrine, theory), "non-original" databases, sui generis right

Cuvinte cheie: protecția bazelor de date**,** protecția legală a bazelor de date, bazele de date „spin-off" (liste de informații), teoria (doctrina) „sweat of the brow" (a sudorii frunții), bazele de date neoriginale, drepturile *sui generis*

1. What is a database?

As other authors noticed[1], elaborating a definition of the term "database" is not a simple pursuit, because the concept has not a precise definition. Generally, a database is defined as a collection of data, organised in a certain way, usually, but not necessarily having an electronic nature. The term may be approached from different points of view, because it has different meanings for different professionals. To the author of information contained in the database, the term might refer to a way to make it known to the public, to the programmer, it might mean a specific application used to classify data into different categories, to the user, it is a helpful source of information etc.

The community legislator formulates a legal definition in the European Parliament and the Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases[2], article 1 § 2. According to the Directive, " *"database" shall mean collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*".

The narrow interpretation refers to electronic databases, but a wide definition includes any compilation created using a computer technology and which can be operated using such technology. A popular example refers to those compilations which can be commercialised on CD, such as electronic dictionaries, encyclopedias etc.[3]. The broad definition comprises even listings of telephone subscribers, compilation of case-law and legislation, catalogues of different types of information etc.

Any compilation requires the contribution of three different creators, the author of data, the programmer and the author of the database.[4]

The *author of data* which represents the content of a database might possess a copyright or a related right, if the condition of originality subsists. There is no connection between the protection granted to the author of the database and the author of the data. The Directive specifically regulates that "the copyright protection of databases provided by this Directive shall not extent to their contents and shall be without prejudice to any rights subsisting in those contents themselves" (article 3 § 1). If the author of the data and the author of the database is the same person, it is necessary to make a difference between the investments in creating the information and colleting information. This shall be debate upon in the section referring to the jurisprudence of ECJ.

The programmer's contribution in the creation of a database consists in conceiving a computer program for collecting, fixing, changing and arranging information. His contribution extends to finding the most appropriate way of searching information, using hypertext, links etc. Generally speaking, he is the one who makes the database work. His activity, anyway, is not an independent one, because the creator of the database is the person who gives the instructions. Of course, the software thus created, could be protected by copyright under certain conditions, if it were independent of the database. Computer programs used in the making or operation of databases accessible by electronic means are not protected by the Directive[5], but by the Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs[6].

The creator of the database is the key figure in the whole compilation activity, because he is a professional in a certain field, and, therefore, he is able to choose the information collected in the database. Many times he finds himself in a direct connection with the authors of the content of the database, influencing the act of creation. His creation is independent from the content, but most of the times it enriches it. His contribution could be also protected by copyright in certain

conditions (if the selection or the arrangement of the contents of a database were the author's own intellectual creation, so the protection covers the structure of the database), but it also benefits of a different type of protection if it lacks originality (originality determined using aesthetic or qualitative criteria), yet representing a substantial investment in collecting, verifying and presenting information, the so called *sui generis right*.

2. Premises of the new legislation

As it is stated in the preamble of the Directive, its aim was to eliminate the existing differences in the legal protection of data bases offered by the legislation of Member States, by harmonising the rules that applied to copyright protection.

At the time of its adoption, the Commission identified the differences in the standard of "originality" between *common law* Member States and *droit d'auteur* Member States, which subsequently influenced the level of protection granted to databases[7].

Prior to the adoption of the Directive, the Member States' national laws had different approaches of the "level of originality" required in order to consider a database safeguarded or not by copyright law. *Droit d'auteur* Member States protected only "original" databases which implied an element of "intellectual creation", and this high standard of "originality" led to the granting of the copyright protection only to few databases, the so called "original" databases. The *common law* Member States protected not only the "original" but also the "non-original" databases, when the creation of the "non-original" databases involved considerable skills, effort or an important decision process in collecting and checking compilation. The fundamentals of this protection were the "sweat of the brow" theory.

I shall not insist on the *droit d'auter,* because the subject is well known, in my opinion, and, anyway, it does not refer to the *sui generis* right, but I consider there are some questions related to the "*sweat of the brow*" theory, and, in this context, I will draw some ideas about "*spin-off*" databases.

"*Spin-off*" databases are simple lists incorporating information such as telephone numbers[8], fixture lists[9], lists of horses running in the races[10], television programmes' lists[11] etc.

Usually, before the adoption of the Directive, this type of databases was not protected by copyright according to the jurisprudence of European Court. In the *Magill* case[12], for instance, the European Commission found that the three public television broadcasters whose images were broadcasted in Ireland had abused their dominant position on the Irish broadcasting market refusing to license Magill to publish in its magazine a comprehensive weekly television guide, given that information about TV programme timings was indispensable to allow a firm to compete in the market for TV list magazines. The Court of first instance found that *"although the programme listings were at the material time protected by copyright*

as laid down by national law, which still determined the rules governing that protection, the conduct at issue could not qualify for such protection within the framework of the necessary reconciliation between intellectual property rights and the fundamental principles of the Treaty concerning the free movement of goods and freedom of competition. The aim of that conduct was clearly incompatible with the objectives of Article 86". Therefore, in this case, the Court ruled that "spin-off" databases were not protected, but its judgment was motivated not by the appliance of the copyright rules, but through the appliance of free movement of goods and freedom of competition standards.

The jurisprudence was similar in the United States of America, but, in this case, the motivation was based on copyright elements. The landmark case was *Feist Publications, Inc. v Rural Telephone Service Co*., 499 U.S. 340 (1991)[13]. Even the U.S. Copyright Report on Legal Protection for Databases from August 1997[14] speaks about a period "before Feist" and "subsequently judicial interpretation of Feist". Shortly, in Feist case, the plaintiff, Rural Telephone Service Co. (Rural), was a local telephone company that produced a white-pages telephone directory covering its service area. Feist Publications (Feist), the defendant, published a directory covering multiple service areas. After Feist sought, and was refused, a license to the listings in Rural's directory, it copied the listings without authorization. The Court reviewed the former "sweat of the brow" theory and, actually, rejected it, settling that authorship means a certain level of originality in the selection, coordination and arrangement of the underlying material. Rural's selection of listings was not just unoriginal, but practically inevitable, so, in this kind of works,"*the creative spark was utterly lacking or so trivial as to be virtually nonexistent*". The conclusion, anyway, was that factual lists had not been protected by copyright.

3. The EU database Directive 96/9/EC

In its attempt to harmonise the legislation of different Member States, the community legislator found a way to protect not just databases which fall within the *droit d'auteur* concept, but also those databases which lack in originality, but had been protected before by "sweat of the brow" criterion.

The new Directive contains rules protecting the "original" databases and rules for "non-original" databases, protected by the *sui generis right.* Its real purpose was, as it easily noticeable, to assure protection within the Union for those databases which do not meet the originality requirements in order to be protected by copyright in the light of *droit d'auteur* criterion.

As a consequence, the protection of databases is divided in *copyright* and *sui generis right*.

Copyright

According to article 3 § 1, "*databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection."* Backing up to the 16th recital of the preamble, "*no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied"*.

Copyright entitles the author of a database to authorize:

"(a) temporary or permanent reproduction by any means and in any form, in whole or in part;

(b) translation, adaptation, arrangement and any other alteration;

(c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

(d) any communication, display or performance to the public;

(e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b)." (article 5).

There are still certain restrictions of these rights which may be stipulated in national legislation, enumerated in article 6, in favor of the lawful user, in case of reproduction of a non-electronic database for private purposes, in case of use for the sole purpose of illustration for teaching or scientific research (non commercial purposes), for the purpose of public security or for the purpose of an administrative or judicial procedure, without allowing its use in a manner that would unreasonably prejudices the rightholders' legitimate interests or conflicts with normal exploitation of the database.

Sui generis right

The relevant provisions from Directive are:

Article 7

"*1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.*

2. For the purposes of this Chapter:

(a) 'extraction` shall mean 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;

(b) 're-utilization` shall mean 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. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community; public lending is not an act of extraction or re-utilization. (…)

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted."

The Directive also stipulates the rights and obligations of lawful users in article 8[15] and exceptions to the *sui generis right* in article 9[16].

4. Case-Law of the European Court of Justice

On 9 November 2004, for the first time, the European Court of Justice gave its interpretation of the scope of the *sui generis right* under Directive 96/9/EC, in four cases referred to it under Article 234 of the EC Treaty by national Courts of the United Kingdom, Finland, Sweden and Greece, namely:

1) **Case C-46/02**, Fixtures Marketing Ltd – v – Oy Veikkaus Ab

2) **Case C-203/02**, The British Horseracing Board Ltd et al ("BHB") – v – William Hill Organisation Ltd

3) **Case C-338/02**, Fixtures Marketing Ltd – v – AB Svenska Spel

4) **Case C-444/02**, Fixtures Marketing Ltd – v – OPAP

I shall not evoke all of them, just one, which, in my opinion, is the most relevant.

The British Horseracing Board Ltd and Others – v – William Hill Organisation Ltd[17]

Facts of the case

The British Horseracing Board (BHB) is the governing authority for the British horse racing industry, being responsible for the compilation of different types of data related to horseracing, such as pedigrees of horses, name, place, date

of the race concerned, the distance over which the race is to be run, the criteria for eligibility to enter the race, the date by which entries must be received, the entry fee payable and the amount of money the racecourse is to contribute to the prize money for the race.

Weatherbys Group Ltd, the company which compiles and maintains the BHB database, performs three principal functions, which lead up to the issue of pre-race information, namely, registering information concerning owners, trainers, jockeys and horses and records the performances of those horses in each race, deciding on weight adding and handicapping for the horses entered for the various races and compiling the lists of horses running in the races. This activity is carried out by its own call centre, manned by about 30 operators. They record telephone calls entering horses in each race organised. The identity and status of the person entering the horse and whether the characteristics of the horse meet the criteria for entry to the race are then checked upon. Following those checks the entries are published provisionally. To take part in the race, the trainer must confirm the horse's participation by telephone by declaring it the day before the race at the latest. The operators must then ascertain whether the horse can be authorised to run the race in the light of the number of declarations already recorded. A central computer then allocates a saddle cloth number to each horse and determines the stall from which it will start. The final list of runners is published the day before the race.

The annual cost of continuing to maintain the database and keep it up to date is approximately £4 million.

The racing information, including the names of all the participants in all the races in the UK, is made available to radio and television broadcasters, magazines and newspapers and to members of the public on the afternoon before the race through newspapers and Ceefax/Teletext.

On the day before a race, bookmakers receive, through various subscriber services, a specific compilation of information without which bets could not be placed.

William Hill Organisation Ltd is one of the leading providers of odds in horseracing. In addition to traditional sales methods – such as licensed betting offices and telephone betting – it offers internet betting for all the major horse races in the UK.

The information displayed on its web sites comes from newspapers and from an information service for subscribers that in turn obtains its information from the BHB's database. Neither the newspapers nor the information service have any right to grant a sublicense to William Hill to use any information derived from the BHB's database on its web site.

The information on the William Hill web site only covers a small part of the whole of the BHB database and is arranged in a different way. If the customer requires any other information to arrive at an informed view of the horse's chances of success, such information can be found elsewhere, such as newspapers.[18]

Arguments of the British Horseracing Board Ltd

"In March 2000 the BHB and Others brought proceedings against William Hill in the High Court of Justice of England and Wales, Chancery Division, alleging infringement of their *sui generis* right. They contend, first, that each day's use by William Hill of racing data taken from the newspapers or the RDF is an extraction or re-utilisation of a substantial part of the contents of the BHB database, contrary to Article 7(1) of the directive. Secondly, they say that even if the individual extracts made by William Hill are not substantial they should be prohibited under Article 7(5) of the directive. "

Request for a preliminary rulings

The High Court of Justice ruled in a judgment of 9 February 2001 that the action of BHB and Others was well founded. William Hill appealed to the referring court.

The Court of Appeal decided to stay proceedings and refer the following to the Court of Justice for a preliminary ruling, raising questions regarding the interpretation of certain terms, such as:

- "substantial or insubstantial part of the contents of the database",
- "substantial part evaluated quantitatively and qualitatively",
- "extraction",
- "re-utilisation",
- "acts which conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database".

The Rulings

1. ***The expression 'investment in … the obtaining … of the contents' of a database in 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 to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.***

The expression 'investment in … the … verification … of the contents' of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition.

The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears.

In other words, if the author of the databases invested in creating the data, this does not constitutes also an investment in obtaining it from an independent source and in verification. Consequently, there is no protection by *sui generis right,* which is the equivalent for any protection at all, because the data incorporated in the content is not original, so it is not protected by the copyright. Many times, like in the case cited, there is no difference between creating the data and obtaining the data, because there must be somebody to collect that information directly from the interested individuals, like horse owners for instance, in this case.

Resolving the question as above stated, the Court left the "spin-off" databases without any protection, which was not the real intention of the community legislator, despite of the jurisprudence of the court before the Directive[19]. Reading the Commission's *First evaluation of Directive 96/9/EC on the legal protection on data bases*[20], we notice that certain resentments transpires because of the narrow interpretation given by the Court to the *sui generis* protection for "non-original" databases where the data were created by the same entity as the entity that established the database, the so called "single-source" databases, whereas other industries like publishers of directories, listings or maps, remain protected as long as they solely obtain these data from others and do not create their own data.

In this procedure, the Court should give an abstract answer to an abstract question, leaving the national judge to apply the law interpreted by the Court to the facts. In other words, the final solution shall not transpire from the preliminary rulings. In this case, the Court crossed the line and ruled on the facts, saying that *"the resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears".* This fact did not remain unnoticed by the national judges, as we may conclude by perusing the final decision[21]. Lord Justice Pill motivated his opinion mainly based on the conclusion of the European Court, which should have been applied by his Court (48, 49). Lord Justice Clarke limited his arguments by simply embracing those of the other two LJ. Lord Justice Jacob, who was the main redactor of the judgment, found a supplementary argument in order not to give up his own beliefs about the protection of "spin-off" data bases on the field of "sweat of brow" theory. He explained that the final database, which is eventually published, had had the BHB's stamps of authority on it, becoming an official list. That meant "no one else could go trough a similar process to produce the official list". So, the BHB's database was not one consisting of "existing independent materials", because the nature of information was changed with the stamp of official approval, "becoming something different from a mere database existing material" (28, 29, and 30).

2. The terms 'extraction' and 're-utilisation' as defined in Article 7 of Directive 96/9 must be interpreted as referring to any unauthorised act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned.

The fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database.

We shall notice, that *'extraction'* and 're-*utilisation'* includes indirect use of the database. Consequently, a person may extract or reutilise the contents of a database without having direct access to the database from which the contents are derived (or realising they have done so).

The fact that the contents of the database are otherwise publicly available, does not affect the protection of the database.[22]

3. The expression 'substantial part, evaluated … quantitatively, of the contents of [a] database' in Article 7 of Directive 96/9 refers to the *volume* of data extracted from the database and/or re-utilised and must be assessed in relation to the total volume of the contents of the database.

The expression 'substantial part, evaluated qualitatively … of the contents of [a] database' refers to the scale of the *investment* in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.

Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.

This is an eloquent conclusion, which does not necessitate many commentaries. Just a single idea is worthy of mention, on paragraph 70, that throws light on what the substantial part quantitatively evaluated means[23]. The criterion of quantity is explained not just by comparing the volume of data extracted or re-utilised with the volume of the entire content of the database, but the volume of investment in the part extracted or re-utilised with the volume of investment in the entire content. In other words, the *investment* made by the creator of the database will always have to be taken into consideration in the assessment of whether a substantial part has been taken.

4. The prohibition laid down by Article 7(5) of Directive 96/9 refers to unauthorised acts of extraction or re-utilisation the cumulative effect of which is to reconstitute and/or make available to the public, without the authorisation of the maker of the database, the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker.

5. The impact of the ECJ's interpretation on the scope of the "sui generis" right

There are some conclusions in the Commission's *First evaluation of Directive 96/9/EC on the legal protection on data bases*[24] about the effects of the ECJ's evaluation on the scope of the "sui generis" right, namely that this proved to be a difficult task, and the "sui generis" provisions had caused considerable legal uncertainty in the EU and national level. The scope of the provision was severely curtailed, as noticed the Commission, in the ECJ's judgments, which led to a decreased protection for "non-original" databases.

Trying to solve this situation, the Commission formulated some policy options[25], specifically to repeal the entire Directive; to withdraw the "sui generis" right; to amend the "sui generis" right or to maintain the *status quo.* Apparently, this final option proved to be the viable alternative.

6. Instead of conclusions…

This paper does not pretend to exhaust the subject of the "sui generis" right, not even to be as original as the author wished it to be. Hopefully, the criterion of originality would be applied at least as in the case of databases, for the way the author chose the relevant information and arranged it in a certain logical, order.

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* ANDREA ANNAMARIA CHIS, Judge, Court of Appeal, civil division. tulusandrea@yahoo.com

[1] See Laura Gasaway, *Databases and The Law,* Cyberspace Law course at the UNC School of Law for Spring, 2006, http://www.unc.edu/courses/2006spring/law/357c/001/projects/dougf/node1.html .

[2] Published in Official Journal L077, 27/03/1996 P. 0020-0028, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML, we will call it further the Directive.

[3] See Balogh Zsolt, Information and Communication Technology Law in EU and in Hungary, Chapter 11. *Az adatbazisok vedelme.*

[4] See footnote 3.

[5] See article 1 § 3.

[6] Published in Official Journal L 122, 17/05/1991 P. 0042 – 0046, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML .

[7] Commission of the European Communities, Brussels, 12 December 2005, DG Internal Market and services Working paper, *First evaluation of Directive 96/9/EC on the legal protection on data bases, p. 1, 7,* http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf .

[8] See *Telstra Corporation Limited v Desktop Marketing Systems Pty, Ltd,* http://www.austlii.edu.au/au/journals/DTLJ/2001/1.html and also http://www.findlaw.com.au/article/1308.htm . The case is interesting because the judgment is in favor of protection for "spin-off" databases. For a different opinion, see, *Feist Publications, Inc. v Rural Telephone Service Co*., 499 U.S. 340 (1991), http://www.law.cornell.edu/copyright/cases/499_US_340.htm.

[9] See reference for a preliminary ruling, Fixtures *Marketing Ltd – Oy. Veikkhaus Ab*, Case C – 46/2002, *Fixtures Marketing Ltd – v – AB Svenska Spel*, Case C-338/02, *Fixtures Marketing Ltd – v – OPAP*, Case C-444/02, http://ec.europa.eu/internal_market/copyright/prot-databases/jurisprudence_en.htm

[10] Case C-203/02, *The British Horseracing Board Ltd et al ("BHB")– v – William Hill Organisation Ltd,* http://ec.europa.eu/internal_market/copyright/prot-databases/jurisprudence_en.htm

[11] See *Radio Telefis Eireann v RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities,* Joined cases C-241/91 P and C 242/91 P, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61991J0241&lg=en .

[12] See footnote 11 above.

[13] For some commentaries, see footnote 1 above, footnote 14 below, and Anita Thomas, *Protection for Databases,* http://library.findlaw.com/1999/Jun/1/128089.html . For the text of the judgment, see footnote 8.

[14] See http://www.copyright.gov/reports/dbase.html .

[15] The text is: "1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.
2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.
3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database."

[16] The text is: " Member States may stipulate that 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;
(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 and/or re-utilization for the purposes of public security or an administrative or judicial procedure. "

[17] See footnote 10 above.

[18] See also *Legal protection for databases: case report,* http://www.out-law.com/page-392 .

[19] See footnotes 11 and 12 above, about the Magill case.

[20] See footnote 7 above, p.13-15.

[21] See http://www.hmcourts-service.gov.uk/judgmentsfiles/j3280/bhb_v_williamhill.htm .

[22] See footnote 18 above.

[23] This paragraph has the following content: "The expression 'substantial part, evaluated quantitatively', of the contents of a database within the meaning of Article 7(1) of the directive refers to the volume of data extracted from the database and/or re-utilised, and must be assessed in relation to the volume of the contents of the whole of that database. If a user extracts and/or re-utilises a quantitatively significant part of the contents of a database whose creation required the deployment of substantial resources, the investment in the extracted or re-utilised part is, proportionately, equally substantial. "

[24] See footnote 7 above, p.13-15.

[25] For more details, see p. 25-27 from the report.