The Regulation of Sport in the European Union

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10. Exploitation of databases, intellectual property, competition law and the sport industry: a missed goal?

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INTRODUCTION

As the book highlights it, sporting activities are increasingly regulated especially by EU law. One way the sport industry has been indirectly regulated by EU law is through the interpretation of an intellectual property right, the *sui generis* right protecting databases, also called ‘database right’. On 9 November 2004, the European Court of Justice (‘ECJ’) interpreted the right in four related cases concerning football and horse racing fixtures (that is, information relating to the dates, times, places, teams playing in the matches or horses running in the races). Organisers of important sport events like the

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1 In the context of this article, the terms ‘information’ and ‘data’ will be used interchangeably. For an explanation of the difference of meaning between these two terms, see E. Derclaye, ‘What is a database? A critical analysis of the definition of a database in the European Database Directive and suggestions for an international definition’ (2002), 5, The Journal of World Intellectual Property, 6, 981–1011, at 1004–1005.

2 *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou* (OPAP) (case C-444/02) [2005] 1 CMLR 16 (further referred to as ‘OPAP’); *Fixtures Marketing Ltd v Oy Veikkaus AB* (case C-46/02) [2005] ECDR 2 (further referred to as ‘Veikkaus’); *Fixtures Marketing Ltd v Svenska Spel AB* (case C-338/02 [2005] ECDR 4 (further referred to as Svenska Spel) and the *British Horseracing Board Ltd v William Hill Organisation Ltd* (case C-203/02) [2005] 1 CMLR 15 (further referred to as ‘BHB’), also available on http://curia.europa.eu. Briefly, the facts were that the defendants, several betting organisations, had copied and communicated to the public Fixtures Marketing’s and the British Horseracing Board’s fixtures without the latter’s authorisation. The latter claimed they had database rights in these fixtures and that the defendants had infringed them. For comments on the decisions, see T. Aplin, ‘The ECJ Elucidates the Database Right’ (2005), *Intellectual Property Quarterly*, 204; M. Davison and P.B. Hugenholtz, ‘Football fixtures, horseraces and spin offs: the ECJ domesticates the database right’ (2005), *European Intellectual Property Review*, 113; E. Derclaye, ‘The ECJ interprets the database *sui generis* right for the first time’ (2005), 30, *European Law Review*, 420–30.
Olympics, football, rugby, cricket, tennis, etc. matches and horse races are therefore affected by law in their ownership rights on information relating to such events. The book aims at examining how and with what effect, among others, intellectual property and competition laws are applied to sporting activities. To this effect, this chapter first gives a general background to the issues (background). Then the chapter explains the main features of the database right as interpreted by the European Court of Justice and examines the effect of the database right on sporting organisations (Section 1). The analysis shows that in most cases, the database right is not of much help to sporting organisations. However, in some cases, sporting organisations can be very well protected, so much so that problems of competition law can occur if the organisation has a monopoly (Section 2). Section 3 then addresses what the sporting industry can do to tackle these problems. Finally, the chapter concludes and outlines future developments in the area (conclusion).

BACKGROUND

Organizing a sporting event, like any event, generates a lot of information. This includes, for instance, information concerning the identity of the sportsmen and women, their coaches, the places, dates and times of events, statistics on sportspersons’ performances and results of matches and competitions. Sporting organizations, such as the English and Scottish football leagues and the British Horseracing Board, but also for instance the Rugby Football Union, the British Indoor Cricket Association, the International Olympic Committee, the Women’s Tennis Association and so on therefore create databases to record and classify the information they generate to organize events. This information can be classified in three categories: fixtures, results and statistics, and have different consequences at the legal level. These consequences will be explored throughout the chapter. Databases are therefore very important assets for sporting organizations as they generally are the first proprietors of this information. If this information is protected by law, that is, the law gives them property rights on it, they can license their rights to others and thereby make profit by asking for licence fees. In the European Union, databases are protected by intellectual property law.

To understand how databases are currently protected by intellectual property law in the European Union, a short historical review of the evolution of the law is in order. Databases were traditionally protected by copyright law. However, in most European countries (mainly the continental ones), copy-

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3 All except the Netherlands, the Nordic countries, the United Kingdom and Ireland. The latter countries protected the contents of databases either by copyright or by a neighbouring right. See, for example, P.B. Hugenholtz, *Auteursrecht op informatie*
right protected only the structure of the database (the way elements of a database are selected, arranged, classified or presented), not its contents. In addition, copyright protected only original works. Thus databases structured in a banal way, for example alphabetically or chronologically, were not protected by copyright. Most databases were and still are structured in a banal way as it is the most practical way for the user to find the information. Unfair competition, when it was available, was used to fill this protection gap. As the legal protection of databases in Member States radically diverged, the European Commission decided to harmonize the law. The Directive on the legal protection of databases (‘the Directive’) was enacted in 1996 to do so.\(^4\) Traditional continental copyright was retained but a new right, rather than unfair competition, was created to protect investment in gathering, verifying or presenting databases’ contents. This is the database right. What is really important to many database producers, and especially the sport industry, is not really to create an original structure for their database, as this is not very useful (who would want a database classifying towns where matches take place by the personal preference of the database maker for this town?). What matters is the database’s completeness, its ease of access (user-friendliness, that is, an easy-to-understand alphabetical or chronological structure, for example) and the information contained in it. Fixtures, sports statistics and sports results are generally not protected by copyright as they are classified by alphabetical, chronological order or by ranking. Therefore, copyright does not really help such database producers. It is the database right that can be useful to the sport industry. The focus of the chapter will therefore be on the extent of its usefulness to sporting organizations.

CHARACTERISTICS OF THE DATABASE RIGHT WITH PARTICULAR APPLICATION TO THE SPORT INDUSTRY

This section concentrates on the features of the database right that are most important to the sport industry and includes a description of the provisions of the Directive as interpreted by the ECJ. The section envisages the features of the right keeping in mind the particularities of the sport industry.

Like any intellectual property right, the database right has a subject matter of protection, a protection requirement, rights, exceptions and a term of protection. There are also rules on ownership of the right but what concerns us is not who is the owner of the right but what is a database, under what conditions the right is acquired, what the owner can do with its rights and for how long. The ownership rules are therefore not reviewed.

**Subject Matter of Protection**

The database right protects, of course, databases. Databases are defined as collections ‘of independent works, data or other materials, systematically or methodically arranged and individually accessible by electronic or other means’ (art. 1(2)) and can be in any form, for example on analogue or digital media (off or online) (art. 1(1)). This definition is broad as it includes databases in every form and can potentially include collections of tangible objects because of the breadth of the term ‘materials’. The latter is not really a matter of concern for sporting organizations since they mainly deal with intangible materials, that is, information.

The three main criteria that restrict this generally broad definition are independence, systematic or methodical arrangement and individual accessibility of the elements. Independence means that the elements of a database ‘are separable from one another without their informative, literary, artistic, musical or other value being affected’. This means that, if an element is taken out of the database or is added, this element still makes sense. Examples of inseparable elements are chapters of a novel or images of a film. Novels and films cannot be databases because the value of each of their elements is affected when separated from the whole. In other words, elements of a database must have autonomous informative value.

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6. In most cases, the sports organization will be the owner of the database because it is the person who takes the initiative and the risk of investing.

7. Para. 20 (OPAP).


ruled, and sports results by application of this ruling, are independent. Sports statistics (for example, how fast a tennis player’s serve is, how many double faults s/he made, how many direct and indirect errors s/he made and so on) are also independent. Systematic or methodical arrangement does not mean that this arrangement must be physically apparent but there must be at least a means, such as an index, a table of contents, or a plan or method of classification that allows the retrieval of any independent material contained within the database. Sports fixtures and results always fulfil this criterion as they are classified alphabetically, chronologically or by ranking. Sports statistics fulfil this criterion as well. The requirement of individual accessibility has not been directly construed by the ECJ and remains unclear to many commentators. Probably, it simply coincides with the previous criterion. In conclusion, sports fixtures, sports results and sports statistics are databases.

**Protection Requirement**

The database right accrues when a qualitatively or quantitatively substantial investment in the obtaining, verifying or presenting of the materials is proven (art. 7). The investment can be financial, material (acquisition of equipment such as computers) or human (number of employees, hours of work). The Directive does not define substantiality and the ECJ did not venture to give an interpretation. However, many national courts, and the Advocate General in his Opinion in the *Veikkaus* case, interpreted the requirement as being rather low. For example, a few days’ work or a few hundred pounds or euros may be sufficient to qualify the database for protection. A quantitatively substantial investment refers to the amount of money and/or time invested in the database while a qualitatively substantial investment refers to the effort and/or energy invested in the database. The alternative requirement set out in the Directive (quantitatively or qualitatively) therefore allows protecting a

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11 Para. 30 (OPAP).
12 E. Derclaye, n.1 above.
13 Para. 36 (OPAP). The judgment only talked of football fixtures but this can be safely extrapolated to sports results and statistics because the criteria of independence and methodical or systematic arrangement are met as well.
14 Recital 7 of the Directive.
17 Para. 43 (OPAP).
database that required only a substantial investment in effort or energy rather than in money. Verifying the elements of a database means ensuring the reliability of the information contained in the database, monitoring the accuracy of the materials collected when the database was created and during its operation. Presenting elements refers to ‘the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organization of their individual accessibility’. Thus ‘verifying’ and ‘presenting’ have been given a straightforward dictionary meaning. On the other hand, ‘obtaining’ the elements of a database exclusively means collecting them. This excludes their creation. In addition, if the substantial investment in the collection, verification or presentation of the materials is inseparable from the substantial investment in their creation, the right will not subsist.

All these requirements do not pose problems to sporting organizations as they generally do invest a lot of money or energy (substantially enough) into obtaining, verifying or presenting their database’s materials. However, the fate of sports fixtures on the one hand, and sports results and statistics on the other hand, must be distinguished. As regards sports fixtures, generally, the investment made in obtaining, presenting or verifying the identity of players, dates, times and places of matches or competitions will be inseparable from the investment in their creation. This is what the ECJ held in respect of the sports fixtures lists in question. As the protection requirement is not fulfilled in this case, the sporting organizations are not protected by the database right. This, however, is different for sports results and statistics. Sports results and statistics are not created by sporting organizations but by sportsmen and women themselves. The organizations record the results and statistics. This leads us to examine different types of data whose different characteristics influence the subsistence of the right.

There are three types of data: created (also called synthetic), collected and recorded data. Created data is data made by man. These data never existed before. Such data include sports fixtures lists, television listings, event schedules, transport timetables, telephone subscriber data and stock prices.

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18 Para. 27 (Svenska Spel).
19 Ibid.
20 Para. 24 (Svenska Spel).
21 Paras. 29–30 (Svenska Spel).
22 Paras. 31–6 (Svenska Spel).
23 For more developments, see E. Derclaye, ‘Databases sui generis right: should we adopt the spin-off theory?’ (2004), 9, European Intellectual Property Review, 402–12, at 409ff.
Collected data are pre-existing data. They may have been previously created or recorded by man but they are used at a second stage, that is, the collection comes after the recording or creation. Recorded data sit in between created and collected data. They are data existing in nature and recorded by instruments of measure in intelligible form. In this sense, they can also be described as created, since they did not exist in intelligible form before. The difference between recorded and created data is that anyone can record recorded data as they pre-exist in nature. They are not arbitrarily created by only one person. They can be recorded by several persons. However, it can be difficult to determine whether these data are actually created or collected for the purposes of the law. Perhaps they are both collected and created. Despite this quasi-insoluble question, in many cases it will be possible for a sporting organization to claim that a substantial investment went into presenting recorded data in an intelligible form and therefore the database right will accrue. For instance, recording and presenting the results of all football, cricket (and so on) matches held in a given country at a given time would probably consist in substantial investment. Investment in recording and presenting the exact time of the sportspersons’ performances (for example of a 100 metres race) could also probably be a substantial investment as specific and expensive computing equipment must be used to do so. The same applies to statistics on sportspersons’ performances. Therefore some databases of sports results and statistics may well be protected by the database right.

Rights

The database right grants to the database maker the right to prevent the extraction and the reutilization of a substantial part, evaluated quantitatively or qualitatively, of the contents of the protected database (art. 7). The rights of extraction and reutilization are very similar to the rights of reproduction and communication to the public in copyright law. Both direct and indirect extractions and reutilizations infringe the right. However, extraction and reutilization do not cover mere consultation of the database. A substantial part is not defined but it must represent a substantial investment. A part which does not fulfil the requirement of a substantial part is automatically an insubstantial part. The substantial part evaluated quantitatively refers to the volume of the

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24 Para. 24 (Svenska Spel).
25 Para. 53 (BHB).
26 Paras. 54–5 (BHB).
27 Para. 45 (BHB).
28 Para. 73 (BHB).
data extracted or reutilized from the database and it must be assessed in relation to the volume of the contents of the whole of the database,\textsuperscript{29} while the substantial part evaluated qualitatively refers to the scale of investment in the obtaining, verification or presentation of the contents, regardless of whether that subject (or part) represents a quantitatively substantial part of the contents.\textsuperscript{30} Users can therefore extract or reutilize insubstantial parts as long as they do not do this repeatedly and systematically so that the accumulation of insubstantial parts becomes a substantial part.\textsuperscript{31}

Sporting organizations are therefore well protected. Their rights are broad; if users extract or reutilize without permission a substantial part of the contents of their database (as long as this part represents a substantial investment), sporting organizations can sue them for infringement. This also means that they can ask for licences for use of substantial parts of the contents of their databases. In the case of sports results, generally, licensees will want to use all of them, and they will not escape the payment of royalties. As mentioned above, the database right’s exclusive rights are useless for sports fixtures as the database right does not accrue.

Exceptions

There are three exceptions to the rights of extraction and reutilization: lawful users, that is, those who have acquired a lawful copy of the database,\textsuperscript{32} can (a) extract a substantial part of the contents of a non-electronic database for private purposes, (b) extract a substantial part of any database for the purposes of illustration for teaching or scientific research as long as it is not for commercial purposes and the source is indicated and (c) extract and/or reutilize a substantial part of any database for the purposes of public security or an administrative or judicial procedure (art. 9). However, these exceptions are all optional so Member States did not have to implement them. Thus the number of exceptions varies from Member State to Member State. In the United Kingdom, there is no private extraction exception but paragraphs (b) and (c)

\textsuperscript{29} Para. 70 (BHB).
\textsuperscript{30} Para. 71 (BHB).
\textsuperscript{31} Article 7(5) and 8(1) as construed by the ECJ, see para. 86 (BHB).
of article 9 were implemented. Some countries implemented all three exceptions (e.g. Belgium). The right of the user to use insubstantial parts not amounting to a substantial part has been made imperative (art. 15 of the Directive) but not the three optional exceptions. Therefore, database makers can override these three exceptions using contracts and/or technological protection measures (‘TPMs’). However, as regards TPMs, article 6(4) of the Copyright Directive must be respected.

Sporting organizations that hold rights on sporting results or other information that could be protected by the database right should not fear these exceptions as they are very narrow. Persons who wish to use results for their own private use (for example, a football fan copying football matches results of his or her favourite team since its creation in a personal notebook) will not harm the rights of the sporting authorities. The second exception is so narrow that the sport industry should not worry about it. A teacher or researcher will not be able to use a substantial part of the results to teach or write an article or book: this would be prohibited reutilization as it would not fall in the exception. S/he will have to ask for a licence. The only exception that may affect sporting organizations is the third one. For reasons of prohibited drug-taking by sportsmen or women for example, sporting authorities may have to disclose information they hold on those athletes that is protected by the database right to the police or competent investigating authority. As the exceptions are different in every country, sporting authorities should always check whether each specific exception exists or not. In any case, when licensing the use of their protected information, they can override the exceptions so that any use of a substantial part of their protected database is prevented. If the information is in electronic format and protected by a TPM, any use can be prevented as well, although not the use of an insubstantial part, notwithstanding the fact that article 6(4) of the Copyright Directive must be respected.

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33 See regulation 20 of the Copyright and Rights in Databases Regulations of 18 December 1997, SI 1997 n. 3032.
34 Art. 23 bis of the 1994 Copyright Act.
36 This provision implies that users may circumvent TPMs for the purposes of illustration of research and teaching as well as for the purposes of public security and administrative or judicial procedures if the Member State in question has implemented them and an agreement to this effect is found with the right holders. If there is no such agreement, then the state has to provide for this possibility to benefit from the exceptions.
37 Para. 4, indents 1–3 of article 6 apply only to copyright law. Para. 4, indent 5, simply says that article 6 applies also to the database right. However, while it seems
Term of Protection

Databases are protected for 15 years from their completion or their publication (art. 10 of the Directive). Furthermore, each time the database maker reinvests substantially in the obtaining, verifying or presenting of the elements of its database and there is a substantial change, it gets a new term of 15 years. The Directive, however, is unclear as to whether the right applies on the whole new database, which comprises the ‘old’ elements (those whose term has expired), or only on the elements that have been newly included, verified or presented. The ECJ has not clarified this question and it is therefore possible that constantly updated databases are perpetually protected. Hence, if a sporting authority constantly updates its database of competition results, it may well have a right ad vitam eternam.

In conclusion, although the ECJ has considerably reduced some of the excessively protective features of the database right,38 the right remains very strong: the definition of a database and rights is broad, the protection requirement is low, the exceptions are narrow and the term is potentially eternal. Indeed, the right has been heavily criticized by many, especially because it can give a monopoly on information.39 And, for at least two features, the scarcity and narrowness of the exceptions as well as the potential perpetual duration of the right, the right can still be criticized.40

38 Because many terms, such as obtaining, qualitatively, quantitatively and substantial part, were vague they were often broadly interpreted.
40 As this author does in her doctoral thesis (The Legal Protection of Databases, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, forthcoming, 2007).
HOW THE DATABASE RIGHT AFFECTS THE SPORT INDUSTRY

The Database Right does not generally Protect Sporting Organizations well

As can already be seen, the effects of the database right on sporting authorities and organizations are mixed. On the one hand, there is some good news for sporting authorities: sports fixtures, sports results and statistics are databases. Therefore, they fall within the subject matter of protection of the database right. On the other hand, their protection by the database right depends on the type of information involved. Sports fixtures remain almost certainly always unprotected because the stages of creation, collection, verification and/or presentation of the data are interlinked. Obtaining, verifying and/or presenting fixtures does not require any investment independent of that required for the creation of the data contained in those lists. But sports results and statistics may sometimes be protected. If the sporting authority can prove a substantial investment in the collection and/or presentation of the results and statistics which is separable from the investment in creating the results and statistics, it will be protected by the database right. As mentioned above, the recording of times and performances of sportspersons can be very costly as special equipment (such as software and hardware) and personnel is used to do so. However, as also briefly said above, it is unclear whether recording is actually different from creating. Thus the sporting organization will be protected only if the substantial investment relating to the creation of the results is separable from the substantial investment in collecting or presenting them. In sum, some databases of sports results and statistics may be protected by the database right very well.

Competition Problems may Occur despite Protection

Competition law prohibits, among other behaviours, abuses of dominant position (art. 82 of the European Community Treaty (‘ECT’)). The compilation of sports fixtures will almost never give rise to a dominant position on the relevant market because the database right will not subsist.\(^{41}\) Recording the results of certain types of sporting activities, such as football or tennis matches, is simple. It may be made by several entities, such as the spectators, the media and the sporting authority organizing the event. In this case, there is no monopoly as the information is available to collect/record by anyone present.

\(^{41}\) However, see the Attheraces case, discussed below.
at the game. In addition, there may often be no substantial investment involved and thus no protection. Therefore, in this case, abuses of dominant position will not exist.

Other types of results, implying specific times, such as races (running, skiing, swimming) and sports statistics such as averages in tennis, may only be recorded by machines and the latter generally belong in exclusivity to the sporting organization. In addition, they may not permit other companies on the site to record the information. In such a case, a natural monopoly on the information automatically arises. Therefore, in this case, sporting organizations are subject to article 82 ECT if they abuse their monopoly, e.g. they ask excessive or discriminatory prices or refuse to license the use of the information. Indeed, there is no compulsory or statutory licence in the Directive requiring the licensing of the information for commercial purposes (that is, apart from the exceptions provided for in the Directive).

WHAT CAN AND MUST THE SPORT INDUSTRY DO?

Sporting authorities can try and address these two types of problems in different ways that have various results.

Lack of Protection of Sports Fixtures and of some Sports Results and Statistics

As to the first problem (lack of protection of sports fixtures), sporting organizations can try and protect their fixtures and some of their sports results and statistics in other ways. There are two main possibilities of doing this: one is to try and attract the database right in other ways; the second is to seek alternative legal protection.

42 This is what happened, for instance, in the American case National Basketball Association v Motorola, 105 F. 3d 841 (2d cir. 1997). Collecting sports results from television broadcasts or live from the sports arena was not misappropriation.

43 Such a compulsory licence was envisaged in article 8 of the preceding draft of the Directive but was subsequently withdrawn. It read: ‘1. Notwithstanding the right provided for in article 2(5) to prevent the unauthorised extraction and re-utilisation of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilise, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms. 2. The right to extract and re-utilise the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so’.
There are mainly two other ways to attempt attracting database right protection. A first solution, which some have identified, is to change the way the database is created. The company creating the data would sell its database to another company. This way, the other company, which is buying the database, would make a substantial investment in collecting the data and would attract database right. However, courts may find this operation a bit artificial.

Another way to try and attract database right protection would be to put more money, more time and/or energy into the verification and/or presentation of the database, while of course keeping records of those investments in order to prove them if litigation should ensue. But this may not always be worthwhile commercially speaking. It will depend on the amount the company can recoup from the commercialization of its database. If the amount is small, it does not make sense to spend more money on verifying or presenting the data. In addition, the problem remains: would not this verification and/or presentation be inseparable from the creation of the data?

The second main way for sporting organizations to protect their databases is to use alternative types of protection. One such type of protection would be copyright. Sporting organizations could transform their fixtures and results into original databases and license their copyright on them. However, copyright will not protect against the reutilization of the raw information contained in the database. There would be no copyright infringement if a third party reused the data but in a different order.

Thus copyright is not an alternative protection for the contents of a sporting organization’s database. In the United Kingdom, however, there may still be a way of using copyright to protect sports fixtures or results. The category of ‘table or compilation’ still remains in the Copyright Act alongside the category of database. However, it remains unclear what the difference between

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45 Ibid., at 17; A. Strowel and E. Derclaye, Droit d’auteur et numérique, 2001, (Brussels: Bruylant, 316, n.358) were already of the opinion that the acquisition by a second company of a company that makes databases will not constitute a substantial investment.
46 Peermohamed and Kaye, n.42 above, at 17.
47 But not in Ireland, where tables and compilations have been deleted from the Copyright Act. See s. 17 (2) of the Irish Copyright and Related Right Act 2000: ‘Copyright subsists, in accordance with this Act, in –
(a) original literary, dramatic, musical or artistic works,
(b) sound recordings, films, broadcasts or cable programmes,
(c) the typographical arrangement of published editions, and
(d) original databases.’
48 Section 3(1) of the Copyright, Designs and Patent Act 1988 as amended
the two is because a table or compilation is not defined. Nevertheless, the two categories are clearly separate.49 For this reason, neither a table nor a compilation is a database, so a table or compilation must not have at least one of the requirements of the database definition. As football fixtures and sports results are clearly databases,50 they cannot be tables or compilations. Therefore, they cannot be copyright protected. However, if sporting organizations were to make elements of their lists or results dependent and/or unorganized, they would not be databases and might fall into the category of table or compilation. But they would not be ‘user-friendly’ and therefore not, as users will not find the information quickly or maybe at all. Thus this is not a solution for sporting organizations. In any case, it is very unlikely that the retention of the category of table or compilation by the British legislator complies with EU legislation (that is, the Directive).51

A second alternative protection is confidentiality contracts. They could be used to protect the contents of sporting organizations’ databases. If the data are kept confidential, third parties wishing to use the data will have to ask for a licence. However, if the purpose of the data is to be disseminated to the public, then it must by definition not have confidentiality status and such confidentiality contracts are plainly useless. This is the case for sports fixtures and results and many statistics: their purpose is to be divulged to the broad public. A different type of databases where confidentiality agreements could work would be customer lists, medical data or sensitive news, such as some stock data. Thus one area where sporting organizations may find confidentiality protection useful is their databases covering use of prohibited drugs enhancing sport performance or other sensitive data on sportspersons that are not generally divulged to the public.

A third alternative protection is trade mark law. The use of a trade mark indicates not only the origin of the good or service but also a certain quality that attaches to it and distinguishes the database from other less good (for example, less accurate) databases. However, this will not protect the database owner from reutilizations of the raw data contained in his database. It may

49 See n. 48.
50 Para. 36 (OPAP).
only entice licensees to pay for the information because of its renowned source.

Last but not least, perhaps the best protection is simply the reality of the industry. Sports fixtures generally need to be known by, for example, betting organizations as soon as possible. Speed of access is therefore crucial. Potential licensees may thus be prepared to pay for the sports fixtures even though they could obtain them at a later date.52 A recent example of this situation is the Attheraces case.53 In that case, Attheraces (‘ATR’), a betting organization, which uses horse racing fixtures to allow users to place bets, was still in need of the ‘pre-race’ data54 from the British Horse Racing Board (‘the BHB’), even after the ECJ’s November 2004 decisions. In reality, if an organization, for its economic survival, desperately needs the information from the organization generating it as soon as it is available, it does not matter whether the organization generating this information has an intellectual property right on it or not. It has power on a product (information) like an undertaking that would sell regular tangible products. The Attheraces case has proved this, as will be seen below.55 This shows that, in the case where the information’s time-sensitivity is crucial, and the organization generating it has a monopoly or a dominant position (as is the case for sporting organizations in relation to their fixtures, some of their results and statistics), it does not matter that there is no copyright or database right in the information and sporting organizations are de facto very well protected.

Excessive Protection of Sports Fixtures and Sports Results and Statistics

As has just been seen in the previous section, an undertaking creating information can have a de facto or de jure monopoly in it, and thus have monopoly power. Therefore, its behaviour must comply with competition law and in particular article 82 ECT. Although the undertaking may have a right to charge

52 Peermohamed and Kaye, n. 44 above, at 17.
54 Pre-race data include the place and date on which the race meeting is to be held; the name of the race; a list of horses entered; the list of declared runners (horses competing).
55 Etherton J agreed that the BHB has the right to charge for its data even if it does not have intellectual property rights in them. This is because they are ‘a valuable commodity, for which it is entitled to charge’. This is nonetheless disputable as sporting organizations recoup their investments in drawing fixtures by charging a price for entrance at sporting events. The Court of Appeal agreed. Attheraces Ltd, Attheraces (UK) Ltd v British Horse Racing Board Ltd, BHB Enterprises Plc [2007] EWCA Civ 38.
for the sports fixtures, be they protected by an intellectual property right or not, it cannot abusively refuse to supply the information or charge an excessive price.56 The issue of excessive prices is considered in the recent *Atheraces* case, which concerned horse racing fixtures, and is summarized here. As the case mainly concerns excessive prices, this section will first review the law applying to them and then it will review the law relating to refusals to license.

The British Horse Racing Board is the entity that organizes horse races in the United Kingdom and, in this capacity, it creates ‘pre-race’ data. ATR, a betting organization, pays the BHB for the pre-race data it needs in order to organize its betting activities. ATR claimed that the BHB had a monopoly in the supply of pre-race data and that, by asking an excessive, unfair and discriminatory price, it abused its dominant position in breach of article 82 ECT. This was because the BHB continued asking a price, and a very high one at that, of ATR after the ECJ’s November 2004 decisions. The BHB claimed it had copyright and database right on its database to justify this price. Both Etherton J and the Court of Appeal held that the BHB held a dominant position on the relevant product market (UK pre-race data). The data could not be obtained elsewhere so it was an essential facility. At first instance, the judge ruled that the terms at which the BHB proposed to supply the data to ATR were unreasonable and unfair. First, it was so because the BHB claimed an injunction to prevent infringement of copyright and database right by ATR but an intellectual property licence was not warranted. In addition, the BHB never articulated its claim to copyright despite ATR’s requests. Second, the BHB’s proposed price to ATR was excessive because it was far in excess of the competitive price.57 The BHB covered its costs nearly four times over. Third, the BHB’s price was also discriminatory because it applied a different price to ATR than to another competitor without justification.

However, the Court of Appeal overturned the decision. First, whilst the cost+ approach (cost of producing the product plus a reasonable profit) is a

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56 When the owner of an essential facility charges an excessive price it can be a constructive refusal to supply. Thus the concept of refusal to license includes constructive refusal, that is, where the dominant firm subjects supply to objectively unreasonable conditions. See *Deutsche Post AG and British Post Office*, Comp/C-1/36.915, 25 July 2001.

57 A price is excessive because it has ‘no reasonable relation to the economic value of the product supplied’. See *United Brands v Commission* [1978] ECR 207, at 250. In other words, according to the European Commission and the Office of Fair Trading (‘OFT’), an excessive price is a price that is higher than it would be in a competitive market and there is no effective competitive pressure to bring them down to competitive levels nor is there likely to be. See, e.g., OFT’s guideline on ‘assessment of individual agreements and conduct’, 414, September 1999; *Napp Pharmaceuticals*, No. CA98/2/2001-30.03.2001.
necessary step to determine whether the price is excessive, it is not sufficient. The competitive price is not always cost+. All the relevant circumstances have to be assessed and especially those relating to the product in question. Given the nature of the pre-race data and the basis on which it was marketed, this approach was not right. The judge tied the costs allowable in cost+ too closely to the costs of producing the data. The value of the product to the contracting party is an important factor to take into consideration. Also, even if the BHB sought to take half of what ATR did make, even if this may be unfair, this alone did not constitute an abuse. There must be evidence that competition in the market is distorted by the demands made by the dominant undertaking towards its contracting party. Since ATR’s competitiveness was not at risk of being materially compromised, the price charged was neither unfair nor excessive. Second, as the price was neither unfair nor excessive and it was agreed that the BHB could charge for data although it was not protected by intellectual property, the BHB was not abusing its dominant position by refusing to supply pre-race data. Finally, there was no discrimination between ATR and other contracting parties simply because the price the BHB charged was different, even though the transactions were equivalent. Differential treatment is not per se abusive. There must be overcharging, that is, the price differential must go beyond falling more heavily on one buyer than on the other and actually or potentially distorts competition between them.

The ECJ suggested that other ways of proving excessive pricing exist.58 ‘Yardstick competition’ is one technique. This compares the performance of one undertaking with the performance of others. Such a comparison can also be made with prices charged in other Member States but only where the Member States are both either high-price or low-price countries. Several methods exist to determine a fair price/royalty for use of an IPR in certain contexts.59

Competition law therefore applies and regulates excessive and discriminatory prices for sports fixtures that can be charged by sporting organizations in dominant positions. The same applies for sports results and statistics where the sporting organization is the only one which records them, as it has a monopoly (if speed of access is crucial, which generally will be the case). This will happen with the recording of exact times of sportspersons. When anyone is free to record the results at the same time (spectators, broadcasting organizations), no monopoly arises and there is free competition. This will be the case for the results of tennis, football, rugby and other matches. As a result of the

At the races decision, it is clear that sporting organizations will have to make sure they do not charge excessive or unfair prices for their sporting data or discriminate unfairly between their customers as to price. However, as a result of this case, it is more difficult than it seemed at first sight to prove that a dominant undertaking commits an abuse in these kinds of situations.

As far as simple refusals to supply are concerned, the law is set in the IMS Health case. In that case, IMS Health refused to license its copyright on its database (a structure used to market reports on sales of medicines in Germany) to NDC. The ECJ held that there is abuse when the refusal to license (1) concerns a product the supply of which is indispensable for carrying on the business in question, in that the person wishing to make the product would find it impossible to do so, (2) prevents the emergence of a new product for which there is a potential consumer demand, (3) is not justified by objective considerations, and (4) is likely to exclude all competition in the secondary market. These four conditions are cumulative. This test applies to all intellectual property rights. The IMS Health case clarified the law, as previously it was unclear whether the conditions were cumulative or not. The requirement that the refusal prevent the emergence of a new product maintains a good balance between competition and intellectual property law: innovation is not stifled by the obligation to grant a licence to competitors who would just replicate the product. However, the decision did not clarify what it meant by ‘new product’. Legal certainty suffers as a result. Similarly, the condition of unjustified refusal to impose the licence has not been defined, leaving the law uncertain. Finally, the decision implies the immediate imposition of the compulsory licence, which can reduce the incentive to create innovative products in the first place. The law should at least provide that the licensee licenses its new product back to the original creator so that the latter can survive in the market. Further developments on this legal issue are awaited in the future Commission v Microsoft case.

The IMS Health decision nevertheless entails that sporting organizations in a dominant position have to immediately license their information to competitors if the latter propose to make a new product out of it. The typical example of a new product comes from the Magill case, where Magill proposed to market a comprehensive television guide out of the separate so far existing

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61 Ibid., para. 38.
television guides produced by each television channel.\textsuperscript{63} It is arguable that a website reproducing sports fixtures in order to place bets is a new product. The IMS Health ruling may also apply to situations where the information is not protected by an intellectual property right as it was decided in a line of cases concerning refusals to supply in general. This is not clear-cut though, as information can be viewed as a mere commodity and the ‘old test’ stemming from the Bronner case, not requiring the condition of new product may therefore apply, making a finding of abuse easier.\textsuperscript{64} An objective justification sporting organizations could use to refuse to give their information away is that the licensee is a bad debitor.\textsuperscript{65} Other objective justifications for refusing to supply information have yet to be developed.

CONCLUSION AND FUTURE PROSPECTS

Sporting organizations are generally not well protected by copyright and the database right. However, when the database right protects them, this protection is very effective, perhaps even too much so, as a result of their monopoly positions. Even where sporting organizations cannot secure intellectual property protection, when speedy access to the information they generate is vital, the simple fact that they have a monopoly on the information protects them well and, again, sometimes too much because of their monopoly power. As the Directive does not incorporate mechanisms to prevent abuses of dominant position by holders of the database right, resort to competition law must be had. Article 82’s case law is relatively settled and provides a generally good working framework to prevent abuses such as excessive pricing and refusals to license. However, the recent developments at least in the UK on this issue seem to indicate that it may be an uphill struggle for the claimant to show such abuse exists. Human rights law based on the rights to freedom of speech and to access to information can also provide a means to prevent abuses by monopolists.\textsuperscript{66} Nevertheless, as far as the database right is concerned, a better solu-

\textsuperscript{63} RTE and ITP v Commission (‘the Magill case’), Case C-241/91 [1995] ECR I-743.

\textsuperscript{64} Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG & Mediaprint Anzeigengesellschaft mbH & Co. KG, Case C-7/97, (1998) ECR 7791.

\textsuperscript{65} R. Whish, n. 58 above, 611.

\textsuperscript{66} This issue is discussed in E. Derclaye, ‘Database sui generis right: the need to take the public’s right to information and freedom of expression into account’, in F. Macmillan (ed.), New Directions in Copyright Law, Volume V, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2007.
tion would be to incorporate principles of competition law and human rights law within the Directive. This would make the law more certain. A revision of the Directive is therefore mandated, something the European Commission has in mind.\textsuperscript{67} In the meantime, the case law applying article 82 ECT (although not yet a perfect tool) plays a crucial role in regulating the sport industry in the area of the licensing of information.

In conclusion, the Directive may have generally missed its goal of protecting database producers such as sporting organizations but even if the law is not helpful, the reality of the industry sometimes provides de facto strong protection. When these power positions are abused, fortunately antitrust law generally does not miss its goal of safeguarding competition.

\textsuperscript{67} On 12 December 2005, the Commission handed down a report recommending certain options (e.g. revising or abolishing the \textit{sui generis} right) and requesting comments before taking action. See http://europa.eu.int/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf; so far, the Commission favours the status quo but it has indicated that it may later on revise the Directive.