

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2004^{*}

In Case C-203/02,

REFERENCE for a preliminary ruling under Article 234 EC,

from the Court of Appeal (England and Wales) (Civil Division), made by decision of 24 May 2002, received at the Court on 31 May 2002, in the proceedings

The British Horseracing Board Ltd and Others

v

William Hill Organization Ltd,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), (Presidents of Chambers), J.-P. Puissochet, R. Schintgen, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,

Registrars: M. Múgica Arzamendi and M.-F. Contet, Principal Administrators,

having regard to the written procedure and further to the hearing on 30 March 2004,

after considering the observations submitted on behalf of:

- The British Horseracing Board Ltd and Others, by P. Prescott QC, L. Lane, Barrister, and H. Porter, Solicitor;

- William Hill Organization Ltd, by M. Platts-Mills QC, J. Abrahams, Barrister, S. Kon, T. Usher and S. Turnbull, Solicitors,

- the Belgian Government, by A. Snoecx, acting as Agent, and P. Vlaemminck, advocaat,

- 2 The reference was made in the course of proceedings brought by The British Horseracing Board Ltd, the Jockey Club and Weatherbys Group Ltd (‘the BHB and Others’) against William Hill Organization Ltd (‘William Hill’). The litigation arose over the use by William Hill, for the purpose of organising betting on horse racing, of information taken from the BHB database.

Legal background

- 3 The directive, according to Article 1(1) thereof, concerns the legal protection of databases in any form. A database is defined, in Article 1(2) of the directive, as ‘a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means’.
- 4 Article 3 of the directive provides for copyright protection for databases which, ‘by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation’.
- 5 Article 7 of the directive provides for a *sui generis* right in the following terms:

‘Object of protection

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-utilisation 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-utilisation” 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-utilisation.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright

or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their content.

5. The repeated and systematic extraction and/or re-utilisation 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.'

6 Article 8(1) of the directive provides:

'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-utilising insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorised to extract and/or re-utilise only part of the database, this paragraph shall apply only to that part.'

7 Under Article 9 of the directive 'Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorisation of its maker, extract or re-utilise 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-utilisation for the purposes of public security or an administrative or judicial procedure.'

8 Article 10 of the directive provides:

'1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire 15 years from the first of January of the year following the date of completion.

...

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.'

9 The directive was implemented in United Kingdom law by the Copyright and Rights in Databases Regulations 1997 which entered into force on 1 January 1998. The terms of those regulations are identical to those of the directive.

The main proceedings and the questions referred for a preliminary ruling

- 10 The BHB and Others manage the horse racing industry in the United Kingdom and in various capacities compile and maintain the BHB database which contains a large amount of information supplied by horse owners, trainers, horse race organisers and others involved in the racing industry. The database contains information on inter alia the pedigrees of some one million horses, and 'pre-race information' on races to be held in the United Kingdom. That information includes the name, place and 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.
- 11 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.
- 12 First, it registers information concerning owners, trainers, jockeys and horses and records the performances of those horses in each race.
- 13 Second, it decides on weight adding and handicapping for the horses entered for the various races.
- 14 Third, it compiles 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. 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.

15 The BHB database contains essential information not only for those directly involved in horse racing but also for radio and television broadcasters and for bookmakers and their clients. The cost of running the BHB database is approximately £4 million per annum. The fees charged to third parties for the use of the information in the database cover about a quarter of that amount.

16 The database is accessible on the internet site operated jointly by BHB and Weatherbys Group Ltd. Some of its contents are also published each week in the BHB's official journal. The contents of the database, or of certain parts of it, are also made available to Racing Pages Ltd, a company jointly controlled by Weatherbys Group Ltd and the Press Association, which then forwards data to its various subscribers, including some bookmakers, in the form of a 'Declarations Feed', the day before a race. Satellite Information Services Limited ('SIS') is authorised by Racing Pages to transmit data to its own subscribers in the form of a 'raw data feed' ('RDF'). The RDF includes a large amount of information, in particular, the names of the horses running in the races, the names of the jockeys, the saddle cloth numbers and the weight for each horse. Through the newspapers and the Ceefax and Teletext services, the names of the runners in a particular race are made available to the public during the course of the afternoon before the race.

- 17 William Hill, which is a subscriber to both the Declarations Feed and the RDF, is one of the leading providers of off-course bookmaking services in the United Kingdom, to both UK and international customers. It launched an on-line betting service on two internet sites. Those interested can use these sites to find out what horses are running in which races at which racecourses and what odds are offered by William Hill.
- 18 The information displayed on William Hill's internet sites is obtained, first, from newspapers published the day before the race and, second, from the RDF supplied by SIS on the morning of the race.
- 19 According to the order for reference, the information displayed on William Hill's internet sites represents a very small proportion of the total amount of data on the BHB database, given that it concerns only the following matters: the names of all the horses in the race, the date, time and/or name of the race and the name of the racecourse where the race will be held. Also according to the order for reference, the horse races and the lists of runners are not arranged on William Hill's internet sites in the same way as in the BHB database.
- 20 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.

- 21 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.
- 22 In the light of the problems of interpretation of the directive, the Court of Appeal decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) May either of the expressions:

- “substantial part of the contents of the database”; or

- “insubstantial parts of the contents of the database”

in Article 7 of the directive include works, data or other materials derived from the database but which do not have the same systematic or methodical arrangement of and individual accessibility as those to be found in the database?

- (2) What is meant by “obtaining” in Article 7(1) of the directive? In particular, are the [facts and matters in paragraph 14] above capable of amounting to such obtaining?

(3) Is “verification” in Article 7(1) of the directive limited to ensuring from time to time that information contained in a database is or remains correct?

(4) What is meant in Article 7(1) of the directive, by the expressions:

— “a substantial part, evaluated qualitatively ... of the contents of that database”? and

— “a substantial part, evaluated quantitatively ... of the contents of that database”?

(5) What is meant in Article 7(5) of the directive, by the expression “insubstantial parts of the database”?

(6) In particular, in each case:

— does “substantial” mean something more than “insignificant” and, if so, what?

— does “insubstantial” part simply mean that it is not “substantial”?

- (7) Is “extraction” in Article 7 of the directive limited to the transfer of the contents of the database directly from the database to another medium, or does it also include the transfer of works, data or other materials, which are derived indirectly from the database, without having direct access to the database?
- (8) Is “re-utilisation” in Article 7 of the directive limited to the making available to the public of the contents of the database directly from the database, or does it also include the making available to the public of works, data or other materials which are derived indirectly from the database, without having direct access to the database?
- (9) Is “re-utilisation” in Article 7 of the directive limited to the first making available to the public of the contents of the database?
- (10) In Article 7(5) of the directive what is meant by “acts which conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database”? In particular, are the facts and matters in paragraphs [17 to 19] above in the context of the facts and matters in paragraph [15] above capable of amounting to such acts?
- (11) Does Article 10(3) of the directive mean that, whenever there is a “substantial change” to the contents of a database, qualifying the resulting database for its own term of protection, the resulting database must be considered to be a new, separate database, including for the purposes of Article 7(5)?

The questions referred

Preliminary observations

- 23 Article 7(1) of the directive provides for specific protection, called a *sui generis* right, for the maker of a database within the meaning of Article 1(2) of the directive, provided that it 'shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents'.
- 24 By its second and third questions, which should be considered together, the referring court seeks an interpretation of the concept of investment in the obtaining and verification of the contents of a database within the meaning of Article 7(1) of the directive.
- 25 Article 7(1) of the directive authorises a maker of a database protected by a *sui generis* right to prevent extraction and/or re-utilisation of the whole or of a substantial part of its contents. Article 7(5) also prohibits the repeated and systematic extraction and/or re-utilisation 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.
- 26 The seventh, eighth and ninth questions referred, which should be considered together, concern the concepts of extraction and re-utilisation. The concepts of 'substantial part' and 'insubstantial part' of the contents of a database are crucial to the first, fourth, fifth and sixth questions, which will also be considered together.

- 27 The 10th question concerns the scope of the prohibition laid down by Article 7(5) of the directive. The 11th question seeks to ascertain whether a substantial change by the maker of the database to its contents implies the existence of a new database for the purposes of assessing, under Article 7(5) of the directive, whether acts of extraction and/or re-utilisation of insubstantial parts of the contents of the database were repeated and systematic.

The second and third questions, concerning the concept of investment in the obtaining or verification of the contents of a database within the meaning of Article 7 (1) of the directive

- 28 By its second and third questions the referring court seeks clarification of the concept of investment in the obtaining and verification of the contents of a database within the meaning of Article 7(1) of the directive.
- 29 Article 7(1) of the directive reserves the protection of the *sui generis* right to databases which meet a specific criterion, namely to those which show that there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of their contents.
- 30 Under the 9th, 10th and 12th recitals of the preamble to the directive, its purpose, as William Hill points out, is to promote and protect investment in data 'storage' and 'processing' systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity. It follows that the expression

'investment in ... the obtaining, verification or presentation of the contents' of a database must be understood, generally, to refer to investment in the creation of that database as such.

- 31 Against that background, the expression 'investment in ... the obtaining ... of the contents' of a database must, as William Hill and the Belgian, German and Portuguese Governments point out, be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.
- 32 That interpretation is backed up by the 39th recital of the preamble to the directive, according to which the aim of the *sui generis* right is to safeguard the results of the financial and professional investment made in 'obtaining and collection of the contents' of a database. As the Advocate General notes in points 41 to 46 of her Opinion, despite slight variations in wording, all the language versions of the 39th recital support an interpretation which excludes the creation of the materials contained in a database from the definition of obtaining.
- 33 The 19th recital of the preamble to the directive, according to which the compilation of several recordings of musical performances on a CD does not represent a substantial enough investment to be eligible under the *sui generis* right, provides an additional argument in support of that interpretation. Indeed, it appears from that recital that the resources used for the creation as such of works or materials included in the database, in this case on a CD, cannot be deemed equivalent to investment in the obtaining of the contents of that database and cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial.

34 The expression 'investment in ... the ... verification ... of the contents' of a database 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 data or other materials which are subsequently collected in a database, on the other hand, are resources used in creating a database and cannot therefore be taken into account in order to assess whether there was substantial investment in the terms of Article 7(1) of the directive.

35 In that light, the fact that the creation of a database is linked to the exercise of a principal activity in which the person creating the database is also the creator of the materials contained in the database does not, as such, preclude that person from claiming the protection of the *sui generis* right, provided that he establishes that the obtaining of those materials, their verification or their presentation, in the sense described in paragraphs 31 to 34 of this judgment, required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.

36 Thus, although the search for data and the verification of their accuracy at the time a database is created do not require the maker of that database to use particular resources because the data are those he created and are available to him, the fact remains that the collection of those data, their systematic or methodical arrangement in the database, the organisation of their individual accessibility and the verification of their accuracy throughout the operation of the database may require substantial investment in quantitative and/or qualitative terms within the meaning of Article 7(1) of the directive.

37 In the case in the main proceedings, the referring court seeks to know whether the investments described in paragraph 14 of this judgment can be considered to amount to investment in obtaining the contents of the BHB database. The plaintiffs in the main proceedings stress, in that connection, the substantial nature of the above investment.

38 However, investment in the selection, for the purpose of organising horse racing, of the horses admitted to run in the race concerned relates to the creation of the data which make up the lists for those races which appear in the BHB database. It does not constitute investment in obtaining the contents of the database. It cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial.

39 Admittedly, the process of entering a horse on a list for a race requires a number of prior checks as to the identity of the person making the entry, the characteristics of the horse and the classification of the horse, its owner and the jockey.

40 However, such prior checks are made at the stage of creating the list for the race in question. They thus constitute investment in the creation of data and not in the verification of the contents of the database.

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

42 In the light of the foregoing, the second and third questions referred should be answered as follows:

- The expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of the directive 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 the directive 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.

The seventh, eighth and ninth questions, on the terms ‘extraction’ and ‘re-utilisation’ in Article 7 of the directive

43 By its seventh, eighth and ninth questions, the referring court seeks essentially to know whether use such as that made by William Hill of a database constitutes extraction and/or re-utilisation within the meaning of Article 7 of the directive. The

referring court asks, *inter alia*, whether the protection conferred by the *sui generis* right also covers the use of data which, although derived originally from a protected database, were obtained by the user from sources other than that database.

- 44 The protection of the *sui generis* right provided for by Article 7(1) of the directive gives the maker of a database the option of preventing the unauthorised extraction and/or re-utilisation of all or a substantial part of the contents of that database, according to the 41st recital of the preamble to the directive. Furthermore, Article 7 (5) of the directive prohibits, under certain conditions, the unauthorised extraction and/or re-utilisation of insubstantial parts of the contents of a database.
- 45 The terms extraction and re-utilisation must be interpreted in the light of the objective pursued by the *sui generis* right. It is intended to protect the maker of the database against ‘acts by the user which go beyond [the] legitimate rights and thereby harm the investment’ of the maker, as indicated in the 42nd recital of the preamble to the directive.
- 46 According to the 48th recital of the preamble to the directive, the *sui generis* right has an economic justification, which is to afford protection to the maker of the database and guarantee a return on his investment in the creation and maintenance of the database.
- 47 Accordingly, it is not relevant, in an assessment of the scope of the protection of the *sui generis* right, that the act of extraction and/or re-utilisation is for the purpose of creating another database, whether in competition with the original database or not, and whether the same or a different size from the original, nor is it relevant that the act is part of an activity other than the creation of a database. The 42nd recital of the

preamble to the directive confirms, in that connection, that 'the right to prohibit extraction and/or re-utilisation of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment'.

48 It must also be pointed out that, although the Proposal for a Council Directive on the legal protection of databases (OJ 1992 C 156, p. 4), presented by the Commission on 15 April 1992, restricted the scope of the protection conferred by the *sui generis* right, under Article 2(5), to unauthorised extraction or re-utilisation 'for commercial purposes', the absence of any reference in Article 7 of the directive to such purposes indicates that it is irrelevant, in an assessment of the lawfulness of an act under the directive, whether the act is for a commercial or a non-commercial purpose.

49 In Article 7(2)(a) of the directive, extraction is defined as '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', while in Article 7(2)(b), re-utilisation is defined as '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'.

50 The reference to 'a substantial part' in the definition of the concepts of extraction and re-utilisation gives rise to confusion given that, according to Article 7(5) of the directive, extraction or re-utilisation may also concern an insubstantial part of a database. As the Advocate General observes, in point 90 of her Opinion, the reference, in Article 7(2) of the directive, to the substantial nature of the extracted or re-utilised part does not concern the definition of those concepts as such but must be understood to refer to one of the conditions for the application of the *sui generis* right laid down by Article 7(1) of the directive.

- 51 The use of expressions such as ‘by any means or in any form’ and ‘any form of making available to the public’ indicates that the Community legislature intended to give the concepts of extraction and re-utilisation a wide definition. In the light of the objective pursued by the directive, those terms must therefore be interpreted as referring to any act of appropriating and making available to the public, without the consent of the maker of the database, the results of his investment, thus depriving him of revenue which should have enabled him to redeem the cost of the investment.
- 52 Against that background, and contrary to the argument put forward by William Hill and the Belgian and Portuguese Governments, the concepts of extraction and re-utilisation cannot be exhaustively defined as instances of extraction and re-utilisation directly from the original database at the risk of leaving the maker of the database without protection from unauthorised copying from a copy of the database. That interpretation is confirmed by Article 7(2)(b) of the directive, according to which the first sale of a copy of a database within the Community by the rightholder or with his consent is to exhaust the right to control ‘resale’, but not the right to control extraction and re-utilisation of the contents, of that copy within the Community.
- 53 Since acts of unauthorised extraction and/or re-utilisation by a third party from a source other than the database concerned are liable, just as much as such acts carried out directly from that database are, to prejudice the investment of the maker of the database, it must be held that the concepts of extraction and re-utilisation do not imply direct access to the database concerned.
- 54 However, it must be stressed that the protection of the *sui generis* right concerns only acts of extraction and re-utilisation as defined in Article 7(2) of the directive. That protection does not, on the other hand, cover consultation of a database.

- 55 Of course, the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people. However, if he himself makes the contents of his database or a part of it accessible to the public, his *sui generis* right does not allow him to prevent third parties from consulting that base.
- 56 The same applies where the maker of the database authorises a third party to re-utilise the contents of his database, in other words, to distribute it to the public. According to the definition of re-utilisation in Article 7(2)(b) of the directive, read in conjunction with the 41st recital of the preamble thereto, the authorisation of the maker for the re-utilisation of the database or a substantial part of it implies that he consents to his database or the relevant part of it being made accessible to the public by the third party to whom he gave that authorisation. In authorising re-utilisation, the maker of the database thus creates an alternative means of access to the contents of and of consultation of his database for those interested.
- 57 The fact that a database can be consulted by third parties through someone who has authorisation for re-utilisation from the maker of the database does not, however, prevent the maker from recovering the costs of his investment. It is legitimate for the maker to charge a fee for the re-utilisation of the whole or a part of his database which reflects, *inter alia*, the prospect of subsequent consultation and thus guarantees him a sufficient return on his investment.
- 58 On the other hand, a lawful user of a database, in other words, a user whose access to the contents of a database for the purpose of consultation results from the direct or indirect consent of the maker of the database, may be prevented by the maker, under the *sui generis* right provided for by Article 7(1) of the directive, from then

carrying out acts of extraction and/or re-utilisation of the whole or a substantial part of the database. The consent of the maker of the database to consultation does not entail exhaustion of the *sui generis* right.

- 59 That analysis is confirmed, as regards extraction, by the 44th recital of the preamble to the directive, according to which, ‘when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorisation by the rightholder’. Similarly, as regards re-utilisation, the 43rd recital of the preamble to the directive states that ‘in the case of on-line transmission, the right to prohibit re-utilisation is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder’.
- 60 It should, however, be emphasised that the prohibition in Article 7(1) of the directive concerns only extraction and/or re-utilisation of the whole or of a substantial part of a database whose creation required a substantial investment. According to Article 8 (1) of the directive, apart from in the cases referred to in Article 7(5) of the directive, the *sui generis* right does not prevent a lawful user from extracting and re-utilising insubstantial parts of the contents of a database.
- 61 It follows from the foregoing that acts of extraction, in other words, the transfer of the contents of the database to another medium, and acts of re-utilisation, in other words, the making available to the public of the contents of a database, which affect the whole or a substantial part of the contents of a database require the authorisation of the maker of the database, even where he has made his database, as a whole or in part, accessible to the public or authorised a specific third party or specific third parties to distribute it to the public.

- 62 The directive contains an exception to the principle set out in the previous paragraph. Article 9 defines exhaustively three cases in which Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorisation of its maker, extract or re-utilise a 'substantial part' of the contents of that database. Those cases are: extraction for private purposes of the contents of a non-electronic database, extraction for the purposes of illustration for teaching or scientific research and extraction and/or re-utilisation for the purposes of public security or an administrative or judicial procedure.
- 63 In the case in the main proceedings, the order for reference states that the data concerning horse races which William Hill displays on its internet site and which originate in the BHB database are obtained, first, from newspapers published the day before the race and, second, from the RDF supplied by SIS.
- 64 According to the order for reference, the information published in the newspapers is supplied to the press directly by Weatherbys Group Ltd, the company which maintains the BHB database. As regards William Hill's other source of information, it must be borne in mind that SIS is authorised by Racing Pages Ltd, which is partly controlled by Weatherbys Group Ltd, to supply information concerning horse races in the form of RDF to its own members, which include William Hill. The data in the BHB database concerning horse races have thus been made accessible to the public for the purpose of consultation with the authorisation of BHB.
- 65 Although William Hill is a lawful user of the database made accessible to the public, at least as regards the part of that database representing information about races, it appears from the order for reference that it carries out acts of extraction and re-utilisation within the meaning of Article 7(2) of the directive. First, it extracts data

originating in the BHB database by transferring them from one medium to another. It integrates those data into its own electronic system. Second, it re-utilises those data by then making them available to the public on its internet site in order to allow its clients to bet on horse races.

66 According to the order for reference, that extraction and re-utilisation was carried out without the authorisation of BHB and Others. Since the present case does not fall within any of the cases described in Article 9 of the directive, acts such as those carried out by William Hill could be prevented by BHB and Others under their *sui generis* right provided that they affect the whole or a substantial part of the contents of the BHB database within the meaning of Article 7(1) of the directive. If such acts affected insubstantial parts of the database they would be prohibited only if the conditions in Article 7(5) of the directive were fulfilled.

67 In the light of the foregoing, the seventh, eighth and ninth questions should be answered as follows:

— The terms ‘extraction’ and ‘re-utilisation’ in Article 7 of the directive 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.

The first, fourth, fifth and sixth questions, concerning the terms 'substantial part' and 'insubstantial part' of the contents of a database in Article 7 of the directive

- 68 By its fourth, fifth and sixth questions, the referring court raises the question of the meaning of the terms 'substantial part' and 'insubstantial part' of the contents of a database as used in Article 7 of the directive. By its first question it also seeks to know whether materials derived from a database do not constitute a part, substantial or otherwise, of that database, where their systematic or methodical arrangement and the conditions of their individual accessibility have been altered by the person carrying out the extraction and/or re-utilisation.
- 69 In that connection, it must be borne in mind that protection by the *sui generis* right covers databases whose creation required a substantial investment. Against that background, Article 7(1) of the directive prohibits extraction and/or re-utilisation not only of the whole of a database protected by the *sui generis* right but also of a substantial part, evaluated qualitatively or quantitatively, of its contents. According to the 42nd recital of the preamble to the directive, that provision is intended to prevent a situation in which a user 'through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment'. It appears from that recital that the assessment, in qualitative terms, of whether the part at issue is substantial, must, like the assessment in quantitative terms, refer to the investment in the creation of the database and the prejudice caused to that investment by the act of extracting or re-utilising that part.
- 70 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.

71 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. A quantitatively negligible part of the contents of a database may in fact represent, in terms of obtaining, verification or presentation, significant human, technical or financial investment.

72 It must be added that, as the existence of the *sui generis* right does not, according to the 46th recital of the preamble to the directive, give rise to the creation of a new right in the works, data or materials themselves, the intrinsic value of the materials affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for the assessment of whether the part at issue is substantial.

73 It must be held that 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.

74 In that regard, it appears from the order for reference that the materials displayed on William Hill’s internet sites, which derive from the BHB database, represent only a very small proportion of the whole of that database, as stated in paragraph 19 of this

judgment. It must therefore be held that those materials do not constitute a substantial part, evaluated quantitatively, of the contents of that database.

- 75 According to the order for reference, the information published by William Hill concerns only the following aspects of the BHB database: the names of all the horses running in the race concerned, the date, the time and/or the name of the race and the name of the racecourse, as also stated in paragraph 19 of this judgment.
- 76 In order to assess whether those materials represent a substantial part, evaluated qualitatively, of the contents of the BHB database, it must be considered whether the human, technical and financial efforts put in by the maker of the database in obtaining, verifying and presenting those data constitute a substantial investment.
- 77 BHB and Others submit, in that connection, that the data extracted and re-utilised by William Hill are of crucial importance because, without lists of runners, the horse races could not take place. They add that those data represent a significant investment, as demonstrated by the role played by a call centre employing more than 30 operators.
- 78 However, it must be observed, first, that the intrinsic value of the data affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for assessing whether the part in question is substantial, evaluated qualitatively. The fact that the data extracted and re-utilised by William Hill are vital to the organisation of the horse races which BHB and Others are responsible for organising is thus irrelevant to the assessment whether the acts of William Hill concern a substantial part of the contents of the BHB database.

79 Next, it must be observed that the resources used for the creation as such of the materials included in a database cannot be taken into account in assessing whether the investment in the creation of that database was substantial, as stated in paragraphs 31 to 33 of this judgment.

80 The resources deployed by BHB to establish, for the purposes of organising horse races, the date, the time, the place and/or name of the race, and the horses running in it, represent an investment in the creation of materials contained in the BHB database. Consequently, and if, as the order for reference appears to indicate, the materials extracted and re-utilised by William Hill did not require BHB and Others to put in investment independent of the resources required for their creation, it must be held that those materials do not represent a substantial part, in qualitative terms, of the BHB database.

81 That being so, there is thus no need to reply to the first question referred. The change made by the person making the extraction and re-utilisation to the arrangement or the conditions of individual accessibility of the data affected by that act cannot, in any event, have the effect of transforming a part of the contents of the database at issue which is not substantial into a substantial part.

82 In the light of the foregoing, the fourth, fifth and sixth questions referred should be answered as follows:

- The expression ‘substantial part, evaluated ... quantitatively, of the contents of [a] database’ in Article 7 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 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.

The 10th question, concerning the scope of the prohibition laid down by Article 7(5) of the directive

83 By its 10th question, the referring court seeks to know what type of act is covered by the prohibition laid down by Article 7(5) of the directive. It also seeks to know whether acts such as those carried out by William Hill are covered by that prohibition.

84 On that point, it appears from Article 8(1) and from the 42nd recital of the preamble to the directive that, as a rule, the maker of a database cannot prevent a lawful user of that database from carrying out acts of extraction and re-utilisation of an insubstantial part of its contents. Article 7(5) of the directive, which authorises the

maker of the database to prevent such acts under certain conditions, thus provides for an exception to that general rule.

85 Common Position (EC) No 20/95 adopted by the Council on 10 July 1995 (OJ 1995 C 288, p. 14) states, under point 14 of the Council's statement of reasons: 'to ensure that the lack of protection of the insubstantial parts does not lead to their being repeatedly and systematically extracted and/or re-utilised, paragraph 5 of this article in the common position introduces a safeguard clause'.

86 It follows that the purpose of Article 7(5) of the directive is to prevent circumvention of the prohibition in Article 7(1) of the directive. Its objective is to prevent repeated and systematic extractions and/or re-utilisations of insubstantial parts of the contents of a database, the cumulative effect of which would be to seriously prejudice the investment made by the maker of the database just as the extractions and/or re-utilisations referred to in Article 7(1) of the directive would.

87 The provision therefore prohibits acts of extraction made by users of the database which, because of their repeated and systematic character, would lead to the reconstitution of the database as a whole or, at the very least, of a substantial part of it, without the authorisation of the maker of the database, whether those acts were carried out with a view to the creation of another database or in the exercise of an activity other than the creation of a database.

88 Similarly, Article 7(5) of the directive prohibits third parties from circumventing the prohibition on re-utilisation laid down by Article 7(1) of the directive by making insubstantial parts of the contents of the database available to the public in a systematic and repeated manner.

- 89 Under those circumstances, 'acts which conflict with a normal exploitation of [a] database or which unreasonably prejudice the legitimate interests of the maker of the database' refer to unauthorised actions for the purpose of reconstituting, through the cumulative effect of acts of extraction, the whole or a substantial part of the contents of a database protected by the *sui generis* right and/or of making available to the public, through the cumulative effect of acts of re-utilisation, the whole or a substantial part of the contents of such a database, which thus seriously prejudice the investment made by the maker of the database.
- 90 In the case in the main proceedings, it is clear, in the light of the information given in the order for reference, that the acts of extraction and re-utilisation carried out by William Hill concern insubstantial parts of the BHB database, as stated in paragraphs 74 to 80 of this judgment. According to the order for reference, they are carried out on the occasion of each race held. They are thus of a repeated and systematic nature.
- 91 However, such acts are not intended to circumvent the prohibition laid down in Article 7(1) of the directive. There is no possibility that, through the cumulative effect of its acts, William Hill might reconstitute and make available to the public the whole or a substantial part of the contents of the BHB database and thereby seriously prejudice the investment made by BHB in the creation of that database.
- 92 It must be pointed out in that connection that, according to the order for reference, the materials derived from the BHB database which are published daily on William Hill's internet sites concern only the races for that day and are limited to the information mentioned in paragraph 19 of this judgment.

93 As explained in paragraph 80 of this judgment, it appears from the order for reference that the presence, in the database of the claimants, of the materials affected by William Hill's actions did not require investment by BHB and Others independent of the resources used for their creation.

94 It must therefore be held that the prohibition in Article 7(5) of the directive does not cover acts such as those of William Hill.

95 In the light of the foregoing, the answer to the 10th question must be that the prohibition laid down by Article 7(5) of the directive 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.

96 Against that background, it is not necessary to reply to the 11th question referred.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

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.

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.

- 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.

- 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.**

Signatures.