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PROTECTION OF SPACE DATA PRODUCTS UNDER THE EUROPEAN DIRECTIVE ON THE LEGAL PROTECTION OF DATABASES

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Abstract

Since the European directive 96/EC of 11 March 1996 on the legal protection of databases - now transposed into the national laws of the member States - space data products which are "*databases*" under the directive benefit from an improved legal protection. When a space data set can be defined as "*a collection of independent ...data...arranged in a systematic or methodical way and individually accessible by electronic or other means*" (article 1 of the directive), it is a "*database*" under the directive. On the one hand, such a data set benefit from copyright protection under the directive provided it is the author's own creation by reason of the selection or arrangement of its content, notwithstanding other criteria. Some derived data products does meet that requirement. Others do not. On the other hand, space data products that are "*databases*" under the directive are protected by a new "*sui generis right*" provided one shows that there as been a substantial investment in some activities relating to such database and mentioned in the directive. The said "*sui generis right*" is a right for the "*maker*" of such "*database*" to prevent extraction and/or re-utilization of the whole or of a substantial part of the content of that database.

Introduction

Until the transposal of directive n° 96-9 of March 11th, 1996 into the national laws of member States, a large number of space images was not protected, particularly images acquired systematically and automatically by meteorological satellites.

Indeed, few Earth observation systems presuppose, like the Spot system, human programming prior to the taking of photographs by the satellite, when subjective choices are made by the programming team.

This lack of protection made difficult the commercial exploitation of the systems concerned, the creation and operation of which had required colossal investment.
In several European countries, legal sentencing of the author of copies made without authorisation presupposed either the demonstration of real commercial interference or violation of a contractual obligation.

Many people believed that the answer was to extend legislatively the copyright regime to images which could not, in principle, make a claim to it insofar as they were not works of the mind, created by an author.

In 1992, a study of the legal aspects of space data protection in Europe, carried out on behalf of the European Commission by a team of experts coordinated by Mr Philippe

GAUDRAT, currently a professor at Poitiers University, underlined that a draft European directive on the legal protection of databases gave to the latter a definition liable to encompass space data files.

The provisions of the draft directive appeared likely to bring, finally, at European level initially, a solution adapted to the requirements of operators, particularly in that these provisions were intended to establish a sui generis right to databases whose constitution had required substantial investment.

This draft became directive n° 96-9 of March 11th, 1996, transposed into French law by the Act n° 98-536 dated July 1st, 1998, which was incorporated into the French Intellectual Property Code. These texts do not specifically target satellites data files. However, as we shall see, many of these files are "databases" within the meaning of the definition given to this expression by the directive, taken up in French law with a slightly different wording which is explained mainly by a concern for clarity of style on the part of the French legislator.

Directive n° 96-9 and the French transposal Act establish two independent protection regimes: the first provides for protection by copyright (Part II - A) and the second by the new sui generis right (Part II - B), which we shall examine successively after having initially looked at what the satellite data files are which fall within the scope of the definition of the expression "databases" (Part I).

The subject of this article is to present in summary fashion in what way space data files are concerned by the rules defined in the aforementioned directive, and not to analyse the French Act transposing the directive, French case law mentioned hereinbelow is referred to only to give illustrations of the application of these rules after their transposal into the law of a member State. Of course, these first French case law solutions are of relative value insofar as the directive is transposed differently from one country to another, according to the legal system in each country.

PART I - SPACE DATA FILES FALLING WITHIN THE SCOPE OF THE DEFINITION OF THE EXPRESSION "DATABASES"

According to article 1, paragraph 2 of directive n° 96-9, the expression "database" means *"a collection of independent works, data or other materials, which are systematically or methodically arranged and individually accessible by electronic means or by any other means" (1).*

Paragraph 1 of the same article states that the *"directive concerns the legal protection of databases in any form".* Non-electronic databases are not therefore excluded from the scope of application of the directive.

1° - A file of space data is not a database within the meaning of this definition except if, firstly, it is a body of data, that is measures that are independent and individually accessible, which excludes mere photographs. This drafting would appear to indicate that it is not enough for items of data comprising the database to be accessible individually, they must also be independent between themselves. Otherwise, one must believe that the adjective "independent" can be removed from this definition without the latter being modified for as much. A photograph taken by an astronaut and scanned after development, is actually a group of pixels that are individually accessible, but each of these pixels cannot be interpreted except by taking into account the values and positions of the other pixels. The digital file, derived from the photograph, would not therefore be a

database, a fact which would be coherent with recital 17 of the directive which reads as follows:

> "*(17) whereas the term "database" should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts and data; whereas it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed; whereas this means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive;*"

On the other hand, a digital model of land which is a file of altimeter measurements geographically located would appear to meet the condition of autonomy of elements in that each of its measurements is not only individually accessible, but is also independent of the others in that it possesses a significance that does not depend on its relation with the other measurements in the file.

If this reading of the definition is the correct one, a Spot scene also meets the condition of autonomy of elements in that each of its pixels is a measurement with its own autonomous significance. A Spot scene is first and foremost a file of measurements and not a simple image. Although it is true that one can recompose the image of the site observed from this file, the latter cannot be considered only as the fixing of an image of a terrestrial site (fixing, which eliminates the pixels, is not a reproduction of the scene, but only that of the image which the latter harbours); each of the pixels in a Spot scene, which is geographically located, represents a separate radiometry measurement which can be found by reading this pixel with an appropriate programme.

A collection of scenes obtained from Earth observation systems meets, too, the demand for autonomy of each of its elements which are also accessible individually. It is of little importance that these scenes are retained in a computer system since, as we will have seen on reading article 1 of the directive, the latter does not exclude non-electronic databases from its scope of application. A collection of space images fixed onto paper is a database insofar as these elements are arranged in a systematic or methodical fashion.

Finally, in terms of products derived from digital space scenes, one must distinguish between those which, like the scenes from which they come, are collections of independent measurements fixed in the form of pixels or in any other form which is individually accessible, and others which reproduce only the images of the scenes from which they are derived.

Amongst the latter products, some are the result of a combination of several space scenes, often from various origins, which can be separately down-loaded or superimposed, depending on what the operator wants to do. Like the derived products in the first category these complex products meet the requirement of autonomy of their materials which are, moreover, also accessible individually.

2° - The requirement that the elements within the base be arranged either systematically or methodically indicates that the database must be organised and structured in such a way as that each element is attributed a specific place within the whole. A digital model of land and a Spot scene meet this requirement since their respective measurements are indeed arranged in a methodical manner, sequence by sequence. A collection of scenes fixed on paper cannot be considered to be a database if these scenes are merely piled one onto the

other, without order. This would only be a database within the meaning of the directive and of French law if the scenes are classified.

3° - We are not aware of a French decision or ruling which either accepts or rejects the qualification of a database as a file of space data or a group of Earth observation images, but it is interesting to note that this qualification has already been used for the France Télécom electronic directory (T. com. Paris, 18 June 1999, JCP ed. E 2000, p. 841). However, whereas the addition of entries into a directory does not produce a coherent text, an image is the result of the combination of measurements in a file produced by an Earth observation system. This is why, if a court were to be one day asked to consider whether a digital space scene can be qualified as a database within the meaning of Act n° 98-536, one may expect that the party requesting that this qualification be rejected will claim that this product comprises only one single image. It would then be for the other party to underline the fact that although this product is in the form of one image, it is not only one image, but also, as stated hereinabove, a database insofar as each of its pixels is both individually accessible and is the representation of an independent measurement.

PART II - PROTECTION REGIMES

The two protection regimes referred to in directive n° 96-9 and taken up in French law are autonomous one in terms of the other and are of different types. Copyright is a private right which is attached to the form of a work of the mind whereas sui generis right, which appears with this directive, is part of the law of competition - more particularly the branch of this law relating to commercial interference - in that it does not aim to protect a work but rather the product of "substantial investment" the exploitation of which, when not authorised by the investor, is forbidden.

Copyright protects the architecture and organisation of the base, in other words its "form"; sui generis right involves the contents of the base, forbidding unauthorised extraction from the base. A sui generis right allows the rightholder to control access to the contents of the base as is done for a warehouse. The sui generis right does not make its title-holder the owner of the contents of the base any more that the right to operate a warehouse makes the person enjoying that right the owner of the goods stored in the warehouse. Both the directive and the French Intellectual Property Code also specify that the protection of a base under one or other of the two regimes which we shall now look at, does not change in any way the rights of third parties over the elements included in the base.

A file of space data, which is a "database" within the meaning of the definition that we have just looked at, can be protected according to one of these regimes and not according to the other.

The file of space data which is assimilated to a database and which is "its author's own intellectual creation", due to the "choice and arrangements of the materials" will be, if it exists, protected by a copyright; the one which is the result of "substantial investment" will be protected under sui generis right. The one which is both its author's intellectual creation and the result of substantial investment will be the object both of a copyright and a sui generis right.

As we shall see, products from Earth observations often benefit from protection by sui generis right over the databases but rarely from copyright protection, or at least in their form as databases.

For each of the two regimes, we will consider the conditions of access to the regime (1^{si}),

the rightholder (2nd), definition of the monopoly (3rd) and its duration (4th).

A - COPYRIGHT

The European directive aims, with regard to the protection of databases by copyright, to harmonise the level of protection in member States by the transposal of joint rules into national law, particularly with regard to the criterion of access to protection.

1° - The condition for protection by copyright: the database must be an intellectual creation due to the choice or arrangement of the materials it contains.

The criterion of access to protection by copyright varies from one legal system to another, and from one member State to another, particularly between countries with actual "*droit d'auteur*" (author's right) and those using "copyright" where protection is, in general, easier to obtain.

Since transposal of the directive *"databases which by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection"* (article 3, paragraph 1 (2).

In terms of space scenes, one must observe that they will have difficulty in meeting this requirement insofar as the data of which they are comprised is neither chosen since the instrument acquires it as a block, nor arranged in any kind of original manner, but rather in a systematic way. This is why directive n° 96-9 has not, in its chapter relating to copyright, really changed the level of protection of space scenes and the products derived therefrom. The sui generis right is, as we shall see, more relevant to the protection of these information-type products.

On the other hand, space map libraries may probably, in certain cases, due to the specific classification of the space scenes contained therein, the choice of the latter, if selection has been made, be their author's own intellectual creation or creations by a team.

We should specify here that complex space map products which are presented in the form of truly specific map libraries would appear to us to possibly be liable, in some cases, to meet the aforementioned criterion in that the very many scenes which they contain, which can be displayed separately if desired, have been chosen with care, from amongst hundreds and hundreds of others, sometimes in a subjective manner, by a specialist technician so as to create the space map which accompanies them.

2° - The monopoly holder

According to article 4 of the directive, *"The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation"* (paragraph 1).

The last part of this text refers, of course, mainly to the author's employer, invested with the copyright arising from the salaried activity, under the law in numerous countries.

Article 4 in no way obliges a member State where such is not the law, as in France, to allow for the employer of the author of a database, created within the context of the activities of this author, to be invested with the copyright over the said database. The result is that, in rare cases, the copyright holder and the sui generis rightholder, supposing that the database benefits from these two protections and that it is not a collective work, may not be one and the same person. The sui generis right in this case belongs to the investor employer and the

copyright to the employee (if he does not transfer it to his employer) (3). It being moreover recalled here that in France, according to strong case law, the employee cannot exercise his copyright abusively against the legitimate interests of his employer.

Referred to specifically in article 4, the mechanism of a collective work - a qualification that describes numerous databases - is often used to avoid this situation and to bring the sui generis right and copyright together into the same hands: those of the investor employer.

3° - The monopoly of the copyright holder

This monopoly is defined in article 5 of the directive. Articles 6 deals with exceptions.

Amongst the acts which the copyright holder can perform alone or authorise, one notes mainly reproduction of the database, whether permanently or provisionally, its dissemination or representation to the public, its adaptation and any other kind of transformation.

"The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and the normal use of the contents by the lawful user shall not require the authorisation of the author of the database." (article 6, paragraph 1).

4° - The duration of copyright

The directive applies without prejudice to the community provisions relating to the term of protection of copyright (article 2).

B - SUI GENERIS RIGHT

Whereas copyright is an old institution present across all five continents, sui generis right over databases appeared with the directive and today is a reality only in Europe. There were not therefore any pre-existing texts similar to those governing copyright.

The chapter of the directive devoted to it therefore organises the regime completely.

1° - The condition for protection under sui generis right: the existence of substantial investment

Recital 40 of the directive, which reads as follows, specifies that the object of the new sui generis right over databases is to protect the investment:

> *"(40) Whereas the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy."*

The condition for protection by sui generis right is therefore the existence of an investment as set forth in the first paragraph of article 7 of the directive:

> *"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."*

One observes, on reading this paragraph, that the investment must be relative to the content of the database, more specifically to the method of obtaining it (either from a third party or by collection), to its verification (one thinks of course of verification of the exactitude of an item of data or of a document included, but verification could also have an aim, for example that of legibility of the elements) or even its presentation. It is logical to require that the investment involves precisely the contents of the database, and not its container (4), where the right which results from it for the investor aims to ensure control of access to these contents.

The investment must also be substantial from a qualitative or quantitative point of view, a fact which can only be appreciated case by case. One notes that recital 40 of the directive states "*that this investment may consist in the deployment of financial resources and/or the expending of time, effort and energy*".

The size of the investment must not of course be confused with the increase in the value of the database which results therefrom. The monopoly which the investment gives rise to, to the benefit of the producer of the database is not moreover affected in any way if, for one reason or another, at one time or another, the database created is caused to lose a major part of its value. In the same way as a work of the mind accedes to protection by copyright independently of any appreciation, which is necessarily subjective, of its artistic quality and purpose (a principle known in France as the unity of Art), a database is protected by the sui generis right without any account being taken of the result of the substantial investment made.

In terms of the digital space scenes which fall within the scope of the definition of the expression "database", the obtaining, verification and presentation of their contents require major investments on the part of the operator of the observation system.

Firstly, "obtaining" the data which comprises them presupposes substantial investment. One thinks of course firstly of the amounts expended in order to create the Earth observation satellite used, then of the share in the cost of operating this satellite which corresponds to the period of acquisition of this scene. This period may, moreover, be lengthy, particularly if an optical observation instrument is used, since the sky over entire regions of our planet is cloudy for a major part of the year. The number of attempts to be made in order to acquire the scene desired is thus high and the cost of operation of the satellite chargeable for acquisition of the scene is therefore increased.

Secondly, raw data produced by tele-measurement is checked on reception and this investment must also be taken into account since article 7 refers to verification of the contents of the database.

Thirdly, the presentation of the contents of a digital space scene also presupposes an investment as referred to in article 7 insofar as a file of raw data must also be corrected using data on the lurching and swaying of the satellite, which involves particularly the position of the pixels (and therefore their presentation).

Also, doubtless, the producer of a space map library which falls within the definition of the expression "database", also makes a substantial investment within the meaning of article 7 by paying the price for space scenes and derived products which he buys for his map library or by paying royalties on licences obtained from the rightholders of these elements. (5)

2° - <u>The holder of the monopoly</u>

The first paragraph of article 7 of the directive, as already quoted, indicates that *"Member States shall provide for*

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

The chapter of the directive which refers to sui generis right does not give a definition of the term "maker" but recital 41 indicates that " *....the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker*"(6).

Moreover, article 11 of the directive (7) reserves the benefit of protection of the right set forth in article 7 of the directive for Community nationals and residents. This requirement of nationality or residence applies not only to the "maker" of the database, but also to the person wishing to obtain from a "maker" the sale of his sui generis right over his database (8). A non-community body, such as an industrialist from across the Atlantic is however accepted as a beneficiary of the protection of sui generis right if a specific agreement has been concluded with the State of which he is a national, by the European Community Council. This provision is explained by the absence of an international convention on the sui generis right over databases. Since, to date, no such agreement exists either with the United States or with Japan, or with any non-European State, non-European bodies are currently obliged to use their subsidiaries in Europe in order to obtain by their intermediary benefit of the sui generis right, it being specified that such a subsidiary can only claim to benefit from the protection of the sui generis right subject to the double condition that it is the "maker" of the database (which presupposes that the subsidiary is the investor) and its main establishment is located in Europe or it has a real and continual link with the economy of a member State.

In view of the above, the space agency of a member State which takes the initiative of investing a major share of its budget in the creation of an observation system in order to obtain digital space scenes is, rather than its main contractor, the "maker" within the meaning of the directive of the collection of digital space scenes produced by this system.

The European company which, as a client of the "maker", acquires digital scenes for its requirements, thus creating a map library in which these scenes are classified methodically or systematically will be, for its part, the "maker" of this map library.

3° - Monopoly and its exceptions

According to paragraph 1 of article 7 of the directive, *"Member states shall provide for a right for the maker of a database to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively or quantitatively, of the contents of that database ..."* (9).

Paragraph 2 defines "extraction" and re-utilisation, the two acts that the "maker" may forbid, subject to the exceptions referred to hereinbelow:

2. For the purposes of this Chapter:

a) "extraction" shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

b) "re-utilization" shall mean any form of making available to the public all or a substantial part of the contents of a database by the

distribution of copies, by renting, by on-line or other forms of transmission...."

Symmetrically, the holder of the sui generis right to a database made available to the public, such as the catalogue in our previous example, cannot forbid extraction of a non-substantial part - evaluated in a qualitative or quantitative manner - of the content of the said database by its legitimate user (article 8 of the directive; French Intellectual Property Code, art. L. 342-3). The rule is in the public domain and no dispensation can be made to it by contract (article 15 of the directive; French Intellectual Property Code, art. L. 342-3). However, claim to this right may not be made abusively, whence the final paragraph of article 7 which reads as follows:

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

When the database is a computer file of space data, its "maker" can therefore forbid any copies of the complete file or of a substantial part of the latter, particularly by downloading (10). He may also forbid the hire or sale to the public of copies of the file (11), on-line transmission of the file and, specifically, its dissemination over the Internet.

If the database in question is not a file, but an organised group of files such as, once again, a catalogue of space scenes available and presented in the form of samples or down-graded images (very often only one in ten pixels is reproduced), that can be consulted via the Internet, this right may be used to forbid the down-loading of a substantial part of the catalogue. If the samples reproduced themselves each meet the definition of a database, down-loading of one only image will be prohibited, even in the case in question where a single sample could not be considered to be a substantial part of the catalogue.

Moreover, in terms of exceptions to the monopoly, article 9 of the directive allows member States to provide for the legitimate user of a database the right to extract a substantial part of a database made available to the public either for private use (this concerns only non-electronic databases), or for the purposes of illustration of teaching or scientific research, or even for the purposes of public security or for administrative or legal proceedings (12).

We should remember, finally, that holders of a sui generis right to a database as the legitimate user of the latter must, of course exercise their prerogatives, respecting the rights of third parties over the elements incorporated into this database, particularly copyrights.

4° - Duration of the monopoly

According to article 10 of the directive, the sui generis right over a database expires *"fifteen years from the first of January of the year following the date of completion"*. The date of completion of a digital space scene is of course the date of its production (13).

Moreover, in a case where the database is made available to the public prior to the end of this period, the duration of protection expires fifteen years after the 1st of January of the year following the date when the database was first made available to the public. As an example, in application of this rule, the date to be taken into account to determine the date on which the sui generis right over a Spot scene expires is the date on which it was introduced into the catalogue of the Spot Image company.

Finally, paragraph 3 of the same article provides as follows:

> *"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"* (14).

So, a derived product, the production of which has required a substantial modification to the contents of the digital space scene from which it is produced, would appear to have to benefit, if it is itself a database, from a separate sui generis right from the one attached to the initial scene, for a period of fifteen years starting on the date of completion of the said modification.

Conclusions

The sui generis right is the perfect answer to the requirements of producers of space databases in that it protects the result of an investment.

This cannot be said of copyright since digital space scenes are first and foremost information tools, rarely "their author's own creations" to use the words of the directive and, more rarely still, works of the mind within the traditional meaning of the expression.

This is why it is regrettable that the sui generis right over databases has not yet been the object of an agreement between the European Community Council and non-European States and, particularly, with the major space powers on other continents.

When these agreements finally do come into existence one may consider that producers of digital space scenes, the market for which has been worldwide since the very outset, will finally benefit from a protection regime adapted to the scale of this market, which cannot be that of copyright because, in a vast number of countries, this regime concerns only works of the mind.

Notes

(1) The French Intellectual Property Code rewords this definition as follows:

> "*un recueil d'œuvres, de données ou d'autres éléments indépendants, disposés de manière systématique ou méthodique, et individuellement accessible par des moyens électroniques ou par tout autre moyen*" (article L.112-3, second paragraph).
>
> ("*a collection of works, data or other independent elements, arranged in a systematic or methodical manner and individually accessible by electronic means or by any other means*")

(2) This wording is close to that of article 10-2 of the TRIPS Agreement (which is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994) which reads as follows:

> *"Compilations of data or other material, whether possible to be reproduced on a medium exploitable by machine or in any other way which, by reason of the selection or arrangement of their contents constitute intellectual creations, will be protected as such. This protection does not extend to the data or material itself and will be without prejudice to any copyright subsisting in the data or material contained in the compilation"*

It is also close to that of article 5 of the WIPO Copyright Treaty dated December 20th, 1996, which has not yet come into force:

> "*Article 10 Computer Programs and Compilations of Data*
>
> *1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).*
>
> *2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."*

(3) The problem is that downloading of a space scene may in some cases be at the same time an act of reproduction (copyright) and an act of extraction (sui generis right). See note (9).

(4) Although the directive refers several times to the content of the database, it makes no mention of the database container. The border between the contents and the container appears difficult to set moreover, insofar as article 7 specifies that an investment can be relative to the "presentation" of the contents of the database. Indeed, one may wonder whether the investment in a presentation medium should not, therefore, be taken into account. Now, if such is the case, and a presentation medium is an element of the "container", one is forced to conclude that the use of the word "presentation" introduces the container where one refers specifically only to the content.

(5) In terms of compilations of satellite images on CD, the declaration made in recital 19 of the directive, which reads as follows, obliges one to wonder about whether they presuppose an investment that is big enough to be protected by the sui generis right over databases:

> *"(19) Whereas, as a rule, the compilation of several recordings of*

musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the sui generis right".

However, unlike music CDs, the CDs on which are fixed digital space scenes are often complex products made for a single client and the production of which has required reflection, particularly in terms of the choice of space scenes meeting as closely as possible the technical specifications expressed by the client. One may believe, therefore, that in many cases the investment required for the production of the product is sufficiently substantial to obtain the benefit of protection by sui generis right.

(6) The French legislator has taken up this definition of "maker", designated in French law under the better word of "producer", in a slightly different wording: : "*la personne qui prend l'initiative et le risque des investissements correspondants*" (*"the person who takes the initiative and the risk of the corresponding investment")* (Intellectual Property Code, art. L. 341-1). An example of application of this definition can be found in the following decision: Paris TGI, 3rd ch., 22 June 1999, JCP, ed. E 2000, p. 841.

(7) The text of which is as follows:

"Article 11 Beneficiaries of protection under the sui generis right

1. The right provided for in Article 7 shall apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community.

2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.

3. Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

Article L. 341-2 of the French Intellectual Property Code transposes article 11 into French law, the rules of which are reproduced in a slightly different wording.

(8) Article 11 refers not only to the "maker", but also to the rightholder who may have bought it from the "maker". Indeed, although this right is not private, paragraph 3 of article 7 states, *"The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence".*

(9) Something which the French legislator did by adopting the provisions which are today articles L. 342-1 and following of the Intellectual Property Code.

(10) The first French case-law application of the sui generis right over databases dates back to 1999. In this case, the Paris Commercial Court judged that the unauthorised down-loading of the France Télécom electronic directory by a third party for the purposes of creating an inverse directory was an extraction prohibited by the Act of July 1st 1998 (T. com. Paris, 18 June 1999, Dalloz 2000 n°5, p.105, note Goldstein). Moreover,

the Nanterre commercial court ruled that the substantial nature of the part extracted could be evaluated depending on the use made of it later by the author of the extraction (T. com. Nanterre, 7th ch. 16 May 2000).

(11) However, taking up a principle of community law, article 7 of the directive recalls that *"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 the resale of that copy within the Community".*

(12) Extraction of a substantial part of a non-electronic database for private purposes is consolidated in French law at article L-342-3, para. 2 of the Intellectual Property Code.

(13) In terms of databases completed during the fifteen years prior to January 1st, 1998, *"...the term of protection by the right provided for in Article 7 shall expire fifteen years from the first of January following that date"* (article 14, paragraph 5 of the directive). French Act n° 98-536 of July 1st, 1998 applies, in its article 8, as from January 1st, 1998. The same articles provides that databases completed between January 1st, 1983 and January 1st, 1998, benefit from protection lasting fifteen years as from January 1st, 1998.

(14) This rule is taken up in paragraph 3 of article L. 342-5 of the French Intellectual Property Code.