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LEGAL PROTECTION AND USE OF DIGITAL INFORMATION
RECENT DEVELOPMENTS IN EUROPE

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Many noteworthy legal developments in the field of digital intellectual property have occurred in Europe in recent times. This paper will focus on only two: the right of temporary copying, as laid down in the new European Directive on copyright and related rights in the information society ('Copyright Directive'), and the new database right as transposed into the laws of the EU Member States as a result of the Database Directive.

1. The right of temporary copying[1]

The European Copyright Directive[2], which was adopted on 22 May 2001, bring the laws on copyright and related rights in the European Union in line with the WIPO 'Internet Treaties' concluded in Geneva in 1996. Member States must comply with the provisions of the Directive by 22 December 2002. Whereas in Geneva no consensus could be reached on a definition of a right of reproduction, the Directive also harmonises the reproduction right, to include acts of temporary copying.

A similar right was first recognized in Europe in respect of computer programs. According to Article 4(a) of the Computer Programs Directive, the reproduction right comprises:

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[1] See P. Bernt Hugenholtz, 'Copyright Aspects of Caching', DIPPER (Digital Intellectual Property Practice Economic Report) Legal Report, 30 September 1999, abridged version published in European Intellectual Property Review 2000-10, p. 482-493.

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, OJ L 167/10 of 22 June 2001.

"the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitates such reproduction, such acts shall be subject to authorization of the rightholder."[3]

In respect of databases a broadly worded reproduction right also appears in Articles 5(a) and 7(2)(a) of the European Database Directive.

At the national level the copyright status of temporary copying remains largely unclear, as long as the Copyright Directive has not been implemented. Following a 'normative' interpretation of the right of reproduction, not every (incidental) copy in a technical sense would constitute a reproduction in a legal sense.[4] A notable exception is the United Kingdom. Section 17 (6) of the Copyright, Designs and Patents Act (CDPA) clearly states:
"[c]opying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work."

Article 2 of the European Copyright Directive provides:
"Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part […]."
The Explanatory Memorandum explains that
"the second element (temporary/ permanent) is intended to clarify the fact that in the network environment very different types of reproduction might occur which all constitute acts of reproductions within the meaning of this provision. The result of a reproduction may be a tangible permanent copy, like a book, but it may just as well be a non-visible temporary copy of the work in the working memory of a computer. Both temporary and permanent copies are covered by the definition of an act of reproduction."[5]

The broad reproduction right of Article 2 is counterbalanced by the mandatory limitation of Article 5 (1):
"Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

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[3] *Cf.* Bundesgerichtshof (German Federal Supreme Court), Decision of 20 January 1994 ('Holzhandelsprogramm'), [1994] *Computer und Recht* 275. The Court left undecided the question of whether the act of running a computer program is restricted under the Software Directive.

[4] Legal Advisory Board, 'Reply to the Green Paper on Copyright in the Information Society', Brussels 1995, available at http://www2.echo.lu/legal/en/labhome.

[5] Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10 December 1997, COM (97)62, Explanatory Memorandum, p. 30.

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."

According to the Explanatory Memorandum,

"[t]he purpose of Article 5 (1) is to exclude from the scope of the reproduction right certain acts of reproduction which are dictated by technology, but which have no separate economic significance of their own. […] Such an obligatory exception at Community level is vital as such short lived reproductions ancillary to the final use of a work will take place in most acts of exploitation of protected subject matter, which will often be of a transnational nature."[6]

Article 5(1) has been largely inspired by industry concerns, particularly in the telecommunications and electronics sector, that the broad reproduction right of Article 2 would no longer allow such routine acts as 'proxy caching' and 'system caching'. Consumer groups, libraries and free speech advocates had expressed similar concerns that 'browsing' would not longer be allowed. Although the wording of Article 5(1) is not free from ambiguities, it appears that such acts are indeed exempted. This is confirmed by Recital 33 to the Directive:

"[…] under these conditions [stated in Article 5(1)] this exception covers also acts of caching or browsing".

2. Database right

The European Database Directive was adopted on 11 March 1996.[7] The Directive created a unique two-tier protection scheme of electronic and non-electronic databases. Member States are required to protect databases by copyright as intellectual creations, and by introducing a *sui generis* right to prevent unauthorised extraction or reutilization of the contents of a database, the so-called 'database right'. The deadline for implementation of the Directive has expired on 1 January 1998.[8] Most Member States have completed the implementation process between 1998 and 2000.

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[6] Explanatory Memorandum, p. 35.

[7] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal No. L 77 of 27 March 1996, p. 20.

[8] See P.B. Hugenholtz, 'Implementing the Database Directive', in: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, The Hague, p. 183.

Since the implementation of the Directive some 30 court decisions dealing with the new right have been reported, mostly from courts in Germany and the Netherlands.[9] Not surprisingly, courts have been struggling with the application of various key concepts, such as the notion of 'database', the 'substantiality' of the investment required, the concepts of 'extraction' and 'reutilisation', et cetera. As the following examples of case law from Europe will demonstrate, many of these concepts will require further interpretation and refinement by higher-level courts, and eventually the European Court of Justice.

Berlin Online – Court of Berlin (Germany) 8 October 1998[10]

An on-line database containing newspaper advertisements was systematically searched by a 'meta search engine'. The Court ruled that the conversion into digital form and the selecting, updating and verifying of the ads constituted a substantial investment, so the database right applied. The use of a search engine was held to amount to repeated and systematic extraction of insubstantial parts of the database that unreasonably damaged the lawful interests of the owner of the database right. The web site owner was deemed to have suffered damages because the search engine systematically bypassed the advertisements on the Berlin Online site.

Tele-Info-CD – Federal Supreme Court (Germany) 6 May 1999[11]

The first database right case to be decided by a highest-level national court in Europe, the *Tele-Info-CD* decision was a case of telephone directory piracy. Defendants had scanned subscriber data from the directories of Deutsche Telekom, and published the data on a CD-ROM. The Federal Supreme Court ruled that telephone directories are not copyright works. However, telephone directories, both electronic and non-electronic ones, do qualify as protected databases because of the substantial investment involved in their production.

MIDI-Files – Court of Munich (Germany) 30 March 2000[12]

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[9] For a more complete overview of European database law case law see P. Bernt Hugenholtz, 'The new database right: early case law from Europe', paper presented at Fordham University School of Law Ninth Annual Conference on International IP Law & Policy, New York, 19-20 April 2001, available at http://www.ivir.nl/staff/hugenholtz.html.

[10] *Berlin.Online*, Landgericht Berlin 8 October 1998, [1999] Computer und Recht 388, critical comment J. Obermüller at 594.

[11] *Tele-Info-CD*, Bundesgerichtshof (Federal Supreme Court) 6 May 1999, [1999] Multimedia und Recht 470, note J. Gaster at 543; [1999] Computer und Recht 496. Three similar cases were decided by the Bundesgerichtshof on the same day.

[12] *MIDI-Files,* Landgericht München I 30 March 2000, [2000] Computer und Recht 389, note M. Lehmann at 392.

The case concerned the liability of an internet service provider for making infringing MIDI (music) files available online. The Munich Court held that the individual musical data that constitute a MIDI file are not 'independent' data. A MIDI file, therefore, is not a 'database' within the meaning of the German Copyright Act.

Algemeen Dagblad a.o. v. Eureka – District Court of Rotterdam (Netherlands), 22 August 2000[13]
Kranten.com provided automatic hyperlinks to newspaper articles posted online. The Court denied database protection. Plaintiffs, a group of newspaper publishers, had failed to show that the links to its underlying web pages (so-called 'deep' links) had resulted in a loss of advertising revenue.

NOS v. De Telegraaf – Court of Appeals of The Hague (Netherlands) 30 January 2001[14]
De Telegraaf had copied television program listings for publication in its weekly television guide. The Court accepted the defendant's argument that the program listings were a mere spin-off of NOS' core activity as a public broadcaster, and therefore did not constitute 'substantial' investment.

British Horseracing Board v. William Hill – High Court of Justice (UK) 9 February 2001[15]
On-line bookmaker William Hill used racing information compiled by the governing body of horse and dog racing (BHB) for its betting web sites. The Court ruled that the BHB database is protected by database right. BHB was found to have invested substantially in the controlling and up-keeping of its database. William Hill had copied a substantial part of the database, by extracting core information, such as the times and places of the races, in a repeated and systematic manner. The Court noted that so-called 'dynamic' databases, requiring constant updating, are also protected by database right.

Stepstone – Court of Cologne (Germany) 28 February 2001 [16]
Stepstone, an online recruitment company, offered jobs on its web site. Its competitor Ofir provided direct hyperlinks ('deep links') to jobs offered on Stepstone's site, bypassing its homepage. The Court held that Ofir's hyperlinking amounted to repeated and systematic reutilization of insubstantial parts of Stepstone's database, causing damage because its homepage was bypassed.

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[13] *Kranten.com* , President District Court of Rotterdam, 22 August 2000, Mediaforum 2000, p. 344, English translation available at http://www.ivir.nl/rechtspraak/kranten.com-english.html.

[14] *NOS v. De Telegraaf* , Court of Appeals of The Hague 30 January 2001, [2001] Mediaforum 90.

[15] *Horseracing Board Ltd. v. William Hill Organization Ltd.*, High Ct. of Justice, Ch. Div., 9 February 2001, Case No. HC 2000 1335, available at http://www.courtservice.gov.uk/judgments/judg_home.htm.

[16] *Stepstone*, Court of Cologne 28 February 2001, available through http://www.jura.uni-tuebingen.de/~s-bes1/lcp.html.