Database rights: success or failure? The chequered yet exciting journey of database protection in Europe

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Outline

- Introduction
- Failings and successes of the database sui generis right
- Failings and successes of database copyright
- New developments
- Conclusion – the future

1. *Sui generis* right: failings

- Mainly a failure: high number of birth defects, mainly 3
  - Exceptions: too narrow, too scare and optional
  - Term of protection indefinitely renewable without proper safeguards
  - Relationship between *sui generis* right and other protections (contracts, unfair competition and anti-circumvention provisions) not addressed appropriately => overprotection
- Effect of the *sui generis* right? A wasted effort?

1. Sui generis right: successes

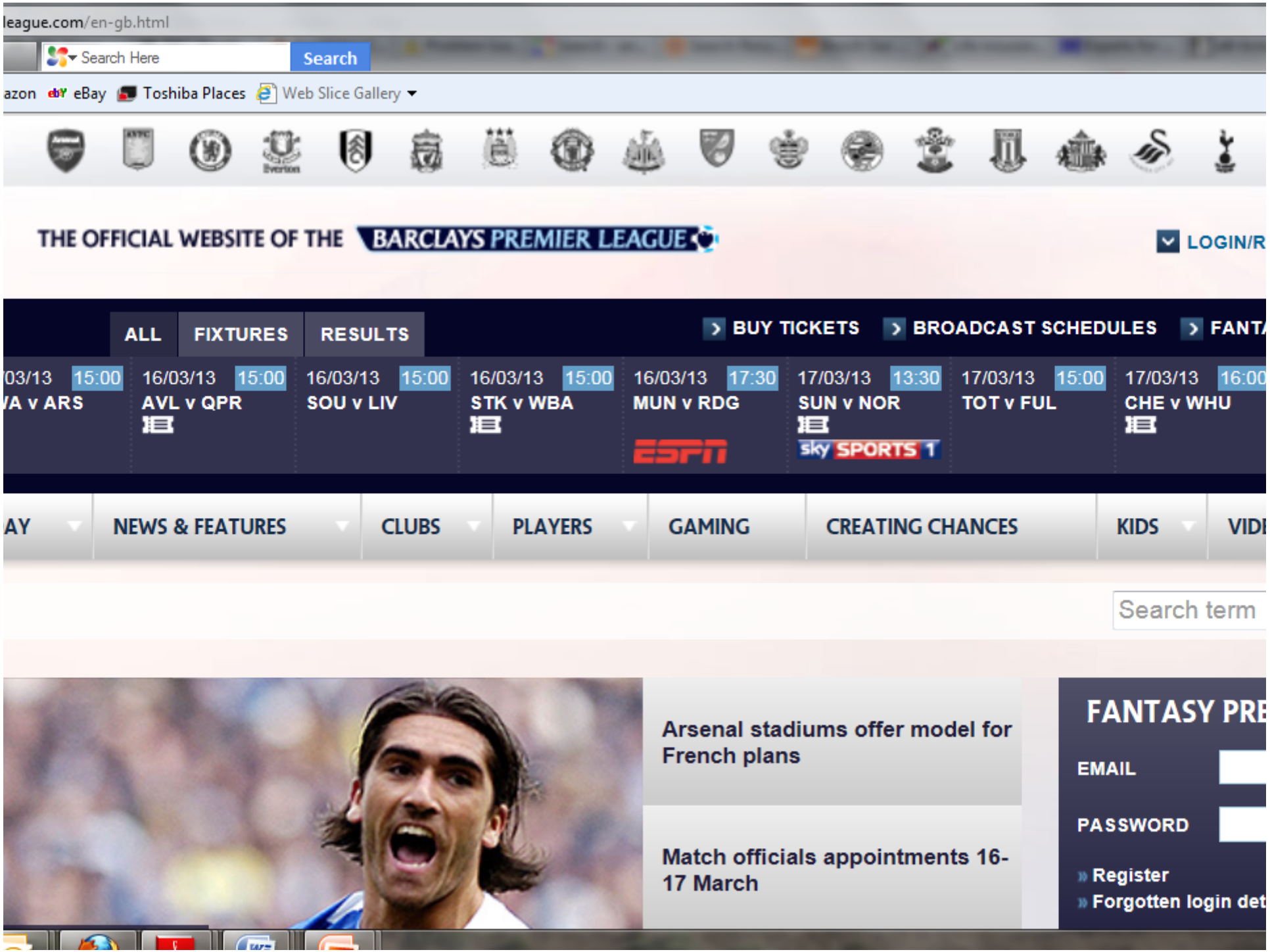
- Domesticated by CJEU2004 – main point: interpretation of the term 'obtaining'
- Other clarifications:
  - definition of a database
  - link between the substantial investment and substantial part, including a clarification of what 'qualitative' and 'quantitative' mean and that the concepts of substantial part and insubstantial part are mutually exclusive
  - scope of the rights of extraction and reutilisation - broad (include indirect acts although not mere consultation) and in 2008 not mere physical copying (*Directmedia*)
  - 2009: Russian doll databases: level at which infringement must be examined is the level of the smallest database (*Apis*)

2. Copyright: failings and successes

- Much less controversial – mainly codified status quo, clarified a few things (databases comprised of data) + requirement of originality
- In the main a success but a moderate one as really codified 'business as usual'
- 'Only' 2 main defects:
  - scarce and narrow exceptions
  - lack of appropriate provisions as to the relationship between copyright and unfair competition, contracts and anti-circumvention measures
    - => // *sui generis* right

3. New developments - *Football Dataco v Yahoo UK!*

- *Sui generis* right does not subsist in football fixtures lists. Neither does *copyright.*
- Applied to databases, the "criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices […] and thus stamps his 'personal touch'". Therefore, the criterion is "not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom".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Football Dataco

- Other criteria such as skill and labour are not sufficient, if this skill or labour does not express the author's own intellectual creation in the selection or arrangement of the data.
- “Adding important significance” to the data selected or arranged in the database is irrelevant to determine the database’s originality.

Football Dataco

- The database directive precludes national legislation which grants databases copyright under conditions which are different than those set out in article 3(1) of the directive, i.e. under conditions other than originality.
- Therefore, the Nordic catalogue rule and Dutch geschriftenbescherming are out

Football Dataco

- How about "copyright-like" protection such as protection against parasitism or slavish copying?
- Answer is not entirely clear, but on a logical construction *Football Dataco*, not possible to cumulate parasitism with the *sui generis* right as it would adversely affect the functioning of the internal market and FMGS if databases could obtain quasi-copyright/*sui generis* right protection through unfair competition law provisions.

New developments - *Usedsoft*

- *Usedsoft* does not apply by analogy to electronic databases because recital 33 DBD clearly states that "the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services".
- This is despite the fact that article 5 does not make a difference between electronic and non-electronic databases.
- However, it is clear from the same recital that electronic databases in tangible, material, medium (e.g. CD-ROM) are subject to exhaustion.

Usedsoft

- *Usedsoft* should apply by analogy to the concept of lawful user as same concept in both directives
- Before *Usedsoft*, three possible interpretations: the lawful user is
  - 1) any user relying upon exceptions provided by law or contract (this is the traditional copyright law approach and the broadest)
  - 2) only a licensee and
  - 3) any user who lawfully acquires a database.

Usedsoft

- CJEU: A person who bought a program downloaded online from the software manufacturer's web site, even under a so-called licence agreement, is a sale and the person acquiring it from this first owner via a re-sale is a lawful acquirer = First or third interpretation?
- "The argument [...] that the concept of 'lawful acquirer' in Article 5(1) of Directive 2009/24 relates only to an acquirer who is authorised, under a licence agreement concluded directly with the copyright holder, to use the computer programme cannot be accepted" because it would render the exhaustion of the right of distribution ineffective.

New developments - *Innoweb v Wegener ICT Media*

- Pending case on concept of extraction, especially extractions of insubstantial parts repeatedly and systemically.
- German Supreme Court decided a case with similar facts. It held that:
- When performing searches, users did not copy a substantial part of the database. Even if they copied some results of searches permanently in their computers, users only extracted insubstantial parts and even if it was repeatedly and systemically, these insubstantial parts did not constitute a substantial part.
- Users did not infringe when they individually extracted insubstantial parts, even if taken together all these parts represented a substantial part because users did not collaborate: “Several, individually permissible uses by individual users could not be totalled up to form an aggregate unauthorised use.”

Conclusion: Failure or success overall?

- Despite relatively little change in copyright law and the *sui generis* right's flaws, the Directive's success = undeniable as it harmonised both copyright and the *sui generis* right in the EU's single market.
- However, success is relative: so long as the national courts do not follow ECJ's rulings, no harmonisation.

National courts behaving badly?

- French and Spanish Supreme courts followed the 'obtaining' interpretation
- German Supreme Court reversed decision assuming database right without checking whether it was a database and whether there was a substantial investment
- Many French, Spanish and Belgian courts still cumulate *sui generis* right and parasitism and supreme court decisions are still unclear on this issue

The future

- Main problem: *sui generis* right: empirical data is needed to 'fix' it
- Whilst waiting for empirical economic studies (if any), one of the major flaws (cumulation) can already be addressed
- Commission late with its other reports...

Thank you for your attention

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