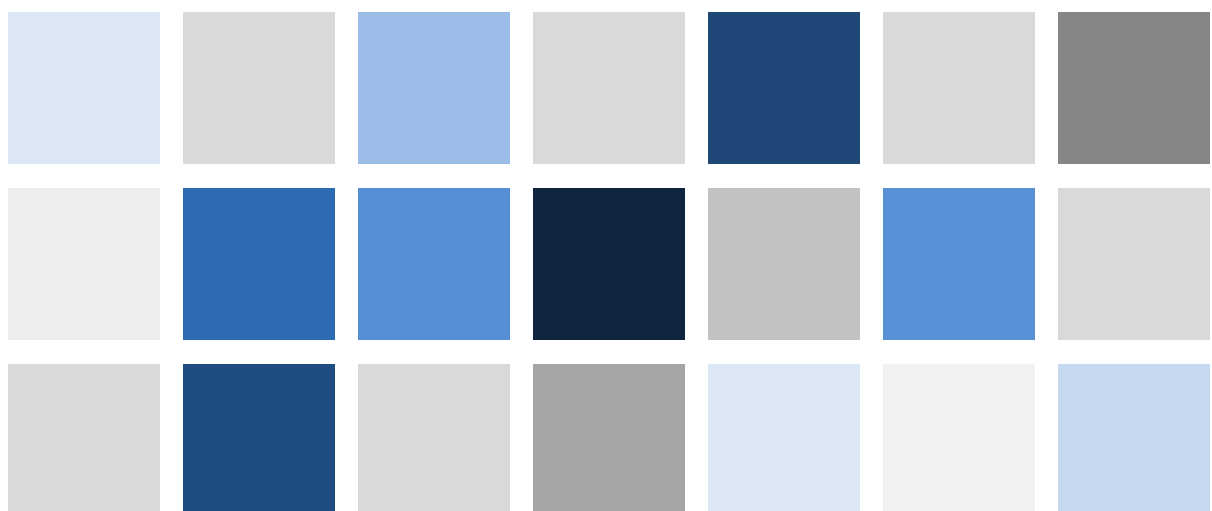


Long-term data for Europe

EURHISFIRM

D3.1: Report on Intellectual Property Rights Design



Deliverable	D3.1: Report on IPR Design (issues, constraints and solutions)
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1. Objective and Structure of the Report on Intellectual Property Related Issues – WP 3.1

1.1. Objective

The aim of the EURHISFIRM project is to create a database for long-term firm data from seven different Member States of the EU, namely Belgium, France, Germany, The Netherlands, Poland, Spain, and the United Kingdom. An essential part of the creation of such a database is the collection and processing of corporate data and historical sources containing such data. Since (ownership) rights might subsist in the source materials, issues in creating the database and operating it in the future might arise. The objective of this report therefore is to identify and examine such intellectual property rights and unfair competition claims with regard to the EURHISFIRM database project.

For the creation of any database the gathering and eventual presentation of data is obviously a key component. In order to gather data an extraction from various sources is necessary. Different media can be used as sources for firm data, e.g. public (commercial) registers, stock market lists, corporate yearbooks, newspapers, secondary literature or other databases, whether in print or electronic form. While the information (in the sense of facts or ideas) as such is not subject to exclusive intellectual property rights,¹ the expression or the database in which it is contained might well be. Part of the extraction process will usually be the copying of such source material. In some cases, the inclusion of the original sources or images thereof in the database might be considered. Additionally, those source materials will potentially also be made available to the public.

None of this creates a legal risk as long as the source materials are not protected. If they are, however, subject to copyright or related rights protection or their use conflicts with unfair competition law, certain rules have to be respected in order to legally create and utilise the EURHISFIRM database. Thus, in order to enable the project's compliance with EU and national copyright and related rights and unfair competition rules, this report will firstly detect and examine potential legal issues and secondly lay out policies to comply with the legal framework.

1.2. Structure

The examination of the legal issues is complicated by the fact that neither intellectual property nor unfair competition law is fully harmonised within the EU. Thus, under A.III., the report will begin with a brief look at the state of harmonisation particularly in the field of intellectual property to lay out the relevant legal sources.

Since the vast majority of potential issues concerns copyright and related rights, the report will then go on to present the relevant aspects of these rights, i.e. "B. Copyright in Literary Works", "C. Copyright in Database Works", "D. Right of the Maker of a Database", and other potentially relevant rights on the national level (E). To the extent possible, the report will refer to the source materials presented in "D4.2: Report on the Inventory of Data and Sources"² and examine whether any rights might subsist in the

¹ Cf. *Goldstein/Hugenholtz*, International Copyright, § 6.1.3.1. In respect to data and materials in databases see also Art. 10 (2) TRIPS and Art. 5 WCT.

² Available at: <https://eurhisfirm.eu/wp-content/uploads/2019/02/EURHISFIRM-D4.2-FinalVersion.pdf> (as of 28 March 2020).

materials, and if so which ones. It will furthermore examine whether the possible utilisations of the materials in the context of the database project might infringe those rights or whether they fall within the scope of a limitation or exception of the exclusive rights.

Thereafter, the report will briefly touch upon other intellectual property rights, namely trade mark and design rights, in section F. This will be followed by an examination of unfair competition law (in section G.). The report will then examine the rights potentially subsisting in a future EURHISFIRM database. The report concludes with an Executive Summary.

1.3. Relevant Legal Sources

As mentioned before, the EU does not have a fully harmonised intellectual property (IP) regime.³ The existence and scope of IP rights is therefore in part determined by the national laws of the EU Member States, in this case by the seven countries included in the EURHISFIRM project. However, due to a number of EU regulations, directives and judgments from the Court of Justice of the European Union (CJEU) large parts, particularly of copyright law, are harmonised. In addition to the EU legislation and jurisprudence, international treaties to which either all the EU Member States or the EU itself are signatories provide for a common ground with regard to copyright law. All of this is even more true for design and trade mark law, where the national regimes are almost fully harmonised. Reference to national legal regimes will therefore be limited to those issues where no full harmonisation or unification has been achieved and thus differences in national laws may occur.

³ Also see *Rehbinder/Peukert*, Urheberrecht, § 5 II., paras. 161-168.

2. Copyright in Literary Works

The source materials contain primarily writings and informational graphics. The first type of right which might be of relevance with regard to the database project are therefore copyrights in literary works.

2.1. Subject Matter

The first step in considering the relevance of copyright in literary works for EURHISFIRM is to determine what subject matter can be covered by copyright in literary works and what the requirements for such protection are.

2.1.1. General Requirements for Copyright Protection of Literary Works

At the outset, it should be noted that it is of no relevance whether a text or image is in printed on paper or stored as a digital file. To provide a simple and obvious example: a newspaper article is subject to copyright in literary works regardless of whether it is published in the print or online edition of the newspaper.

What constitutes a “literary” work is not defined in an abstract, general manner by EU legislation or any international copyright treaties. While Art. 1 Berne Convention broadly refers to “literary and artistic works”, Art. 2 Berne Convention defines this term as including “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression [...]”. Art. 2 Berne Convention then goes on to list different examples of creations in the literary, scientific and artistic domain. It becomes clear that “literary” and “artistic” works are not supposed to be two exclusive categories. A categorisation of the sub-categories “literary” or “artistic” is, moreover, not necessary since all the Member States are obliged to provide for copyright protection for all productions in the “literary, scientific and artistic domain”.

Almost all relevant source materials that might be used in the context of the database project contain some form of writing or text, even if it is just to structure a list of numbers or a graphical illustration. Some materials will be characterised mostly by writing (such as texts), while others will mostly express information via numbers or as a graphical illustration. The single most important question thus is whether the respective texts and graphics qualify as copyrightable “works”.

Just as EU legislation does not provide for different categories of works, it also does not define the concept of a “work”; nor do any international copyright treaties. However, the CJEU through several cases developed a threshold for an expression to be a “work” in the sense of the EU copyright directives. In the *Infopaq I* case, the CJEU held that “[...] copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation”.⁴ This threshold also applies to databases (Art. 3(1) Database Directive), computer programs (Art. 1(3) Computer Programs Directive), and photographs (Art. 6 Term Directive). The requirement of an “author’s own intellectual creation” is therefore a general standard in EU and national copyright laws.

⁴ CJEU ECLI:EU:C:2009:465, para. 37 – *Infopaq I*.



According to the CJEU, an intellectual creation is an author's own "if it reflects the author's personality". This is the case if the author "was able to express his creative abilities in the production of the work by making free and creative choices [...]"⁵ When the realisation of a subject matter has, in contrast, been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work.⁶ Playing football also leaves no room for creative freedom for the purposes of copyright because it follows the rules of the game.⁷

As regards literary works, the CJEU specified that it "is only through the choice, sequence and combination of [...] words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."⁸ In the *Infopaq I* case, the question was submitted to the court whether copying an eleven-word snippet of a newspaper article could constitute a partial reproduction of a work pursuant to Art. 2(a) Information Society Directive. The case concerned the phrase "a forthcoming sale of the telecommunications group TDC, which is expected to be bought".⁹ The CJEU held that this rather mundane text snippet could potentially qualify for copyright protection. It left it, however, to the national court to determine whether in the case at hand "[...] the elements thus reproduced are the expression of the intellectual creation of their author [...]"¹⁰ In any event, the decision shows that the threshold of "originality" is quite low.

Even if one comes up with a neologism, one single word will not constitute a literary work in and of itself.¹¹ In contrast, two words may already display sufficient creativity. For example, a German court held that the two-word phrase "esoterische Räuberpistole" ("esoteric cock-and-bull story") qualifies for copyright protection because it is particularly inventive and creative. At the same time, a more extensive but routine phrase like "publishers who need not pay royalties any more" has not been considered a literary work.¹² It thus all depends upon the concrete wording used in the source material. The more technical the language, the less likely short excerpts will be held to constitute literary works.

Thus, where an author has different options and free choices to express something, his final creation might express his "own intellectual creation" in terms of which words he used in what manner. Usually, there are countless ways to express something with words, so that even short combinations of words (as in the *Infopaq I* case) will constitute the "author's own intellectual creation" and thus be subject to copyright protection. If, however, an author has no options for how to use and combine words to express something, his creation cannot be subject to copyright protection.

This principle is generally applicable to all work categories. Hence, where creations are characterised not by their writing but rather by their presentation of information and data, the question is whether the

⁵ CJEU ECLI:EU:C:2011:798, paras. 88–89 – Painer; CJEU ECLI:EU:C:2019:623, para. 19 – Funke Medien.

⁶ CJEU ECLI:EU:C:2019:721, para. 31 – Cofemel.

⁷ CJEU ECLI:EU:C:2011:631, para. 98 – FAPL/Murphy.

⁸ CJEU ECLI:EU:C:2009:465, para. 45 – *Infopaq I*.

⁹ CJEU ECLI:EU:C:2009:465, para. 21 – *Infopaq I*.

¹⁰ CJEU ECLI:EU:C:2009:465, para. 51 – *Infopaq I*.

¹¹ Cf. German Federal Court of Justice *Gewerblicher Rechtsschutz und Urheberrecht* 2011, 134, 139, para. 53 – *Perlentaucher I*.

¹² Higher Regional Court Frankfurt am Main *Zeitschrift für Urheber- und Medienrecht* 2012, 146, 150 – *Perlentaucher II*. Also CJEU ECLI:EU:C:2009:465, para. 46 – *Infopaq I*.

author had enough creative freedom, i.e. enough different ways of presenting the information or data, to express his creativity by making free and creative choices.¹³

Regarding photographs, for example, the CJEU has held that a portrait photographer can indeed make free and creative choices in several ways and at various points in the production of a portrait. In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, the photographer can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques or, where appropriate, use computer software. By making those various choices, the author of a portrait photograph can stamp the work created with his or her "personal touch". Consequently, a portrait photograph of a kindergarten child was considered an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.¹⁴

In addition, it should be noted that no other factors, such as the skill and labour that went into the author's creation, are relevant in terms of meeting the threshold. In this context, the CJEU, regarding the copyright protection of a database, has held that "the fact that the setting up of the database required [...] significant labour and skill of its author [...] cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data."¹⁵

To sum up:

- ▶ In order for a creation to be protected by EU copyright law, the CJEU requires it to be original in the sense that it is its author's own intellectual creation.
- ▶ Such an intellectual creation can only be expressed through free and creative choices in the creation process. Where authors cannot make those choices, their creations are not their own intellectual creation and thus not "works" subject to copyright protection.
- ▶ The shorter and the more standardised a sequence of words or a table is, the less likely it is to be protected as a "work".

2.1.2. Source Materials Protected as Literary Works

Now that the requirements for copyright protection for literary works have been laid out, the report will turn to the source materials. It will examine different examples so as to determine which of the materials provided for in "D4.2: Report on the Inventory of Data and Sources" are likely subject to copyright protection in literary works. In doing so, the report will examine the relevant types of materials such as: official journals, (regional) newspapers, paper stock certificates, (official) quotation lists, (financial) newspapers, financial data websites, stock exchange or company yearbooks including compilations of

¹³ While the question of presentation is of relevance for the protection of illustrations or even tables as literary works, the question of selection and arrangement of data is of relevance for their protection as database works (see infra "C. Copyright in Database Works").

¹⁴ CJEU ECLI:EU:C:2011:798, paras. 90-94 – Painer

¹⁵ CJEU ECLI:EU:C:2012:115, para. 42 – Football Dataco.

company data, and historic literature on companies such as monographies, dissertations, volumes, journals, etc.

- Official Journals

Official journals are usually issued by a public authority. The mere fact that there is a public law duty to publish the respective information does not exclude the content from copyright protection, because the content in and of itself is not an official decree or official notice like a statutory act.¹⁶

The journals can include a wide range of information. Thus, the content of these journals might look very different. They can include articles of incorporation, general information about the incorporation and modification of companies and/or accounting data such as balance sheets or annual accounts. These different contents are characterised by different features. Articles of incorporation are mostly characterised by writing, while balance sheets or annual accounts are mostly characterised by the presentation of numbers. Whether official journals of such content qualify for copyright protection depends on which concrete texts and other forms of expression they contain.

Articles of incorporation can consist of a large number of words. Whereas extensive amounts of text usually give the author sufficient room for free and creative choices, articles of incorporation are technically legal texts, drawn up with a view to the applicable law. They have to deal with and answer similar if not the same type of questions regarding the corporate governance of a company. This needs to be accomplished with precise legal terminology. The options to draft articles of incorporation are therefore quite limited with regard to the choice and arrangement of words. Hence authors have limited opportunities to make free and creative decisions for their “own intellectual creation”. Nonetheless, according to the case law of the CJEU, eleven words might already suffice, depending on the concrete formulation in question.¹⁷ Therefore, the copyright protection of articles of incorporation can only be decided on a case-to-case basis. Single articles of incorporation and shorter excerpts are likely not copyright-protected when they are worded in a routine manner typical of other articles of incorporation. If, however, articles of incorporation are drafted with a view to the special needs of the parties involved, then those articles of incorporation in all likelihood do constitute the intellectual creation of their author and thereby are subject to copyright protection in literary works. Therefore, even a rather common but still complete set of articles of incorporation, drafted for a particular new legal entity, will probably be considered a literary work.¹⁸

¹⁶ See, in contrast, Section 5 German Copyright Act: “Official works. (1) Acts, statutory instruments, official decrees and official notices, as well as decisions and official head notes of decisions do not enjoy copyright protection. (2) The same applies to other official texts published in the official interest for general information purposes, subject to the proviso that the provisions concerning the prohibition of alteration and the indication of sources in section 62 (1) to (3) and section 63 (1) and (2) shall apply accordingly. (3) Copyright in respect of private normative works shall not be affected by subsections (1) and (2) if acts, statutory instruments, decrees or official notices refer to such works without reproducing their wording. In that case the author shall be obliged to grant every publisher, on equitable conditions, a right of reproduction and distribution. Where a third party is the owner of the exclusive right of reproduction and distribution, he shall be obliged to grant the right of use pursuant to sentence 2.”

¹⁷ Supra B.I.1.

¹⁸ See e.g. Hamburg Regional Court Gewerblicher Rechtsschutz und Urheberrecht 1987, 167 – Gesellschaftsvertrag. Regarding General Terms and Conditions see München Regional Court I Gewerblicher Rechtsschutz und Urheberrecht 1991, 50 – Geschäftsbedingungen or Higher Regional Court Cologne Computer und Recht 2009, 568.

Whether **general information about the incorporation and commercial status of a company** is copyright-protected again depends on the precise content of the official journal in which it appears. If the journal already provides for certain categories and the information is just filled in by using a few descriptive words regarding the respective category, the author most likely does not have enough room to make creative decisions to consider the expression his “own intellectual creation”. If, instead, the journal does not provide a pre-arranged presentation, the author would at first sight seem to have sufficient room to make free and creative choices. However, even in this case the author only articulates simple facts about the company. These are never copyrightable. If this information can only be expressed in certain comprehensible ways, the formulation is largely predetermined by its content. In this case protectable expression merges with non-copyrightable factual information. As a result, general information about the incorporation and modification of companies in official journals, consisting only of few words or numbers, will in general not qualify for copyright protection.

Balance sheets or annual accounts usually contain a bare minimum of words used only to structure the data. While there are obviously some different ways to present a balance sheet or even annual accounts, there are accepted accounting standards which have to be met. Therefore, the freedom of the author using these formats is severely narrowed. It is difficult to imagine how an author can express his creativity in such publications. Hence balance sheets and annual accounts will rarely qualify for copyright in literary works. Balance sheets and annual accounts might however be subject to copyright in database works or protected by the sui generis right of the maker of the database.¹⁹

- (Regional or Financial) Newspapers

(Regional) newspapers contain company announcements and other information about companies. Whether such newspaper excerpts are protected by copyright in literary works depends on the length and complexity of the formulations. While a mere announcement of a new manager with no further information will not be considered copyright-protected, even a relatively short press release might very well be considered copyright-protected. In light of the *Infopaq I* decision, there is furthermore no doubt that complete newspaper articles,²⁰ opinions, reports etc. will practically always be subject to copyright in literary works.

More difficult is the question of copyright protection of literary works regarding tables and illustrations which are not just copies of the official stock or quotation lists but deviate in terms of presentation or even by providing new information or correlations of data. These types of tables are sometimes contained in financial newspapers. While the new raw data itself is not protected by copyrights or related rights, its presentation might be. As indicated above, illustrations and tables might be subject to copyright in literary works if their presentation constitutes their author’s own intellectual creation. For that to be the case they have to express the creativity of the author, which is only possible if there are different ways of adequately presenting the information. If a particular style of a table is obvious, or if it is constrained by external factors to such an extent that they effectively determine the presentation, the table will not be covered by copyright in a literary work.

¹⁹ See infra C.I.3. and D.I.2.

²⁰ See supra B.I.1. In the case before the CJEU it was not disputed that full newspaper articles are subject to copyright protection.

The presentation of most tables and illustrations of financial data are obvious. In order for them to be easily comprehensible, they have to stay in a common and familiar frame. As long as the presentation of the table or illustration is not of an extraordinary and uncommon nature expressing some creativity by its author they are not subject to copyright protection of literary works.

- [Paper Stock Certificates](#)

Stock certificates provide some very basic information about the corporation issuing the stock. The expression of this information is however already pre-arranged by certain categories of information a stock certificate must provide. All stock certificates have the same form and only deviate slightly regarding company names, share value etc. Since there is no room for any creative decisions, they cannot be their authors' own intellectual creation and thus are not subject to any copyright protection for literary works.

- [Official\) Stock Market and Quotation Lists](#)

Stock market and quotation lists are usually issued by stock exchanges. They contain various financial information about corporations. Regarding their form, they are somewhat similar to balance or accounting sheets. They are typically not characterised by writing but rather by their presentation of data.

In light of their purpose, stock market and quotation lists issued by stock exchanges are, moreover, highly standardised. The lists are published in order to transparently and easily inform market participants. For that reason, most of the lists have a fairly uniform format that makes the data easy to comprehend and compare. Stock market and quotation lists will therefore in general not qualify for copyright protection of literary works.

Examples of Stock Exchange Lists from "EURHISFIRM - D4.2 - Report on the Inventory of Data and Sources", p. 106-116

Example 1: Berliner Börsen Zeitung (Berlin), 1872

1	2	3	4	5	6
Name der Gesellschaft.					
Versicherungs-Gesellschaften.					
Aachen-Münchener Feuer-Vers.-Ges.	64	—	4	1/6	St. 1926 G
Aachener Rück-Versicherungs-Ges.	354	—	fr. Z.	—	do. 590 G
Agrippina, Transp.-Vers. Gos. zu Köln	11	—	4	1/1	do. —
				do.	do. 150 B

Columns: (1) Name ("Name der Gesellschaft"); (2) Dividends for the previous two years; (3) Interest rate ("Zinsfuß"); (4) Payment date ("Zins Termin"); (5) Indication whether prices in the next column are in percent of money; (6) Prices (G for "Geld" or ask and B for "Brief" or bid).

Example 2: Berliner Börsen Zeitung (Berlin), 1922

1	2	3	4	5	6	7
Dv. 19	Dv. 20	Dv. 21	Geschäft.	Stücke zu		
12	16	30	1/10	300	berliner Kindl-Dr.	900 bz G
—	—	10	da	1000	da da	neue — G
14	18	18	da	1000	da St.-Fr.	— B
—	—	9	da	1000	da da	neue — G
9	10	18	da	200	Böhm. Brauhaus	— G
5	6	10	da	1200.000	Holl. Weisabier	— G
7	9	—	da	1000	Deutsche Bierbr.	440 bz G
15	15	18	da	1000	Engelhardt	110 bz G

Columns: (1) Dividends for the previous three years; (2) Start date of fiscal year ("Geschäftsjahr"); (3) Nominal value ("Stücke zu"); (4) Industry; (5) Name; (6) Current prices ("Heute", whereby "G" stands for "Geld" or ask and "B" for "Brief" or bid); (7) Previous price ("Vortag", idem).

Example a. – German Stock Exchange Lists, p. 107

Example 1: Prys-courant der effecten (Amsterdam), 29 November 1813

1	2	3	4	5
26 NOV.				
Oblig. Weenerbank, bij	5 pCt.	24 1/2 à 27	24 1/2 à 27	24 1/2 à 27 1/2
Goll en Comp.	—	20 à 21 1/2	20 à 21 1/2	20 à 21 1/2
		20 à 22	20 à 22	20 à 22

Columns: (1) Type (e.g. "aand." for stocks and "oblig." for bonds); (2) Name; (3) Interest rate (for bonds); (4) Lowest price; (5) Highest price.

Example 2: Prijscourant uitgegeven door de Vereeniging voor den Effectenhandel (Amsterdam), 1898

1	2	3	4	5	6	7	8	9
Nummer der coupon	Bedrag der leverbare stukken	Vervaldagen der Coupons	NAMEN DER FONDSEN.	%	Vorige koers	Laagste koers	Hoogste koers	Gebleven koers
fr. 500	RM. 500-2000	15 Jan.-15 Juli	BRABLANDE	4 1/2	1896	67 1/2	—	—
£ 100	April-Oct.	15 April-15 Sept.	Oeste de Minas	5	—	62	—	—
	Maart-Sept.	West Minas	ditto	5	—	—	—	—

Columns: (1) Coupon number ("Nummer coupon of dividend"); (2) Nominal value ("Bedrag der leverbare stukken"); (3) Coupon date ("Vervaldag der coupons"); (4) Name ("Namen der fondsen"); (5) Interest rate; (6) Previous price ("Vorige koers"); (7) Lowest price ("Laagste koers"); (8) Highest price ("Hoogste koers"); (9) Closing price ("Gebleven koers").

Example 3: Officiële prijscourant (Amsterdam), 1972

1	2	3	4	5	6	7	8
Vervaldag der coupon	Coupons de fonds	NAMEN DER FONDSEN	%	Omzet vorige beursdag	Vorige koers	Openings koers	Later gedane koersen
15/11	1000	NEDERLAND 1969	6 3/4	65.000	102.80	103	—
15/2	1000	ditto 1970	6 1/2	68.000	102.80	103	—
15/10	1000	ditto 1971	6 3/4	343.000	102.80	102.80	102.80

Columns: (1) Coupon date; (2) Nominal value ("Coupons"); (3) Name; (4) Interest rate; (5) Turnover during the previous day ("Omzet vorige beursdag"); (6) Previous price; (7) Opening price ("Openingskoers"); (8) Additional prices ("Later gedane koersen").

Example c. – Dutch Stock Exchange Lists, p. 114

Example 1: Course of the Exchange &c.(London), 1825 (shares)

1	2	3	4	5
No. Shares.	Div. per An.	Divds. Payable.	CANALS.	
1766 1/2 sh.	6s.	April & Oct.	Ashton and Oldham ..	Average 97 1/8 sh. 290
1482	Ashby-de-la-Zouch ..	Average 118 1/2 sh.
9,946 1/2 sh.	6s. p. ct.	April.	Ditto Bonds, various amounts
720	12s. & 6s	Feb. & Aug.	Barnsley,	160 1/2 sh. 320

Columns: (1) Number of shares authorised; (2) Annual dividend; (3) Dividend payment date(s); (4) Name of securities grouped by industry with additional information on their nominal value and amount paid-up; (5) Prices.

Example 2: The Stock Exchange daily official list, 1900 (shares)

1	2	3	4	5	6	7	8	9
MINES.—Continued.								
Authorised Issue.	Present Amount.	Share or Share	When x d. or x in.	Div.	NAME	PAID.	CLOSING QUOTATIONS.	BUSINESS DONE
50,000	20,000	8	30 Mar	6d.	Fortuna, Limited, Nos. 1 to 50,000	8	1 1/2 - 2 1/2	—
140,000	120,000	1	11 Oct.	1/2	Fortuna & Bol. (American) Old. Min. Ltd., Nos. 1-140,000 ..	1	1 1/2 - 2 1/2	—
15,000	15,000	4	10 Oct.	1	Great Western, Limited	4	14 - 15	—

Columns: (1) Number of shares authorised ("Authorised issue"); (2) Number of shares issued ("Present amount"); (3) Par value of shares; (4) Next ex-dividend date ("When x d. or x in."); (5) Amount of previous dividend ("Div."); (6) Name; (7) Amount paid-up on shares ("Paid"); (8) Closing prices (sale-purchase) for the current day ("Closing quotations"); (9) Prices ("Business done")

Example 3: The Stock Exchange daily official list, 1900 (government bonds)

1	2	3	4	5	6	7	8
BRITISH FUNDS, &c.							
Amount.	Present Amount.	INTEREST DUE.	When x d. or x in.	Per Cent.	NAME.	CLOSING QUOTATIONS.	BUSINESS DONE.
1,000,000	1,000,000	4s. 6d.	1 Sept.	4	Two-and-Three Quarters per Cent., until 1901, then 3 1/2 per cent., United States Stock, redeemed in 1901, ..	97 1/2 - 98	98 1/2

Columns: (1) Total amount of bonds authorised ("Amount"); (2) Amount of bonds outstanding ("Present amount"); (3) Interest payment dates ("Interest due"); (4) Next ex-interest date; (5) Interest rate ("Per cent"); (6) Name; (7) Closing prices (sale-purchase) for the current day; (8) Prices

Example b. – British Stock Exchange Lists, p. 116

This is illustrated by the examples a. – c. of different stock exchange lists above. The lists all have a similar column structure that allocates similar types of data like company names and information about the shares and dividends. They only deviate in the exact arrangement of the different categories. None of these lists meets the requirements of an author’s own, intellectual, creative expression.

- Stock Exchange or Company Yearbooks

Yearbooks can contain a wide array of information about companies. As can be seen in the examples provided below, the yearbooks are a mixture of texts conveying information about companies and some accounting or financial market data. The entries follow a common scheme and ordering. The German (Example a.) and the Dutch (Example b.) yearbooks use a term to describe the category at the beginning of the line followed by a colon to present the information. The British yearbook uses a descriptive term and columns to do the same. Other yearbooks might provide headlines or use a dash instead of a colon to mark the different categories but still all of those ways are routine, obvious ways of presenting and conveying information in an efficient and structured way. Because of that the authors of the yearbooks are limited in their choices of presentation, which then leads to a limited freedom to make free and creative choices. As a result, the structure of the yearbooks does not constitute an author’s own intellectual creation and thus not a literary work.

The yearbooks might however still contain some subject matter that is protected by copyright in literary works, namely the entries. Similar to texts in the official journals, the formulations are to an extent predetermined by the respective categories. The texts also have to contain a certain amount of technical terms to convey important company information. As a result, the room to make free and creative decisions in writing texts in a company yearbook is relatively narrow. Nonetheless, the longer and more comprehensive an entry, the more room there is for creative decision making. Thus, longer sentences, paragraphs and longer entries in yearbooks will often express some creative choices. The longer the text in a yearbook, the more likely it is to be protected by copyright in literary works.

Applying these principles to example a. below leads to the conclusion that this entry does not qualify for copyright in a literary work. It does not contain a complete sentence and is almost entirely predetermined by the factual information conveyed.

In contrast, the entry “GENERAL DETAILS, INCLUDING PARTICULARS OF CAPITAL, STOCKS, LOANS, RESERVE FUND, DIVIDENDS, &c.” (example b.) will with high likelihood be considered a literary work. It consists of a number of full sentences. This leaves the author with a good amount of room to express his or her creativity by making free and creative choices in formulating the text.

Example c., finally, presents a borderline case. It does contain some short sentences. The wording is, however, of a highly technical nature, predetermined by the facts to be expressed. Therefore, there is little room for creative decisions. There is nevertheless a significant chance that a court might qualify the wording as a “literary work”.

Examples of Yearbooks from “EURHISFIRM - D4.2 - Report on the Inventory of Data and Sources”, p. 117-132

1 **Dortmunder Ritterbrauerei Aktiengesellschaft**

2 **Sitz:** (21b) Dortmund, Rheinische Straße 48/51

3 **Fernruf:** Sa.-Nr. 3 43 45 - 49

4 **Vorstand:** Dr. Wilhelm Ahl, Dortmund, Vors.; Dr. Willibald Günther, Dortmund, stellv.; Josef Wagener, Dortmund, stellv.

5 **Aufsichtsrat:** Hans Hinm, Hamburg, Vors.; Dr. Felix Eckhardt, Dortmund, stellv. Vors.; Willi Daams, Dortmund; Dipl.-Br.-Ing. Otto Schnitter, Hamburg; Arbeitnehmervertreter: Karl Reiter, Dortmund; Bruno Seltenheim, Dortmund

6 **Gründung:** 1889

7 **Tätigkeitsgebiet:** Erzeugung von Bier, unter- und obergärig, alkoholfreien Getränken, Eis; Nebenproduktverwertung im eigenen Betrieb und durch Verkauf.

8 **Beteiligungen:** Glöckhof-Brauerei AG, Gelsenkirchen Kapital: DM 1 750 000,- (46,5 %) Dividenden ab 1955: 9,10,11,12,14,12 % Brauerei Westfalica Gehr. Hagedorn & Comp. O. H., Münster (Westf.) Kapital: DM 475 000,- (100 %) Grundstücks-Verwertungs-GmbH, Dortmund Kapital: DM 20 000,- (100 %)

9 **Geschäftsjahr:** Kalenderjahr

10 **Stimmrecht d. Aktien i.d.H.-V.:** Je som. DM 100,- = 1 Stimme

11 **Zahlstellen:** Gesellschaftskasse; Dresdner Bank AG; Bankhaus Wolff & Co. KG; sämtl. Dortmund;

12 **Hermann Lampe KG; Dresdner Bank AG;** beide Bielefeld; Bank für Brau-Industrie, Frankfurt (M); Dresdner Bank AG, Düsseldorf, Frankfurt (M) und Hamburg; Bank für Handel und Industrie AG, Berlin

13 **Grundkapital:** DM 14 400 000,- Umstellung 10/5 auf DM 4 779 000,- durch H.-V.v. 29.5.1951; Lf. H.-V.v. 31.11.1955 Erhöhung auf DM 7 200 000,- Lf. H.-V.v. 31.5.1960 Erhöhung aus Gesellschaftsmitteln auf DM 14 400 000,-

14 **Börsennotiz:** Düsseldorf, Berlin und Frankfurt/M (amtl.)

15 **Wertpapier-Kenn-Nr.:** 5546000

16 **Stückelung:** 12 950 Inh.-St.-Akt. zu je DM 1 000,- 1 500 Inh.-St.-Akt. zu je DM 500,- 7 000 Inh.-St.-Akt. zu je DM 100,-

17 **Grossaktionäre:** Dresdner Bank AG, Frankfurt/M (50,2 %); Bankhaus Wolff & Co. KG, Dortmund (33 %)

Aktienkurse (Düsseldorf):
ultimo 1948 35 %
" 1949 50 %
" 1950 56 %
" 1951 81,5 %
" 1952 66 %
" 1953 175 % (+)
" 1954 400 %
" 1955 350 %
" 1956 375 %
" 1957 480 %
" 1958 690 %
" 1959 1 500 %
" 1960 1 900 %
30. Sept. 1961 746 %

+ ab 15.12.1953 Kurs für DM-Nennwert

Dividenden auf Stammaktien:
II/1948/49 u. 1949/50: 0 %
1950/51: 5 % (Div. Sch. Nr. 55)
1951/52: 5 % (Div. Sch. Nr. 56)
1952/53: 7 % (Div. Sch. Nr. 1)
1953 (I, 10.-31.12.); 2 % (Div. Sch. Nr. 1)
1954: 9 % (Div. Sch. Nr. 2)

906 **N.V. Amsterdamsche Likeurstokerij „t Lootseje“ der Erven Lucas Bols, gevestigd te Amsterdam. Gewone aandelen.** (Hk 42)

Genoteerd: f 16.304.000; coupure: f 20.—. Bewijsen van aand. aan toonder worden afgegeven voor 1, 5 of 50 aand. respectievelijk genummerd vanaf 200.001, vanaf 100.001 en vanaf 1, echter met uitzonderingen van nos. 1001—1020. De aand. van f 1000 dienen te zijn voorzien van een stempelafdruk waaraan blijkt dat deze bewijsen gelden voor 50 aand. à f 20.— (24-9-1964).

Kapitaal: f 20.000 pref. aand. en f 25.000.000 gew. aand.; geplaatst: f 20.000 pref. aand. en f 16.304.000 gew. aand.

31-12-1965: Statutaire reserve f 4.897.200; Reserve diverse doeleinden f 11.306.758; Aanvulling afschrijving duurzame produktiemiddelen f 2.215.051

Doel: De vervaardiging van en de handel in likeuren en andere sterke dranken en al hetgeen daartoe in de uitgebreidste zin behoort, zoher hier te lande als elders, alsmede de deelneming in ondernemingen, die hetzelfde of een soortgelijk doel beogen.

Fabrieken te Amsterdam en Schiedam, Nederzettingen in België, Frankrijk, Zwitserland, Oostenrijk, Duitsland, Spanje, U.S.A., Canada, Argentinië, Republiek van Zuid-Afrika, Groot-Brittannië en Nieuw-Zeeland.

Geaffilieerde ondernemingen in Nederland: N.V. Moutierij-Branderij De Koning (Schiedam), N.V. P.J.A. Chrispijn & Zoon (Amsterdam), N.V. Drukkerij Erven Lucas Bols, N.V. Likeurstokerij Wynand Fockink, H. Bootz Distilleerderij N.V., N.V. Verkoopassociatie der Verenigde Likeurstokerijen V.V.L., N.V. Wijnhandel Tivoli, alle te Amsterdam.

De bew. van 1,5 en 50 aand. zijn steeds zonder kosten onderling overwisselbaar. Bew. v. 50 aand. worden desverlangd in een aandeelhoudersregister ingeschreven.

Betaalkantoren: A.R.B. te A.

Dividend over 1963: 10 % interim, no. 23, 10 % slot in aand. (tot 1-1-1965) of in cont., no. 24, 13 % (slot) in cont., no. 25; 1964: f 2 interim, no. 26, f 2 slot in aand. (tot 1-1-1966) of in contanten, no. 27, f 2,60 slot, no. 28; 1965: f 2 interim, no. 29, 13-1-1966.

Koersen 1963—1965: f 176.20—f 213.20; f 202—f 238; f 185.50—f 250

- Identification
- Listed capital and par value of shares
- Share capital
- Reserves
- Purpose
- Branches and affiliated companies
- Payment offices
- Dividends
- Share prices

Example a. – Dutch Yearbook, *Gids bij de Prijscourant van de Vereeniging voor den Effectenhandel*, 1966 (p. 128)

Fields: (1) Name; (2) Registered address (Sitz); (3) Telephone number (Fernruf); (4) Board of directors (Vorstand); (5) Supervisory board (Aufsichtsrat); (6) Year of incorporation (Gründung); (7) Activities (Tätigkeitsgebiet); (8) Participations on other companies (Beteiligungen); (9) Fiscal year (Geschäftsjahr); (10) Payment offices (Zahlstellen); (11) Capital and details on capital operations (Grundkapital); (12) Exchanges where securities are listed (Börsennotiz); (13) Identification number of securities (Wertpapier-Kenn-Nr.); (14) Nominal value (Stückelung); (15) Large shareholders (Grossaktionäre); (16) End-of-year quotations (Aktienkurse); (17) Annual dividends (Dividenden auf Stammaktien)

D	Aus den Bilanzen	
	31.12.1959	31.12.1960
1955: 10 % (Div. Sch. Nr. 4)		
1956: 12 % (Div. Sch. Nr. 5)		
1957: 12 % (Div. Sch. Nr. 6)		
1958: 20 % (Div. Sch. Nr. 7)		
1959: 11 % (Div. Sch. Nr. 8)		
1960: 13 % (Div. Sch. Nr. 10)		
Dividenden insgesamt seit 21.6.1948: 106 %		
Besuchsrechtsabschläge insgesamt seit 21.6.1948: 105 %		
Zur Geschäftslage: In 1960 erzielte die Gesellschaft eine Ausstoßleistung von 3,4 % und lag, zu vergleichbaren Zahlen gesehen, günstig. Der Bierexport hat sich weiter entwickelt. Der Jahresumsatz betrug DM 64,0 Mio. Die bisherige Entwicklung in 1961 läßt auf eine weitere Zunahme des Ausstoßes schließen, so daß wieder mit einem günstigen Ergebnis gerechnet werden darf.		
	Aus den Gewinn- und Verlustrechnungen	
	1959	1960
Löhne u. Gehälter	6 375	6 499
Abschreibungen	5 981	5 962
Ausweispl. Steuern	6 955	7 545
Sonstige Steuern	13 215	13 615
Umsatzerlöse		64 004
Beteiligungserträge	336	300

Fields: (17) Annual dividends (continued); (18) Total dividends (Dividenden); (19) Total subscription rights (Besuchsrechtsabschläge); (20) Report on the current situation (Zur Geschäftslage); (21) Balance sheets (Bilanzen); (22) Profit-and-loss accounts (Gewinn- und Verlustrechnungen)

Example c. – German Yearbook, *Aktienführer 1962* (p. 119-120)

NAME OF SECURITY, DATE OF INCORPORATION, ADDRESS, VOTING (V), TRANSFERS AND FEES (F) AND SHUTTINGS OF BOOKS (B).	CAPITAL.				INCOME.	
	Nominal or Authorized Shares or Pounds.	Called up.	Per Share or Pound.	Total Shares and Loans and Present Amount.	Date of Payment and Rate % per Annum.	Dividends paid during year.
D. H. EVANS AND COMPANY, LIMITED. Registered 4th April, 1894. Office: 510, Oxford Street, W.	£ 202,000 100,000 0/0	£ 1	£ 1	£ 130,000	April 1/25, 1962	10% (Interim)
GENERAL DETAILS, INCLUDING PARTICULARS OF CAPITAL, STOCKS, LOANS, RESERVE FUNDS, DIVIDENDS, &c.	DIRECTORS AND CHIEF OFFICIALS.					
<p>D. H. Evans and Company, Limited (GENERAL DRAPERS AND SHIRT MERCHANTS)—formed to acquire the business of the firm of this name. In November, 1907, the capital was increased to £202,000 by the creation of 80,000 additional Preference Shares, which were offered at par to shareholders. The balance will be called up as and when required in one or more instalments on 14 days' notice. The shares not taken up by old shareholders were allotted at an aggregate premium of 2/12d. The Preference Shares are entitled to a cumulative dividend of 8 per cent, payable at the same time as the Ordinary dividends, and in priority as to capital. The Ordinary Shares are entitled to a non-cumulative dividend of 7 per cent, after which 10 per cent of any surplus profits will be carried to reserve, and any balance will be distributed as to one-half among the Ordinary Shares and the remainder among the Preference Shares. In the event of liquidation, any surplus assets will belong one-half to the Ordinary and Preference Shares and the balance to the Preference Shares. Accounts made up annually to 30th February, and submitted in April, but an interim dividend is paid in October. Reserve Fund, £7,500. Debenture Redemption Fund, £9,840. There are mortgages amounting to £10,000. Dividends on Ordinary Shares—1894-5 and 1895-6, 12 per cent; 1896-7, 10 per cent; 1897-8, 12 per cent; 1898-9, 12 per cent; 1899-1900 (interim), 10 per cent; per annum; on Preference Shares—1894-5 and 1895-6, 8 per cent; 1896-7, 8 per cent; 1897-8, 8 per cent; 1898-9, 8 per cent; 1899-1900 (interim), 8 per cent. Carried forward to 1900, £2,000. In 1900, £2,000. Highest, 11; Lowest, 11; Lowest, 1085.</p> <p>Trustees for Debenture Stockholders—A. J. NEWTON, D. H. EVANS, Directors—A. J. NEWTON (Chairman); JAMES BAYLEY, M.P.; JAMES ROYDON, Wm. MERRILL, EDGAR COHEN, D. H. EVANS. Director's qualification, £1,000 in Shares of any class. Solicitor—ALFRED R. GRAY. Auctioneers—HAY, ADKINS & HAY. Bankers—LONDON CITY AND MIDLAND BANK, LIMITED. General Manager—ROBERT WEAVER. Secretary—ROBERT LEYER.</p>						

Example b. – British Yearbook, *Stock Exchange Official Intelligence*, 1900 (p. 131)



Historic Literature

Another potential source of firm data is historic literature. This includes academic monographs, dissertations, and journal articles about or related to companies. While they might contain some tables or illustrations conveying raw, unprotected company data, these writings will typically be considered literary works.

- Financial Data Websites

While the design of a website might be protected as a work (though not a literary one) this question is not of interest in the context at hand since the design of a website as such is not a source that the EURHISFIRM project uses in any way. Regarding the content of financial data websites, the principles laid out above apply.

2.2. Scope of protection

Evaluating whether copyright in literary works subsists in a EURHISFIRM source is only the first step of the inquiry. The next step is to consider the scope of these exclusive rights, i.e. the term of protection (below 1.), and the activities covered by copyright (below 2.). Only if protectable subject matter (see supra) is still under copyright and not yet in the public domain and, in addition, the usages envisaged by the EURHISFIRM project are covered by copyright can rights clearance issues arise.

2.2.1. Term of Protection

The term of protection of copyrightable works in the EU lasts for the life of the author plus 70 years after his death, irrespective of the date when the work is lawfully made available to the public.²¹ The works are thus protected from the moment they are created (irrespective of publication) until 70 years after the death of their author, or in the case of joint authorship, of the last surviving author.²² After this point the works fall into the public domain. This means that no exclusive rights in the creations subsist anymore.

Copyright protection terms are, however, not calculated from the precise day of the death of the respective author, but rather from the first day of the following year.²³ Thus, as of 1 January 2020 all works of authors who died sometime in 1949 or earlier have already fallen into the public domain. On 1 January 2021, the copyright in all works whose authors died in 1950 will cease, and so on. After the term of copyright protection has lapsed, the respective works may be used for any otherwise legal purpose, including for commercial purposes.

In cases of anonymous or pseudonymous works, i.e. works which do not provide their author's identity at all or not their real identity, the term of protection runs for 70 years after the work is lawfully made available to the public.²⁴ This might be particularly relevant in the EURHISFIRM context, since it is possible

²¹ Art. 1(1) Term Directive.

²² Art. 1(2) Term Directive.

²³ Art. 8 Term Directive.

²⁴ Art. 1(3) Term Directive. That is however only unless the pseudonym clearly identifies the author or the author discloses his or her identity during those 70 years. In those instances, the term of protection must be calculated as laid out above. Works that

that source materials do not identify their authors. If that is the case, those source materials fall into the public domain 70 years after publication, starting from the first day of January the year following their publication. Thus, all anonymous or pseudonymous works published in 1949 or earlier already form part of the public domain. They may therefore also be used as part of a commercial database project.

Where works are made available to the public in volumes, parts, issues or episodes, the term of protection runs separately for every item.²⁵ Consequently, all copyright in the entries of a handbook written by anonymous authors and published in 1949 has lapsed.

2.2.2. Exclusive Rights of Relevance for the EURHISFIRM Project

a. Reproduction Right

The first and most important right of a copyright holder is the reproduction right. Art. 2 of the Information Society Directive provides for authors “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 [...] of their works”.²⁶

Thus, the reproduction right ensures that only the author of a work can allow or prohibit a reproduction of the work. The concept of “reproduction” laid out in Art. 2 Information Society Directive is extensive:

The reproduction right is firstly technology-neutral. It covers reproductions “by any means and in any form”. Whether copying occurs in analogue or digital form is therefore irrelevant. Secondly, the right covers any “temporary or permanent” reproduction of the work. Accordingly, even a reproduction of a work for only a few seconds e.g. in the random access memory (RAM) of a computer falls under the scope of Art. 2 Information Society Directive. This also follows from the mandatory exception pursuant to Art. 5(1) Information Society Directive which exempts certain kinds of “transient or incidental” reproductions from the reproduction right. Such an exception only makes sense if ephemeral copies of the work are considered reproductions. Thirdly, the right includes reproductions of the whole work or just parts of it. However, in order to ensure that not every single word of a literary work is protected by a copyright, to constitute a partial reproduction, the reproduced part itself must express its author’s own intellectual creation. Conversely, if an extract of a work is reproduced that does not express the author’s own intellectual creation, such a reproduction is not subject to the permission of the author.²⁷

With this broad scope, the reproduction right is relevant in virtually every step taken in the creation and use of an electronic database (always provided that the source material is (still) under copyright at all; see *supra*).

neither have an identifiable author, nor have been made lawfully available to the public within 70 years from their creation, cease to be protected (Art. 1(6) Term Directive).

²⁵ Art. 1(5) Term Directive for works where the term of protection runs from the time when the work was lawfully made available to the public.

²⁶ Art. 2(a) Information Society Directive.

²⁷ See *supra* B.I.1. “[...] the reproduction of an extract of a protected work [...] is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; [...]”, CJEU ECLI:EU:C:2009:465, para. 48 – *Infopaq I*.



(1) Initial Digitisation of the Source Materials

In order for company data to be extracted from analogue source materials, a digitisation process will have to take place. During this process, a digital copy (scan) of the source materials is generated from which a computer program can later extract data. By scanning the source materials, the protected subject matter is reproduced either by being permanently saved on a computer or at least transiently saved in the computer RAM until the data extraction has occurred. As laid out above, those transient reproductions also fall under the scope of the reproduction right. It follows that such a utilisation of source materials that are (still) copyright protected (see supra) in general requires the rightholder's authorisation (unless an exception or limitation of the copyright is applicable; see below).

(2) Optical Character Recognition (OCR)

The initial scanning of source materials is not the only way the reproduction right comes into play. If this scan is converted into machine-encoded text via optical character recognition (OCR), this step again constitutes a reproduction of the work, this time in another data format.

(3) Use of the EURHISFIRM Database for Text and Data Mining

A further reproduction of protected parts of works can occur if a machine-readable dataset is used for text and data mining purposes. The results of a particular search of the database will be saved at least temporarily in the RAM of all computers used for this purpose. The results may furthermore be stored permanently.

b. Right of Communication and Making Available to the Public

The second exclusive right of relevance for the EURHISFIRM project is the right of communication and making available to the public pursuant to Art. 3 of the Information Society Directive. It provides “authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”²⁸

This right should be understood in a broad sense covering all communication to a public that is not present at the place where the communication originates. Thus, the right applies to all “forms of communication to the public characterised by a distance element”.²⁹ This is to say that it is supposed to cover the communication to an unspecified group and number of people that are not in the same place but rather can access the work remotely.

The right covers any such transmission or retransmission of a work to the public “by wire or wireless means”.³⁰ The right of communication to the public is therefore technology-neutral. It includes traditional broadcasting as well as the right to make the work available to the public in “a way that members of the public may access [the works] from a place and at a time individually chosen by them” – i.e. on-demand services via the internet. It is irrelevant whether anyone actually accesses the protected content. The right

²⁸ Art. 3(1) Information Society Directive.

²⁹ *Walter/v. Lewinski*, European Copyright Law, 11.3.19.

³⁰ Recital (23) Information Society Directive.

of communication and making available to the public is already encroached upon by the act of uploading and/or unlocking protected content.³¹

The right of communication to the public and especially the right of making available to the public will become relevant in the implementation phase of the EURHISFIRM project. If copyright-protected subject matter forms part of the digitised dataset and that content is made available online to anyone who uses the website and/or logs in, this act of making available in principle requires prior authorisation from the rightholder. That would for example be the case if scans of protected subject matter contained in the source materials, such as texts that qualify as literary works, could be accessed by members of the public via the EURHISFIRM database interface. If, in contrast, the EURHISFIRM database allowed only the display of raw data extracted from the protected source materials, the right of communication/making available to the public would not come into play.

c. Distribution Right

Copyright also guarantees the rightholder the exclusive distribution of the work. Pursuant to Art. 4 of the Information Society Directive, “authors, in respect of the original of their works or of copies thereof”, have “the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.”³²

This exclusive right is of lesser relevance for the EURHISFIRM project because it only applies to tangible copies of the work, for example printed books, CDs or DVDs.³³ Since it is unlikely that the database will be made available to the public in any other form than on demand via the internet, the distribution right will not be concerned. If, however, any physical reproductions of a copyright-protected source material were distributed “to the public by sale or otherwise”, such distribution would be subject to the authorisation of the respective rightholders.

2.3. Limitations and Exceptions

As already indicated above, the reproduction and the communication to the public of copyright-protected source materials only require authorisation if no exceptions or limitations to copyright apply. According to these provisions, certain reproductions and certain acts of making works available to the public “shall be permissible”, in other words lawful even without prior authorisation from the rightholder.³⁴ In the following, we will examine whether and which exceptions and limitations might apply in the context of the database project.

In contrast to the definition of a copyrightable work and the scope of exclusive rights, limitations and exceptions to copyright are not fully harmonised under EU law. Copyright directives for the most part provide only optional limitations and exceptions, which may but need not be transposed into national laws in the EU Member States.³⁵ Only few specific limitations and exceptions are mandatory; they have to be implemented without any deviation by EU Member States. In addition, the optional exceptions in the EU

³¹ Cf. for example Higher Regional Court Munich *Zeitschrift für Urheber- und Medienrecht* 2010, 709.

³² Art. 4 Information Society Directive.

³³ *Walter/v. Lewinski*, European Copyright Law, 11.4.6.

³⁴ See for example sections 44a et seq. German Copyright Act.

³⁵ In particular Art. 5(2) and (3) Information Society Directive.

copyright directives are phrased rather broadly. Thus, the phrasing of the national exceptions enacted on the grounds of the optional exceptions might differ substantially from Member State to Member State.

Of particular relevance for the EURHISFIRM project are text and data mining (TDM) exceptions,³⁶ and, more generally, exceptions for scientific research purposes. In the following, we will address two specific provisions that declare permissible non-commercial (1.) and even commercial TDM (2.). Thereafter, we will briefly address two more general limitations of copyright that are potentially of relevance for EURHISFIRM (3. and 4.).

2.3.1. Non-commercial Text and Data Mining for Scientific Purposes

According to Art. 3 Digital Single Market Directive, EU Member States must provide for an exception to the reproduction right of copyright holders “for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access”. The purpose of Art. 3 is to provide more certainty about the legality of text and data mining activities and to foster respective research within the EU.³⁷ While the provision has yet to be transposed into the national copyright laws of all Member States, which has to occur by 7 June 2021 (Art. 29 Digital Single Market Directive), Art. 3 ensures a full harmonisation from which Member States must not deviate. It is therefore sufficient to limit our analysis to the directive.

a. Beneficiaries of the Exception

The first condition of Art. 3 Digital Single Market Directive is that TDM activities are carried out by one of the beneficiaries of the exception, i.e. “research organisations” or “cultural heritage institutions”.

(1) Cultural Heritage Institutions

Art. 2(3) Digital Single Market Directive defines a cultural heritage institution as “a publicly accessible library or museum, an archive or a film or audio heritage institution”. Currently, such institutions do not form a part of the EURHISFORM consortium.

(2) Research Organisations

A “research organisation” is defined in Art. 2(1) Digital Single Market Directive as a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research: (a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or (b) pursuant to a public interest mission recognised by a Member State; in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation;”.

³⁶ For an in-depth study on the legal framework for text and data mining in the EU before the enactment of the Digital Single Market Directive, see *Trialle/de Meeus d’Argenteuil/de Francquen*, Study on the legal framework of text and data mining, available at: <https://op.europa.eu/en/publication-detail/-/publication/074ddf78-01e9-4a1d-9895-65290705e2a5/language-en> (as of 28 March 2020).

³⁷ See Recital (8) Digital Single Market Directive. Also *Raue*, *International Review of Intellectual Property and Competition Law* 49 (2018), 379, 381.

- EURHISFIRM Consortium Members

All institutions participating in the current EURHISFIRM project can be qualified as either universities or a research institutes. Their primary goal is to conduct scientific research or at least to carry out teaching activities involving such scientific research. If the EURHISFIRM database were associated only with one or certain entities, their primary aim would still have to be scientific research or related education.

- Separate EURHISFIRM Entity

As of today, EURHISFIRM is not an entity with legal personality independent of the members of the consortium. If such an entity were established in the future, it would also only benefit from the TDM exception of Art. 3 Digital Single Market Directive under the condition that, according to its statute and practical operations, its “primary goal is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research”. A regular commercial entity such as a corporation would not fulfil this requirement.

As a further requirement of Art. 3, a scientific or educational institution has to operate either (a) on a not-for-profit basis or (b) by reinvesting all the profits in its scientific research or (c) pursuant to a public interest mission recognised by a Member State. We analyse these three alternatives in turn.

- Not-for-profit Operation

EURHISFIRM would operate on a not-for-profit basis if its (or its foundational members’) operations were completely funded by public research funding (i.e. via H2020 or a comparable national scheme) or similar donations and not by any subscription or any other use-based fees. In this scenario, access to the EURHISFIRM database would consequently be open to anyone pursuing scientific research purposes without any fee (open access scenario).

- Reinvestment into Scientific Research

EURHISFIRM would still be covered by Art. 3 Digital Single Market Directive if the owner of the database generated income by restricting and monetising access to the database but proceeded to reinvest all the profits in its scientific research. In this second scenario, the entity owning and operating the EURHISFIRM database would act commercially but only with the aim to finance the operation of the database or other scientific research of that entity. If the EURHISFIRM database were owned and operated by a separate EURHISFIRM entity, any income would have to be reinvested in improving the database and its usefulness for TDM. If the database were held by a university or other scientific institution, this entity could reinvest the income from EURHISFIRM in other scientific projects, even if unrelated to EURHISFIRM. This scenario shows the potentially wide scope of application of Art. 3 Digital Single Market Directive. It has to be recalled, however, that the CJEU often adopts a narrow interpretation of copyright exceptions.³⁸ The court may thus limit the freedom of the operator of the EURHISFIRM database to reinvest income earned on the basis thereof. A system that charges its user only the amount necessary to cover the operating costs will most likely be accepted, whereas the reallocation of EURHISFIRM proceeds to scientific projects completely unrelated to the database or any other kind of TDM may go too far.

³⁸ *Kur/Dreier*, European Intellectual Property Law, 302.

- Public Interest Mission

The third basis upon which a scientific or educational institution owning the EURHISFIRM database could operate and still benefit from the exception of Art. 3 Digital Single Market Directive would be “a public interest mission recognised by a Member State”. According to Recital (12) Digital Single Market Directive, “a public-interest mission could, for example, be reflected through public funding or through provisions in national laws or public contracts.”

The same recital contrasts these beneficiaries with “organisations upon which commercial undertakings have a decisive influence allowing such undertakings to exercise control because of structural situations, such as through their quality of shareholder or member, which could result in preferential access to the results of the research”. These entities “should not be considered research organisations for the purposes of this Directive.” In a similar vein, pursuant to Art. 2(1) Digital Single Market Directive, the scientific research or teaching activity involving the former also has to be conducted in “such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation”.

This distinction reconfirms that a newly established commercial entity that owns and commercialises the EURHISFIRM database would not benefit from Art. 3 Digital Single Market Directive. If, in contrast, the database were to be assigned to a newly established not-for-profit entity dedicated to a purely scientific purpose and non-discriminatory access rules for all researchers, that scientific entity would at least arguably operate pursuant to a public interest mission recognised in national company law.

b. Text and Data Mining

Reproductions of works by research organisations are permissible under Art. 3 Digital Single Market Directive only if they are made in order to carry out “text and data mining”. Art. 2(2) Digital Single Market Directive defines “text and data mining” as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations”. Recital (8) Digital Single Market Directive further specifies that TDM “makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible.”

In the context of the EURHISFIRM project, this focus on the generation of new information might be considered problematic since the purpose of the EURHISFIRM project is, first and foremost, to create a database that might later be used for various and yet unspecified TDM projects. In and of itself, the EURHISFIRM collection of source material is not immediately producing new knowledge and new trends. Rather, existing knowledge, i.e. existing information and data, is compiled. It could therefore be argued that the creation of the EURHISFIRM database is not covered by the TDM exception.

However, the EURHISFIRM database itself can and will eventually be used as the necessary basis for text and data mining. The purpose of the database is to create a corpus of long-term firm data that can be used for text and data mining for scientific research. As a result, as long as the database is used to this end, the initial reproductions “aim” at gaining new knowledge, albeit in an indirect fashion. The intermediate step of creating some kind of corpus of information and data, which then can be analysed by text and data

mining tools, is, in whichever technical form, a necessary part of the text and data mining process as it is laid out in the directive. The provision of Art. 3 Digital Single Market Directive also seems to lay out a two-step process. In a first step, source material is reproduced to create a permanent database. To this end, several reproductions might occur, in particular in order to create a machine-readable version of the corpus (often called “normalisation”).³⁹ In a second step, digital technologies conduct the actual text and data mining process, producing further temporary copies.⁴⁰ Consequently, the very creation of the EURHISFIRM database concerns “reproductions ... made by research organisations ... in order to carry out ... text and data mining” (Art. 3 Digital Single Market Directive). The same is true of temporary or permanent reproductions of protected source materials in the course of searches in the EURHISFIRM database. Such copies must be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results (Art. 3(2) Digital Single Market Directive).

What this exception does not cover, however, is the making available of any protected subject matter to the public. In other words, Art. 3 Digital Single Market Directive does not declare it permissible to make protected parts of handbooks, newspapers etc. available in the course of or as the result of the TDM process. Only raw data extracted from the database, such as the number of companies established at a certain time in a certain place etc. may be displayed publicly.

c. For the Purposes of Scientific Research

Any such reproduction of protected source material must, moreover, be carried out “for the purpose of scientific research” in order to be permissible under Art. 3 Digital Single Market Directive. That directive does not provide further guidance on what is to be considered scientific research, but case law on the interpretation of Art. 5(3)(a) Information Society Directive is instructive.⁴¹ Thus, setting up and allowing access to the EURHISFIRM database for users who try to prove or establish correlations or causations is covered by Art. 3 Digital Single Market Directive. The non-commerciality of such scientific activity is ensured by the restrictions on who can be a beneficiary of the exception to copyright.⁴²

d. Of Works or Other Subject Matter to Which They Have Lawful Access

Rightholders, in particular scientific publishers, lobbied against the legality of text and data mining of copyright-protected content. They argued that Art. 3 Digital Single Market Directive reduces incentives to invest into large databases.

To accommodate these concerns, Art. 3(1) Digital Single Market Directive exempts non-commercial, scientific TDM from copyright only if the respective research organisation, i.e. the owner of the EURHISFIRM database, has “lawful access” to the protected source materials. Recital 14 of the directive sets out that access is lawful if it is “based on an open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or

³⁹ Supra B.II.a.(1).

⁴⁰ Supra B.II.a.(2).

⁴¹ Infra B.III.3.

⁴² Supra B.III.1.a.

through other lawful means.”⁴³ In the case of subscriptions taken by research organisations, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access. Lawful access also covers access to content that is freely available online.⁴⁴

The source material of the EURHISFIRM database consists of historical firm data. Originally, these data were published in printed form. Access to these printed materials is “lawful” in the sense of Art. 3 Digital Single Market Directive if the handbooks, newspapers etc. were either lent from public libraries, bought on the secondary market or otherwise lawfully acquired.

e. Summary of Key Points

To sum up the most important points regarding the applicability of the exception for text and data mining for the purposes of scientific research pursuant to Art. 3 Digital Single Market Directive:

- ▶ Any type of work still copyright-protected is covered.
- ▶ Universities and other entities with a scientific purpose benefit from the exception.
- ▶ The database must not be commercialised on a for-profit basis.
- ▶ The exception only legalises the reproduction of works, be it in the course of the creation of the database or its use for TDM purposes. In contrast, any making available of protected subject matter, like text extracts or even full scans, to the public in the context of the database project without the authorisation of the respective rightholders is not permitted.

2.3.2. Text and Data Mining for Commercial Purposes

In addition to the exception for text and data mining for the purposes of scientific research, the Digital Single Market Directive provides a further mandatory exception for text and data mining, namely Art. 4 Digital Single Market Directive. Its first paragraph simply proclaims that EU Member States must provide for an exception or limitation for reproductions of lawfully accessible works and other subject matter for the purposes of text and data mining.

Structurally, this provision is very similar to Art. 3 Digital Single Market Directive. Just like Art. 3 Digital Single Market Directive, it only provides an exception to the exclusive reproduction right. The requirements of “text and data mining”, and “lawfully accessible” works have already been explained in the context of Art. 3 Digital Single Market Directive.⁴⁵

In contrast to Art. 3, Art. 4 Digital Single Market Directive is, however, not limited to specific beneficiaries, such as research organisations, and it also does not require the text and data mining to be carried out for the purposes of scientific research. The reasoning behind this broad exception is to allow not only the research sector but also the commercial sector to take advantage of the technological possibilities and opportunities TDM provides. Text and data mining techniques are widely used both by private and public

⁴³ “The exception requires the researcher to have access to the mined material but does not grant it”, as *Raue*, International Review of Intellectual Property and Competition Law 49 (2018), 379, 381 et seq. puts it.

⁴⁴ Recital (14) Digital Single Market Directive.

⁴⁵ *Supra* B.III.1.b. and B.III.1.d., respectively.



entities to analyse large amounts of data in different areas of life and for various purposes, including government services, complex business decisions and the development of new applications or technologies.⁴⁶ Art. 4 Digital Single Market Directive aims to improve legal certainty in such cases and to encourage innovation in the private sector as well.⁴⁷ Thus, the scope of the exception is substantially broader than that of Art. 3 Digital Single Market Directive. A scientific purpose, i.e. the intention to find new knowledge by exploring a subject matter by pursuing a methodical approach on a non-commercial basis, need not be present. Instead, any reason to use TDM methods and technologies, including in particular a purely commercial purpose, suffices for Art. 4 Digital Single Market Directive.

However, Art. 4 Digital Single Market Directive comes with one major caveat. That is the opt-out mechanism in paragraph 3. It restricts the applicability of the exception to cases in which “the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner”. If the TDM activity concerns online sources, an appropriate reservation of rights needs to be implemented by “machine-readable means, including metadata and terms and conditions of a website or a service”.⁴⁸ As regards other source materials, in particular printed source materials, Recital (18) Digital Single Market Directive provides:

“In other cases, it can be appropriate to reserve the rights by other means, such as contractual agreements or a unilateral declaration. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected.”

This points to a broad understanding of what constitutes an “appropriate” reservation of the right to use copyright-protected offline content for commercial TDM. It would thus arguably suffice to declare in a new edition of a book that it is prohibited to digitise the book for commercial TDM purposes.

But what about copyright-protected subject matter that was printed (and published) before the coming into force of Art. 4 Digital Single Market Directive? Most if not all of the source material envisaged for the EURHISFIRM database falls into this category of “old” printed matter. On the one hand, Art. 4 also applies to these source materials; it is not restricted to content that is already available online. A prohibition of commercial TDM under Art. 4 Digital Single Market Directive of these dated materials thus requires that the exclusive reproduction right has been “expressly reserved by their rightholders in an appropriate manner” (Art. 4(3) Digital Single Market Directive). On the other hand, the reservation of rights against commercial TDM must also be available for holders of copyrights in “old” printed matter. Like holders of rights in online content, they too must be in a position to object to commercial TDM reproductions. The unresolved question, though, is what constitutes an “appropriate manner” of expressly reserving rights in printed matter. One arguably sufficient option would be to publish a notice on the website of the copyright holder according to which none of its printed/published works may be used for commercial TDM purposes.

It could furthermore be argued that Art. 4 Digital Single Market Directive is only applicable to copyright-protected content printed or published after the coming into force of the directive. Until then, reproductions for commercial TDM projects required prior authorisation. Rightholders did not need to

⁴⁶ Recital (18) subsection 1 sentence 1 Digital Single Market Directive.

⁴⁷ Recital (18) subsection 1 sentence 4 Digital Single Market Directive.

⁴⁸ Recital (18) subsection 2 sentence 2 Digital Single Market Directive.

reserve this right by an express declaration. In addition, ex post reservations, e.g. on a publisher's website, are not attached to the published copies. They thus cannot achieve their informational purpose. To subject old, printed or published works to the new exception of Art. 4 Digital Single Market Directive thus arguably amounts to an unjustified ex post limitation of the exclusive property right.

The aforementioned questions are unresolved, and they will probably remain so for several years to come. We therefore have to caution against a development of the EURHISFIRM project into a purely commercial enterprise that digitises and “mines” copyright-protected source material that was published before 6 June 2019 (the date of the coming into force of the Digital Single Market Directive).

2.3.3. Uses for the Sole Purpose of Scientific Research

TDM projects such as EURHISFIRM may not only rely on Articles 3 and 4 of the Digital Single Market Directive. Their reproductions may furthermore be permissible irrespective of an authorisation by copyright holders on the basis of other EU provisions. This additional leeway follows from Art. 25 Digital Single Market Directive, according to which EU Member States may adopt or maintain in force exceptions and limitations beyond Articles 3 and 4 Digital Single Market Directive provided that these other provisions are in line with older EU directives. The key provision concerning limitations and exceptions to copyright is Art. 5 Information Society Directive. According to that provision, EU Member States must or may provide for exceptions to or limitations of the reproduction right and the right of communication and making available to the public. The most relevant limitation or exception with regard to EURHISFIRM is provided in Art. 5(3)(a) Information Society Directive.

That provision states that EU Member States may provide for exceptions or limitations to exclusive rights for any “use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”. The core requirement here is the purpose of “scientific research”. Scientific research is the methodical or systematic exploration of a subject matter in order to gain new knowledge.⁴⁹ The exception is not limited to any specific beneficiaries, but rather hinges the activity i.e. on conducting scientific research. Thus, not only specific research institutions or professional researchers, but also private persons who explore a subject matter in a methodical or systematic, i.e. a scientific manner, can benefit from this exception.

The EURHISFIRM database in and of itself does not produce new knowledge but it provides an essential basis and infrastructure for this purpose. Having one broad-scope database for historic firm data facilitates scientific research into new economic correlations. Therefore, already the initial phase of the project falls under the rubric of “scientific research”. This does however imply that the EURHISFIRM database must also be used later on only for scientific research.

According to the express wording of Art. 5(3)(a) Information Society Directive, the scientific purpose of the reproduction must at the same time be “non-commercial”. Similar to the definition of “scientific research”, the non-commerciality requirement is not dependent on the status of a particular beneficiary (e.g. a

⁴⁹ *Walter/v. Lewinski*, European Copyright Law, 11.5.48.

“research organisation” as in Art. 3 Digital Single Market Directive), but is to be considered with a view to the activity at stake.⁵⁰ Thus, the reproduction must not have any direct or indirect commercial purpose.

According to another EU copyright directive, “a payment the amount of which does not go beyond what is necessary to cover the operating costs” is considered to be of “no direct or indirect economic or commercial advantage”.⁵¹ This threshold also applies with regard to the status of a “research organisation” that may benefit from Art. 3 Digital Single Market Directive.⁵² Such entities must conduct scientific research “on a not-for-profit basis or by reinvesting all the profits in [their] scientific research”. As a result, scientific research should be deemed “non-commercial” in the sense of Art. 5(3)(a) Information Society Directive if it either does not generate any profit or only as much profit as is necessary to cover the operating costs of the research and to continue the research project. The result for the EURHISFIRM project is therefore the same as under Art. 3 Digital Single Market Directive: The database could either be operated on an open-access basis without charging any fees, or on the basis of a usage fee that covers the costs of operating the database. Such permissible use would also be in line with the so-called three-step test of Art. 5(5) Information Society Directive because it concerns a “certain special case” that does “not conflict with a normal exploitation of the work” and also does “not unreasonably prejudice the legitimate interest of the rightholder”.

At first sight, Art. 5(3)(a) Information Society Directive does not go beyond the TDM provision of Art. 3 Digital Single Market Directive. What is more, Art. 5(3)(a) Information Society Directive is not mandatory but optional. Consequently, before the enactment of the 2019 Digital Single Market Directive, EU Member States were not required to legalise non-commercial, scientific TDM. Only some countries, such as Germany and the UK, had already exempted scientific text and data mining from copyright.⁵³ From 6 June 2021 onwards, all EU Member States will have to fully comply with Art. 3 Digital Single Market Directive.

There are however aspects of the EURHISFIRM database for which Art. 5(3)(a) Information Society Directive and its implementation in national laws will remain relevant. This concerns in particular the legalisation of the making available of source materials. To this end, Section 60d German Copyright Act currently declares it permissible, “in order to enable the automatic analysis of large numbers of works (source material) for scientific research,” not only “to reproduce the source material, including automatically and systematically, in order to create, particularly by means of normalisation, structuring and categorisation, a corpus which can be analysed”, but also “to make [that] corpus available to the public for a specifically limited circle of persons for their joint scientific research, as well as to individual third persons for the purpose of monitoring the quality of scientific research.” A recent draft bill to implement Art. 3 Digital Single Market Directive retains the latter follow-on use, based on Art. 5(3)(a) Information Society Directive.⁵⁴ It must be stressed, however, that this additional limitation only permits making the

⁵⁰ Recital (42) Information Society Directive.

⁵¹ Recital (11) Rental and Lending Right Directive.

⁵² *Supra* B.III.1.a.

⁵³ See *Geiger/Frosio/Bulayenko*, The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market – Legal Aspects, available at: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA\(2018\)604941_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA(2018)604941_EN.pdf) (as of 28 March 2020), 17 et seq.

⁵⁴ Federal Ministry of Justice and Consumer Protection, Draft for discussion of a First Act to adapt copyright law to the requirements of the digital single market (“Diskussionsentwurf des BMJV - Entwurf eines Ersten Gesetzes zur Anpassung des

corpus or source materials available to a narrow and specific circle of persons. As long as the EURHISFIRM database contains any copyright protected materials, its content must not be made publicly available on the Internet or otherwise distributed to the general public without restriction. Such an act would always amount to an infringement of copyright in the source materials.

Another example of an early national codification allowing for non-commercial, scientific TDM can be found in UK law, which remains of particular interest due to Brexit. Section 29 British Copyright, Designs and Patents Act provides a general fair-dealing exception for scientific research and Section 29A British Copyright, Designs and Patents Act sets out a TDM exception for non-commercial research. The latter provision allows reproductions of works in order to “carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose”. Unlike German law, the UK act does not allow for the copies to be transferred to any other people, thus not even a specifically limited number of researchers.

The last observation supports our suggestion to refrain from making publicly available any potentially copyright-protected texts or other works via the EURHISFIRM website.

2.3.4. Temporary Reproductions in the Course of TDM for Scientific Purposes

Finally, Art. 5(1) Information Society Directive provides a mandatory exception to the reproduction right, which will also remain applicable alongside Arts. 3 and 4 Digital Single Market Directive.⁵⁵ According to that provision, temporary acts of reproduction are to be exempted from the reproduction right if they are transient or incidental and an integral and essential part of a technological process, and if their sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter, and which have no independent economic significance.

Unlike text and data mining exceptions, which also legalise permanent copies, Art. 5(1) Information Society Directive only applies to temporary acts of reproduction. Thus, reproductions made under this exception cannot be stored permanently but rather have to be “transient or incidental”. With regard to the database project this means that if the protected subject matter has to be reproduced in a more permanent way than just in the computer RAM in order to enable the technological tools to extract the information and data, the exception of Art. 5(1) Information Society Directive will not be applicable. Thus, the initial digitisation via scanning of printed materials and potentially also the creation of a machine-readable copy of the source materials via OCR technologies are not legalised by that provision but only by national copyright acts implementing Articles 3 and 4 Digital Single Market Directive and Art. 5(3)(a) Information Society Directive. Art. 5(1) Information Society Directive would however permit the processing of protected source material in a computer RAM for a minimal amount of time, during which a computer program extracts the information.

Urheberrechts an die Erfordernisse des digitalen Binnenmarkts”), available at:

https://www.bmiv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=1 (as of 28 March 2020), 23.

⁵⁵ Cf. Recital 18 Subsection 2 Sentence 4 (“This exception or limitation should leave intact the mandatory exception for text and data mining for scientific research purposes provided for in this Directive, as well as the existing exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.”).

Such transient reproductions furthermore have to be an integral and essential part of a technological process. This technological process can also be the “mining” part of text and data mining as defined above, i.e. the search of the database and the display of the (non-copyrighted) results.⁵⁶ These acts of reproduction in the RAM of the computers or servers used is key to the technological process of the data extraction via a computer program. Thus, the reproductions occurring during the use of the EURHISFIRM database for scientific TDM purposes are an integral and essential part of this technological process.

In addition, the sole purpose of the technological process has to be “(a) a transmission in a network between third parties by an intermediary, or (b) a lawful use”. Alternative (a) is not of relevance for the project at hand. Thus, Art. 5(1) Information Society Directive can only come into play if the TDM process is itself a “lawful use”. Recital (33) Information Society Directive states that “use should be considered lawful where it is authorised by the rightholder or not restricted by law.” If a use is allowed by an exception, it is “not restricted by law” and thus “lawful”. This, in turn, is the case according to Art. 5(3)(a) Information Society Directive to the extent that Member States have implemented this optional exception, and in the future according to the national transpositions of the mandatory TDM exception of Art. 3 Digital Single Market Directive. In other words, reproductions for scientific TDM purposes constitute a “lawful use” in the sense of Art. 5(1)(b) Information Society Directive.

Lastly, Art. 5(1) Information Society Directive requires that the transient reproductions have “no independent economic significance”.⁵⁷ In the context of the *Infopaq II* decision, which concerned an automated database search and extraction process, the CJEU held that “the condition that those acts must not have an independent economic significance [is fulfilled] provided, first, that the implementation of those acts does not enable the generation of an additional profit, going beyond that derived from lawful use of the protected work and, secondly, that the acts of temporary reproduction do not lead to a modification of that work.”⁵⁸ The ephemeral reproductions made in the context of the TDM process cannot be separately exploited. Thus, the reproductions made in the context of and only due to the TDM process are not “distinct or separable from the economic advantage derived from the lawful use of the work concerned and [do] not generate an additional economic advantage going beyond that derived from that use of the protected work”.⁵⁹ The CJEU also clarified that efficiency gains from digital data processing are no reason to decide otherwise.⁶⁰

It is true that the “three-step test” pursuant to Art. 5(5) Information Society Directive also applies to the exception of Art. 5(1) Information Society Directive.⁶¹ However, the CJEU clarified “if they fulfil all the conditions laid down in Article 5(1) of that directive, the acts of temporary reproduction carried out during

⁵⁶ Supra B.III.1.b.

⁵⁷ Sentence 2 of Recital (33) Information Society Directive in this context states that “[...] acts of reproduction concerned should have no separate economic value on their own.”

⁵⁸ CJEU ECLI:EU:C:2012:16, para. 54 – *Infopaq II*.

⁵⁹ CJEU ECLI:EU:C:2012:16, para. 50 – *Infopaq II*.

⁶⁰ “The efficiency gains resulting from the implementation of the acts of temporary reproduction [...] have no such independent economic significance, inasmuch as the economic advantages derived from their application only materialise during the use of the reproduced subject matter, so that they are neither distinct nor separable from the advantages derived from its use.” - CJEU ECLI:EU:C:2012:16, para. 51 – *Infopaq II*.

⁶¹ “[...] in order for the exception laid down by that provision to be capable of being relied upon, those acts must also fulfil the conditions of Article 5(5) of the Copyright Directive” – CJEU ECLI:EU:C:2011:631, para. 181 – *FAPL/Murphy*.

a “data capture” process [...] must be regarded as fulfilling the condition that the acts of reproduction may not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder.”⁶² Consequently, the “three-step test” is automatically fulfilled if the conditions of Art. 5(1) Information Society Directive are met.⁶³

In light of Arts. 3 and 4 Digital Single Market Directive, the practical relevance of Art. 5(1) Information Society Directive is, however, rather limited. It does not permit the creation of permanent digital copies (the data corpus), and it presupposes that the technical process is overall “lawful”. As explained above, this is only the case for a strictly scientific, non-commercial setup of the EURHISFIRM database. The legality of reproducing protected works to this end follows, however, already from Art. 3 Digital Single Market Directive.

2.4. Summary Copyright in Literary Works

To conclude the examination of copyright in literary works:

- ▶ Literary works protected by copyright are only written texts and illustrations of a scientific or technical nature, such as drawings, plans, maps, sketches, tables and three-dimensional representations that are original in the sense that they are their author’s own intellectual creation. Typical EURHISFIRM source materials that fulfil this requirement are lengthy entries in handbooks and complete newspaper articles. Raw data, their routine presentation and short text excerpts formulated in technical, purpose-oriented language do not qualify for copyright protection.
- ▶ Even if source materials comprise copyrightable expressions, copyrights expire 70 years after the death of the named author or 70 years after the publication of anonymous texts. Thus, source material created by authors who died in 1949 or earlier or published anonymously in 1949 or earlier is in the public domain. It may be used for any lawful purpose, including commercially.
- ▶ Even if copyright subsists in source materials, copyright exceptions allow the digitisation of printed source materials and further reproductions necessary to carry out non-commercial text and data mining for the purpose of scientific research.
- ▶ Whether historical source materials published before 2019 may also be used for commercial text and data mining is doubtful. If publishers of handbooks or newspapers reserve their respective rights, e.g. on their website, commercialisation must definitely not occur.
- ▶ In no case must copyright-protected source materials be made available to the general public.

⁶² CJEU ECLI:EU:C:2012:16, para. 56 – Infopaq II.

⁶³ *Kur/Dreier*, European Intellectual Property Law, 308.

3. Copyright in Database Works

Another copyrightable subject matter of potential relevance for the EURHISFIRM project are databases that contain source material. In that regard, the Database Directive provides for a full harmonisation of respective Member States laws. Thus, it is again possible to limit the analysis to EU law. The structure of the following analysis resembles the chapter on copyrights in literary works. The report will firstly examine the requirements of protection of database works (I). Secondly, the report will lay out the scope of protection of copyrights in database works (II). Finally, the section will outline relevant exceptions and limitations to exclusive rights (III).

3.1. Subject Matter

3.1.1. Databases

The notion of a “database” is defined in Art. 1(2) Database 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.” The protection of the Database Directive does not extend to the computer programs used in the making or operation of databases accessible by electronic means.⁶⁴

Looking at this definition, two things stand out. Firstly, databases do not have to be electronic.⁶⁵ Printed handbooks, catalogues, journals, and yearbooks might therefore also constitute protectable databases.⁶⁶

Secondly, the definition is extensive since a collection of any kind of material can qualify as a database. This includes collections of all sorts of copyrightable works⁶⁷ but more importantly also collections of raw data such as stock exchange and other business data. However, since the Database Directive was not supposed to provide an overlapping protection for creations that already are eligible for a copyright or related rights protection,⁶⁸ recordings or audio-visual, cinematographic, literary or musical works as such do not fall within the scope of the Database Directive.⁶⁹ Rather, the materials of the database need to be “independent”, which individual notes of a musical work or frames of a cinematographic works are not. Those depend on each other and cannot stand alone.⁷⁰ What constitutes “independent” materials is, again, interpreted broadly by the CJEU. Combined pieces of information can also constitute “independent” materials, even if those pieces lose some of their informative value standing alone.⁷¹ In this respect, the

⁶⁴ Art. 1(3) Database Directive. However, the “protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems”, Recital (20) Database Directive.

⁶⁵ The “[...] protection under this Directive should be extended to cover non-electronic databases”, Recital (14) Database Directive.

⁶⁶ *Walter/v. Lewinski*, European Copyright Law, 9.1.5.

⁶⁷ Even if the database consists partially or fully of works or subject matter protected by related rights, the “copyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database” – Rec. (27) Database Directive. Also see Art. 3(2) Database Directive in this regard.

⁶⁸ *Walter/v. Lewinski*, European Copyright Law, 9.1.11.

⁶⁹ Recital (17) Database Directive.

⁷⁰ *Walter/v. Lewinski*, European Copyright Law, 9.1.19.

⁷¹ CJEU ECLI:EU:C:2004:697, para. 33-35 – Fixtures Marketing.

CJEU e.g. has held that geographical data extracted from a topographical map constitute “independent” materials.⁷²

In order for a collection of independent materials to qualify as a database in the sense of Art. 1(2) Database Directive, its materials must be arranged in “a systematic or methodical way”. A merely random accumulation of works, data or other materials thus cannot constitute a database. A database in the sense of the Database Directive rather requires a planned structure for the arrangement of the materials contained in it. Also, the materials contained in the database need to be “individually accessible by electronic or other means”, which again is supposed to exclude other creations of literary, musical, cinematographic or similar nature, because their interdependent materials cannot be accessed individually.

It is important to note that the copyright protection for database works only concerns the “structure” of the database as such.⁷³ Art. 3(2) Database Directive expressly proclaims that the copyright protection of databases does not extend to their contents and is without prejudice to any rights subsisting in those contents themselves. Thus, copyright in individual source materials such as yearbook entries or newspaper articles (supra B) exists independently of a potential copyright in the database in which this source material is collected, i.e. for example the yearbook or the newspaper as such.

3.1.2. Database Works

In order to be protected by copyright, a database has to meet the “work” threshold. According to Art. 3(1) Database Directive, a database is protected by copyright if it, by reason of the selection or arrangement of its contents, constitutes the author’s own intellectual creation. Other, in particular aesthetic or qualitative, criteria cannot be applied to determine the eligibility for protection.⁷⁴ “Significant labour and skill” of the author of the database is also insufficient to justify copyright protection for a database.⁷⁵

Instead, in determining whether a database qualifies as a “work”, only the “selection or arrangement of [its] contents” is of relevance. Only if the author made free and creative choices in selecting and arranging the materials included in the database might that database be deemed the “author’s own intellectual creation”. “By contrast, that 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”.⁷⁶

3.1.3. Application to EURHISFIRM Source Databases

We will now proceed to apply these general requirements of protection to typical source databases of the EURHISFIRM project. To this extent, we again rely on D4.2, “Report on the Inventory of Data and Sources”.

⁷² CJEU ECLI:EU:C:2015:735 – Freistaat Bayern/Verlag Esterbauer.

⁷³ CJEU ECLI:EU:C:2012:115, para. 30 – Football Dataco.

⁷⁴ Art. 3(1) Database Directive. Also see Recitals (15) and (16) Database Directive.

⁷⁵ CJEU ECLI:EU:C:2012:115, para. 42 – Football Dataco.

⁷⁶ CJEU ECLI:EU:C:2012:115, para. 39 – Football Dataco.

- Official Journals

As set out above, official journals contain different sorts of materials, i.e. articles of incorporation, general information about companies and balance sheets or annual accounts of companies.

As regards their protection as database works, one again has to distinguish the database as such and its contents. Articles of incorporation and the other categories of information mentioned above do not consist of independent data. Thus, they do not constitute “databases” in the sense of Art. 1(2) Database Directive but are potentially protected as literary works.⁷⁷ In contrast, the official journals as such, as a collection of different materials such as articles of incorporation, are indeed databases in the sense of Art. 1(2) Database Directive.

In general, these databases do not, however, constitute an author’s own intellectual creation. While one could argue that editors of those journals can decide what type of materials they want to include in the journals and also how to arrange them, in reality those questions are largely determined by statutory requirements and a willingness to provide complete information and transparency with regard to companies. Materials in official journals are arranged in a schematic way either in chronological or alphabetical order. These methods are neither uncommon nor creative. Nor should they be, because an extraordinary arrangement of official journals runs contrary to their purpose to provide simple and comprehensive information for market participants. Consequently, official journals as such will with all likelihood not be subject to copyright protection.

- Balance Sheets or Annual Accounts in Official Government Journals

The same is true for balance sheets and annual accounts. Even if one assumes that they constitute “databases” in the sense of Art. 1(2) Database Directive, they will generally not display an original, creative selection or arrangement of data. The reason is again that the data are selected and also arranged largely according to accounting standards. They are supposed to provide a full and true picture of the financial situation of a company. Their authors therefore lack the scope to make free and creative choices and cannot express their creativity in the selection and arrangement of the firm data. As a result, official balance sheets and annual accounts as such are generally not protected by a copyright in database works.

- (Regional or Financial) Newspapers

The legal situation differs with regard to newspapers. Newspapers are a collection of independent literary works (articles, reports, etc.), photographs, illustrations and graphics that are arranged by some sort of editorial plan. They are thus databases in the sense of Art. 1(2) Database Directive.

Usually, it is the responsibility of the editor or editorial board to select the material to be published, and to arrange it. Whereas there are some common, well-known thematic distinctions between, e.g. the sports and the economy section of a newspaper, editors are largely free to decide about the arrangement of the articles, reports, graphical illustrations and so on. They also pick contributions according to largely undefined parameters. Newspaper editors thus have a lot of room for creative decision making in respect

⁷⁷ Supra B.I.2.

of selection and arrangement of materials. Therefore, newspapers are often considered to be a good example of a database work.⁷⁸

It is already important to stress at this point that the copyright protection for databases only covers the structure of the database. If only individual articles or graphical illustrations are reproduced, copyright in those works might be affected, but not copyright in database works. The latter is only encroached upon if the structure of the newspaper is reproduced in its entirety or in large parts. Thus, only the digitisation of entire newspapers or whole sections of newspapers brings the copyright in databases into play.

- (Official) Stock Market and Quotation Lists

Stock market and quotation lists constitute databases in the sense of Art. 1(2) Database Directive. Again the question is, however, whether they also constitute database works.

At first sight, there are numerous ways to select data and even more importantly to arrange them in a stock market and quotation list. However, the mere context of the lists as (official) stock market and quotation lists narrows the options considerably. The type of securities and the issuing companies partly predetermine what data can be included. Moreover, the lists are supposed to give a complete overview of trading activity with regard to the respective companies. This requires certain data, e.g. share price, interest rate, number of shares, dividends, etc. to be included in basically all lists. This can also be seen in the examples of stock exchange lists above under B.I.3. As a result, there is only little room left to make free and creative choices in terms of the selection and arrangement of data. Relevant lists are typically structured in alphabetical order of the company names or in descending order of some category like the share price. It is therefore unlikely that stock market and quotation lists are protected as database works.

- Stock Exchange or Company Yearbooks

In the case of yearbooks, one again has to distinguish between the database as such and its contents. Complete yearbooks clearly constitute databases in the sense of Art. 1(2) Database Directive because they collect information about various firms. Individual entries might be protected as literary works (see supra B). It seems furthermore plausible to consider these individual entries “databases” because they collect independent, individually accessible data that are arranged in a systematic or methodical way.

The selection and arrangement of relevant yearbooks is, however, again largely predetermined. In particular stock exchange yearbooks aim at full coverage of all publicly listed corporations, which leaves no room for a creative selection. Furthermore, as was the case for stock market and quotation lists, the entries will be arranged in alphabetical order of names of the companies or chronological order pursuant to the year of the entry. It is therefore not likely that the yearbook as a database will be held to constitute a database work.

The entries themselves offer a diverse set of data. Usually they contain a mix of textual information about companies with accounting or financial data. The context might to a certain degree determine the sort of information and data to be included in the yearbooks, but within this frame there is barely a blueprint of how to arrange the materials contained. All examples of yearbooks in section B.I.3. exhibit some kind of column view and are therefore rather similar. Still, the data sets are arranged differently. Due to the

⁷⁸ *Leistner*, in: Schricker/Loewenheim, UrhR, § 4 German Copyright Act, para. 28 with further references.

diversity of data contained in the yearbooks, the structure of entries is less predetermined by logic or comprehensibility than in the case of balance or accounting sheets or even stock exchange lists. The editors of the yearbooks therefore have at least some room to define a common structure of the entries, and they express their creativity by making the respective choices. How much freedom they have for creative arrangement decisions heavily depends on the comprehensiveness and length of individual entries. In the case of very short entries focussing on few data categories, editors have only little room for different arrangements. If the entries are however of considerable length, there might be enough room for creative decision making. It can therefore not be ruled out that some of the entries of the yearbooks themselves might be deemed database works.

3.2. Scope of Protection

3.2.1. Authorship and Term of Protection

According to Art. 4(1) Database Directive, the author of a database shall be the natural person or group of natural persons who created the database or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation. The person who created the database will typically be the editor of the collection. It is not the authors or creators of the materials included in the collection. If the database was created by a group of natural persons jointly, the copyright in the database is owned jointly.⁷⁹

As regards the term of protection, the same rules as in the case of literary works apply.⁸⁰ Thus, the exclusive rights deriving from the copyright in a database work “shall run for the life of the author and for 70 years after his death” pursuant to Art. 1(1) Term Directive. As a result, database works whose editor died in or before 1949 are part of the public domain and may thus be used for any lawful use, including commercial TDM uses. Copyright in anonymous and pseudonymous database works already expires 70 years after publication.

3.2.2. Exclusive Rights

The author of a database which is protectable by copyright has the exclusive rights to carry out or to authorise, inter alia, any temporary or permanent reproduction by any means and in any form, in whole or in part and any communication, display or performance to the public, pursuant to Art. 5(a) and (d) Database Directive.

Art. 5 Database Directive, however, explicitly states that these exclusive rights only subsist in “respect of the expression of the database which is protectable by copyright”. The protection is thus limited to a reproduction or communication to the public of the creative selection and arrangement of the data, i.e. of the structure of the database. The mere reproduction or other use of individual data is not subject to the exclusive rights of the database author.

⁷⁹ Art. 4(3) Database Directive.

⁸⁰ See supra B.II.1.

a. Reproduction Right

As in the case of literary works, the reproduction right is the most important right for database works as well. The reproduction right is affected through digitisation, format shifting (OCRing), and the data-extraction process.⁸¹ It has to be stressed again, however, that the exclusive reproduction right of the database editor only relates to the copying of the selection or arrangement of data, not the copying of the database content itself. This is of particular relevance if only small parts of source databases are reproduced in the course of text and data mining processes. Only if entire databases or large parts thereof are copied e.g. in the course of creating the data corpus, the exclusive reproduction right of the database author has to be cleared.

b. Distribution and Communication to the Public Right

The right of distribution and communication to the public under Art. 5(c), (d) Database Directive could only become relevant if complete source databases or substantial parts thereof were sold in printed form or made available to the public online. If the use of the EURHISFIRM database only results in the display of raw data or at most of excerpts of newspaper articles or yearbook entries, the respective source databases (newspapers, yearbooks) would not be distributed or communicated to the public as such.

3.3. Limitations and Exceptions

Even if the EURHISFIRM project concerns original source databases still protected by copyright, their reproduction and even their being made available to the public might be permissible under exceptions and limitations to the database copyright.

First and foremost, the text and data mining exceptions pursuant to Art. 3 and 4 Digital Single Market Directive also limit the right of reproduction of copyright holders in database works. Both articles expressly cover the exclusive reproduction right under Art. 5(a) Database Directive. Accordingly, reproductions carried out for non-commercial, scientific TDM and arguably even for commercial TDM are permissible under the conditions and with the caveats set out above.⁸²

As also explained above, the Digital Single Market Directive leaves existing limitations and exceptions under EU and national copyright laws intact.⁸³ Thus, the exceptions to the exclusive rights of a database author under Art. 6 Database Directive remain applicable. Of particular relevance for EURHISFIRM is Art. 6(2)(b) Database Directive. Similar to Art. 5(3)(a) Information Society Directive concerning literary and artistic works, it allows Member States to provide for exceptions to the exclusive rights of the author of a database work, where this work is solely used for the purpose of scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved. Arguably, this provision already allows EU Member States to legalise non-commercial, scientific TDM of copyright-protected databases. Since this activity has now, however, been expressly and mandatorily regulated in Art. 3 Digital Single Market Directive, there is no need to elaborate on Art. 6(2)(b) Database Directive and

⁸¹ Supra B.II.2.a.

⁸² Supra B.III.1. for non-commercial, scientific TDM and B.III.2. for commercial TDM.

⁸³ See also Art. 6(2)(b) Database Directive as of 2019 ("where there is use for the sole purpose 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, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council").

its partial implementation in national copyright laws any further. As of 7 June 2021, all EU Member States have to make sure that non-commercial, scientific text and data mining is permissible (Art. 29(1) Digital Single Market Directive).

3.4. Summary

- ▶ EURHISFIRM concerns many source databases. But only collections that constitute, by reason of the creative selection or arrangement of their contents, the editor's own intellectual creation, qualify for copyright protection of database works. Most of the source databases used in the EURHISFIRM project do not meet this threshold, with newspapers as the most notable exception.
- ▶ The term of protection of any original database reproduced lapses 70 years after the death of the editor or, in the case of anonymous databases, 70 years after publication.
- ▶ Even if EURHISFIRM includes still-protected source databases, the rights of the editor only extend to the reproduction of the specific selection or arrangement, i.e. the structure of the database as such, not to the copying of individual data.
- ▶ The reproduction of protected databases is permissible if carried out for the purpose of non-commercial, scientific text and data mining. Accordingly, a EURHISFIRM database designed for open access or to reinvest all fees may include copyright-protected source databases.

4. Sui Generis Right of the Maker of a Database

In addition to copyright protection for original database works, the Database Directive also introduced a so called “sui generis” right, i.e. a right of its own kind, for the maker of a database. It protects substantial investments in either the obtaining, verification or presentation of the contents of a database.⁸⁴

The sui generis right applies irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it is applicable irrespective of eligibility of the contents of that database for protection by copyright or by other rights (Art. 7(4) Database Directive). Consequently, a database does not need to display creativity in the arrangement or selection of its content to be protected by the sui generis right of the maker of the database. It merely has to meet the conditions set out below, i.e. it has to involve substantial investments. Conversely, a copyright in a database work does not exclude the sui generis database right, so that both rights can cover a database in parallel, if it is a work and additionally meets the conditions for the sui generis right.⁸⁵

4.1. Subject Matter and Requirements of Protection

4.1.1. Substantial Investment in a Database

The rights of the maker of a database attach to databases in the sense of Art. 1(2) Database Directive. This notion is explained above.⁸⁶ The key difference between copyright and sui generis protection of databases therefore concerns the requirements for protection. Database works have to display a minimum of creativity in the selection and arrangement of the collected data.⁸⁷ The sui generis right, conversely, is applicable if “qualitatively and/or quantitatively” “substantial investment” has been made “in either the obtaining, verification or presentation of the contents” of the database. Thus, the sui generis right is a special type of investment protection, irrespective of any traditional copyright standards.

a. Investment

“Investment” in the sense of Art. 7(1) Database Directive is to be interpreted broadly and may consist in the deployment of financial resources and/or expending of time, effort and energy.⁸⁸ Investments can concern the use of “human, technical and financial resources”.⁸⁹ Whether public funding qualifies for an “investment” in the sense of the Database Directive has yet to be decided by the CJEU. The German Federal Court of Justice tends to apply the general copyright exception for official works (Section 5 German Copyright Act) to the sui generis right in databases. Accordingly, official databases published in the official interest for general information purposes and financed by public funds would not enjoy protection under the sui generis right.⁹⁰

⁸⁴ Recital (40) Database Directive.

⁸⁵ *Kur/Dreier*, European Intellectual Property Law, 268.

⁸⁶ See supra C.I.1.

⁸⁷ Supra C.I.2.

⁸⁸ Recital (40) Database Directive.

⁸⁹ Recital (7) Database Directive.

⁹⁰ German Federal Court of Justice *Zeitschrift für Urheber- und Medienrecht* 2007, 473 – Sächsischer Ausschreibungsdienst.

b. Substantial Investment

The core requirement of “substantial” investment is not expressly defined in the Database Directive. The legislature left the details of the interpretation to the courts.⁹¹ Yet, Art. 7(1) Database Directive at least explicitly states that qualitative and quantitative criteria can be used to determine whether a “substantial” investment has been made. Moreover, Recital (19) Database Directive provides a benchmark in terms of investments that are not substantial enough. It sets out that an ordinary compilation of several recordings of musical performances on a CD does not constitute a substantial enough investment to be eligible for protection under the sui generis right.

Case law provides further clarity on what amount of investment suffices for the sui generis right. The Munich Regional Court has held that the obtaining of regional stories and news requires the readiness of a – cost-intensive – working staff and thus “substantial” investment.⁹² The Düsseldorf Regional Court, in contrast, has denied the presence of “substantial” investments in a service register, where a database creator obtained (and sometimes verified) data about the commercial service sector on the German island of Rügen, comprising over 3000 service providers in over 500 service sectors.⁹³ That finding was based on the fact that the creator of the database easily obtained the data from publicly accessible sources like telephone books, the yellow pages and official commercial registers. In yet another case, the Regional Court of Rostock used the fairly low threshold of more than just minimal economic or labour efforts to assume a “substantial investment” in a collection of links.⁹⁴ The German Federal Court of Justice used a similar threshold in holding that investments can be “substantial” if they are more than just insignificant expenses, which easily could have been made by anyone.⁹⁵ In this case, the court affirmed “substantial” investments in the obtaining and in particular the verification of a database containing 3500 reviews for 800 registered dentists.

c. In the Obtaining, Verification or Presentation of the Contents

Substantial investments must have been made “in either the obtaining, verification or presentation of the contents” of the database. Resources used for other purposes than to obtain, verify or present the data are thus irrelevant for the determination whether a substantial investment has been made.

“Obtaining” of the contents means only the collection of already existing data as opposed to the creation of new data. In this regard, the CJEU has held that 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.”⁹⁶ The reasoning behind this important distinction is this: Investments in the creation of data must be disregarded because otherwise the sui generis right would potentially monopolise raw data/information, which ought to remain

⁹¹ *Walter/v. Lewinski*, European Copyright Law, 9.7.15.

⁹² Munich Regional Court I Multimedia und Recht 2002, 58, 59.

⁹³ Düsseldorf Regional Court Zeitschrift für Urheber- und Medienrecht 2002, 65, 66.

⁹⁴ Rostock Regional Court Multimedia und Recht 2001, 631, 632.

⁹⁵ German Federal Court of Justice Gewerblicher Rechtsschutz und Urheberrecht 2011, 724, 725, para. 23 – Zweite Zahnarztmeinung II.

⁹⁶ CJEU ECLI:EU:C:2004:695, para. 42 – British Horseracing Board.

in the public domain, accessible and usable for everyone.⁹⁷ If only the investment in the obtaining of data can result in a sui generis right, access to the data collected remains free, and others are also able to collect the data.⁹⁸ Like the copyright in database works, the sui generis right only attaches to the structure of the database, not to its contents.

To distinguish between creating materials and obtaining them can, however, be difficult. Investments in the creation of works, e.g. in the writing of a newspaper article or a yearbook entry, are clearly not investments in obtaining database contents. Instead, these efforts receive protection via copyright in literary works. In the case of raw data, or information, the distinction between creating and obtaining data can be more difficult to draw. Data that are measured are not created but rather obtained in the sense of found or collected. If, however, existent data are used to generate new data, this new data cannot be found or collected anywhere else. It was non-existent before someone made an effort to use pre-existing data to generate new data. As a result, these new data are not obtained but rather created. Thus, resources expended in this creation process are not to be considered a substantial investment in the “obtaining, verification and presentation” of the contents of the database.

In a case involving a database which contained a large amount of information supplied by horse owners, trainers, horse race organisers and others on inter alia the pedigrees of some one million horses, and “pre-race information” on horse races to be held in the United Kingdom, the CJEU came to the conclusion that “resources used to draw up a list of horses in a race [...] do not constitute investment in the obtaining [...] of the contents of the database in which that list appears”. Instead, these investments went into the creation of the raw data as such, which are irrelevant in the context of the sui generis right.⁹⁹ Along the same lines, “the resources deployed for the purpose of determining, in the course of arranging the football league fixtures, the dates and times of home and away teams playing in the various matches represent [...] an investment in the creation of the fixture list. Such an investment, which relates to the organisation as such of the leagues, is linked to the creation of the data contained in the database at issue, in other words those relating to each match in the various leagues. It cannot, therefore, be taken into account under Article 7(1) of the directive.”¹⁰⁰

Similarly, an investment in the “verification” of the contents of a database only refers “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.”¹⁰¹ This is however not supposed to mean that a creator of new data can never benefit from the protection of the sui generis right. He or she only needs to make substantial investments in a database, in addition to investments in the creation of data or their verification in the prior stages of data production.¹⁰²

⁹⁷ Cf. supra A.I. and C.I.1.

⁹⁸ Cf. *Walter/v. Lewinski*, European Copyright Law, 9.7.8.

⁹⁹ CJEU ECLI:EU:C:2004:695, para. 42 – British Horseracing Board.

¹⁰⁰ CJEU ECLI:EU:C:2004:697, para. 47 – Fixtures Marketing.

¹⁰¹ CJEU ECLI:EU:C:2004:695, para. 42 – British Horseracing Board.

¹⁰² CJEU ECLI:EU:C:2004:695, para. 36 – British Horseracing Board.

Finally, “presentation” refers to the visual display of the contents. This can reach from the structuring of the materials to the actual display of the contents on screens. Resources used in this regard can constitute relevant investments in the sense of Art. 7(1) Database Directive.

4.1.2. Application to EURHISFIRM Source Databases

The report will now go on to examine which of the EURHISFIRM source materials might qualify for such a sui generis right.

- [Balance Sheets and Annual Accounts](#)

As stated above, balance sheets and annual accounts will generally constitute databases. Thus, the relevant question is just whether qualitatively or quantitatively substantial investments have been made in the obtaining, verification or presentation of the contents of the sheets or accounts. While the presentation of the data in the balance sheets or annual accounts usually is pretty uniform and does not require considerable resources, companies have to employ or hire entire accounting departments in order to collect and/or verify the data. This is also not an act of creating data, since e.g. sale numbers, operating expenses, etc. are fixed and only have to be measured and collected. This investment will usually qualify as a substantial investment. If that is the case, balance sheets or annual accounts might be protected under the sui generis right for databases.

- [Official Journals](#)

While official journals as such generally also constitute databases in the sense of Art. 1(2) Database Directive, it is doubtful whether relevant substantial investments have been made in this context. The contents, such as articles of incorporation, general information about the companies and the balance sheets and annual accounts, normally have to be published in the official journals due to legal requirements. Therefore, the resources spent in obtaining those contents should be fairly low. Also, the editors of the official journals do not necessarily verify the information and data delivered to them. It is however on the editors or makers of those journals to present the contents. If substantial investments of a technical, human or financial nature have been made in the presentation of the contents, the official journals can be subject to the sui generis right of the maker of the database. To what extent such investments in those journals actually have been made has to be determined on a case-to-case basis.

- [Newspapers](#)

As set out above, newspapers essentially are a collection of independent literary materials, like articles or reports, but also graphical illustrations that are arranged by some sort of editorial plan. They thus regularly enjoy copyright protection as original databases.¹⁰³ In order to additionally be protected by the sui generis right, substantial investments have to be shown in the obtaining, verification or presentation of the newspaper content. As set out above, the creation of articles and other newspaper content has to be distinguished from their obtaining. Resources spent to create those literary or graphical contents in the first place cannot be taken into account in determining a substantial investment. What can be taken into account are for example resources spent to purchase licences to use articles or graphics in the newspapers, since those resources have to be deemed financial investments in the obtaining of pre-existing content.

¹⁰³ Supra C.I.3.

The same principle applies in terms of the verification of those contents. If the verification happens in the stages of the creation of the contents, e.g. while writing a report, resources spent for this must be disregarded. Yet, if the verification happens later, e.g. in order to determine whether certain reports purchased by freelancers are accurate, resources expended in this context may arguably be of relevance. Finally, the presentation of articles and other content in a printed newspaper might additionally require substantial resources. If the resources spent either on obtaining the literary or graphical contents of the newspaper or their verification or final presentation in the newspaper account for substantial investments, which is likely especially in the case of bigger newspapers, they are subject to the right of the maker of the database.

- (Official) Stock Market and Quotation Lists

The case of stock market and quotation lists is similar to that of balance sheets or annual accounts. They constitute databases in the sense of Art. 1(2) Database Directive. Typically, the resources necessary to verify and present the data are limited. Still, the obtaining, i.e. the measurement and collection, of the data is one of the main activities of stock markets. They spend a considerable amount in the collection of the stock market data, which are then included in the lists. Irrespective of what level of resources are actually spent on the verification and presentation of the data, the resources put into obtaining the data will generally constitute a substantial investment in the sense of Art. 7(1) Database Directive, thus qualifying the stock market and quotation lists for the sui generis right of the maker of the database.

- Stock Exchange or Company Yearbooks

Stock exchange and company yearbooks are also databases as laid out above. There is also a chance that they might qualify as database works.¹⁰⁴ In addition, they could be protected under the sui generis database right. Generally, the amount of information and data that are collected for the yearbooks argues in favour of a substantial investment in obtaining the contents. In addition to possible investments in obtaining large amounts of information and data, those also have to be organised and finally put in a presentable format. This too will typically require considerable resources, which will regularly constitute substantial investments in the sense of Art. 7(1) Database Directive. As a result, it is likely that yearbooks will in principle be eligible for protection under the sui generis database right.

- Other Electronic Databases

As set out above, the Report on the Inventory of Data and Sources¹⁰⁵ broadly refers to other databases of a usually electronic nature. While no concrete information on the type of those electronic source databases is available, it is likely that makers of electronic databases have to spend a considerable amount of resources in the presentation of the database contents, in addition to investments in the obtaining and verification of the contents. Thus, electronic source databases might well qualify for protection under the sui generis regime.

¹⁰⁴ See supra C.I.3.

¹⁰⁵ Available at: <https://eurhisfirm.eu/wp-content/uploads/2019/02/EURHISFIRM-D4.2-FinalVersion.pdf> (as of 28 March 2020).



4.2. Owner, Term and Scope of Protection

4.2.1. Owner

While copyrights vest with the author of the work, the sui generis database right originates with the maker of the database. That is the person who takes the initiative and the risk of investing in the database. In the case of newspapers, this would be the legal entity owning the newspaper, or the legal entity owning a publishing house. Subcontractors, however, do not acquire the right.¹⁰⁶

4.2.2. Application over time

Art. 16(1) Database Directive required EU Member States to implement the sui generis right before 1 January 1998. Regarding the application of the sui generis right over time, Art. 15(3) Database Directive provides that the new sui generis right was also to apply to databases produced between 1 January 1983 and 31 December 1997. In these cases the term of protection commenced on 1 January 1998.

As a consequence, all databases published until the end of 1982 are beyond the scope of application of the sui generis right in the first place. Since no comparable regime existed in national copyright law before the 1996 Database Directive, no exclusive rights in older, non-original databases exist, and no respective rights clearing is necessary.

4.2.3. Term of Protection

Even if a database is in principle eligible for protection by the sui generis right, and it has been made available to the public in whatever manner after 1 January 1983,¹⁰⁷ the term of protection of that right expired or will expire fifteen years from the first of January of the year following the date when the database was first made available to the public (Art. 10(2) Database Directive). Consequently, the relevance of the sui generis right for EURHISFIRM is very limited. The oldest sui generis rights in non-original databases published in the 1980s and 1990s have long lapsed. As of today, the right only has to be taken into account for source databases published on or after 1 January 2005. All non-original databases published prior to that date may be digitised and integrated into the EURHISFIRM database without a need to obtain authorisation from the database maker, i.e. the publisher.

There is, however, a caveat to this. Art. 10(3) Database Directive stipulates that “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.”

It is therefore possible for the maker of a database to acquire a new 15-year term of protection for substantial investments into an update of the database. The “substantial new investment” regarding the changes should not be interpreted any differently than in the context of Art. 7(1) Database Directive.¹⁰⁸ While not technically constituting a “change”, a substantial re-verification of the database contents can

¹⁰⁶ Recital (41) Database Directive.

¹⁰⁷ Within 15 years after its completion, see Art. 10(1) and (2) Database Directive.

¹⁰⁸ *Walter/v. Lewinski*, European Copyright Law, 9.10.6. For this interpretation see supra D.I.1.

also qualify as a substantial new investment.¹⁰⁹ The burden of proof for a new investment in an existing database lies with the maker of the database.¹¹⁰ In any case, the new term of protection only concerns those changes of the database “resulting from that [additional] investment” (Art. 10(3) Database Directive). In other words, a substantial update does not lead to a new term of protection for the old version of the database, which falls into the public domain 15 years after its publication. Only the substantial changes/investments made receive their “own term of protection”.¹¹¹

The separate term of protection for substantial changes is of particular practical relevance for electronic databases, which are routinely updated. EURHISFIRM, in contrast, is mostly concerned with printed source databases. These printed editions stand for themselves. Since the vast majority of these EURHISFIRM source databases were published before 1 January 2005, their term of protection has lapsed.

4.2.4. Exclusive Rights of the Maker of the Database

Pursuant to Art. 7(1) Database Directive the maker of the database has the exclusive right to authorise or prevent the “extraction and/or re-utilization” of the whole database or of a substantial part of the contents of that database, whereby the substantiality of the part can be evaluated qualitatively and/or quantitatively. The exclusive rights of the maker of the database are supposed to broadly protect the investment in the database.¹¹²

a. Extraction

In order to provide comprehensive, high-level protection for investments in databases, the term “extraction” is broadly defined as any “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”.¹¹³ The term “extraction” is thus not limited to technical reproductions (copies) of the database, but can also include the transfer of material from a protected database to another database after an on-screen consultation and assessment of the individual materials of the first database, as long as a substantial part is taken.¹¹⁴ This means that cases of manual extraction of contents can also amount to “extraction”. “Extraction” and also “re-utilization” do not even require direct access but can rather take place on an indirect basis.¹¹⁵

If the EURHISFIRM project therefore extends to non-original, but investment-heavy source databases published on or after 1 January 2005, any act of digitisation, other type of copying and even hand-written

¹⁰⁹ Recital (55) Database Directive.

¹¹⁰ Recital (54) Database Directive.

¹¹¹ This is particularly relevant for non-live databases like for example annual accounts or stock exchange or company yearbooks. While there might be new yearbooks issued every year, the old ones generally are not changed. Thus in yearbooks that were created before 1 January 2004 and not substantially changed since then, there are no more sui generis database rights (but there still could be copyright protection if the yearbooks constitute “works”).

¹¹² The “special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization 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”, Recital (42) Database Directive.

¹¹³ Art. 7(2)(a) Database Directive.

¹¹⁴ CJEU ECLI:EU:C:2008:552, para. 60 – Directmedia Publishing.

¹¹⁵ CJEU ECLI:EU:C:2004:695, para. 67 – British Horseracing Board.

or typed excerpts of the whole or substantial parts of that database require the authorisation of the owner of the source database.¹¹⁶

b. Re-utilisation

While the “extraction” right is the functional equivalent to the reproduction right in the context of copyright (though broader), the “re-utilization” right functions as an equivalent to the rights distribution, communication and making available to the public for copyright. It is defined as any form of making available to the public of all or of a substantial part of the contents of a database by the distribution of copies, by renting or by on-line or other forms of transmission.¹¹⁷ Thus, the most important constellations covered by the re-utilisation right are, just like in the context of copyrights, the distribution of physical copies and the making available of the database via online transmission. Beyond those classical cases, the CJEU has held that a database is also re-utilised where a meta search engine operator essentially uses the materials contained in the database to get results for its search engine.¹¹⁸

As a result, if the EURHISFIRM project extends to non-original, but investment-heavy source databases published on or after 1 January 2005, any distribution of tangible copies or making available via the internet of those source databases or substantial parts thereof is subject to the authorisation of the original database maker. In other words, substantial amounts of such source data must not be made available to the public via the EURHISFIRM database.

c. Quantitatively or Qualitatively Substantial Parts of a Database

Acts of extraction or re-utilisation are only reserved for the database maker if they extend to the “whole or ... a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database”. While the term “substantial” is not defined in the directive, there is some CJEU jurisprudence on what “quantitatively and qualitatively” refers to.

A “quantitatively” substantial part of a database “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”.¹¹⁹ The size of the contents of the database into which material from a protected database has been transferred is – in contrast – of no relevance in assessing the substantial nature of the part of the contents.¹²⁰ If the extraction or re-utilisation concerns a module of a protected database, the volume of extracted/re-utilised materials must be compared with the total contents of that module or, if the module itself is not protected as a database, with other modules, and the total content of that body of materials.¹²¹

A “qualitatively” substantial part 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

¹¹⁶ See infra D.II.3.c.

¹¹⁷ Art. 7(2) lit. b Database Directive.

¹¹⁸ CJEU ECLI:EU:C:2013:850 – Innoweb.

¹¹⁹ CJEU ECLI:EU:C:2004:695, para. 82 – British Horseracing Board.

¹²⁰ CJEU ECLI:EU:C:2009:132, para. 60 – Apis-Hristovich.

¹²¹ CJEU ECLI:EU:C:2009:132, para. 64 – Apis Hristovich.

the protected database.”¹²² In this respect, the CJEU has held that an extracted data set can be considered substantial in qualitative terms if that part contains material from not publicly accessible sources, which required the maker of the database to invest human, technical or financial resources on a large scale to obtain those materials.¹²³

d. Repeated and Systematic Acts of Extraction/Re-utilisation

Finally, the Database Directive prohibits any unauthorised repeated and systematic extraction and/or re-utilisation of insubstantial parts of the database, which implies acts that either conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database.¹²⁴ That extension of the scope of the sui generis rights addresses the problem of cumulative effects of insubstantial extractions that, taken together, again amount to a use of the whole or a substantial part of the protected database and thereby seriously prejudice the investment by its maker.¹²⁵

4.3. Limitations and Exceptions

Even if the EURHISFIRM project covers databases published on or after 1 January 2005 and protected under the sui generis rights regime, their complete or partial copying (“extraction”) and “re-utilization” might still be permissible under limitations and exceptions to the sui generis right. These are essentially the same as those limiting copyright in original databases.¹²⁶

First and foremost, the text and data mining exceptions pursuant to Art. 3 and 4 Digital Single Market Directive also limit the sui generis right in databases. Both articles expressly cover the exclusive extraction and re-utilisation rights under Art. 7(1) Database Directive. Accordingly, extractions and re-utilisations of protected databases carried out for non-commercial, scientific TDM and arguably even for commercial TDM are permissible under the conditions and with the caveats set out above.¹²⁷

As also explained above, the Digital Single Market Directive leaves existing limitations and exceptions under EU and national copyright laws intact.¹²⁸ Thus, the exceptions to the exclusive rights of a database maker author under Art. 8 and 9 Database Directive remain applicable. Of particular relevance for EURHISFIRM is Art. 9(b) Database Directive. Similar to Art. 5(3)(a) Information Society Directive concerning literary and artistic works, it allows Member States to 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 “for the purposes of ... scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved”. Arguably, this provision already allows EU Member States to legalise non-commercial, scientific TDM of sui generis

¹²² CJEU ECLI:EU:C:2004:695, para. 82 – British Horseracing Board.

¹²³ CJEU ECLI:EU:C:2009:132, para. 68 – Apis Hristovich.

¹²⁴ Art. 7(5) Database Directive.

¹²⁵ CJEU ECLI:EU:C:2004:695, para. 95 – British Horseracing Board.

¹²⁶ Supra C.III.

¹²⁷ Supra B.III.1. for non-commercial, scientific TDM and B.III.2. for commercial TDM.

¹²⁸ See also Art. 6(2)(b) Database Directive as of 2019 (“where there is use for the sole purpose 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, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council”).

protected databases. Since this activity has now, however, been expressly and mandatorily regulated in Art. 3 Digital Single Market Directive, there is no need to elaborate on Art. 9(b) Database Directive and its partial implementation in national copyright laws (such as Section 87 German Copyright Act) any further. As of 7 June 2021, all EU Member States have to ensure that non-commercial, scientific text and data mining is permissible (Art. 29(1) Digital Single Market Directive).

4.4. Conclusion

- ▶ The sui generis right in databases protects substantial investments in the obtaining, verification or presentation of data. It is thus of particular relevance for all databases that aim at comprehensiveness.
- ▶ The right is, however, of very limited relevance for EURHISFIRM because databases published before 1 January 2005 have either never been protected by the sui generis right or the respective rights have lapsed. Subject to a copyright protection of their contents or an original selection/arrangement of data, databases published in 2004 or earlier may thus be covered by the EURHISFIRM project, including even for commercial purposes.
- ▶ Even if the EURHISFIRM project extends to databases published within the last 15 years, extractions and re-utilisations in the course of non-commercial, scientific text and data mining is permissible according to the Digital Single Market Directive.



5. Further Copyrights and Related Rights

The aspects of copyrights in original works and in databases relevant for EURHISFIRM are fully harmonised by EU Directives. We could thus refrain from undertaking a comparative study of national copyright laws. There exist, however, two further, potentially relevant rights in the national copyright laws of Germany and the United Kingdom, respectively. Those are rights in simple, non-original photographs (Section 72 German Copyright Act) and rights in “typographical arrangements of published editions” pursuant to Section 1 UK British Copyright, Designs and Patents Act.

5.1. Non-original Photographs (Germany)

As explained above, EU and national copyright laws protect photographic works, including works produced by processes similar to photography.¹²⁹ This long-lasting right presupposes that the author has used his or her freedom to take a photo in an original, creative manner, with portrait photos as a prime example.¹³⁰

German copyright law goes a step further and also protects “photographs and products manufactured in a similar manner to photographs”, even if they do not qualify for protection as photographic “works” (Section 72(1) German Copyright Act). The relevance of this right for EURHISFIRM ensues from the fact that some source materials might themselves be reproductions (“reprints”) of still older originals. The publisher of these reprints could claim that the digitisation and further use of those reprints runs afoul of his or her exclusive right in simple photographs.

5.1.1. Subject Matter and Requirements of Protection

The right in simple photographs under Section 72(1) German Copyright Act does not attach to the objects photographed but to the photographic production.¹³¹ In the latter regard, the right covers any technology that uses radiant energy to produce pictures, including as scanning or photocopying. Although Section 72 German Copyright Act clearly goes beyond traditional copyright law, the question remains whether the right really extends to any type of photographic reproduction such as fully automated acts of mass digitisation, or whether a certain minimum threshold of human effort has to be involved in the making of the photograph.

Already in 1990, the German Federal Court of Justice ruled that a minimum of personal intellectual effort in manufacturing the photographic productions is necessary.¹³² The decision concerned, however, a peculiar constellation. The plaintiff had produced a new edition of a 17th century bible. But he had used, for that purpose, photos of the bible already taken before. The court found that taking a photograph from another photograph with the aim of reproducing that photograph in an exact manner does not suffice for the protection under Section 72 German Copyright Act. Instead, a photograph only qualifies for this related right if it has been taken from an artefact which itself is not a photo, e.g. a bible from the 17th century. Or in other words: A photographic reproduction of a photograph is not itself subject to the protection of Section 72 German Copyright Act.

¹²⁹ See, e.g. Section 2(1) No. 5 German Copyright Act.

¹³⁰ *Supra* B.

¹³¹ *Rehbinder/Peukert*, Urheberrecht, para. 656.

¹³² German Federal Court of Justice *Gewerblicher Rechtsschutz und Urheberrecht* 1990, 669, 673 – Bibelreproduktion.

Not before the court was the probably more common scenario that a reprint is indeed directly produced based on new photographic reproductions of a old, hand-written or printed book. If a publisher of a reprint produces that reprint from scratch, by reproducing and format-shifting of the original, can that publisher claim that the reprint photographs are protected under Section 72 German Copyright Act? According to the German Federal Court of Justice, a minimum of personal intellectual effort in the photographic production and thus also in the reprinting of old books is required.

In 2019, the court held that photographs of paintings aiming at an exact reproduction are indeed eligible for protection under Section 72 German Copyright Act.¹³³ The case of scans or photocopies of written or other printed material (“reprints”) was, however, again not before the court. Legal literature mostly denies the eligibility of such reprints for protection.¹³⁴ This reasoning finds further support in Art. 14 Digital Single Market Directive, which essentially overrules the 2019 decision of the German court. This provision states that “[...] when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation.” Thus, exact, non-creative reproductions of public domain paintings, sculptures and other artistic works must be free from exclusive rights so as to improve access to the cultural heritage, for example via Wikipedia.

Digitising printed matter in a more or less automated way to produce a reprint of old books is neither creative, nor does it involve a minimum of personal intellectual effort, which is indeed present if an exact photo of a painting, a sculpture or another three-dimensional artwork is taken. In this case, the photographer chooses the motif, the angle, the exposure, etc. In contrast, copying or scanning documents only involves mechanical, fully predetermined steps. In our view, there is thus only a limited risk of violating rights in simple photographs if reprints are used as EURHISFIRM source materials.

5.1.2. Term and Scope of Protection

The right in simple photographs originally vests with the photographer, i.e. the natural person who took the photo. The publisher of a reprint is therefore never the original holder of the right. Instead, the publisher has to prove that it acquired the respective rights from the photographer.

Rights in simple photographs expire 50 years after the photograph was communicated to the public or otherwise released. Rights in unpublished photographs expire 50 years after production (Section 72(3) German Copyright Act). Thus, rights in reprints can only be brought forward against EURHISFIRM if these were published in 1970 or later. Subject to other potential rights, in particular copyrights in literary content, older reprints can safely be integrated in the EURHISFIRM project.

The exclusive rights, but also the limitations and exceptions applicable to literary and other creative works, apply accordingly to the protection of simple photographs. Thus, even more recent reprints may be reproduced without authorisation for non-commercial, scientific text and data mining.

¹³³ German Federal Court of Justice *Gewerblicher Rechtsschutz und Urheberrecht* 2019, 284, 286 – *Museumsfotos*.

¹³⁴ *Lauber-Rönsberg*, in: BeckOK UrhR, § 72 German Copyright Act, para. 16.1; *Thum*, in: Wandtke/Bullinger, UrhR, § 72 German Copyright Act, para. 29; *Nordemann*, in: Fromm/Nordemann, UrhR, § 72 German Copyright Act, para. 11.

5.2. Typographical Arrangements (United Kingdom)

The second national right of potential relevance for EURHISFIRM is a right under UK law in “the typographical arrangement of published editions”. That right only applies on UK territory. It came into force on 1 June 1957. There are thus no respective rights in EURHISFIRM source material published before this date.¹³⁵

Section 1(c) British Copyright, Designs and Patents Act grants a copyright for the typographical arrangement of published editions. “Published edition” in this context means a published edition of the whole or any part of one or more literary, dramatic or musical works. The copyright at stake here does not, however, attach to the content of the edition nor its arrangement in a database but only to its typographical arrangement. Again, the mere reproduction of a previous edition does not trigger a new right in the typographical arrangement of the reprint.¹³⁶ Case law has further clarified that it is not the “particular fonts, columns, margins and so forth”, which “are only [...] the typographical vocabulary in which the arrangement is expressed”, but rather the “combination of all of these into pages which give the newspaper as a whole its distinctive appearance”.¹³⁷ Thus, only the concrete overall appearance or format of a page or multiple pages and their relationship are subject to a potential copyright protection. This means that only an exact copy of the arrangement can infringe the right. As a result, this right is of relevance for the database project only in so far as entire pages of financial newspapers or yearbooks are scanned in order to create the EURHISFIRM data corpus. After normalising (applying OCR), the typeface, the overall appearance or format is not perceptible anymore. These and later reproductions thus do not encroach upon the right in the typographical arrangement of the original source.

The copyright in typographical arrangements of published editions vests with the publisher.¹³⁸ The term of protection lasts for 25 years from the end of the calendar year in which the edition was first published.¹³⁹ Consequently, the typographical arrangement of editions published in 1994 or prior to that are not protected anymore. Even if the EURHISFIRM project were to cover more recently published editions, the exclusive right of the publisher to make “a facsimile copy of the arrangement” (Section 17 (5) British Copyright, Designs and Patents Act) is limited with regard to non-commercial, scientific text and data mining (Sections 29 and 29A British Copyright, Designs and Patents Act).¹⁴⁰

¹³⁵ *Deazley/Patterson*, Guidance Note: Copyright in the typographical arrangement of published editions, available at: https://www.digitisingmorgan.org/uploads/BN2-typographical%20arrangement_DigiMorgan.pdf (16 January 2020), 1.

¹³⁶ Section 8 British Copyright, Designs and Patents Act.

¹³⁷ *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2003] 1 A.C. 551, para. 23.

¹³⁸ Section 9 (2) lit. d. British Copyright, Designs and Patents Act.

¹³⁹ Section 15 British Copyright, Designs and Patents Act.

¹⁴⁰ *Supra* B.III. for all exceptions and B.III.1.a.(2)(bb) specifically for the British exceptions.

6. Unfair Competition Law

6.1. Purpose and Applicability

All countries covered by the EURHISFIRM project and indeed most countries of the world are bound, under Art. 10bis Paris Convention, to assure effective protection against unfair competition, which is generally defined as any act of competition “contrary to honest practices in industrial or commercial matters”. The two archetypes of unfair competition are commercial practices that mislead other market participants or that harass consumers, obstruct competitors or otherwise act aggressive vis-à-vis other market participants.¹⁴¹ Laws prohibiting such conduct remain applicable alongside and independent of intellectual property law. While intellectual property law aims to protect intellectual creations and investments, unfair competition law aims to ensure “fair” market conditions for all market participants, i.e. companies, their competitors, and consumers.¹⁴²

In contrast to copyright law, not only is there no unified unfair competition law in the EU, but there is altogether much less EU legislation in this area. The few directives that have been adopted in the field are either only applicable in a business-to-consumer context¹⁴³ or only cover specific parts of unfair competition law¹⁴⁴. None of these directives are relevant in the context of the EURHISFIRM database project. Thus, apart from vague international law obligations concerning protection against unfair competition,¹⁴⁵ national unfair competition law remains the most important legal source. The national laws are applicable if the competitive relations, and in particular the interests of a market participant, are, or are likely to be, affected within the respective country.¹⁴⁶

As examples of unfair competitive behaviour that has to be prohibited in all countries, Art. 10bis Paris Convention mentions acts that create confusion, false allegations that discredit a competitor and indications or allegations that mislead the public about the properties of products. Comparative legal studies of national unfair competition laws have revealed, moreover, that further scenarios are addressed by virtually all unfair competition laws.¹⁴⁷ In the following, we will take German unfair competition law, which is generally regarded as relatively strict, as an example of unfair competition claims that could be of relevance for EURHISFIRM.¹⁴⁸

The German Act Against Unfair Competition only governs “commercial practices”. These are defined as “any conduct by a person for the benefit of that person’s or a third party’s business ..., which conduct is

¹⁴¹ Peukert, in: Teplitzky/Pfeifer/Leistner, Großkommentar UWG, § 3 paras. 251-261.

¹⁴² Henning-Bodewig, in: id., International Handbook on Unfair Competition, § 1 para. 26.

¹⁴³ E.g. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L149/22, 11.6.2005.

¹⁴⁴ E.g. advertising as is the case for the Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L376/21, 27.12.2006.

¹⁴⁵ The most relevant legal norm in the context is Art. 10bis Paris Convention. Its first paragraph obliges the Member States of the convention to provide at least “effective protection against unfair competition”.

¹⁴⁶ Art. 6 Rome II Regulation.

¹⁴⁷ Henning-Bodewig, in: id., International Handbook on Unfair Competition, § 1 para. 18.

¹⁴⁸ For detailed country reports see Henning-Bodewig, International Handbook on Unfair Competition, § 11 France, § 12 Germany, § 18 Netherlands, § 19 Poland, § 21 Spain, § 25 United Kingdom.

objectively connected with promoting the sale ... of goods or services” (Section 2(1) No. 1 German Act Against Unfair Competition). Conducting and publishing scientific research is, however, not a “commercial practice” in that sense. Furthermore, the EURHISFIRM consortium does not comprise entrepreneurs who engage in commercial practices within the framework of their trade, business, craft or profession (Section 2(1) No. 6 German Act Against Unfair Competition). Instead, the project collects and mines firm and other commercial data with an academic/scientific purpose. It aims at a better understanding of economic developments, but it does not participate in economic transactions or compete on markets. Such activity is beyond the scope of application of unfair competition law.¹⁴⁹

Thus, as long as EURHISFIRM confines itself to a strictly non-commercial, scientific venture, it is not subject to the laws of unfair competition. This is clearly the case if a future EURHISFIRM database is operated as a fully publicly funded, open-access database. If access and use were ever dependent upon the payment of a fee, unfair competition law would come into play. Under this circumstance, namely, EURHISFIRM would enter the market of providers of economic data with a non-gratuitous service. The respective promotion and sales conduct would cross the boundaries of academia or science and enter the field of commercial practices. EURHISFIRM would not only study the economy but become a market participant itself. This is true irrespective of whether EURHISFIRM would operate for profit or whether it would re-invest all proceeds into the operation of the database.¹⁵⁰ Reinvesting all income from the database into its operation thus shields EURHISFIRM against potential copyright infringement claims,¹⁵¹ yet still exposes it to potential unfair competition allegations.

6.2. Deceptive Replicas

One archetype of unfair competition is misleading commercial practices. Confusion in the market can be created in a variety of ways and can be considered “unfair” for multiple reasons. The most relevant constellation with a view to EURHISFIRM is the prohibition of offering a service which is replica of another service of a competitor if such offering causes avoidable deception of the purchaser regarding the commercial origin of the service (Section 4 No. 3(a) German Act Against Unfair Competition). In other words, a commercial provider of economic data could allege that the EURHISFIRM database is a deceptive replica.

Such an allegation presupposes, however, that the EURHISFIRM database can be considered a “replica” of the service of a competitor. This would only be the case if the EURHISFIRM database included sources taken from that competitor. As long as all source material is lawfully digitised, normalised and made available with EURHISFIRM resources, the resulting database can hardly be considered a “replica” of another database. This is even true if it contains partly or even mostly the same raw data as other databases. Firstly, EURHISFIRM is planning to create a comprehensive, historical database for firm data from seven different European countries. Other databases do not have a comparably wide scope. Secondly, not even the sui generis right in databases goes so far as to monopolise raw data as such.¹⁵² It may be scientifically and also economically dubious if EURHISFIRM obtains, verifies and presents data

¹⁴⁹ Peukert, in: Teplitzky/Pfeifer/Leistner, Großkommentar UWG, § 2 paras. 219-227.

¹⁵⁰ Peukert, in: Teplitzky/Pfeifer/Leistner, Großkommentar UWG, § 2 paras. 618-621.

¹⁵¹ Supra B.III1.a.(2)(dd).

¹⁵² Supra D.I.1.c.

already available in other databases, but such duplicative effort is not illegal if undertaken with one's own funds.

Even if the EURHISFIRM database did contain data that were directly extracted and re-utilised from existing (electronic) databases, such conduct would only amount to unfair competition vis-à-vis the respective competitor if the EURHISFIRM offering caused confusion. To cause confusion, some form of direct or indirect communication is necessary. Information can be communicated directly via explicit statements or can be implied indirectly through other behaviour, e.g. the appearance, design and presentation of products. Statements can be worded similar to those of a competitor or even state similarities to a competitor's products or services. The general appearance or design of a product can imitate that of a competitor. Thus, the database could for example cause confusion by resembling the design of another database from which data were extracted.

6.3. Slavish Imitation/Parasitic Behaviour

What might be problematic in terms of "unfair" competition law in regard to EURHISFIRM is, however, not so much the creation of confusion, but rather the mere fact that EURHISFIRM relies on other commercial databases, in particular reprints of handbooks, as source materials to extract data and use them to offer a competing service. This conduct alone does not create confusion, discredit or mislead anyone. But the publisher of firm data source materials who also enters the market for online economic data might claim that such extractions amount to unfair free riding on other entrepreneurs' investments and achievements. This allegation is known under labels like "slavish imitation" or "parasitic behaviour" in many unfair competition laws.¹⁵³ It boils down to the argument that it is "contrary to honest practices in industrial or commercial matters" when a market participant (mis)appropriates some result of an investment and takes advantage of it without rewarding the investor in any kind.

Even if EURHISFIRM were to simply extract data from other electronic databases – and there are no indications whatsoever that anything along these lines is even being considered by members of the EURHISFIRM consortium –, it is very questionable whether unfair competition law could go beyond the broad and years-long protection that other database makers already enjoy under the sui generis rights regime explained above.¹⁵⁴ In a case going back to the very early days of the Database Directive and its implementation in German copyright law, a publisher of a telephone book indeed successfully resorted to unfair competition law in order to stop the commercialisation of an electronic version of the telephone directory on a CD.¹⁵⁵ In addition to an infringement of the sui generis database right of the maker a telephone book, the German Federal Court of Justice also found the extraction and re-utilisation of phone book data to be an unfair competitive practice. The court based this firstly on the undue exploitation of the reputation of the Telekom phone books by the competitor, since consumers associated certain qualities, such as accuracy and comprehensiveness, with the data from the "official" books.¹⁵⁶ Moreover,

¹⁵³ See *Henning-Bodewig*, International Handbook on Unfair Competition, § 11 France, § 12 Germany, § 18 Netherlands, § 19 Poland, § 21 Spain, § 25 United Kingdom.

¹⁵⁴ *Supra D*.

¹⁵⁵ German Federal Court of Justice *Gewerblicher Rechtsschutz und Urheberrecht* 1999, 923 – *Tele-Info-CD*.

¹⁵⁶ German Federal Court of Justice *Gewerblicher Rechtsschutz und Urheberrecht* 1999, 923, 927 – *Tele-Info-CD*.

the fact that the competitor free-rode on the substantial investments in the telephone books was put forward as an additional argument in favour of finding for the plaintiff.¹⁵⁷

It is highly questionable whether these arguments could be applied to a theoretical EURHISFIRM case. An exploitation of reputation would firstly require consumers to associate reputation, and thus any type of quality, with the long-term firm data extracted and re-utilised in the EURHISFIRM database. Since the database should not resemble any other database in terms of overall look or presentation of data, this quality cannot be associated with the presentation of the data but rather has to be associated with the data itself. In the “Tele-Info-CD” decision, that was the case because consumers could rightfully assume that the phone data on the CDs were taken from the “official”, reliable books. It is difficult to even imagine that users of the EURHISFIRM database would assume that certain firm data were taken from a particularly trustworthy source whose reputation they falsely associate with EURHISFIRM. Moreover, EURHISFIRM intends to build a multi-national historic firm database, i.e. a product that does not yet exist, and a new service cannot be considered a slavish imitation.

What is more, even if the EURHISFIRM database is operated over the long run on the basis of user fees, its main aim will remain scientific in kind. As long as the database is not turned into a for-profit enterprise, unfair competition law has to reflect that copyright law specifically permits scientific text and data mining, even if that includes the extraction and re-utilisation of complete, up-to-date electronic databases, provided that EURHISFIRM actors had lawful access to these sources.¹⁵⁸ In our view, national unfair competition laws must not prohibit a conduct that mandatory EU copyright directives expressly allow. In the end, “free-riding” on investments of other database makers is exactly what the EU Database Directive aims to prevent with the sui generis right. And that special regime takes precedence over general unfair competition laws of EU Member States. While Art. 13 Database Directive explicitly states that the directive is without prejudice to provisions concerning, amongst other things but in particular, unfair competition, Recital 47 sets out that the “protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value” – like the unique EURHISFIRM database covering seven European countries.

6.4. Protection of Trade Secrets

Historically, the protection of trade secrets has often been considered as an integral part of unfair competition law. The EURHISFIRM project, however, does not raise problems in that regard because the source materials are either publicly accessible or otherwise lawfully acquired and thus do not constitute “trade secrets” in the sense of Art. 2(1)(a) Trade Secret Directive.

6.5. Conclusion

If the EURHISFIRM database is completely publicly funded and operated in an open-access mode, it is a purely scientific activity not subject to unfair competition law in the first place.

¹⁵⁷ Ibid.

¹⁵⁸ Supra B.III.1.

- ▶ If the EURHISFIRM database is operated in the long run based on users' fees, unfair competition law is applicable, even if all proceeds are re-invested in the database.
- ▶ A violation of unfair competition laws, however, remains even theoretically a remote risk. The main reason is that as long and in so far as EURHISFIRM is in compliance with EU copyright law and in particular the sui generis right in databases, such conduct cannot at the same time be considered unfair competition under national law. To be sure, false and otherwise deceptive statements about this or any other database have to be avoided.



7. Trade Mark and Design Rights

Copyright and related rights are the most relevant intellectual property rights for the EURHISFIRM database project. Source materials might, however, also contain protected corporate logos or signs, which may be protected by trade mark and/or design rights. In the following, we will briefly explain why there is nevertheless no conflict between the EURHISFIRM database project and such industrial property rights.

7.1. Trade Mark Rights

The protection of trade marks only extends to the use of the protected sign (or similar signs) in the course of trade in relation to goods or services.¹⁵⁹ This, however, is not the case with regard to EURHISFIRM.

Firstly, if the database is offered free of charge as an open-access offering financed by public funding, EURHISFIRM does not act in the course of trade.¹⁶⁰ Secondly, even if a fee is charged for accessing and using the database, any trade mark-protected signs will not be used in relation to a service offered by EURHISFIRM, but only referenced as data contained in the database. Just as newspapers or yearbooks do not have to ask for permission to mention the name of a product or the name of a company, the provider of a database collecting historical firm data also does not need to do so. Protected trade marks may be used without authorisation for the purpose of identifying or referring to products as those of the proprietor of that trade mark.¹⁶¹ The use of word marks and other protected signs in a firm database actually only makes sense as long as their use identifies the proprietor of the trade mark or refers to goods and services as those of the proprietor. Hence, the extracted signs will not be used in relation to goods or services in the sense that they mark and identify third party goods or services.

The only circumstance in which trade mark claims might theoretically arise is where the reproduction or display of the trade mark in the database gives the impression that it constitutes a generic name of the goods or services for which the trade mark is registered. In this case the proprietor of the registered trade mark can demand that the publisher of the reference work ensure that the reproduction of the trade mark in the next edition of the publication at the latest is accompanied by an indication that it is a registered trade mark.¹⁶²

7.2. Design Rights

Design rights also do not pose a legal risk for the database project. Even if the source materials contained some firm logos which were protected as designs, the exclusive right to use the design¹⁶³ could not be exercised in respect of acts of reproduction for the purpose of making citations or of teaching, provided that such acts are compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design, and that mention is made of the source.¹⁶⁴ While the term “citation” might be considered unclear when referring to designs, the intended meaning of this exception becomes evident in light of the French and Dutch wordings of the EU Design Directive and Design Regulation, “illustration” and

¹⁵⁹ Art. 10(2) Trade Mark Directive/Art. 9(2) Trade Mark Regulation.

¹⁶⁰ Supra F.I. in the context of unfair competition law.

¹⁶¹ Art. 14(1)(c) Trade Mark Directive/Trade Mark Regulation.

¹⁶² Art. 12 Trade Mark Directive/Trade Mark Regulation.

¹⁶³ Pursuant to Art. 12(1) Design Directive/Art. 19(1) Community Design Regulation.

¹⁶⁴ Art. 13(1)(c) Design Directive/Art. 20(1)(c) Community Design Regulation.

“illustratie,” respectively. Thus, design protection cannot be enforced against uses of a design as an explanation, proof or illustration of facts.¹⁶⁵ This is, however, what the EURHISFIRM database achieves. It uses and displays protected designs in order to explain and illustrate certain economic facts. Such scientific communication does not violate design rights.

¹⁶⁵ See CJEU ECLI:EU:C:2017:724, paras. 76-77 – Nintendo/BigBen.

8. Protection of the EURHISFIRM Database

Because all the principles of database protection have already been set out above under C. and D., the report will only briefly take a look at the protection of the final EURHISFIRM database itself.

Quite obviously, the final EURHISFIRM database will constitute a collection of data “arranged in a systematic or methodical way and individually accessible by electronic or other means” and thus a “database” in the sense of Art. 1(2) Database Directive.

Whether or not there will be a copyright in the final database is hard to evaluate at this point, because the database is far from finished. The requirement for such a copyright protection would be that the selection and/or arrangement of the data contained in the database constitute an author’s own intellectual creation pursuant to Art. 3(1) Database Directive. If completeness is the main factor in terms of data selection, and the data arrangement primarily aims at efficiency and accessibility of the database, creative choices will be difficult to establish. In any case, copyrights in the data selection and arrangement would arise with individual authors and not EURHISFIRM consortium partners or a separate EURHISFIRM entity. It could thus be advisable set up a licensing practice according to which the researchers who decide on the selection and arrangement of the data grant an exclusive licence in any database copyright they might acquire to a future EURHISFIRM entity. Otherwise, those rights will in principle remain with the researchers, and any future operator of the database would have to argue that an implied licence was granted. Such licence would most likely not cover a for-profit scenario.

In any case, the EURHISFIRM database will be protected under the sui generis right regime of the Database Directive, for the investments in the obtaining, the verification and also in the presentation of the data are and will continue to be very substantial. It is, however, unclear which legal entity can be considered the person who takes the initiative and the risk of investing in the database, i.e. the database maker.¹⁶⁶ In that regard, the H2020 grant agreement might contain relevant presumptions as to who the database maker is.

Finally, the database website might be accompanied by explanatory texts and illustrations. These supplementary materials will likely fulfil the requirements for copyright protection of original works. Again, those rights vest with the authors of the texts etc. The establishment of a licensing mechanism should be considered to make sure that the operator of the EURHISFIRM database acquires all necessary rights.

¹⁶⁶ Recital (41) Database Directive.



9. Executive Summary

9.1. Potentially Relevant Intellectual Property Rights

Depending on the source materials covered, the EURHISFIRM project can possibly be affected by the following intellectual property rights and unfair competition claims:

9.1.1. Copyright in literary and artistic works (EU + UK)

Typical EURHISFIRM source materials that fulfil the requirements of copyright protection are entries in handbooks and newspaper articles of some length and complexity in expression. Raw data, their routine presentation and short text excerpts formulated in technical, purpose-oriented language do not qualify for copyright protection.

Even if source materials comprise copyrightable expressions, copyright expires 70 years after the death of the named author or 70 years after the publication of anonymous texts. Thus, source material created by authors who died in 1949 or earlier, or source material published anonymously 1949 or earlier is in the public domain. It may be used for any lawful purpose, including commercially.

9.1.2. Copyright in databases (EU + UK)

EURHISFIRM covers many source databases. But only collections that constitute, by reason of the creative selection or arrangement of their contents, the editor's own intellectual creation, qualify for protection under copyright. Most of the source databases used in the EURHISFIRM project do not meet this threshold, with newspapers as the most notable exception.

The term of protection of any original database reproduced lapses 70 years after the death of the editor or, in the case of anonymous databases, 70 years after publication. Even if EURHISFIRM covers still-protected source databases, the rights of the editor only extend to the reproduction of the specific selection or arrangement, i.e. the structure of the database as such, not to the copying of individual data.

9.1.3. Sui generis right in databases (EU + UK)

The sui generis right in databases protects substantial investments in the obtaining, verification or presentation of data. It is thus of particular relevance for all databases that aim at comprehensiveness. EURHISFIRM covers many source databases with this purpose.

The right is, nevertheless, of very limited relevance for EURHISFIRM because databases published before 1 January 2005 have either never been protected by the sui generis right or the respective rights have lapsed. Subject to a copyright protection of their contents or an original selection or arrangement of data, databases published in 2004 or earlier may thus be covered by the EURHISFIRM project, including even for commercial purposes.

9.1.4. Related rights in simple photographs (Germany)

The source materials used in the EURHISFIRM project also include reprints of original, out-of-commerce books. Technically speaking, these reprints are photographs of other artefacts. They thus theoretically qualify for protection under a related right in simple photographs, available inter alia in Germany. In our



view, there is, however, only a limited risk of violating these rights. The reason is that the German Federal Court of Justice requires that even simple photographs involve a minimum of personal intellectual effort. This threshold is not met in the case of digitising printed books.

Moreover, rights in simple photographs expire 50 years after the photograph was communicated to the public or otherwise released. Thus, rights in reprints can only be brought forward against EURHISFIRM if these were published in 1970 or later.

9.1.5. Copyright in typographical arrangements (UK)

UK copyright law grants publishers of editions an exclusive right in the typographical arrangement against facsimile copies of that arrangement. Facsimile copies of e.g. newspapers are, however, only produced by scanning the original. Any reproductions of source materials by and after normalising the source via OCR technologies is thus beyond the scope of that right in the first place.

Moreover, the right in typographical arrangements of e.g. a newspaper lapses 25 years after publication. Thus, editions published until 31 December 1994 may be safely used, even for commercial purposes.

9.1.6. Trade Mark and Design Rights

Even if source materials contain protected trade marks, trade names (company names) and designs (e.g. logos), these rights do not pose a legal risk for the EURISFIRM database project. Firstly, if the database is offered free of charge as an open-access offering financed by public funding, EURHISFIRM does not act in the course of trade and is thus outside the scope of trade mark and design law in the first place. Secondly, trade mark law allows the use of trade marks for the purpose of simply referring to the owner, and design law allows the citation of protected designs in order to illustrate something. This is exactly what the EURHISFIRM database aims at.

9.1.7. Unfair competition

If the EURHISFIRM database is completely publicly funded and operated in an open-access mode, it is a purely scientific activity not subject to unfair competition law in the first place. If, instead, the EURHISFIRM database is operated in the long run based on user fees, unfair competition law is applicable, even if all proceeds are re-invested in the database.

A violation of unfair competition laws remains, however, even theoretically a remote risk. Firstly, EURHISFIRM as a whole is not a “replica” of any existing database. Secondly, as long and in so far as EURHISFIRM is in compliance with EU copyright law, such permissible conduct cannot at the same time be considered unfair competition under national law. In any event, false and otherwise deceptive statements about this or any other database have to be avoided.

9.1.8. Conclusion

In sum, intellectual property rights only affect the following categories of source materials:

- ▶ Handbooks, newspapers and similar content displaying a minimum of creative effort published anonymously since 1 January 1950 or by named authors who died on or after 1 January 1950.



- ▶ Source databases with creatively selected or arranged content published anonymously during the period since 1 January 1950 or by named editors who died on or after 1 January 1950.
- ▶ Other source databases published on or after 1 January 2005.

All other source materials are in the public domain. They may therefore be reproduced and made available to the public even for commercial purposes.

9.2. Legality of Non-Commercial Text and Data Mining for Scientific Purposes

Any source material still protected by copyright in literary or other creative works, by copyright in databases or by the sui generis right in databases may be reproduced (copied) without authorisation from the respective rightholders on the basis of statutory limitations and exceptions to those rights.

The most important provision for EURHISFIRM is Art. 3 Digital Single Market Directive, which has to be transposed into the laws of EU Member States by 7 June 2021. Under this provision, research organisations like the EURHISFIRM consortium members may carry out, for the purposes of scientific research, text and data mining of protected works or other subject matter to which they have lawful access. Thus, source materials available in public libraries or lawfully acquired may be digitised and integrated into the EURHISFIRM database. The respective corpus may be retained for the purposes of scientific research, including for the verification of research results.

Art. 4 Digital Single Market Directive even legalises commercial text and data mining projects. It is, however, unclear whether and under which conditions this provision is applicable to source material that was published before the enactment of the Directive.

9.3. Limits: EURHISFIRM as a For-Profit Enterprise and the Making Available of Protected Source Materials

We therefore caution against developing EURHISFIRM into a for-profit enterprise. The maximum type of monetisation of the database permissible under EU copyright is a use fee that is, however, completely reinvested in the database.

Even if EURHISFIRM remains a non-commercial, scientific text and data mining project, protected source materials must not be made available to the public via the EURHISFIRM database. Thus, handbooks, newspapers and protected parts of such source materials such as complete entries in handbooks or newspaper articles must not be accessible for users of the database. Only raw data and very short excerpts may be displayed.

9.4. Public Domain Source Materials

The limitations mentioned above do not apply to public domain source materials such as stock certificates, stock market and quotation lists and other non-creative collections of economic data published before 1 January 2005. This rich body of information may also be integrated into a for-profit database, and it may be made available to its users.



10. Most Relevant Legal Provisions

British Copyright, Designs and Patents Act

Section 1: “(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work— [...] (c) the typographical arrangement of published editions.”

Section 8: “(1) In this Part “published edition”, in the context of copyright in the typographical arrangement of a published edition, means a published edition of the whole or any part of one or more literary, dramatic or musical works.

(2) Copyright does not subsist in the typographical arrangement of a published edition if, or to the extent that, it reproduces the typographical arrangement of a previous edition.”

Section: 15: “Copyright in the typographical arrangement of a published edition expires at the end of the period of 25 years from the end of the calendar year in which the edition was first published.”

Section 29: “(1) Fair dealing with a work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise. [...]”

Section 29A: “(1) The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—

(a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and

(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(2) Where a copy of a work has been made under this section, copyright in the work is infringed if—

(a) the copy is transferred to any other person, except where the transfer is authorised by the copyright owner, or

(b) the copy is used for any purpose other than that mentioned in subsection (1)(a), except where the use is authorised by the copyright owner. [...]”

German Copyright Act

Section 60c: “(1) Up to 15 per cent of a work may be reproduced, distributed and made available to the public for the purpose of non-commercial scientific research

1. for a specifically limited circle of persons for their personal scientific research and

2. for individual third persons insofar as this serves the monitoring of the quality of scientific research. [...]

(3) In derogation from subsections (1) and (2), full use may be made of illustrations, isolated articles from the same professional or scientific journal, other small-scale works and out-of-commerce works. [...]"

Section 60d: "(1) In order to enable the automatic analysis of large numbers of works (source material) for scientific research, it shall be permissible

1. to reproduce the source material, including automatically and systematically, in order to create, particularly by means of normalisation, structuring and categorisation, a corpus which can be analysed and

2. to make the corpus available to the public for a specifically limited circle of persons for their joint scientific research, as well as to individual third persons for the purpose of monitoring the quality of scientific research.

In such cases, the user may only pursue non-commercial purposes. [...]

(3) Once the research work has been completed, the corpus and the reproductions of the source material shall be deleted; they may no longer be made available to the public. It shall, however, be permissible to transmit the corpus and the reproductions of the source material to the institutions referred to in sections 60e and 60f for the purpose of long-term storage."

Section 72: "(1) The provisions of Part 1 applicable to photographic works shall apply mutatis mutandis to photographs and products manufactured in a similar manner to photographs."

Database Directive

Article 1: "[...] (2) For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

(3) Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means."

Article 3: "(1) In accordance with this 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.

(2) The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves."

Article 4: "(1) 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. [...]

(3) In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly."

Article 6: “(1) 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 normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

(2) Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases: [...] (b) where there is use for the sole purpose 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 [, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council]*; [...]

(3) In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.”

Article 7: “(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 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-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. 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;”

Article 8: “(1) 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-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

(2) A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

(3) A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.”

* As amended by the Digital Single Market Directive.

Article 9: “Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: [...] (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; [...]”

Article 10: “(1) The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.

(2) In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.

(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.”

Digital Single Market Directive

Article 2: “For the purposes of this Directive, the following definitions apply:

(1) ‘research organisation’ means a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research:

(a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or

(b) pursuant to a public interest mission recognised by a Member State;

in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation;

(2) ‘text and data mining’ means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations;

(3) ‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution; [...]”

Article 3: “(1) Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order



to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

(2) Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.

(3) Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective. [...]"

Section 4: "(1) Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.

(2) Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.

(3) The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

(4) This Article shall not affect the application of Article 3 of this Directive."

Information Society Directive

Article 2: "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: (a) for authors, of their works; [...]"

Article 3: "(1) Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. [...]"

(3) The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article."

Section 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

(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.

(2) Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: [...] (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage; [...]

(3) Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved; [...]

(4) Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

(5) The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Term Directive

Article 1: "(1) The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.

(2) In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.

(3) In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.

(4) Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply.

(5) Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.



(6) In the case of works for which the term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.”

Article 8: “The terms laid down in this Directive shall be calculated from the first day of January of the year following the event which gives rise to them.”



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