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RESEARCH HANDBOOKS IN INTELLECTUAL PROPERTY

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4 Can and should misappropriation also protect databases? A comparative approach

*Estelle Derclaye*¹

Introduction

Article 13 of the Database Directive² provides that

[t]he Directive shall be without prejudice to provisions concerning in particular . . . unfair competition. . . .

It therefore allows Member States to protect databases by unfair competition law in addition to the *sui generis* right. In other words, database producers can protect their databases by the *sui generis* right and unfair competition simultaneously if their national laws allow it. This chapter aims at discovering whether this additional protection against unfair competition over-protects databases and if it does, remedies are suggested. It is concerned only with the database right, which protects the investment in collecting, verifying or presenting data, and not copyright, which protects the structure of the database. Over-protection exists when the same subject-matter (here investment in databases) is protected more than once by similar types of protection at the same time. I call this type of over-protection ‘simultaneous over-protection’.³ It is against the intellectual property paradigm that an effort be rewarded twice. More protection leads to rent-seeking and all the negative effects of monopolies. Over-protection must therefore be avoided. This chapter examines the protection of databases against parasitism.⁴ Unfair competition acts

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² Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L77/20, 27.03.1996 (‘the Directive’).

³ Two other types also exist. There is *a posteriori* over-protection if the intellectual property protection has expired but the database can still be protected against parasitism and there is negative over-protection when no intellectual property protection is available at all but the action for parasitism is. These are examined in the author’s thesis (2008), *The Legal Protection of Databases: A Comparative Analysis*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.

⁴ The terms, the ‘theory of parasitism’, ‘tort of parasitism’ and ‘parasitism’ will be used interchangeably. Parasitism is also commonly known as slavish imitation, slavish copying or misappropriation depending on the country. For the purposes of this

other than parasitism, such as disparagement, trade secret protection or misleading advertising, are not aimed at protecting investment but at protecting reputation, secrecy or guarding against false allegations. Thus, there is no cumulation as the subject-matters protected under the two laws are different. Unfair competition law is not harmonised in Europe. Therefore, national laws must be reviewed. Analysis of the law of a few Member States is sufficient to prove there is, at least in some, over-protection. To this aim, the laws of the United Kingdom, Ireland, France and Belgium have been chosen.

Before tackling the issue of simultaneous over-protection, a broad overview of the unfair competition legal framework in Europe is in order.

1. Unfair competition in Europe

Unfair competition in the European Union remains largely unharmonised.⁵ So far only two acts of unfair competition, namely misleading and comparative advertising, have been harmonised.⁶ Despite this lack of harmonisation, each Member State must comply with articles 1–12 and 19 of the 1967 version of the Paris Convention for the Protection of Industrial Property of 1883 as required by article 2 of TRIPs.⁷ Article 10bis of the Paris Convention states:

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:

chapter, the word ‘parasitism’ will be chosen to refer to all these concepts because it is the term most used in France and Belgium.

⁵ Henning-Bodewig, F. and G. Schricker (2002), ‘New initiatives for the harmonisation of unfair competition law in Europe’, *EIPR* 271–2.

⁶ Council Directive 84/450/CEE of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L250/17, 19.09.1984 and Directive 97/55/EC of Parliament and Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ L290/18, 23.10.1997. See also the regulation of advertising in Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L298, 17.10.1989, p. 23. See also G. Schricker (1991), ‘European harmonisation of unfair competition law – a futile venture’, *IIC* 788; Henning-Bodewig and Schricker, above fn. 5, pp. 271–2.

⁷ TRIPs has no special section on unfair competition and it refers to it only in places, namely in article 39 on the protection of undisclosed information and article 22.2.b in the section on geographical indications.

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Parasitism is not mentioned in the illustrative list of article 10bis(3).⁸ It can only be prohibited under article 10bis(2). However, there is no further definition of what is an act of unfair competition beyond an act contrary to honest practices in industrial or commercial matters. Therefore, the Convention does not force Member countries to prohibit parasitism. Since there is neither international nor European harmonisation of parasitism, it is still regulated on a purely national basis.

2. Misappropriation and parasitism

2.1. The United Kingdom and Ireland

The legal concepts of unfair competition and of parasitism do not exist in the United Kingdom. Despite the obligation under article 10bis of the Paris Convention⁹ and calls by many authors for a law against unfair competition,¹⁰ the United Kingdom has continually rejected the legal concept of unfair competition as such¹¹ as well as a general clause establishing a tort of unfair

⁸ J. Schmidt-Szalewski (1994), 'La distinction entre l'action en contrefaçon et l'action en concurrence déloyale dans la jurisprudence', *RTD Com.* 455, at 462.

⁹ It is arguable that the United Kingdom complies with article 10bis of the Paris Convention because it is unclear whether article 10 bis(2) requires acts other than those enumerated in article 10bis (3) to be considered unfair. See Robertson, Aidan and A. Horton (1995), 'Does the UK or the EC need an unfair competition law?' *EIPR* 568, at 572.

¹⁰ W. Cornish (1972), 'Unfair competition? A progress report', *Journal of the Society of Public Teachers of Law*, **12**, 126; G. Dworkin (1979), 'Unfair competition: is the common law developing a new tort?', *EIPR* 241; H. Brett (1979), 'Unfair competition – not merely an academic issue?', *EIPR* 295; P. Burns (1981), 'Unfair competition – a compelling need unmet', *EIPR* 311; A. Booy (1991), 'A half-way house for unfair competition in the United Kingdom – a practitioner's plea', *EIPR* 439; Robertson and Horton, above fn. 9, at 581–2.

¹¹ G. Schriccker (1995), '25 years of protection against unfair competition' *IIC* 782, at 785; Robertson and Horton above fn. 9, at 568 (during the passing of the Trade Mark Act 1994 there was lobbying for an unfair competition law but the government resisted it).

competition.¹² As a result, there is no statute on unfair competition, neither specific nor general.¹³ There is no general civil liability statutory provision as in France,¹⁴ but courts developed a series of different unfair competition torts to which they applied different rules, namely passing off, injurious falsehood, defamation, interference with contractual relations, interference with trade by unlawful means, deceit, conspiracy, intimidation and breach of confidence.¹⁵ English courts are conservative and are reluctant to create new causes of action,¹⁶ especially a general unfair competition cause of action,¹⁷ and still have not recognised a tort of misappropriation or parasitism.¹⁸ Therefore, in the United Kingdom, misappropriation as such is not unlawful.¹⁹ Passing off always requires a risk of confusion²⁰ and the other torts are not concerned with rendering copying *per se* illegal.

In conclusion, as there is no British tort of misappropriation, none of the issues addressed in this article occurs in the United Kingdom. The same is

¹² W. Cornish (1974), 'Unfair competition and the consumer in England', *IIC* 73, at 74; Dworkin above fn. 10, at 242; F. Beier (1985), 'The law of unfair competition in the European Community, its development and present status', *IIC* 139, at 156; Robertson and Horton, above fn. 9, at 568.

¹³ The only exception is misleading advertising which the United Kingdom had to implement due to the relevant European Directives, see *supra*.

¹⁴ See below section 2.2.1.

¹⁵ Burns above fn. 10, p. 311; Robertson and Horton above fn. 9, p. 568.

¹⁶ Burns above fn. 10, p. 311; Cornish, William and David Llewelyn (2003), *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 5th edn, London: Sweet & Maxwell, p. 18, nn. 1–22. Courts believe this power belongs exclusively to Parliament.

¹⁷ G. Dworkin (2004), 'Unfair competition: is it time for European harmonisation?', in D. Vaver and L. Bently (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, Cambridge: Cambridge University Press, 175, at 177.

¹⁸ An attempt to establish a general tort of unfair competition and misappropriation was killed off by the Privy Council in the *Cadbury Schweppes Pty Ltd v Pub Squash Pty Ltd* [1981] 1 All ER 213, commented on by G. Dworkin (1981), 'Passing off and unfair competition and opportunity missed', *MLR*, 564, pp. 566–7. The defendant had reaped where she had not sown but there was no misrepresentation. The court stuck to the strict conditions of passing off and the claimant lost. The Privy Council (per Lord Scarman) refused to create a tort of misappropriation because it encountered criticism in the United States and Australia. Lord Scarman also emphasised the need to preserve the freedom to compete: 'A defendant, however, does no wrong by entering a market created by another and there competing with its creator. The line may be difficult to draw; but unless it is drawn, competition will be stifled.'

¹⁹ J. Adams (1992), 'Unfair competition: why a need is unmet', *EIPR* 259, at 260.

²⁰ Robertson and Horton, above fn. 9, at 569; Adams, above fn. 19, at 259; Beier, above fn. 12, at 156; S. Byrt (2003), 'Le *passing-off* au Royaume-Uni: des léçons a tirer?', 213 *RIPIA* 55, n. 213.

valid for Ireland, another country where parasitism is absent.²¹ In other words, in those two countries, unfair competition law does not over-protect databases which are protected by the *sui generis* right.

2.2. France

This section examines the legal basis of the protection against parasitism and states under which conditions courts found copying another's creation unlawful. It does not aim at retracing in detail the history of the notion nor of the case law²² but only to give a picture of protection against parasitism as it currently stands in France. This is sufficient to determine whether French law against parasitism over-protects databases.

2.2.1. Legal basis French unfair competition law is based on the principle of the freedom to copy. This principle dates back to the Decret d'Allarde of 2–17 March 1791²³ which provides for the principle of freedom of commerce and industry. According to this principle, undertakings are free to compete and the competitive prejudice is normally lawful. Thus, every competitor has the right to attract the customers of her competitors. The corollary of this principle is that everyone is free to sell similar or even identical products. As far as intellectual products are concerned, it means that everyone is free to copy or imitate another's creation.²⁴ This is not illegal *per se*. This principle is affirmed by courts and the vast majority of commentators.²⁵ The principle is

²¹ M. Davison (2003), *The Legal Protection of Databases*, Cambridge: Cambridge University Press, p. 127.

²² For more detail, see e.g. J. Passa (1997), *Contrefaçon et concurrence déloyale*, Publications de l'IRPI no. 15, Paris: Litec; M. Buydens, *La protection de la quasi-creation*, Larcier: Bruxelles, 1993.

²³ Also known as Loi Le Chapelier. P. De Candé (2004), 'L'action en concurrence déloyale est-elle menacée par l'évolution du droit de la propriété intellectuelle?', *Prop. Int.*, p. 492; Passa, above fn. 22, at 13.

²⁴ A. Puttemans (2000), *Droits intellectuels et concurrence déloyale*, Bruxelles: Bruylant, p. 234; Buydens above fn. 22, p. 678.

²⁵ E. Golaz (1992), *L'imitation servile des produits et de leur présentation, étude comparée des droits français, allemand, belge et suisse*, Genève: Droz, p. 105; J.-J. Burst (1993), *Concurrence déloyale et parasitisme*, Paris: Dalloz, p. 1; Buydens, above fn. 22, at 655, 677, 683; M. Buydens (1993), 'La sanction de la "piraterie de produits" par le droit de la concurrence déloyale', *Journal des Tribunaux* 117, at 119, 123, fnn. 22 and 23; Passa, above fn. 22, at p. 13; M.-L. Izorche (1998), 'Les fondements de la sanction de la concurrence déloyale et du parasitisme', 51(1) *RTD Com.* 17, at 19; A. Bertrand (1998), *Le droit français de la concurrence déloyale*, Paris: Cedat, pp. 16 ff.; De Candé (2004), at fn. 23 above, including the authors and decisions cited by all. *Contra*: P. Le Tourneau (2000), 'Retour sur le parasitisme', *Dalloz*, Chronique, 403, at 405 (the simple parasitic copy of another's work with an interested goal is a breach).

also called the principle of pre-emption. It means that competition is free and that limitations on competition can be set only by Parliament.²⁶

The principle of the freedom to copy is subject to two exceptions. First, the legislature can grant certain intellectual property rights to certain deserving creations. In this case, copying is no longer free but is an infringement of the right holder's exclusive right. Second, courts declared certain types of copying contrary to honest practices in commercial matters on the basis of unfair competition law.

French unfair competition law (*concurrence déloyale*) is based on civil liability, i.e. on article 1382 of the Civil Code ('CC').²⁷ The three requirements of any civil liability action (breach (*faute*²⁸), damage and causal link) must therefore be proven to establish that an act of unfair competition occurred. Several acts of unfair competition are prohibited by courts on this basis, including parasitism.

2.2.2. *The concept of parasitism and conditions of application* Parasitism occurs when a third party, without incurring any expenditure, uses the fruit of the efforts made by another by following in her wake. The copied creation must not be banal, nor be a necessary and functional form.²⁹ Only the copying of 'arbitrary' forms is parasitic. In other words, it is the act of copying another's creation, even if the copy is not slavish,³⁰ and does not create a risk

²⁶ A. Kamperman Sanders (1997), *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity*, Oxford: Clarendon Press, p. 11.

²⁷ Golaz above fn. 25, at 60–1.

²⁸ The main element of the tort is that there must be a 'faute'. This corresponds to the breach of the duty of care in the British tort of negligence. The term 'breach' will be used to designate the *faute*.

²⁹ Buydens above fn. 22, at 707, 721; Passa above fn. 22, at 272; Schmidt-Szalewski above fn. 8, at 466–7.

³⁰ The act of copying another's creation is also referred to as slavish or quasi-slavish copying. Slavish or quasi-slavish copies are simply identical or quasi-identical copies of another person's creation unprotected by an intellectual property right. Passa, above fn. 22, at 242. *Contra*: Strowel, A. and J.-P. Triaille (1993), 'De l'équilibre entre le droit de la concurrence et la propriété intellectuelle. A propos de la proposition de loi Godfrain sur les "créations réservées"' 2 *DIT* 25, at 26 (slavish copies are those which create a risk of confusion). The notion of parasitism requires the avoidance of efforts and does not require that the copy be slavish or quasi-slavish, although it will generally be the case. Y. Saint-Gal (1956), 'Concurrence parasitaire ou agissements parasitaires', *RIPIA* 37. It is not the slavish character of the copy which constitutes the breach; the breach is the avoidance of efforts. Passa, above fn. 22, at 249 ff.; Izorche above fn. 25 and decisions cited. However, generally, when one slavishly or quasi-slavishly copies something, she inevitably always avoids effort. Slavish copying therefore always has as a consequence that the copying product will be cheaper since the copier

of confusion, by which someone (the parasite) benefits unduly from the creation, efforts, investment or know-how of another person without herself making any such efforts and thereby saving the costs necessary in the creation of the original product.³¹ It can now be understood why courts called the tort ‘parasitism’; the copier acts like a parasite, nourishing herself upon the efforts of another person without making any effort herself.³² However, the Court of Cassation has sometimes ruled that it is not necessary for the victim of parasitism to prove she made efforts or investments.³³ The notion of parasitism encompasses parasitic competition (*concurrency parasitaire*) and parasitic acts (*actes parasitaires*). The difference between the two is that in the first case, the two parties are in competition with one another and in the second, they are not.

As parasitism is based on civil liability, to win the action, breach, damage and causal link must be proven. However, courts interpreted those requirements very loosely over the years. This has had the effect that there is no need to prove any of these three requirements to win the action.³⁴ The breach is the proof of parasitism. As has been seen above, in some cases it is not even necessary to prove avoidance of efforts. Proof of copying will be sufficient. As to damage, courts generally infer it from the breach itself. It generally consists in the vague notion of ‘commercial turmoil’³⁵ or can simply be a

by definition always avoids the research and presentation costs. Parasitism and slavish copying can therefore be said to be synonyms or quasi-synonyms. Consequently, I will refer to parasitism only and this will encompass slavish and quasi-slavish copying.

³¹ E.g. Puttemans above fn. 24, at 236; Golaz above fn. 25, at 228. There are two notions of parasitism, a broad one (parasitism exists if the copied creation necessitated some effort or investment) and a narrow one (parasitism exists only if the copied creation necessitated important efforts). See e.g. M. Malaurie-Vignal (1996), ‘Le parasitisme des investissements et du travail d’autrui’, *Dalloz* 177, at 180.

³² Sometimes parasitism is also referred to as ‘economic parasitism’ to distinguish it from parasitism occurring in nature. The term ‘parasitism’ will be used to describe economic parasitism.

³³ Contrast Cass. com., 26.01.1999 [2000] *D.*, Jurisp. 87, cited by P. Le Tourneau (2001), ‘Folles idées sur les idées’ *CCE*, Chronique no. 4, 8, at 12; Cass. com., 30.01.2001, *D.*, 2001, n. 24, p. 1939, *Bull. Civ. IV*, 27; JCP G 2001, I, 340, nn. 29 comment by Viney; *D.* 2001, Jurisp. 1939, comment by Le Tourneau; *Prop. Int.* 2002, n. 3, p. 101, comment by Passa with Cass. com., 20.05.2003, case no. 01–11212, available on www.legifrance.gouv.fr cited by J. Passa (2003), ‘Responsabilité civile – concurrence’ *Prop. Int.* 448–9 (claimants have to establish the amount of investment necessary for a product to be copied and show to what extent litigious behaviour allows them to benefit from it).

³⁴ Golaz, above fn. 25, p. 64.

³⁵ See e.g. Cass. com., 22.02.2000 [2000] CCC, com. 81, comment of Malaurie-Vignal; Cass. com., 25.04.2001 [2001] *PIBD* 726, III, 451; *Guerlais v Tillaud Boisouvres*, Cass. com., 01.07.2003, Juris-data no. 2003–019892, cited by J. Schmidt-Szalewski,

moral prejudice.³⁶ It is not necessary to prove a loss of turnover or of clients,³⁷ unless the creator seeks damages.³⁸ In addition, it is possible to take legal action while the damage has not yet happened (i.e. when the parasite is just attempting to commit the act of unfair competition) to prevent it from happening.³⁹ As far as causation is concerned, as unfair competition acts do not always lead to a decreased turnover, courts are flexible on the certainty of the causation and often skip the requirement altogether.⁴⁰

As can now be seen, the conditions of the action against parasitism are very lenient. Proof of copying is often sufficient to have the copying stopped. Because in practice damage and causation need not be established, the action is used more usually to stop the behaviour complained of⁴¹ and has come to resemble a restrictive injunction or cease and desist order.

2.2.3. The case law How is protection against parasitism received by French courts now? The case law of the Court of Cassation is unclear. As the highest court's case law does not give guidance, the whole French case law is unsettled.

The Court of Cassation continually contradicts itself. Generally, it is clearly in favour of the tort of parasitism.⁴² Thus, it is unlawful to reproduce a

Comment, *Propriété industrielle*, November 2003, 29; Golaz, above fn. 25, p. 64; M.-L. Izorche, 'Concurrence déloyale et parasitisme économique', in Y. Serra (2001), *La concurrence déloyale, Permanence et devenir*, Paris: Dalloz, 27, at 31–2.

³⁶ Cass. 22.05.2002, case no. 99–21579, available on www.legifrance.gouv.fr, cited by J. Passa (2003), 'Responsabilité civile – concurrence', *Prop. Int.* 84, at 85.

³⁷ Cass. com., 22.10.1985, *Bull. Civ. IV*, no. 245. See also J. Passa, 'Responsabilité civile – distribution' [2002] *Prop. Int.* 100.

³⁸ Cass. com., 16.01.2001 [2001] CCC, com. 59, comment of Malaurie-Vignal, cited by J. Passa, above fn. 37, at 100.

³⁹ See e.g. P. Le Tourneau (2001), 'Le bon vent du parasitisme', *CCC*, January, 4–6, at 6.

⁴⁰ J.-M. Mousseron (1992), 'Entreprise: parasitisme et droit', *JCP E* 6, 14, at 24; Burst, above fn. 25, p. 182.

⁴¹ P. Roubier (1948), 'Théorie générale de l'action en concurrence déloyale', *Revue Trimestrielle de Droit Commercial*, 541, at 589; Golaz, above fn. 25, p. 63; Burst, above fn. 25, p. 154, 174 citing CA Douai, 21.12.1989 [1990] *PIBD* III, 316; Passa, above fn. 37, at 100 ff.

⁴² See e.g. Cass. com., 21.06.1994 [1994] *PIBD*, III, 514 cited by Passa, above fn. 25, p. 273; Cass. com., 27.06.1995 [1995] *RJDA*, p. 1129 (parasitism does not require proof of confusion) cited by Malaurie-Vignal, above fn. 31, at 181; Cass. com., 26.01.1999 [2000] *D.*, Jurisp. 87, cited by Le Tourneau, above fn. 33, at 12; Cass. com., 30.01.2001, *D.*, 2001, no. 24, p. 1939, comment of Le Tourneau; *Bull. Civ. IV*, 27; *JCP G* 2001, I, 340, n. 29, comment by Viney; *Prop. Int.* 2002, p. 101, comment by Passa (plagiarism of a catalogue); Cass. com., 27.03.2001 [2001] CCC, n. 123, p. 4, comment by Malaurie; *PIBD* 725, III, 408; Passa, above fn. 36, pp. 100 ff.; Cass. 15.01.2002,

creation (e.g. a catalogue, a trade mark) even if this reproduction does not entail a risk of confusion. The position of the Court recently, however, is that there is no parasitism when the copier herself also invested herself or has made some, even minor, differences to her product even if she copied to avoid effort.⁴³ On the other hand, in other decisions from the late 1990s to date, the Court did not accept that parasitism alone is an act of unfair competition; instead it required a risk of confusion.⁴⁴ And in two decisions of 2002, the Court held that it is not unlawful to sell products identical to those of another undertaking which are unprotected by an intellectual property right.⁴⁵ These decisions are difficult to reconcile with other decisions of the Court of the same period (2001–2003) which clearly favour the prevention of parasitism.⁴⁶ While the most recent decisions show that the Court seemingly prefers to keep the tort of parasitism alive, the current situation is unsettled as the Court has continually oscillated between the two positions over the last few years.

The vast majority of the decisions of the Courts of Appeal and of First Instance also favour of the tort of parasitism.⁴⁷ However, they remain split.

22.05.2002, 18.06.2002 and 08.10.2002, cited by J. Passa (2003), 'Responsabilité civile – concurrence', *Prop. Int.* 84, at 85; Cass. 08.07.2003, case no. 01-13293 cited by Passa, above fn. 32, at 448–9; Cass. com., 29.10.2003 [2004] *PIBD* 778, III, 47, cited by J. Passa (2004), 'Responsabilité civile – concurrence', *Prop. Int.* pp. 683 ff.; Cass. 01.07.03, case no. 01-00628, available on www.legifrance.gouv.fr.

⁴³ Cass. com., 18.06.2002 [2003] *PIBD* 755, III, 22 cited by J. Passa (2003), 'Responsabilité civile – concurrence', *Prop. Int.* 84, at 85; Cass. com., 17.12.2002 [2003] *PIBD* 764, III, 278, cited by J. Passa, above fn. 32, at 448–9. Thus the Court of Cassation limits the hypotheses of parasitism to pure slavish imitations. That was not the position of the previous case law. *Ibid.*

⁴⁴ Cass. com., 21.10.1997 [1998] *PIBD* 645, III, 21; Cass. com., 27.01.1998 [1998] *PIBD* 657, III, 362; Cass. com., 05.10.1999 [2000] *PIBD* 691, III, 75 cited by J. Passa (2000), 'Propos dissidents sur la sanction du parasitisme économique', *Dalloz Cah. Dr. Aff.*, Chronique, no. 25, 297, at 306; Cass. com., 16.01.2001 [2001] *Bull. Civ.*, IV, no. 13; *CCC*, Comm. 43, comment by Malaurie-Vignal; *JCP* IV 1421; Cass. com., 13.02.2001 [2001] *PIBD* 723, III, 354. See also Passa, above fn. 36, pp. 100ff.

⁴⁵ Cass. com., 18.06.2002 [2002] *PIBD* 754, III, 578, cited by Passa, above fn. 42, p. 684; *Distribution Casino France v Ratureau*, Cass. com., 09.07.2002 [2003] *CCC*, Jan. 2003, p. 11; *Prop. Int.* p. 82, comment by Passa.

⁴⁶ Above fn. 42–3.

⁴⁷ Golaz, above fn. 25, at 106; Passa, above fn. 22, at 267 ff.; Bertrand, above fn. 25, at 47 fn. 122 and 123; p. 48 fn. 124, and decisions cited. As far as databases are concerned, parasitism was found in two recent cases. *Edirom v Global Market Network*, T. Comm. Nanterre, 27.01.1998 [1999] *DIT*, 99/3, p. 42; [1998] *Expertises*, p. 149, comment by Ragueneau (act of posting paper database on the internet, performed before the entry into force of the Directive, is parasitic); *Tigest v Reed Exposition France et Salons Français et internationaux*, CA Paris, 12.09.2001, [2001] *Legipresse*, no. 187, Dec., pp. 215–25; [2001] *D.*, no. 35, p. 2895; [2002] *JCP*, no. 1, pp. 25–31, comment by Pollaud-Dulian; [2002] *PIBD* 740, III, 198–201; [2002] *RIDA*,

For instance, a section of the Paris Court of Appeal⁴⁸ as well as the Versailles Court of Appeal⁴⁹ firmly rejects the tort of parasitism and requires that a risk of confusion be present for an act of copying to be unlawful.

In conclusion, the situation in France is unclear. The Court of Cassation's most recent decisions condemn parasitism but in view of its other recent conflicting decisions, the status of the tort of parasitism is uncertain. Additionally, although the majority of the lower courts are in favour of preventing parasitism, they remain split. As France has a long tradition in favour of the prevention of parasitism, it is very likely that the tort is still alive.

2.3. *Belgium*

As for France, this section examines the legal basis of the tort of parasitism and its conditions in Belgium. It does not aim to retrace in detail the history of the notion nor of the case law⁵⁰ but only to give a picture of protection against parasitism as it currently stands in Belgium.

2.3.1. Legal basis Belgian unfair competition law is also based on the principle of the freedom to copy. This principle is also based on the French Decret d'Allarde, which is still applicable in Belgium⁵¹ and is indirectly consecrated in article 96 of the Lois sur les Pratiques du commerce et sur l'information et la protection du consommateur ('LPCC').⁵² This means that everyone is free to copy or imitate another's creation.⁵³ This principle of the freedom to copy is firmly affirmed by Belgian courts and literature.⁵⁴

no. 192, p. 433 affirming TGI Paris 22.06.1999 [1999] *PIBD* 686, III, 494; cited by J. Passa (2002), 'Responsabilité civile – concurrence', *Prop. Int.* 103, at 106 (acts of copying and marketing a paper database, performed before the entry into force of the Directive, are parasitic). Very few lower courts have rejected the tort of parasitism. See Passa, above fn. 22, pp. 58–9, 286, who identified only a couple of decisions.

⁴⁸ Passa, above fn. 44, at 306; Passa, above fn. 37, at 112–13; Passa, above fn. 33, at 448–9.

⁴⁹ Passa, above fn. 47, at 103; De Candé, above fn. 25, at 495, and decisions cited.

⁵⁰ For more detail, see e.g. Buydens, above fn. 22; Puttemans, above fn. 24.

⁵¹ Strowel and Triaille, above fn. 30, p. 26.

⁵² M.B. 29.08.1991; in force 29.02.1992 (Act on commercial practices and on information and the protection of the consumer). Buydens above fn. 22, p. 678.

⁵³ Puttemans above fn. 24, at 234; Buydens, above fn. 22, at 678; Buydens, above fn. 25, at 188.

⁵⁴ See for instance, Cass. 04.11.1954, *Ing.-Cons.*, 1954.249; Prés. Trib. Com. Brussels, 03.06.1970, *JCB* 1971, III, 413, note De Gryse; Trib. Com. Courtrai 30.03.1987, *Pratiques Commerciales*, 1987.I.291; CA Antwerp, 30.05.1988, *Rev. Dr. Com. Belge*, 1988.949; CA Brussels, 24.08.1995, unreported, cited by Van Bunnan, *Journal des Tribunaux*, 1997, p. 62; Prés. Trib. Com. Namur, 22.05.1996, *Journal des*

As in France, this principle suffers two exceptions. First, the legislator grants certain intellectual property rights to certain deserving creations. In this case, copying is no longer free but an infringement of the right holder's exclusive right. Second, courts have declared certain types of copying contrary to honest practices in commercial matters on the basis of unfair competition law. Like French unfair competition law, that of Belgium was initially based on article 1382 of the Civil Code ('CC').⁵⁵ However, the civil liability action soon proved unsuitable because it is slow and expensive, damage must be proved and stopping the behaviour preventively is not possible.⁵⁶ Therefore, in 1934, specific legislation was enacted to enable the injured competitor to get a restrictive injunction or cease and desist order (*action en cessation*).⁵⁷ The difference between the two actions is that the civil liability action requires proof of damage and cannot be used to put an end to the behaviour complained of while the *action en cessation* does not require proof of actual damage and allows the claimant to put an end to the behaviour. The 1934 legislation was replaced by an act of 1971 on trade practices.⁵⁸ This act abandoned the requirement of a competitive relationship between parties to a suit and also protected consumers' interests.⁵⁹ The act of 1971 was replaced by the current LPCC, which retains the same principles as the 1971 act. The central provision of the LPCC is article 93 which provides that '[a]ny act contrary to honest practices in commercial matters by which a trader prejudices or can prejudice the professional interests of one or several traders is forbidden'. There is no further definition so the number of acts which can be considered contrary to honest practices in commercial matters is potentially infinite and is determined by courts. Finally, the *action en cessation* has not replaced the civil liability action, so it remains possible to act under traditional civil liability.⁶⁰

2.3.2. *Case law* Parasitism was rarely considered unlawful until a decision of 1936.⁶¹ In that case, the court condemned the defendant for slavish copying

Tribunaux, 1997, p. 62, obs. L. Van Bunnem; CA Liège, 13.10.1998, *Rev. Dr. Com. Belge*, 1998/6, p. 410. Buydens, above fn. 25, at 119 and fn. 20 for further decisions and commentators; F. De Visscher (2003), 'L'action en concurrence déloyale comme moyen de protection en Belgique', *RIP/A*, no. 213, p. 51, at 52–3; Golaz, above fn. 25, p. 117; Passa, above fn. 44.

⁵⁵ Golaz, above fn. 25, at p. 68.

⁵⁶ Buydens, above fn. 22, at p. 656; Golaz, above fn. 25, at p. 68.

⁵⁷ Royal Decree no. 55 of 23 December 1934.

⁵⁸ Loi sur les pratiques du commerce of 14 July 1971, M.B. 30.07.1971, p. 9087.

⁵⁹ E. Ulmer (1973), 'Unfair competition law in the European Economic Community', *IIC* 188; Beier, above fn. 12, at p. 154.

⁶⁰ Golaz, above fn. 25, at p. 68; Buydens, above fn. 22, at pp. 656–7.

⁶¹ Buydens, above fn. 22, at p. 710.

because it allowed her to sell her product at a cheaper price.⁶² Other decisions followed that trend⁶³ until the highest court endorsed it in 1954.⁶⁴ The first decision to mention expressly the terms ‘parasitic competition’ and to apply the theory dates from 1959.⁶⁵ In the 1960s and 1970s, the reference to parasitic competition grew⁶⁶ and in the 1980s, parasitism was systematically used by competitors whose creations had been copied and was widely accepted by the courts.⁶⁷ So in Belgium until recently, decisions against the tort of parasitism were rare.⁶⁸ The most recent decisions apply neither the narrow nor the broad conception of parasitism but reject the tort in its entirety, thus making one believe that the tort of parasitism has actually died. It seems to be largely admitted now that a copy can only be prohibited if it creates a risk of confusion in the mind of the public.⁶⁹ Two recent cases which follow this trend actually

⁶² See Pres. Trib. Com. Brussels, 24.07.1936, *Ing.-Cons.*, 1937, p. 18. See Buydens, above fn. 22, at p. 710; Buydens, above fn. 25, at p. 122; Passa, above fn. 22, at p. 266.

⁶³ Trib. Com. Brussels, 03.06.1937, *Ing.-Cons.*, 1937, p. 85; Trib. Civ. Charleroi, 24.06.1939, *Ing.-Cons.*, 1939, p. 125, cited by Passa, above fn. 22, at p. 266 and Buydens, above fn. 25, at p. 122.

⁶⁴ Cass. 04.11.1954, *Ing.-Cons.*, 1954, 249.

⁶⁵ Trib. Com. Brussels, 14.02.1959, *Ing.-Cons.*, 1965, 258, comment by De Caluwe. See Buydens, above fn. 22, at p. 710; Buydens, above fn. 25, at p. 123; Golaz, above fn. 25, at p. 226; Y. Saint-Gal (1981), ‘Concurrence et agissements parasitaires en droit français et belge’, in *La concurrence parasitaire en droit comparé, Actes du Colloque de Lausanne*, Genève: Droz, 1981, 133, at 141.

⁶⁶ Golaz, above fn. 25, at p. 228. See e.g. Prés. Trib. Com. Courtrai, 13.06.1974, *JCB* 1975.III.194, comment by De Caluwé; Prés. Trib. Com. Malines, 15.09.1977, *JCB* 1980.III.39, comment by De Caluwé and J. Billiet; Ghent, 20.01.1978, *JCB* 1978.III.573; Trib. Com. Brussels, 29.10.1979, *Ing.-Cons.*, 1980, p. 31.

⁶⁷ See CA Antwerp, 30.05.1988, *Rev. Dr. Com.*, 1988, p. 949; CA Brussels, 14.03.1989, *Ing.-Cons.*, 1989, p. 115; Trib. Com. Brussels, 09.06.1989, *Rev. Dr. Com.*, 1991, p. 331; Trib. Com. Verviers, 10.10.1989, *Ing.-Cons.*, 1990, p. 178; Trib. Com. Namur, 29.11.1990, *Ing.-Cons.*, 1991, p. 172, all cited by Passa, above fn. 22, at p. 273. See also Buydens, above fn. 22, at p. 712; Buydens, above fn. 25, at p. 123, citing a number of decisions, fn. 76.

⁶⁸ See e.g. Prés. Trib. Com. Brussels, 17.12.1969, *Ing.-Cons.*, 1972, p. 82 (not unfair to use brochures whose form is identical to those of the claimant when this form is not original and is used by competitors), cited by Saint-Gal, above fn. 64; Prés. Com. Brussels, 07.11.1974, *JCB* 1975, 385 (the copying of commercial and technical documentation consisting of banal representations and resulting from no creative expensive effort was not judged an act of parasitic competition); Trib. Com. Brussels, 05.05.1980, *Ing.-Cons.*, 1980, p. 356.

⁶⁹ Passa, above fn. 44, at pp. 304 and 306, citing Trib. Com. Namur, 22.05.1996, *Journal des Tribunaux*, 1997, p. 62; Trib. Com. Antwerp, 09.10.1997, *AJT*, 1997–8, p. 581; CA Liège, 17.02.1998, *Rev. Dr. Com. Belge*, 1998/6, p. 415, comment by Putzeys; CA Liège, 13.10.1998, *Rev. Dr. Com. Belge*, 1998/6, p. 410.

relate to parasitic acts concerning databases. They were decided before the entry into force of the Directive. In the first one,⁷⁰ the court held that Kapitool Trading, which had copied in their entirety the files (numbers, names and addresses of subscribers) of the Belgian first telecommunications operator, Belgacom, did not benefit from the name, creative work or investments of Belgacom. Hence, Belgacom did not win on parasitic competition. In the second case,⁷¹ the defendant had copied the claimant's address file. The judge held that the file was not protected by copyright and it would be against the freedom of commerce to recognise a special protection for it. In sum, the case law prior to the Directive applied the freedom to copy strictly; the LPCC cannot grant the database producer an exclusive right which is not organised by a specific statute.⁷² There have been no further cases confirming this trend.

In conclusion, the situation as regards parasitism in Belgium is uncertain. It is not clear whether the theory of parasitism survives and if so what its conditions are.⁷³ Whereas the recent decisions seem to show that parasitism is dead, there are no Court of Cassation decisions to confirm this.

3. Simultaneous protection

After this general overview of the status of the French and Belgian tort of parasitism, this section examines whether the protection of the *sui generis* right and parasitism for databases can be cumulated, in other words whether an infringement action can be combined with an unfair competition action for parasitism. If this is the case, the section will determine whether this simultaneous protection over-protects databases. Thereafter, the question whether the *sui generis* right holder has a choice between the infringement and unfair competition actions will be examined.

3.1. Is simultaneous protection possible?

3.1.1. *France* As the unfair competition and infringement actions are distinct and have a different cause and object, they can be cumulated.⁷⁴ This

⁷⁰ *Belgacom v Kapitool Trading*, Prés. Com. Brussels., 19.07.1995, *Ann. Prat. Comm.* 1995, p. 788, comment Byl; *R.D.C.*, 1996, p. 747. See also Puttemans, above fn. 24 at p. 442; Strowel, Alain and Estelle Derclaye (2001), *Droit d'auteur et numérique: logiciels, bases de données et multimedia, droit belge, européen et comparé*, Bruxelles: Bruylant, p. 340, n. 388.

⁷¹ See Prés. Trib. Com. Courtrai, 06.09.1996, *R.D.C.*, 1997, p. 47, comment by De Vuyst and p. 442, Puttemans, above fn. 24.

⁷² Puttemans, above fn. 24, at p. 442.

⁷³ The legislator also believes that the theory of parasitism is unclear. See Puttemans, above fn. 24, at p. 445, fn. 2009, citing Exposé des Motifs, Doc. Parl., Ch., 1997-8, no. 1535/1-1536/1, p. 6.

⁷⁴ Passa, above fn. 22, p. 73; Golaz, above fn. 25, p. 84.

possibility to cumulate is expressly provided for in articles L. 615–19 al. 2 and L. 716–3 of the Intellectual Property Code ('IPC') which state that actions in infringement of patents or trade marks which also raise an unfair competition question are brought exclusively before the Court of First Instance (*tribunal de grande instance*).⁷⁵ As far as databases are concerned, article L. 341–1 ff. of the IPC provides a civil liability action. Article L. 341–1 paragraph 2 of the IPC states that *sui generis* protection is without prejudice to copyright or other protections on the database.

The two actions are subject to the fulfilment of their respective conditions.⁷⁶ The unfair competition action thus complements the infringement action.⁷⁷ This complementary nature means that there can be cumulation as long as the acts of unfair competition complained of are distinct from the infringement acts. Therefore, there can only be a condemnation for unfair competition if a breach distinct from infringement can be established. If there is not, the unfair competition action is rejected. Courts and commentators are anonymous on this point.⁷⁸ The existence of a distinct breach can be explained by the fact that the damages for infringement must be granted on the principle of integral reparation of the prejudice. The same act cannot serve as the basis of an unfair competition action because there would be no prejudice to repair.⁷⁹ The claimant

⁷⁵ Passa, above fn. 22, p. 73.

⁷⁶ Ibid.

⁷⁷ Roubier, above fn. 41, at p. 555; Passa, above fn. 22, pp. 2, 73; Bertrand 1998, *op cit.* fn. 25, p. 25. However, the Court of Cassation has affirmed (Cass com., 22.09.1983 [1984] *D.*, 187) that the action in unfair competition requires a breach while the action in infringement sanctions the infringement of a privative right. The two actions have different causes and different aims; one does not complement the other. See also Golaz, above fn. 25, p. 84 (the action in unfair competition is independent of the infringement action; it is not the accessory, the complement or the consequence of the infringement action. However courts cumulate the actions as long as there are facts distinct from infringement).

⁷⁸ See e.g. Cass. com., 23.05.1973, *Bull. Civ.* IV, no. 182; *Villeroi & Bosch*, CA Paris, 16.11.2001, *Juris-data*, no. 2001–170988. Roubier, above fn. 41, at p. 557; Burst, above fn. 25, at pp. 2, 146; Bertrand, above fn. 25, at pp. 153–4; Passa, above fn. 22, at p. 2; Golaz, above fn. 21, at pp. 84–5; X. Desjeux, 'La reproduction ou copie servile et l'action en concurrence déloyale dans la jurisprudence française' [1976] *JCP*, ed. CII, no. 17, at 240; P. Le Tourneau (1993), 'Le parasitisme dans tous ses états', *Dalloz*, 42^e Cahier, *Chronique*, 310, at 311 citing Mousseron, Jean-Marc (1990), 'Responsabilité civile et droits intellectuels', in *Mélanges Chavanne*, Paris: Litec, 1990, 247; Izorche, above fn. 35, at p. 33; R. Clauss (1995), 'The French law of disloyal competition', *EIPR* 550, at 552–3; Schmidt-Szalewski, above fn. 8, p. 456; Malaurie-Vignal, above fn. 31, at p. 178; De Candé, above fn. 25, at p. 493. Specifically as regards the *sui generis* right, see N. Mallet-Poujol (2003), 'Protection des bases de données', ed. *Juris-classeur*, n. 9, fasc. 6080.

⁷⁹ Passa, above fn. 22, at p. 73.

cannot ask for a single global reparation since the two damages are different but she must ask for the reparation of two distinct damages.⁸⁰ In spite of this rule, many judges often grant a global sum.⁸¹

Commentators disagree as to what constitute acts distinct from infringement. For some, parasitism is not a distinct act. Only acts without any link to the creation (or sign) infringed, such as disparagement, misleading advertising, copying secret know-how or risk of confusion, can constitute distinct acts.⁸² For others, parasitism can be a distinct act.⁸³

The case law fluctuated on this point and is still unsettled. In many cases involving infringement of subject-matter protected by patent, trade mark and copyright, the Court of Cassation and some courts of appeal held that (slavish) copying, because it allows the copier to save costs and market the product at a reduced price, is an act distinct from infringement.⁸⁴ The Court of Cassation confirmed this view in recent decisions.⁸⁵ On the other hand, the Paris Court of Appeal made it very clear in a number of decisions that it is not possible to condemn for both infringement and parasitism.⁸⁶

⁸⁰ TGI Paris, 06.12.1988 [1989] *RDPI*, no. 23–4, p. 72.

⁸¹ Passa, above fn. 22, at pp. 73 ff.

⁸² *Ibid.*; Bertrand, above fn. 25, at p. 154; P.-Y. Gautier (2001), *Propriété littéraire et artistique*, 4th edn., Paris: Presses Universitaires de France, p. 186, n. 114; Mallet-Poujol, above fn. 77.

⁸³ X. Desjeux (1992), ‘La reprise de la prestation d’autrui: l’idée commerciale et l’investissement économique (esquisse d’un projet de loi)’, *Gaz. Pal.*, Doctr. 973, at 976.

⁸⁴ E.g. Cass. com, 30.11.1966, *Bull.*, no. 460, *Bull. civ.*, III, 407; Cass. 02.01.1969 [1969] *RIPIA* 13, cited by Desjeux above fn. 77, at p. 240; Cass. com, 25.10.1977 [1978] *D.*, IR, p. 164; *Bull. Civ.* IV, 245; Malaurie-Vignal 1996, p. 178; CA Paris, 20.12.1989 [1991] *D.*, somm., p. 91, comment Colombet; CA Paris, 01.10.1992 [1993] *PIBD* 535, III, 35, cited by Schmidt-Szalewski above fn. 8, at pp. 462–3; CA Paris, 07.04.1993 [1993] *PIBD* 548, III, 462; CA Paris, 21.06.1994 [1994] *PIBD* III, 583; CA Versailles, 05.04.2001 [2002] *PIBD* 734, III, 38 cited by J. Passa (2002), ‘Responsabilité civile – distribution’, *Prop. Int.* 81. For more decisions, see Passa, above fn. 22, at pp. 249, 274–5; *ibid.*, (2002), ‘Responsabilité civile – distribution’, *Prop. Int.* 81; Golaz, above fn. 25, p. 106 fn. 268–72; p. 241, fn. 872.

⁸⁵ *Comité national olympique et sportif français v Groupement d’achat des centres Leclerc*, Cass. com., 11.03.2003 [2003] *CCC*, August–Sept. 2003, p. 24 (imitation of a trade mark is a fact distinct from trade mark infringement); Cass. 08.07.2003 [2003] *PIBD* 773, III, 519, cited by De Candé, above fn. 25, at p. 496.

⁸⁶ CA Paris, 31.10.1991 [1992] *Ann. Prop. Ind.*, p. 213; CA Paris, 05.11.1992 [1993] *RDPI*, no. 47, p. 50; CA Paris, 20.09.1995 [1996] *Gaz. Pal.*, 1, somm. 166; CA Paris, 20.03.1996 [1996] *PIBD* III, 419; [1996] *RDPI*, no. 65, p. 62; CA Paris, 22.05.1996 [1996] *Gaz. Pal.*, 2 somm. 508; CA Paris, 03.07.1996 [1996] *Gaz. Pal.*, 2 somm. 504; CA Paris, 12.12.2001 [2002] *PIBD*, 740, III, 196, cited by Passa, above fn. 83.

How have courts applied these principles to databases? Courts are split on the issue of whether parasitism is an act distinct from *sui generis* right infringement.

The great majority of courts ruled that copying a protected database is not an act distinct from *sui generis* right infringement. In *France Telecom v MA Editions*,⁸⁷ MA Editions had copied France Telecom's phonebook. The court ruled that the database was protected and the extractions were illegal and condemned on the basis of infringement of the *sui generis* right. The court rejected France Telecom's argument based on enrichment without cause because the acts were illegal on the basis of the law implementing the Directive in France.

In *Groupe Miller Freeman v Tigest Communication*,⁸⁸ Tigest was held to infringe because it had extracted all the information contained in Groupe Miller Freeman's ('GMF') *sui generis* right-protected catalogue for commercial purposes. The court held therefore that there could be no additional condemnation on the basis of parasitism since the acts of copying were not distinct from the infringement acts.⁸⁹ The same conclusion was drawn by the Court of First Instance of Paris in another case involving GMF against another defendant.⁹⁰ In this case, the court rejected the action based on parasitism because the parasitic acts were a direct consequence of illegal extraction of the contents of a database and could not be distinguished from them. In a decision of March 2002,⁹¹ the Paris Court of Appeal held the *sui generis* right infringed but rejected the action for parasitism. It held that the defendant's attempt to benefit from the investments made by the claimant was not distinct from the unlawful extraction under the *sui generis* right.

In *Cadremploi v Keljob*,⁹² Keljob extracted and re-utilised daily a qualitatively substantial part of Cadremploi's database of job advertisements without the latter's authorisation and was held to infringe Cadremploi's *sui generis* right. Keljob's acts did not create a risk of confusion between Cadremploi's and Keljob's web sites because the internet user was warned that she was leaving Keljob's web site and transferred to Cadremploi's site. Since

⁸⁷ T. Com. Paris, 18.06.1999, *D.*, 2000, no. 5, p. 105.

⁸⁸ TGI Paris, 22.06.1999 [1999] *PIBD*, 686, III, 494.

⁸⁹ Interestingly, the court qualified the same acts, but occurring before 01.01.1998, of parasitic. This clearly shows that the *sui generis* right has replaced parasitism for databases. See below, this section.

⁹⁰ *Groupe Miller Freeman v Neptune Verlag*, TGI Paris, 31.01.2001, available on www.legalis.net.

⁹¹ *Construct Data Verlag v Reed Expositions France*, CA Paris, 20.03.2002 [2002] *PIBD*, 746, III, 331–4.

⁹² TGI Paris, 05.09.2001 [2001] *Legipresse*, no. 187, Dec., pp. 219–21, comment by Tellier-Loniewski.

customers' diversion was a consequence of the extraction, it was not an act distinct from *sui generis* right infringement and the unfair competition action was dismissed.

In *Tigest v Reed Exposition France et Salons Français et internationaux*,⁹³ the defendant copied the claimant's paper catalogue. This took place before and after the entry into force of the Directive. For the acts committed after the entry into force, the court condemned for infringement of the *sui generis* right and rejected parasitism as not distinct from infringement. In *Editions Neressis v France Telecom Multimedia Services*,⁹⁴ Neressis's *sui generis* right in its database of advertisements was infringed by the defendant. Neressis's argument that the extraction and commercial use of its database was an act of unfair competition as the defendant had appropriated its investments without paying was rejected as these acts were not distinct from infringement of the *sui generis* right.

So far, three courts have found that parasitism is an act distinct from *sui generis* right infringement, albeit in indirect ways. In a decision of 2003,⁹⁵ EIP's reproduction of Jataka's database, a CD-ROM containing a list of French municipalities, was held to infringe Jataka's *sui generis* right. In addition, EIP was condemned for unfair competition because it had disseminated the contents of the database and usurped Jataka's clients. But usurping clients by distributing a copy of a protected database is parasitism. In *OCP Repartition v Salvea*,⁹⁶ OCP created a database listing the names of hundreds of thousands of pharmaceutical products and their descriptions. OCP sold this database on CD-ROM and made it available on the internet on subscription. Salvea reproduced notices coming from OCP's database on its internet site. The court held that OCP's database was protected by the *sui generis* right. Salvea's copy was slavish and the court found Salvea liable for *sui generis* right infringement. The court however also found Salvea liable for acts of unfair competition, i.e. that Salvea benefited from OCP's investments. Salvea was ordered to pay under the two causes of action albeit the damage was the same under both heads (to benefit from OCP's investments by copying its database merges with *sui generis* right infringement). As a result, the claimant was compensated twice for the same damage. Finally, in *Consultant Immobilier v Aptitudes Immobilier*,⁹⁷ the court held that the defendant had

⁹³ *Tigest v Reed Exposition France et Salons Français et internationaux*, CA Paris, 12.09.2001 [2001] *Legipresse*, no. 187, Dec., pp. 215–25; [2001] *D.*, no. 35, p. 2895; [2002] *JCP*, no. 1, p. 25–31, comment by Pollaud-Dulian; [2002] *PIBD* 740, III, 198–201.

⁹⁴ TGI Paris, 14.11.2001, available on www.legalis.net.

⁹⁵ *Jataka v EIP*, TGI Strasbourg, 22.07.2003, available on www.legalis.net.

⁹⁶ Trib. Com. Paris, 19.03.2004, available on www.legalis.net.

⁹⁷ Trib. Com. Nanterre, 14.05.2004, available on www.legalis.net.

infringed the claimant's *sui generis* right in its clients list. Additionally, the court found the defendant liable for unfair competition because it appropriated the claimant's files which were an element of the claimant's business. Again this act merges with the infringement of the claimant's *sui generis* right.

As there has been no Court of Cassation decision on the specific issue of simultaneous protection of databases and the lower courts are split, the issue is unresolved. A majority of the few commentators who have written on the possibility of cumulating an action in unfair competition for parasitism and an action in infringement of the *sui generis* right think that, as the *sui generis* right codified parasitism in respect of databases, cumulation is not possible.⁹⁸ In the same vein, the commentators have held that enrichment without cause is now encompassed by the *sui generis* right.⁹⁹

In conclusion, although the majority of courts do not allow the cumulation of the unfair competition action for parasitism and the action in *sui generis* right infringement, a few courts do. This creates simultaneous over-protection.

3.1.2. Belgium The LPCC prohibits the cumulation of the action for infringement of an intellectual property right and the *action en cessation* for unfair competition.¹⁰⁰ The prohibition is found in article 96 LPCC, which states: 'Article 95 does not apply to infringement acts which are prohibited by the statutes on patents, trade marks, designs and models, and copyright and neighbouring rights'. Article 95 LPCC provides that: 'The president of the commercial court declares the existence and orders the cessation of an act . . . which constitutes an infringement to the provisions of this statute . . .'

Article 96 LPCC therefore prevents the holder of an intellectual property right from acting under both actions before the president of the commercial

⁹⁸ P. Gaudrat (1999), 'Loi de transposition de la directive 96/9 du 11 mars 1996 sur les bases de données: le champ de la protection par le droit *sui generis*' 52 (1) *RTD com.* 86, at 89; Passa, above fn. 22, at p. 294; Mallet-Poujol, above fn. 77, n. 147; Gautier, above fn. 81, n. 114 (if the database producer does not win on the basis of the *sui generis* right because there is no infringement, she should not win on the basis of the parasitism theory either because no breach is identifiable). See also J. Passa (2002), 'Responsabilité civile – concurrence', *Prop. Int.* 103, at 107. *Contra*: L. Tellier-Loniewski, Comment [2002] *Legipresse*, no. 96, III, p. 194.

⁹⁹ A. Brüning, comment on *France Telecom v MA Editions*, T. com. Paris, 18.06.1999 [1999] *Expertises* 308.

¹⁰⁰ This was already provided in the specific legislation of 1934 and was rewritten in art. 56 of the 1971 act. It actually codified a decision of 16 March 1939 of the Court of Cassation, *Pas.*, I. p. 150; *Ing.-Cons.*, p. 55. See Golaz, above fn. 25, p. 92; A. Puttemans (1998), 'La loi sur les pratiques du commerce et les droits de propriété intellectuelle', in F. Gotzen (ed.), *Marques et concurrence*, Bruxelles: Bruylant, 1998, p. 236.

court (*tribunal de commerce*).¹⁰¹ Article 96 LPCC does not expressly mention the *sui generis* right. However, it can reasonably be assumed that the *sui generis* right is included in the prohibition because it is a neighbouring right. Indeed, the Civil Procedure Code has assimilated the *sui generis* right to a neighbouring right.¹⁰² In addition to article 96 LPCC, article 12.A of the Trade Mark Act as well as article 14.5 (now 14.8) of the Designs Act provide for the same prohibition, i.e. it is not possible to act on the basis of unfair competition for acts which are only an infringement.¹⁰³ A similar prohibition does not exist in the copyright and patent acts. Despite the silence of the two acts, it has been argued that this approach can be extrapolated to other intellectual property rights.¹⁰⁴ Some courts seem to conform to the prohibition of cumulation,¹⁰⁵ but other courts still circumvent it.¹⁰⁶

How does the prohibition of article 96 LPCC work in practice? Article 96 LPCC is interpreted strictly both by courts and commentators.¹⁰⁷ This strict interpretation leads to an exception to the rule of non-cumulation. The justification for this exception is based on the different aims of the two actions: the infringement action only protects the creator while the unfair competition action aims to protect the undertaking of the trader against unfair acts of other traders.¹⁰⁸ Thus, while

¹⁰¹ Puttemans, above fn. 24, at p. 228; Puttemans, above fn. 99, at p. 236.

¹⁰² Puttemans, above fn. 24, at p. 441 and fn. 1995. See art. 1481, al. 1 and 569 al. 1, 7°, of the Civil Procedure Code.

¹⁰³ A. Delcorde (1995), 'Droits intellectuels et pratiques du commerce', in *Liber Amicorum A. de Caluwé*, Bruxelles: Bruylant, p. 111; D. Dessard (1997), 'L'action en cessation et les droits de propriété intellectuelle', in Gillardin, J. and D. Putzeys, *Les pratiques du commerce, Autour et alentour*, Bruxelles: Publications des FUSL p. 149. Art. 14.5 provides 'acts which would only constitute infringement of a design may not be subject to an action under the legislation against unfair competition'. Art. 12.A provides 'regardless of the nature of the action instituted, no one may judicially claim protection for a symbol which is considered a mark within the meaning of article 1 unless she has filed it in due form and where applicable, has had the registration renewed'.

¹⁰⁴ Delcorde above fn. 103, at p. 112.

¹⁰⁵ *Ibid.*, at pp. 112–13. In 1995, in *U v Delvaux* (unreported), the *tribunal correctionnel* of Brussels avoided this double condemnation and considered the relevant criminal provision did not apply to infringement acts.

¹⁰⁶ Puttemans, above fn. 24, at p. 260 who notes that before the new copyright act of 1994, courts often cumulated actions and this still occurs nowadays in the area of advertising and trade marks. Delcorde notes that, before 1995, *correctionnel* tribunals in Brussels were pursuing simultaneously on the basis of copyright or trade mark infringement and on the basis of unfair competition and the *tribunal correctionnel* of Brussels pronounced two distinct sanctions (decisions are unreported).

¹⁰⁷ Dessard, above fn. 103, at p. 150; Puttemans, above fn. 24, at p. 255; Puttemans, above fn. 24, at p. 321.

¹⁰⁸ Puttemans, above fn. 24, at p. 329.

it is not possible to cumulate both actions if they tend to prohibit the same act (e.g. the infringement of an intellectual property right), it is possible to act under both actions if the acts of unfair competition complained of are based on acts *distinct* from infringement acts.¹⁰⁹ In the 1939 Court of Cassation case where the rule is rooted, it was held that the prohibition of the cumulation of actions did not prevent the holder of a trade mark from acting in unfair competition for the dishonest acts which can *accompany* infringement.¹¹⁰ Article 13, paragraph 1, indent 2 of the act implementing the Software Directive in Belgian law¹¹¹ also provides that any claim which is based at the same time on an infringement act and an unfair competition act must be introduced exclusively before the first instance court.¹¹² This proves that it is possible to act under both statutes. The accompanying act must be distinct from the infringement act.¹¹³ The case law and literature have upheld this principle.¹¹⁴ In conclusion, if the act is distinct from the infringement act, it is possible to introduce the *action en cessation* before the President of the commercial court.¹¹⁵

The question is therefore, as in France, what an act distinct from infringement is. Commentators disagree on this. Some think that both a risk of confusion and the narrow conception of parasitism (i.e. the systematic and characterised looting by the copier of the efforts of the copied) constitute acts contrary to honest practices, detachable from the infringement of the intellectual property right.¹¹⁶ But they then add that if the risk of confusion or parasitic behaviour merges with infringement, the claimant cannot win on the basis of unfair competition.¹¹⁷ Others believe that parasitism cannot succeed where there is a statute granting specific protection to the innovator.¹¹⁸ As, in our view, the *sui generis* right is a codification of parasitism by a special statute, a parasitic act always merges with an act infringing the *sui generis* right. In conclusion, parasitism, be it in its broad or narrow sense, cannot be an act

¹⁰⁹ Golaz, above fn. 25, at p. 93 referring to art. 73, para. 1, indent 2 of the Patent Act of 28 March 1983; Buydens, above fn. 22, at p. 709; Puttemans, above fn. 24, at p. 239.

¹¹⁰ Cass. 16.03.1939, Pas., I, p. 150.

¹¹¹ Act of 30 June 1994 implementing in Belgian law European Directive of 14 May 1991 relating to the legal protection of computer programs, M.B. 27.07.1994, in force 06.08.1994.

¹¹² Puttemans, above fn. 24, at p. 254.

¹¹³ *Ibid.*, at p. 255; Buydens, above fn. 22, at pp. 716 ff.

¹¹⁴ Puttemans, above fn. 24, at p. 254.

¹¹⁵ Except for computer programs, see above, where it is before the Court of First Instance.

¹¹⁶ Puttemans, above fn. 24, at pp. 242, 255–7.

¹¹⁷ *Ibid.*, at p. 255.

¹¹⁸ Delcorde, above fn. 103, at pp. 113–14.

distinct from infringement. Only the risk of confusion, disparagement, misleading advertising and other acts contrary to honest practices can constitute distinct acts.

Very few decisions if any in the field of copyright have distinguished the infringement act from the act of unfair competition. The main reason is, as we shall see below, that many infringements acts have been condemned under the unfair competition action because the claimant can, in its summons, omit the term ‘infringement’ and only mention unfair competition.¹¹⁹

How do these principles apply to databases? In relation to databases, Puttemans has claimed that it is clear from the *travaux préparatoires* of the act implementing the Database Directive in Belgian law that it is not possible to protect databases which fulfil the requirements of the Directive by the theory of parasitism.¹²⁰ However, it is not as clear from the *travaux préparatoires* as Puttemans would like to make us believe. The *travaux préparatoires* simply state that the creation of a new *sui generis* right was envisaged instead of harmonising unfair competition laws to protect database contents. They are silent as to whether *sui generis* right-protected databases can also be protected by parasitism. In our view, as in France, databases can only be protected additionally against unfair competition if a distinct act (e.g. misleading advertising, disparagement of the database producer) occurs. However, in view of the muddled state of the case law, courts may allow the two counts to succeed even if the act is in fact not distinct from infringement.

3.2. *Does the sui generis right holder have a choice between the infringement and unfair competition actions?*

3.2.1. *France* An important question is whether the holder of the *sui generis* right has a choice between infringement and unfair competition actions. Indeed, having a choice can lead to over-protection because the conditions for an unfair competition action for parasitism are less stringent than those for a *sui generis* right. Normally, the principle of pre-emption should apply and there should be no choice. If there is an infringement of the *sui generis* right, the holder must act on that basis. Let us see how the lawmaker and the courts have tackled this issue.

Article 12.2 of the Civil Procedure Code obliges the judge to re-categorise an unfair competition action into an action for infringement of an intellectual property right if an unfair competition action is alleged instead of an infringe-

¹¹⁹ Puttemans, above fn. 24, at p. 348.

¹²⁰ *Ibid.*, at p. 445, citing Exposé des Motifs, Doc. Parl. Ch., 1997–1998, no. 1535/1–1536/1, p. 6 and Rapport Van Overberghe, Doc. Parl., ch., 1997–8, no. 1535/7, p. 4.

ment action.¹²¹ Thus, the intellectual property right holder victim of an infringement cannot choose one or the other action. She must proceed under an infringement action.

The majority of commentators believe that an unfair competition action is not or should not be a substitute for an infringement action.¹²² In other words, the intellectual property right holder should not be allowed to choose between infringement and unfair competition actions. She must act on infringement. A 1978 decision of the Court of Cassation is often cited to support this argument.¹²³ The Court held that the aim of an unfair competition action is to ensure protection of the person who cannot avail herself of any privative right. Commentators believe that this means that *a contrario* an intellectual property right holder cannot use an unfair competition action (for parasitism in the case of databases).¹²⁴ If infringement is alleged but is not found and the claimant does not allege a distinct act of unfair competition, the unfair competition action is rejected.¹²⁵ However, a minority of commentators believe that the database producer can choose between acting on the basis of infringement of the *sui generis* right or on unfair competition because the Directive does not seem to exclude it.¹²⁶

Despite article 12.2 of the Civil Procedure Code forbidding choice, a number of courts allowed the unfair competition action for parasitism rather than the infringement action not only when there was infringement of the *sui generis* right but also of other intellectual property rights and also when the infringement was not established.¹²⁷ The Court of Cassation recently

¹²¹ Passa, above fn. 22, at 72 (except for trade marks: the victim of a trade mark infringement can under certain conditions, act under unfair competition rather than trade mark law).

¹²² Schmidt-Szalewski, above fn. 8, at pp. 456, 458 citing Cass. com., 23.05.1973, *Bull.civ.* IV, no. 182; Clauss, above fn. 78, at pp. 552–3; Passa, above fn. 22, at p. 72; Le Tourneau, above fn. 25, at p. 403; Le Tourneau, above fn. 39, at p. 5.

¹²³ Cass. com., 04.07.1978 [1979] *Ann. Prop. Ind.* 366, cited by Burst, above fn. 25, at pp. 2–3.

¹²⁴ Burst, above fn. 25, at pp. 2–3; 146; Le Tourneau, above fn. 78, at p. 311.

¹²⁵ Golaz, above fn. 25, at p. 87.

¹²⁶ Lucas, André and Henri-Jacques Lucas (2001), *Traité de la propriété littéraire et artistique*, 2nd edn., Paris: Litec, 2001, p. 636, nn. 817–2.

¹²⁷ Desjeux, above fn. 78, at p. 240. See e.g. TGI Paris, 19.03.1993 [1993] *PIBD* 548, III, 439 cited by Schmidt-Szalewski above fn. 8, p. 465 (concerned infringement of copyrighted software, the infringement action was rejected because there were not enough similarities between the two programs, but the court condemned the defendant for parasitism). In *ABC Renovation v Les Maisons Barbey Maillard*, CA Paris, 10.12.2003, RG no. 2003/17581 cited by Passa, above fn. 41, at 683 ff., the Paris Court of Appeal allowed a claim exclusively based on parasitism and held the defendant liable on this count only although the subject-matter (a catalogue of drawings) was protected by copyright.

validated this choice between the two actions. In 2001, it held that the plagiarism of a catalogue which imitates both substance and form is parasitic.¹²⁸ There can be plagiarism when there is no confusion and parasitism can subsist even if the parasitic acts do not concern elements which cost efforts and investments to the maker of the catalogue. No mention was made of the *sui generis* right.

As far as databases are concerned, it is not clear from the case law whether courts allow the option between the infringement and unfair competition actions. It is mainly in early decisions that courts do not refer to the *sui generis* right but only to parasitism. This is perhaps due to the claimants' ignorance of the new *sui generis* right or perhaps because the acts were committed before the entry into force of the Directive. In a decision of 1998, the reproduction of a database of customs tariffs was held to be parasitic.¹²⁹ No reference was made to the *sui generis* right. In *Le Serveur Administratif v Editions Législatives*,¹³⁰ Les Editions Legislatives' dictionary including 400 collective conventions was reproduced almost identically by Le Serveur Administratif. The court found the dictionary protected by copyright since its arrangement of the conventions was original. It held that in addition to infringing the copyright in the database, the defendant committed parasitic acts and created a risk of confusion in the public's mind due to similarities between claimant's and defendant's works. Surprisingly, the *sui generis* right was not discussed.¹³¹

In *Cadremploi v Keljob*,¹³² the Court of First Instance of Paris held that Keljob's use of Cadremploi's database elements – and thereby the investments made by Cadremploi – without paying was parasitic. It thus enjoined Keljob from using Cadremploi's database of job advertisements. Although the court

¹²⁸ *Glock France v Becheret*, Cass. com., 30.01.2001 [2001] *D.*, no. 24, p. 1939, comment by Le Tourneau; *Bull. Civ.* IV, 27; JCP G, I, 340, no. 29, comment by Viney; [2002] *Prop. Int.*, p. 101, comment by Passa.

¹²⁹ *Encyclopédie Douanière v Conex et Agence fiscale*, T. Comm. Valenciennes, 20.01.1998 [1998] *Expertises* 196.

¹³⁰ *Le Serveur Administratif v Editions Législatives*, TGI Lyon, 28.12.1998 [1999] *RIDA*, no. 181, p. 325; [1999] *RTD Com.* 52(4), pp. 866–9, comment by Françon, *aff'd* CA Lyon, 22.06.2000 [2001] *Expertises* 74–8; [2001] *Prop. Int.* 54–5, comment Sirinelli.

¹³¹ P. B. Hugenholtz (2001), 'The new database right: early case law from Europe', 9th Annual Conference on International Intellectual Property Law and Policy, Fordham School of Law, 1, at 7; Sirinelli, comment on *Le Serveur Administratif v Editions Legislatives*, CA Lyon, 22.06.2000 [2001] *Prop. Int.* 54–5.

¹³² *Cadremploi v Keljob*, TGI Paris (ref.), 08.01.2001 [2001] *PIBD*, 721, III, 294–6; *CCE*, May 2001, p. 27.

mentioned earlier that Cadremploi was justified in invoking *sui generis* right protection, it did not rule on that basis.¹³³ In a decision of the Court of Appeal of Aix-en-Provence,¹³⁴ parts of the claimant's web site (sections of a statute) were copied by the defendant. Nowhere did the court refer to the web site as a database, but it could well have been classified and protected as such. The problem was surely that the part extracted and re-utilised was not substantial. The claimant based its action solely on tort and not on infringement of the *sui generis* right and the court held the defendant liable only for parasitism. Nonetheless, in a decision of 2002,¹³⁵ the *sui generis* right was not infringed because a substantial part had not been taken and the court rejected the unfair competition action since there were no distinct acts. This latter case means that it is not possible to act on parasitism when the conditions of the intellectual property right are fulfilled but the latter is not infringed. The option between the two actions is not allowed.

In conclusion, although statutory law makes clear that there can be no choice between the unfair competition action for parasitism and the action for infringement of the *sui generis* right, many courts allowed this option. This creates over-protection because the intellectual property right holder can bypass the stricter conditions of the intellectual property right by acting in unfair competition instead.

3.2.2. *Belgium* It has been argued that the *action en cessation* should not be used as a substitute for the infringement action.¹³⁶ In other words, if the claimant has an intellectual property right, she does not have a choice between the *action en cessation* and the infringement action; she must act for infringement of her intellectual property right only. This is in accordance with the principle of the primacy of intellectual property rights.¹³⁷ However, some claimants used the *action en cessation* rather than the infringement action and

¹³³ However, in the appeal, despite Cadremploi's database being protected by the *sui generis* right, Keljob was held not to infringe and there was no parasitism. *Keljob v Cadremploi*, CA Paris, 25.05.2001 [2001] *PIBD*, 726, III, 455–7; *CCE*, July–August 2001, pp. 27–9.

¹³⁴ *Jean-Louis H. v Net Fly – Strategies Networks*, CA Aix-en-Provence, 17.04.2002, Juris-Data no. 2002–179519; [2002] *JCP G*, IV, 3038; J. Passa (2002), 'Responsabilité civile – concurrence', *Prop. Int.* 103, at 107.

¹³⁵ *News Invest v PR Line*, CA Versailles, 11.04.2002, *CCE*, July/August 2002, pp. 20–2, Comm. 98, comment Caron, also available on www.legalis.net; Passa, above fn. 33, at p. 107 (approving the decision because another reasoning would destroy the balance and coherence of the act implementing the Directive in France and would excessively limit freedom of commerce and the public domain).

¹³⁶ Dessard, above fn. 103, at p. 150.

¹³⁷ See above section 3.1.2.

succeeded in some cases.¹³⁸ In fact, Belgian procedural law allows it. If the summons is drafted to only cover infringing acts, the president of the commercial court is incompetent. But if the claimant drafts it to cover the same acts but describes them as unfair competition acts and does not use the term 'infringement', then the president of the commercial court is competent.¹³⁹

Again, this creates over-protection because the intellectual property right holder can bypass the stricter conditions of the intellectual property right by acting in unfair competition instead.

Conclusion

In the United Kingdom and Ireland, it is not possible to protect a database protected by the *sui generis* right against parasitism. Hence, there is no issue of simultaneous over-protection. In France, while the vast majority of courts and commentators believe that parasitism is not a distinct act, a few courts nevertheless allow the cumulation of actions and repair the same damage twice. Thus, simultaneous over-protection is possible, although rare. Even if the statutory law makes clear that there can be no choice between the unfair competition action against parasitism and the infringement action, courts allow this option in many cases. This leads to over-protection because the intellectual property holder can bypass the stricter conditions of the *sui generis* right by acting in unfair competition instead. Another reason is that it renders the *sui generis* right useless; there is no need to resort to it since the unfair competition for parasitism absorbs it.

In Belgium, as in France, databases can only be protected by unfair competition if a distinct act of unfair competition occurs. However, there is disagreement on what such an act is, leaving the possibility open for courts to cumulate the two actions. In addition, and which is worse, the law seems to allow a choice between the *action en cessation* and infringement action, thereby rendering the *sui generis* right useless.

In conclusion, in the United Kingdom and Ireland, there is no simultaneous over-protection of databases, while in France and Belgium, it is possible. This also proves that there is a lack of harmonisation in Europe in this respect. To avoid over-protection of databases, the Database Directive should be amended to make clear that the *sui generis* right has absorbed parasitism as far as databases are concerned. Failure to do so leads to the recovery of extra damages in contradiction to the intellectual property paradigm. In addition, it should

¹³⁸ For instance, in the *Tele-Atlas* case (Ghent, 16.11.1995 [1997] *A&M* 54 (*Nationaal Geographisch Instituut v Tele Atlas*)), the existence of copyright in maps was held not to be important since the alleged infringing acts could *in se* constitute acts contrary to honest uses in the commercial field. Puttemans, above fn. 24, p. 332.

¹³⁹ *Ibid.*, p. 332.

also provide that there is no choice between the unfair competition for parasitism and the infringement actions. In other words, if the *sui generis* right is infringed, the claimant is obliged to introduce an infringement action. This safeguards its rights to claim under other unfair competition counts such as misleading advertising, disparagement etc. French and Belgian laws should also be amended to respect those changes.