Guidance on answering the discussion questions in the book

Para 7.10

Explain why the exclusion of creation from obtaining limits the scope of sui generis database right.

The facts of the *BHB* case sufficiently illustrate the difference. The horse-racing fixture list did not exist until BHB created it; therefore it was not obtained by BHB, the word having the implication of there being some separate source for the information. Thus a database which is entirely the product of its creator's own efforts, in terms not of the gathering of information, but in the *generation* of the information itself, is not protected by the *sui generis* right (although protection can be claimed on the basis of verification or presentation in such a case).

Para 7.11

Consider the derivation of data from naturally occurring phenomena such as the weather or the genetic sequences of living creatures. Is that derivation an act of creation or obtaining for the purposes of *sui generis* database right? Read the CA decision in Football Dataco Ltd v Sportradar [2013] ECC 12 at paras 31–69 and the sources mentioned therein.

In Football Dataco v Sportradar, the court discusses two scholarly articles relied upon by

Sportradar: Mark Davison and P Bernt Hugenholtz, "Football Fixtures, Horse Races and Spin-offs; The ECJ Domesticates the Database Right" [2005] EIPR 113 and Lee Bygrave, "The Data Difficulty in Database Protection" [2013] EIPR 25. Davison and Hugenholtz comment that the strict approach of the ECJ in the *Fixtures* cases suggest that such data is created: "meteorological data and genetic sequences are records and representations of natural phenomena, not the phenomena themselves". However, the court is not persuaded by this argument. It notes that 'a scientist who takes a measurement would be astonished to be told that she was creating data. She would say she is creating a record of pre-existing fact, recording data, not creating it' (para 39). The court concludes that the scientist in such a case 'is creating a record of data elements, not the elements themselves. The process is miles away from that of creating and determining a fixture list or list of runners and riders' (para 57). The court also does not agree with arguments presented in the article by Bygrave who had argued that the Court of Justice, if faced with a case about recording of natural phenomena, would 'look for when formalised representations (typically recorded measurements) are first made of the natural phenomena and regard that process as creating rather than obtaining or collecting data.' In rejecting this argument, the court notes that 'there is no realistic chance of the court [of justice] striking down the many large database protected industries of Europe on the grounds that they consist of objective information recorded for the first time by their creators' (para 60).

It is worth noting that Davison and Hugenholtz did agree that probably such databases would end up being protected anyway because they are the products of substantial investment in presentation and verification.

Para 7.23

Why do the non-commercial research and teaching exceptions apply only to extraction of content from a database and not to its re-utilisation?

Extraction is the permanent or temporary transfer of database contents to another medium. A teacher or researcher is allowed to do this provided his or her purpose is non-commercial. Re-utilisation is making any of the contents of a database available to the public by any means: this goes beyond the permitted illustrative use in teaching. The exclusion of a research exception in relation to re-utilisation means that here the researcher could not include a substantial part of the contents of the database in any publication of the results of his research.

Para 7.26

Look up the historical background to protection of performers' rights. Why was such protection weak?

Performers were, historically, not well protected in the UK. Only in 1925 were criminal sanctions provided by the Dramatic and Musical Performers' Protection Act 1925 against making recordings of dramatic and musical performances without consent ('bootlegging'). The law was consolidated and extended over the years, notably by encompassing performances of literary, dramatic, musical and artistic works in the Performers Protection Act 1963, and in 1972 when another Performers Protection Act extended the penalties available. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 provided the international basis for such protection.

The UK Acts appeared to give rise to criminal liability, but not to any civil cause of action, for either the performer or those who held recording contracts with the performer. Despite this, in *Rickless v United Artists Corporation* [1988] QB 40, a civil cause of action was accorded to performers. In that case, United Artists made a film using out-takes from previous films in the Pink Panther series starring the late Peter Sellers. Rickless, as the owner of the rights of Peter Sellers' services as an actor, sued for infringement of section 2 of the Dramatic and Musical and Performers' Protection Act 1958 because United Artists had failed to obtain permission for its activities. The Court of Appeal upheld the lower court's ruling that the Performers Acts did give civil remedies to a performer whose performance had been exploited without consent, in addition to the criminal penalties under the Act. This was although earlier, in *RCA v Pollard* [1983] Ch 135, the Court of Appeal had found that the Acts did not give rise to civil remedies for recording companies with whom performers had exclusive recording contracts.

Para 7.31

Which of the economic rights conferred by copyright (para 4.9) is not to be found in the previous list? Why not?

Adaptation right (para 4.68-4.69). Adaptation right covers a number of cases in relation to copyright works not quite caught by the idea of reproduction, but nonetheless deserving to fall within the author's control, such as translations or dramatisations. The concept does not seem readily applicable to performances as such, although digitisation and the ability to manipulate digital records of performances may increasingly suggest that it can and should be. Note that certain performers now have a moral right of integrity (para 7.37).

Para 7.42

Why are all performers not given rights lasting for the same duration as authors of works protected by copyright? Should they be?

For the moment it is clear that so far as duration is concerned performance rights are being treated analogously with media works rather than author works (see for these categories in copyright para 3.113 ff). There does however seem to be a closer analogy between performers and authors, in terms of the individual character of their work, than between performers and producers of media works. Note that performers now have moral rights (paras 7.35-7.37). Final views on this may be dependent upon views as to how long copyright should last; as to which question see paras 3.127-3.129.