

DG Internal Market and Services
European Commission

Via Markt-D1@cec.eu.int

11 March 2006

Dear Sir/Madam

**DG Internal Market and Services Working Paper:
First evaluation of Directive 96/9/EC on the legal protection of databases**

This response is made on behalf of LACA: the Libraries and Archives Copyright Alliance in the UK. LACA monitors and lobbies about copyright and related rights on behalf of its member organisations and UK users of copyright works through library, archive and information services. LACA is convened and supported by CILIP: the Chartered Institute of Library and Information Professionals. A list of LACA member organisations appears at the foot of this page. Our members work at the interface between users of copyright protected materials and databases both analogue and digital, and otherwise manage the use of copyright works and databases within both public sector institutions and commercial enterprises.

The effect of the Directive

The Commission has recognised in its Consultation that there are a number of difficulties with the Database Directive and we agree this is so. We also agree with the Commission that there is no evidence that the existence of the *sui generis* right has actually benefited the European database industry so the objective of the Directive has not been achieved. The reported majority view of stakeholders who responded to the Commission's private online survey simply displays a natural reluctance to lose an existing protection. It is clear that US database industry has been able to dominate the commercial database market without the need for *sui generis* protection and despite the protection existing for European databases. It would seem that withdrawal of the Directive would not only serve the interests of deregulation, but also be unlikely to harm the European commercial database industry's ability to compete in the world market.

It should be remembered that there is also a widespread non-commercial database industry creating and re-using databases, much of which is undertaken by libraries, archives, museums, educational and research establishments. Non-commercial databases are created cooperatively by reutilising the contents of independent databases, often between institutions and often across international borders. Such projects include national and international union catalogues and potentially the proposed European Digital Library. This activity is of great benefit to the education and research community and to the information society as a whole.

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Representing ARLIS/UK & Ireland - The Art Libraries Society of the UK and Ireland, Aslib - The Association for Information Management, AUKML - Association of UK Media Librarians, BIALL - British and Irish Association of Law Librarians, The British Library, CILIP: the Chartered Institute of Library and Information Professionals, Educational Copyright Users Forum, IAML (UK & Irl) - The International Association of Music Libraries, Archives and Documentation Centres, RNIB - Royal National Institute of the Blind, Society of Archivists, Society of Chief Librarians in England and Wales and SCONUL - Society of College, National and University Libraries.

While the *sui generis* right imposes an additional layer of rights to be cleared in order to create such collaborative super-databases, at the same time it provides a level playing field of protection when it comes to the participation of such non-original databases in European-wide collaborative public sector projects since the right is harmonised in all Member States.

However, we agree with the Commission (para. 5.1) that *sui generis* right is difficult to understand. The complex problems concerning the interpretation of the Directive pose barriers to further creativity and enterprise, and to research and communication. The information society and research community has largely coped by ignoring the Directive's existence but this can be perilous. For example, the lack of understanding of the right nearly removed the human genome data from the public domain through privatisation. In his speech at the launch of the Adelphi Charter¹, Sir John Sulston² referred to how the human genome database was nearly acquired by a commercial company in return for the promise of additional funding to the Project. It was not at first realised that the company would have acquired the *sui generis* right in the database and thus a monopoly over access to and dissemination of the data itself which is subject to only very narrow exceptions. Researchers who could pay the subscription fees would have found themselves bound by their licence not to disseminate the information to protect the owner's commercial monopoly. Since the human genome data underpins all research in genetics, any barriers to access and dissemination of the data would have completely undermined the efficacy and speed of further scientific and medical research.

Solutions

We believe that of the four options proposed by the Commission, only two are viable: to **repeal the whole Directive** or to **amend the *sui generis* right**.

Repealing the Directive is attractive to us in the UK since it is a neat solution and Member States would then revert to the protections they had before. With regard to the UK and Ireland, withdrawal of the Directive has a number of advantages. Repeal of the whole Directive is unlikely to harm database makers since nearly all UK and Irish databases, including non-commercial databases created by libraries and archives (which under the Directive are 'non-original'), would then be protected by copyright by reverting from the *droit d'auteur* test of originality to the lower 'sweat of the brow' test of originality. The situation for users would be eased as the raft of complexity introduced by *sui generis* right operating in tandem with copyright in original databases would be removed. Furthermore databases would cease to have perpetual term of protection, reverting to the copyright term for literary works.

Alternatively, **amendment of the *sui generis* right and other provisions of the Directive** would maintain harmonisation of protection for databases within the Internal Market. This would benefit library and archive database makers when participating in major cross-border collaborative projects of the kind mentioned above. However, we feel that should this option be chosen by the Commission, considerable amendment of the *sui generis* right is needed, as set out below, in order for it to work effectively.

Amendments to the scope of the Directive

The Directive has caused users of databases considerable difficulties of interpretation due to the complexities caused by the introduction of the *sui generis* right. The considerable interplay between copyright and the *sui generis* right within a database poses the greatest difficulties since nowadays so very many works, both printed and electronic, are now in fact

¹ www.adelphicharter.org; The RSA Adelphi Charter Launch, 13 October 2005 Transcript, p10
http://www.rsa.org.uk/acrobat/adelphi_131005.pdf

² Nobel Laureate and former Director, Wellcome Trust Sanger Institute, UK

classed as databases, to the extent that the class of copyright protected work known as a literary ‘compilation’ in UK copyright law has become largely redundant. Literary compilations are printed literary works and before the Directive was implemented used to include works now treated as printed databases. We think that printed ‘databases’ are better treated as literary compilations since each printed edition is a static work akin to other printed literary works. To do this would furthermore avoid a lot of confusion.

- We **recommend** that the unnecessarily broad scope of the Directive be reduced by providing that *sui generis* right should subsist only in electronic databases.

Many not-for-profit libraries and archives participate in projects with commercial publishers by providing data such as catalogues or other datasets for the creation of indexes and search engines for repositories of data. It benefits society if, as producers of these databases, such libraries and archives continue to have access to the data they create under licence terms and conditions so they can make it available, adapt, add, store and preserve it and it prevents such data, which was created using public funds, from being locked up in proprietary commercial databases. Before the introduction of the *sui generis* right many licences hindered libraries and archives in this objective but its introduction has increased the bargaining power of libraries and archives as database producers leading to some improvements in licensing.

However, the European Court of Justice (ECJ) rulings of November 2004³ significantly restricted the scope of the *sui generis* right by distinguishing between the resources used in the ‘creation’ of data and the ‘obtaining’ of data in order to compile database content with the result that while the activity of obtaining data is protected by the *sui generis* right, creating data is not. This removes *sui generis* protection from libraries and archives which create the data that makes up the contents of their non-original databases i.e. catalogues or metadata lists.

- This was not the intention of the Directive so, if the Directive is to be retained, we **recommend** that the *sui generis* right be amended in the light of the ECJ judgments to restore protection to all non-original databases.
- Additionally, we **recommend** that provision be made for compulsory licensing as originally intended by the Commission.⁴ This would benefit libraries and archives as database users.

Amendments to address the complexities of *sui generis* right concurrent with copyright

Many databases comprise copyright protected works and where they are ‘original’ at the level of *droit d’auteur* originality defined by the Directive, they are protected both by copyright and *sui generis* right. The two rights appear to be completely enmeshed and are impossible to unravel in order to establish what may or may not legally be done with the information contained in the database under an exception or limitation to copyright or *sui generis* right.

Quite often the two rights and their exceptions and limitations contradict each other, yet the Art. 7(4) provision that *sui generis* right is ‘without prejudice’ to copyright or other rights does not establish which takes precedence in a conflict of law. Art. 7(1) relies on interpretation of the term ‘substantial’ which is undefined and gives ‘qualitative’ investment as a criterion for the subsistence of *sui generis* right, yet it fails to distinguish how ‘qualitative’ investment is different from the intellectual creativity that gives rise to copyright and fails to recognise that copyright and *sui generis* right have different terms and different exceptions.

³ Fixtures Marketing Limited v. AB Svenska Spel (C-46/2) and The British Horseracing Board Ltd and Others (C-203/02)

⁴ Directive COM(93) 464 final–SYN 393, Brussels 4 October 1993. Compulsory licences and arbitration were included in Art. 8(1)-(3).

Our experience is that there is widespread confusion as to what *sui generis* right is, what is protected by copyright and what by *sui generis* right, particularly since most databases are actually protected by both rights. The result is a chilling effect when it comes to extracting and re-using content for non-commercial purposes since the exceptions for the *sui generis* right are far too narrow. The creation of non-commercial databases is hampered because the rights that need to be cleared within a single database are made so complex and entwined. We wish to see a situation in which most non-commercial databases can be created and re-used for non-commercial purposes without the need for permissions or waivers.

- We therefore **recommend**
 - (i) that the references to 'qualitative investment' in Art. 7 be removed since they are unclear and ambiguous with regard to any copyright subsisting in the database;
 - (ii) that the exceptions to the *sui generis* right be harmonised with the list of exceptions in Art. 5 of the Information Society Directive 2001/29/EC.

Amendment to the Term of protection

Another major problem is the term of protection for databases. Under Art. 10(3), significant additions made incrementally to a database allows for the term of protection to be re-set for another 15 years at each addition. This creates a perpetual term of protection for both original and non-original components in the database, which is absolutely contrary to the principle enshrined in all other intellectual property rights that protection is for a limited term. Unless the protection is waived such databases will never enter the public domain.

- We **recommend** that the term of *sui generis* right be limited to 15 years from the first publication of the database but that portions of it may be protected for a further 15 years only if reliable authenticated date stamping is applied to the revised parts, allowing older data to enter the public domain.

Amendment to the concept of 'lawful user'

The failure to define the term 'lawful user' in the Directive has led to confusion amongst both users and database makers, which is compounded by the Information Society Directive 2001/29/EC referring more straightforwardly to just 'users'. We see a 'lawful user' as being someone who is allowed access to and use of a database by statutory right and/or by the terms of a licence. However, many rightholders fail to recognise access and use of databases by statutory right and are (we think wrongly) defining a 'lawful user' only as someone who has directly obtained a licence for access and use of the database. The interpretation of Art. 6(1) and the effectiveness of Art. 15 of the Directive require the deletion of the word 'lawful', or that 'lawful user' be defined to include a user who is making use of a statutory exception (by definition a 'lawful' use).

- We **recommend** that the term 'lawful user' be deleted from the Directive and replaced with 'user' to bring it into conformity with the Information Society Directive. An alternative is to insert the UK's definition⁵ of 'lawful user' into the Directive.

Yours sincerely

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⁵ United Kingdom. Copyright and Right in Databases Regulations, 1997. S.I. 1997/3032 Reg. 12(1): "...lawful user", in relation to a database, means any person who (whether under a licence to do any of the acts restricted by any database right in the database or otherwise) has a right to use the database;" <http://www.opsi.gov.uk/si/si1997/73032--c.htm#19>