

# European Union Protection of Databases:

## *An Overview of the Database Directive*

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### I. History of the Database Directive

On April 15, 1992, the European Commission (the "Commission") proposed a Directive (the "Database Directive" or "Directive") regarding the protection of databases. \*1 The Commission had been reevaluating the legal status of databases while creating a comprehensive plan for information technologies in the European Union (the "EU"). \*2 Several reasons were enumerated by the Commission for proposing the Database Directive, including: (1) the expanding role of electronic information technology in the European Union (the "EU"); (2) the extensive economic value of current EU information assets; as well as (3) the strategic underpinnings of the on-line information industry to the interests of the Community. \*3 Other stated policies behind the Directive include: (a) the harmonization of the law of Member States of the EU regarding the level and kind of protection afforded to database materials; and (b) the encouragement of investment in database compilation. \*4 Basically, the EU wanted to increase protection for on-line and real time databases throughout the Community with the hope of encouraging the development of information technology industries. \*5 The Directive was finally adopted on March 11, 1996 \*6 after years of debate. \*7 Pursuant to the Directive, Member States must conform their domestic laws to the Directive by January 1, 1998. \*8

### II. Scope and Definition of "Database"

The Directive protects databases "in any form." \*9 This means that electronic as well as non-electronic databases are protected under the Directive. \*10 However, the Directive does not apply to computer programs which either created the database, or those programs which operate the database and are accessible electronically. \*11

The Directive defines "database" as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means." \*12

### III. Two Forms of Protection Afforded to Databases

#### A. Copyright Protection

One of the most important reasons cited for the adoption of the Directive was because the "differences in the legal protection of databases offered by the legislation of the Member States" was having "direct negative effects on the functioning of the internal market ... throughout the Community ..." \*13 The

enactment of the Directive provides harmonization of the copyright laws of Member States regarding databases. Further, where there is a large difference between the Member State's regarding such laws, the Directive addresses this issue by allowing the Member States to resolve the conflict pursuant to their domestic law. \*14

## 1. Scope and Duration of Copyright Protection

Pursuant to the Directive, copyright protection extends to the "selection or arrangement" of the contents of the database, but not to the contents themselves. \*15 The contents of the database are separately protected by copyright laws, \*16 and the database creator must obtain permission by the copyright owner to use her material as part of the database. Therefore, the copyright protection afforded extends only to the "structure of the database." \*17

Further, in order to qualify for copyright protection, the database must be the author's own "intellectual creation." \*18 This standard appears to be straight forward. However, there is variance among Member States regarding the determination of "originality." \*19 Also, the Directive does not clearly delineate what level of "intellectual creation" is necessary to receive copyright protection. \*20 For example, a Member State may adhere to the "sweat of the brow" notion, where protection is afforded to works achieved by one's skill and labor. On the other hand, another Member State may enforce protection only for "original" works, which prevents monopoly power over the use of raw data. Therefore, one can conclude that the test for originality will be determined by Member States' legislatures and interpreted by courts. \*21

In regards to the length of an author's copyright protection, the Database Directive extends such protection for a term of 70 years after the death of the author. \*22 The length of this copyright protection complies with the Term of Protection Directive. \*23

## 2. Who It Protects

The Directive gives copyright protection to the "author" of a database. \*24 The author is defined as "the natural person or group of natural persons who created the base, or where the legislation of the Member States so permits the legal person designated as the rightholder by that legislation." \*25 This definition allows Member States to define for themselves who the rightholder may be.

## 3. Author's Rights

Pursuant to Article 5 of the Directive, the author has "the exclusive right to carry out or to authorize: (a) temporary or permanent reproduction by any means and in any form, in whole or in part; (b) translation, adaptation, arrangement and any other alteration; (c) any form of distribution to the public ... or of copies thereof ...; (d) any communication, display or performance to the public; (e) any reproduction, distribution, communication, display or performance to the public" of anything referred to in subparagraph b. \*26

## 4. Exceptions to Author's Rights

However, there are exceptions to these exclusive rights. Article 6 of the Database Directive enumerates the circumstances where these rights are not absolute. The Directive allows a lawful user of a database to perform an act which is normally an author's exclusive right when such act is necessary to access the

contents of the database of the author. \*27 Also, the author's permission is not necessary for normal use of the database contents by a lawful user. \*28 When the author has authorized the user access to only a part of the database, this exception applies to such part. \*29

Other exceptions to the author's exclusive rights may also arise as Article 6 allows Member States to limit the Article 5 exclusive rights in certain circumstances. Member States may limit the author's right to prevent: (a) reproduction of a non-electronic database (for private purposes); (b) use for illustrative purposes in teaching or scientific research; (c) use for public security, administrative or judicial procedural purposes; and (d) use authorized under domestic copyright laws. \*30

The caveat to these exceptions is that they may not be interpreted to apply in a way that would unreasonably prejudice the rightholder's interests, or conflict with the normal exploitation of the database pursuant to the Berne Convention. \*31

## B. Sui Generis Protection

The Database Directive also provides a sui generis right of protection to makers of databases. \*32 Sui generis is Latin for "of its own kind" or unique. \*33 Therefore, the EU has created a new right in favor of the makers of databases.

### 1. Length and Scope of Sui Generis Protection

The sui generis right protects against the unauthorized "extraction and/or re-utilization of the whole or a substantial part ... of the contents of that database." \*34 In addition, repeated and systematic extraction or re-utilization of insubstantial parts of the contents of a database is not permitted when conflicting with the normal exploitation of the database or if such use unreasonably prejudices the interests of the maker of the database. \*35

Extraction is defined as the "permanent or temporary transfer of all of a substantial part of the contents of a database to another medium by any means or in any form." \*36 Re-utilization is defined as "any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission." \*37 The Directive provides that public lending is not considered to be either extraction or re-utilization. \*38

The sui generis protection lasts for fifteen years from the date of completion of the database \*39 and applies even if the database is also covered by the Directive's provisions regarding copyright protection. \*40 The Directive provides an additional fifteen year term of protection if a substantial new investment is made to the contents of the database. \*41 Also, the sui generis right can be transferred, assigned or licensed pursuant a contract. \*42

### 2. Who it Protects

The sui generis right protects the maker of the database who shows "there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents ..." \*43 In order to receive this protection, the maker of the database must either: (a) be a national of a Member State; (b) have her habitual residence within a territory of the EU; or if a company or firm formed under the laws of a Member State, (c) have its "registered office, central administration or principal place of business within the Community," or if only having a registered office within the

Community, the business operations must have a genuine link on an "ongoing basis with the economy of a Member State." \*44 However, in regards to a party who does not fall into any of the above categories, the European Council may approve an agreement (upon proposal of the European Commission) that sui generis rights be extended to databases made outside of the EU. \*45

### 3. Exceptions to Sui Generis Protection

Analogous to the ability of a Member State to limit the copyright protection afforded an author, the Directive allows Member States to permit the extraction or re-utilization of the contents of a database. \*46 For example, a Member State may allow extraction of the contents of a non-electronic database for private purposes. \*47 Member States may also allow the extraction of a database where the purpose is illustrative in regards to teaching or scientific research. \*48 Lastly, a Member State may allow extraction or re-utilization if the purpose is one of public security or administrative or judicial procedure. \*49

## IV. Criticism of the Database Directive

### A. Criticism

There are several criticisms of the Database Directive. One criticism is that the Directive gives a more broad and strong monopoly power to database owners than is necessary to avoid market failure. \*50 Another criticism is that the power granted to database owners is of almost unlimited duration with few public policy limitations. \*51 The Directive also arguably jeopardizes basic scientific and educational research, as basic science may not be able to afford to pay the market rate for data, as scientific needs differ from that expected by the competitive market. \*52 In addition, it is argued that the Directive will eliminate competition for value added products and services, as well as create a difficult legal barrier to entry into the market. \*53

### B. Alternatives to the Database Directive

It is arguable that instead of the copyright and sui generis protection regime the Database Directive provides for databases, there are better ways to get desirable results for both developers and users of databases. One method to protect the developers is to apply unfair competition principles to the contents of databases. \*54 Another alternative to the Directive is to adopt an intellectual property regime based on liability for unauthorized use, as opposed to an exclusive rights regime. \*55 These alternatives arguably allow database developers to recoup their investments (as well as make profits), yet does not create a barrier to entry into the market or impede scientific and educational research. \*56

### C. Defense of the Database Directive

The Database Directive can be defended against the criticisms and alternative proposals mentioned above by the terms of the Directive itself.

In regards to the potential monopoly power conferred by the Directive, one can look to Article 16, section 3 which addresses this issue. It provides for the Commission to submit a report every three years regarding whether the application of the sui generis right by the Member States "has led to abuse of a dominant position or other interference with free competition ..." which would justify action, such as a compulsory licensing agreement. \*57 This would protect the market from any monopoly activity on the

parts of database authors or makers. It would force sole source providers to allow the contents of their database to be used by others, yet retain a profit to the authors or makers of the database. This procedure would also diminish any barriers to entry into the market, as well as provide an avenue for competition over value added products and services.

The argument that the Directive creates an unlimited duration of power for database makers with few public policy exceptions is addressed by Articles 10 and 16 of the Directive. Article 10 provides a database maker a fifteen year term of protection which begins to run when the database is completed. \*58 It allows an additional fifteen year term of protection when there is substantial change to the contents of the database which would constitute a substantial new investment. \*59 The burden of proof regarding whether there has been a substantial new investment is on the maker of the database. \*60 As there is no case law regarding what factors courts will consider significant in making this determination, it is questionable whether a database maker will be able to maintain protection for an unlimited term. However, under Article 16, if database makers are able to maintain such extended terms of protection, the European Parliament, the Council and the Economic and Social Committee can determine whether such term of protection has led to interference with free competition and may take an "appropriate measure." \*61 They can similarly determine that the public policy exceptions are insufficient and take "appropriate measures." \*62

Pursuant to Article 9, Member States are permitted to delineate the scope of the database maker's sui generis regarding scientific or educational research. \*63 Article 9 limits the extent of such research to non-commercial purposes. \*64 Therefore, if the purpose of the extraction or re-utilization of the contents of a database is truly for purely scientific or educational purposes, the Directive does not pose a threat to such research.

Therefore, the dangers of an unlimited term of protection, few public policy exceptions, and threats to scientific and educational research arising from the Directive are not truly problematic.

In addition, the alternatives to the Directive proposed in section IV. B. above are not necessarily opposite to the provisions in the Directive. For example, one alternative proposed was the application of unfair competition principles. The Directive allows for such principles to apply to databases. Article 13 states that "[t]her Directive shall be without prejudice to provisions concerning ... laws on restrictive practices and unfair competition ..." \*65 Therefore, the enactment of the Directive does not preclude the application of unfair competition principles to databases. It merely adds further protection.

Another proposed alternative is the adoption of a liability based database regime, as opposed to the exclusive rights regime adopted by the Directive. There seems to be only a negligible real world distinction between these two regimes. The Directive grants the author or maker of a database either the exclusive right to authorize certain transactions regarding the database, or the right to prevent extraction or re-utilization of her database. \*66 In turn, the rights of the author or maker of a database create liabilities on those who violate these rights. Therefore, the Directive can be seen as providing a liability regime as well as an exclusive rights regime.

## VI. Conclusion

Although it is arguable that the Database Directive will lead to negative results, it is more plausible that at this time the Directive addresses these issues and provides the best method of approaching the problem of free-riders destroying the market.

1 Ancient Debate, New Technology: The European Community Moves to Protect Computer Databases, 12 B.U. Int'l L. J. 153 (1994).

2 Intellectual Property Rights in Data?, 50 Vand. L. Rev. 51, 73 (1997).

3 Id.

4 Id., citing Council Directive 93/98/EEC of October 1993.

5 The European Database Directive: An Introduction for Practitioners, 8 NO. 9 J. Proprietary Rts. 17 (1996).

6 See 96/9/EC: Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 OJ L 77.

7 The European Database Directive: An Introduction for Practitioners, 8 NO. 9 J. Proprietary Rts. 17 (1996).

8 Database Directive at Article 16 § 1.

9 Database Directive at Article 1 § 1.

10 Id., at Recital (14).

11 Id. at Article 3

12 Id. at Article 3

13 Database Directive at Recital (2) 1996 OJ L 77.

14 The European Database Directive: An Introduction for Practitioners, 8 NO. 9 J. Proprietary Rts. 17 (1996), citing Recital (28) of the Database Directive regarding moral rights of an author.

15 Database Directive at Article 3.

16 Database Directive at Article 3 § 2.

17 The European Database Directive: An Introduction for Practitioners, 8 NO. 9 J. Proprietary Rts. 17 (1996), citing Recital (15) of the Database Directive.

18 Database Directive at Article 3 § 1.

19 The European Database Directive: An Introduction for Practitioners, 8 NO. 9 J. Proprietary Rts. 17 (1996).

20 Id.

21 Id.

22 Id.

23 Id.

24 Database Directive at Article 4 § 1.

25 Id.

26 Id. at Article 5.

27 Id. at Article 6 § 1.

28 Id.

29 Id.

30 Id. at Article 6 § 2.

31 Id. at Article 6 § 3.

32 Id. at Article 7.

33 Barron's Law Dictionary, Third Edition, © 1991, at p. 473.

34 Database Directive at Articles 10 § 1 and 7 § 1, 1996 OJ L 77.

35 Id. at Article 7 § 5.

36 Id. at Article 7 § 2(a).

37 Id. at Article 7 § 2(b). However, according to this subsection, the first sale of a copy of a database in the EU will exhaust the right the control the resale of that copy within the EU.

38 Id. at Article 7(b).

39 Id. at Article 10 § 1.

40 Id. at Article 7 § 4.

41 Id. at Article 10 § 3.

42 Id. at Article 7 § 3.

43 Id. at Article 7 § 1.

44 Id. at Article 11.

45 Id. at Article 11.

46 Id. at Article 9.

47 Id. at Article 9(a).

48 Id. at Article 9(b).

49 Id. at Article 9(c).

50 Intellectual Property Rights in Data?, at 55.

51 Id.

52 Id. at 83.

53 Id. at 55.

54 Id.

55 Id.

56 Id.

57 Database Directive at Article 16 § 3.

58 Id. at Article 10.

59 Id. at Article 10.

60 Id. at Recital (54).

61 Id. at Article 16 § 3. As previously stated, the Commission is required to submit a report every three years regarding the impact of the sui generis protection in the Member States.

62 Id.

63 Id. at Article 9.

64 Id.

65 Id. at Article 13.

66 Id., Articles 5, 7.