

<p style="text-align: center;">THE DATABASE RIGHT – EUROPE’S EXPERIMENT</p>
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Databases: copyright and database right

A database is a searchable collection of independent works, data or other material arranged systematically. A database can be both electronic or non-electronic e.g. a library card catalogue. Facts and data per se, such as mathematical formulae or the ocean tides are not eligible for copyright protection, but *collections* of data are copyrightable. In other words, a database is copyrightable if it is “fixed” in some tangible form and if it is original.

There are two thresholds for originality. In civil law countries with the “droit d’auteur” tradition, an element of “intellectual creation” is required. In common law countries, copyright protection is granted if the compilation required considerable skill, labour or judgement (known as “sweat of the brow” copyright). This means that, in general, fewer databases in civil law countries are protected by copyright, because the higher threshold means that only so called “original” databases are protected.

In 1991, the US Supreme Court (common law tradition) made it clear in the Feistⁱ case, however, that unoriginal compilations of facts are not copyrightable. Requiring “originality” in the copyright sense rather than applying the sweat of the brow criteria, the Court ruled that an alphabetically ordered telephone directory did not qualify for copyright.

In the meantime, the European Commission considered that the European market was “fragmented by many technical, legal and linguistic barriers”ⁱⁱ. Database protection in Member States with a civil law tradition differed from that of common law countries (UK and Ireland). The Commission believed that this harmed the free movement of database products within Europe and observed that the UK alone, with its lower sweat of the brow standard, produced 50% of European on-line database services. (Of course, this could also be explained by other factors, such as the language in which the database is produced). The Commission believed that by increasing protection for databases in Europe, it would stimulate the development of the database industry and enable it to compete with the US.

In its 1996 Directive on the Legal Protection of Databasesⁱⁱⁱ, the Commission tried to find a middle ground. It harmonised the threshold of “originality” to the higher standard that applied in droit d’auteur countries, meaning that copyright protection applied only to so-called “original” databases. In a second step, a novel new right was created to protect those “unoriginal” databases that had previously enjoyed protection under sweat of the brow copyright, but which no longer qualified under the higher standard of originality. Known as the database or “sui generis” right, it grants protection to *makers* of databases who have made a substantial investment in their production. Also referred to as a “publishers’ right”^{iv}, it applies to databases that are economically important to the producer, but are nonetheless non-creative.

Sui generis means “of its own kind” or unique in its characteristics. Perhaps with a view to gaining a competitive advantage over database producers in the US, it granted legal protection in one fell swoop to non-original databases (such as alphabetical telephone directories), of a kind without precedent in any international convention. This means that the principle of national treatment, whereby imported and locally produced goods are treated equally, did not apply. This in turn meant that US database producers could not avail of the new right. Thus began Europe’s database experiment.

Practice

In a nutshell, the database right grants the maker of a database (usually the publisher), who has made a substantial investment in either the obtaining, verification or presentation of the contents, an exclusive right of extraction (similar to the right of reproduction in copyright), a right of reutilisation (like the right of communication to the public), plus a right of distribution. The term of protection is fifteen years, extended by a further fifteen years whenever a substantial change is made to the database. The Directive provides for a small number of exceptions and limitations.

Like copyright, the database right is automatic, and it may apply to all European databases irrespective of whether they are also protected by copyright. For copyright protection to apply, the database must have originality in the selection or arrangement of the contents. For the database right to apply, the selection and arrangement must be the result of a substantial investment^v. This means that it is possible to satisfy both requirements, whereby copyright and database right apply at the same time. The actual content of the database may or may not be subject to copyright, depending on the nature of the content.

This has caused a lot of confusion for users of databases, including libraries. The complexity of the two tier approach often makes it unclear what is protected or for how long. The exceptions and limitations do not accord with those of the later copyright Directive^{vi} and it is unclear which Directive prevails. Academics have claimed that the database right impedes research by limiting access to and the use of scientific data, which in itself may not be copyrightable. Vague and ambiguous terms such as "substantial investment" have resulted in different interpretations by the national courts, leading to legal uncertainty.

Recent developments

There have been two important recent developments. In 2004, the European Court of Justice, supreme court for the European Union (EU), made its first ruling on the database Directive in four joined cases concerning fixture lists for football and horse-racing. In a decision reflecting public policy issues, the Court reduced the scope of the sui generis right by curtailing database protection for so-called sole source database providers. Under the ruling, the British Horseracing Board, which creates lists of horse-racing fixtures as an intrinsic part of its activities, is not granted sui generis protection, as this may create an undue monopoly and based on the database right, could otherwise limit the creation of downstream spin-off products. This means that alphabetical telephone directories, TV listings, etc. no longer enjoy sui generis protection. In addition, the scope of protection has been reduced, whereby the only test for infringement is whether what is taken from the database reflects the substantial investment of the database producer.

In 2005, the European Commission undertook an evaluation of the effects of the database right. In a somewhat unusual, but welcome, step, it conducted an empirical evaluation of whether the "experiment" was succeeding. It concluded, "the economic impact of the "sui generis" right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases"^{vii}. The evaluation presented four policy options: repeal the whole Directive; repeal the sui generis right; amend the sui generis provisions or maintain the status quo. Following a public consultation in 2006, the Commission will provide a final assessment on whether legislative changes are needed or not.

Policy issues for libraries

Libraries collect, organise and preserve information and knowledge for the purposes of making it available to students, researchers and the general public in order to benefit society as a

whole. In the digital environment, most content is stored in databases. In this regard, libraries have a dual role. Libraries are heavy database users, licensing access from publishers to electronic material stored in databases. Libraries are also producers of databases such as those resulting from digitisation projects, library catalogues and metadata registries created by libraries.

In principle, libraries oppose the introduction of new rights because it imposes an additional barrier on access to knowledge, particularly to content in the public domain. New layers of rights on information mean new layers of rights for libraries to negotiate or to clear, increasing costs and hindering access. The database Directive introduced a new right favouring database producers in order to stimulate investment in the database industry. At the same time, publishers have consolidated, occasionally invoking the attention of competition authorities^{viii}, thereby placing more information in fewer hands. Database production in Europe has decreased, while the Directive has proved itself complicated to understand and interpret, even for experts.

From the library viewpoint, the information environment has seen many developments. Increasing co-operation between libraries has meant that local databases merge into regional and national resources; large scale digitisation projects are being undertaken between libraries and commercial partners; metadata has emerged as a valuable tool to aid and add consistency to cross-database and internet searching. Some libraries have started to make use of the sui generis right as a way of maintaining control over their databases, especially when entering into partnership arrangements with commercial entities. For example, it can enable a library to ensure that access to their database is safeguarded even when it becomes part of a proprietary database.

In this context, Electronic Information for Libraries (eIFL.net) called on the European Commission to radically improve the database Directive by amending the sui generis right, introducing compulsory licensing and to ensure that there is coherence between the database Directive and the Info Soc Directive.

The international dimension

The European Commission was trying for many years to introduce an international database treaty at the global policy making forum, the World Intellectual Property Organization (WIPO). As recently as 2002, the Commission championed the "success" of its sui generis protection, while calling on WIPO member states to extend database protection at international level^{ix}. The United States, the other major database producer, was sceptical. Since the 1991 Feist case, a few US database companies had been seeking a special database right. However, a greater number, supported by the US Chamber of Commerce, opposed the introduction of such a right believing that they could adequately protect themselves through legal means, such as contracts and technical means, such as password control. More importantly, they argued that strong database protection would make it harder to generate databases in the first place, reducing the incentive to create new database products and limiting competition in the provision of information^x. In other words, it would be counter-productive.

Given their own assessment of the database Directive, it is unlikely that the European Commission will re-introduce the idea of an international database treaty at WIPO in the near future. However, the Directive encourages the extension of the sui generis right to third countries on the basis of forced reciprocity^{xi}. Any country negotiating a trade agreement with the EU, such as an Economic Partnership Agreement, should be aware of the EU's own experience with the database right and should avoid incorporating this new right into their law. (See also Copyright and Trade Agreements).

Library position statements

Responses to the Commission consultation, March 2006

eIFL <http://www.eifl.net/services/databaserules.html>

EBLIDA http://www.eblida.org/position/Databases_Response_March06.htm

UK Libraries and Archives Copyright Alliance

<http://www.cilip.org.uk/professionalguidance/copyright/lobbying/laca3.htm>

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http://ec.europa.eu/internal_market/copyright/prot-databases/prot-databases_en.htm

Two database cheers for the EU. James Boyle, Financial Times, 2.1.2006

<http://www.ft.com/cms/s/99610a50-7bb2-11da-ab8e-0000779e2340.html>

Institute for Information Law, University of Amsterdam. The Database Right File. A unique collection of case law on the European (sui generis) database right

<http://www.ivir.nl/files/database/index.html>

ⁱFeist Publications, Inc. V. Rural Tel. Service Co.

<http://www.techlawjournal.com/cong106/database/19910327feist.htm>

ⁱⁱDG Internal Market and Services Working Paper. First evaluation of Directive 96/9/EC on the legal protection of databases

ⁱⁱⁱDirective 96/9/EC on the legal protection of databases

^{iv}<http://news.independent.co.uk/people/obituaries/article1838327.ece>

^vhttp://www.intellectual-property.gov.uk/resources/other_ip_rights/database_right.htm

^{vi}http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm

^{vii}Evaluation of Directive 96/9/EC on the legal protection of databases p.5

^{viii}http://www.competition-commission.org.uk/rep_pub/reports/2001/457reed.htm#summary

^{ix}The Legal Protection of Databases (Submitted by the European Community and its Member States) WIPO SCCR/8 http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2323

^xJames Boyle: A Natural Experiment, Financial Times, 22.11.2004

^{xi}Article 11(3) & Recital 56