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European Commission
Directorate-General Internal Market and Services
D-1 Copyright and Knowledge-based Economy
B - 1049 Bruxelles/Brussel
Belgium

By email Markt-D1@cec.eu.int

12 March 2006

**Re : First evaluation of Directive 96/9/EC on the legal protection of
databases, Brussels, 12 December 2005**

Dear Sir/Madam,

Electronic Information for Libraries (eIFL.net) hereby submits its observations on the first evaluation of Directive 96/9/EC on the legal protection of databases.

eIFL.net welcomes the opportunity to make its comments. Please do not hesitate to contact me if you have any queries.

Yours sincerely

Teresa Hackett
Project Manager eIFL-IP

1. Electronic Information for Libraries (eIFL.net) is an international foundation which supports and advocates for the wide availability of electronic information for libraries in developing countries and countries in transition. Our global network embraces nearly 4,000 leading libraries serving millions of users in 50 countries in central, eastern and south-east Europe, Africa, Asia, former Soviet Union and the Middle East. We have members in eighteen countries amongst the new EU Member States, candidate countries and neighbouring statesⁱ.

2. eIFL.net welcomes the evaluation by the Commission and wishes to comment first on the methodology used in conducting the evaluation. The Commission's evaluation, based as far as possible on the evidence available, concludes that the impact of the "sui generis" right on database production is unproven and that the necessity of such protection for a thriving database industry is doubtfulⁱⁱ.

3. At the same time, the Commission privately consulted one stakeholder group, the European publishing industry. According to the evaluation report, this stakeholder group "produced strong submissions arguing that "sui generis" protection was crucial to the continued success of their activities"ⁱⁱⁱ. Although the European database industry has the opinion of strongly favouring a database right, respondents appear not to have produced convincing evidence in support of their opinion.

4. As pointed out by Professor James Boyle, William Neal Reynolds Professor of Law at Duke Law School^{iv}, the Commission's evaluation sometimes juxtaposes the two studies as if they were of equivalent status. eIFL.net finds this methodology puzzling especially in the light of the "better regulation" principles initiated by the Barroso Commission. It seems at odds with the undertaking of principle from the Commission that every new legislative proposal will undergo a thorough impact assessment analysis to ensure consistency with the objectives of growth and competitiveness.

5. eIFL.net calls on the Commission to ensure that facts are clearly separated from opinion when determining the future direction of IP policy in general, and the Database Directive in particular, and that the views of all stakeholders are taken into account equally when determining the position.

Libraries and the Database Directive

6. Libraries collect, organise and preserve information and knowledge for the purposes of making the content available to students, researchers and the general public in order to benefit society as a whole. In most cases, libraries use this content for non-commercial, non-exploitative purposes.

7. 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^v created by libraries.

8. At first libraries were cautious about the introduction of the sui generis right, a new right without precedent anywhere in the world. At the time, however, libraries were assured that the sui generis right might be of future benefit to libraries and that the clause on compulsory licensing in the draft text^{vi} would protect users of databases against a dominant position of rightholders.

9. To their dismay however, the compulsory licensing provision was removed from the draft text at a late stage in the negotiations, leaving libraries only with a possible future benefit from the sui generis right.

10. In practice, the Directive has proved itself to be very complicated to understand and interpret, even for experts. It is often unclear what is protected in a database and for which term. Especially problematic is the relationship between the Database Directive and the Information Society Directive (Info Soc).

11. In the decade since the introduction of the Database Directive, the information environment has seen many developments: increasing cooperation 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.

12. Some libraries have started to make use of the sui generis right because it is 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.

13. However, in November 2004, the European Court of Justice (ECJ) significantly curtailed the scope of sui generis protection^{vii}. This may result in libraries no longer being able to benefit from the sui generis right as envisaged.

Evaluation of the Database Directive

14. We shall briefly recap on the stated aims of the Directive and will evaluate the aims as set out in the Commission evaluation. **eIFL.net shall call on the Commission to amend the Database Directive.**

The stated aim of the Database Directive was to:

- (1) remove existing differences in the legal protection of databases by harmonising the rules that applied to copyright protection for databases across the Community;
- (2) safeguard the investment of database makers (term of protection); and
- (3) secure the legitimate interests of users to access information compiled in databases

Harmonisation of the legal protection of databases in the Community

15. At the time of the adoption of the Database Directive, the threshold of originality required for the protection of databases under copyright law varied enormously within the Community. Databases were protected in the common law countries (the UK and Ireland) by the lower “sweat of the brow” copyright standard and in droit d’auteur countries, such as France or Germany, by a much higher “intellectual creation” standard of originality.

16. The Database Directive attempted to harmonise the different standards by applying the higher threshold of originality from droit d’auteur countries (an element of “intellectual creation”) to original databases (“original databases”) and a new form of “sui generis” protection to those databases that did not pass the originality test (“non-original databases”).

17. According to the Database Directive, non-original databases are only protected by the sui generis right if there has been “qualitatively or quantitatively” a substantial investment in either the obtaining, verification or presentation of the contents of a database.

18. The November 2004 decision of the European Court of Justice (ECJ) significantly curtailed the scope of sui generis protection^{viii}. In determining the scope of the sui generis right, the ECJ made a distinction between the resources used in the “creation” of the data that comprises the contents of a database and the “obtaining” of such data in order to assemble the contents of a database. The ECJ decided that only the latter activity is protected under the sui generis right. This narrow interpretation leaves no protection for bodies such as libraries and archives which create the data that makes up the contents of their non-original databases.

19. Although this interpretation of the sui generis right may reduce the risk of the abuse of a dominant position on the data and information “created” by an organisation, it may result in, for instance, catalogues or metadata registries created by libraries of their holdings being left unprotected. We believe this was not the intention of the Database Directive.

20. Libraries, archives and other non-profit institutions such as universities can benefit from protection as it becomes increasingly common to participate in projects with commercial partners whereby the library provides information e.g. catalogues or other datasets for the creation of indexes and search engines for repositories of data.

21. Once the library’s non-original database is incorporated into such search engines, the library may wish to control the use of their data e.g. to ensure continued access by the library of such data and to prevent commercial partners from exploiting such data.

22. For such a scenario, the narrow interpretation of the sui generis right by the ECJ is likely to have a detrimental effect on the protection of non-original databases created by libraries, archives and other non-profit organisations.

Safeguard the investments of database makers (term of protection)

23. The Database Directive provides for two different terms of protection for databases. Databases that are eligible for copyright protection are protected until 70 years after the death of the author. Databases protected by the sui generis right are protected for 15 years from 1 January of the year following the date of completion.

24. One of the characteristics of a database is that it can be updated. Many databases are updated frequently e.g. daily/hourly. According to Article 10(2), any substantial change to the content of the database shall qualify the database resulting from that investment to its own term of protection. This would potentially give such a database owner perpetual protection on the database. As well as conflicting with the spirit of the Berne Convention, it also conflicts with the term of protection for author’s rights as set out in the Term Directive.

25. eIFL.net believes that databases protected by the sui generis right should be granted a maximum protection in line with the Term Directive and should not exceed 70 years, irrespective of the number of times it has been updated or the content changed.

Legitimate interests of users to access information compiled in databases

26. We agree with the Commission that the rulings of the ECJ and some national judges make it clear that even the judiciary is concerned that the balance between the rights of users and rightholders in databases is inappropriate^x. Indeed this is possibly the reason why the ECJ has chosen to adopt a restrictive application of the sui generis right for fear that the right might otherwise significantly restrict access to information. Without having a compulsory licensing provision to rely on in the Directive, the ECJ tried to counteract this fear and ruled in the *British Horseracing Board Ltd and Others* (C-203/02) that the mere act of consultation of a database is not covered by the database maker's exclusive rights. This right of the user of a database should be made much more explicit in the Directive.

27. Moreover, the application of the Database Directive would greatly improve if the inconsistencies and the lack of coherence between the Database Directive and the Info Soc Directive were to be corrected.

The concept of a "lawful user"

28. The Database Directive introduced the concept of a "lawful user". This concept was not adopted by the later Info Soc Directive, which refers simply to "users". This has caused confusion for both users and producers of databases. A contributing factor to the confusion is that the Database Directive does not provide for a definition of a lawful user.

29. eIFL.net believes that a lawful user is a user permitted to access and use a database on the basis of a statutory right and/or on the basis of a licence. However, many rightholders define a lawful user only as a user who has obtained a licence for access and use of such a database and they do not recognise access and use on the basis of a statutory right. The interpretation of Article 6.1 and the effectiveness of Article 15 of the Database Directive hinge on the definition of "lawful user".

30. eIFL.net is firmly of the opinion that the concept of a lawful user must include a user making use of a statutory exception, which is by definition a lawful use.

31. Therefore, eIFL.net urges the Commission to adopt one of two options. The concept of a "lawful user" should be deleted from the Database Directive, putting it in line with the Info Soc Directive. Alternatively, the Database Directive should define the concept of a lawful user as follows:

"A 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."

Source: UK Copyright and Right in Databases Regulations, 1997

Exceptions and limitations

32. Article 6 of the Database Directive lists the exceptions to the restrictions provided for in Article 5 of the said Directive. Article 6(1) contains the exception for “normal use” and Article 6(2) the limitations, such as the use of a database for private purposes and research purposes. The “normal use” exception has proven to be very confusing because it is not clear what is meant by normal use and why the limitations contained in Article 6(2) do not themselves qualify as “normal use”.

33. According to Article 15, only the normal use of the content of a database cannot be overridden by contract law. eIFL.net believes that this evaluation of the Database Directive is an opportunity to differentiate more clearly between normal use and the limitations or alternatively to apply Article 15 to Article 6(2).

Database Directive v Info Soc Directive

34. The relationship between the Database Directive and the Info Soc Directive is especially important since the journal and book publishing environment has changed dramatically over the last decade. Most publications are now available in dual formats and an increasing number of journals, especially in the scientific, technical and medical fields, are only available electronically as part of a database. Journals therefore are increasingly available only as databases.

35. The question is which Directive prevails: the Database Directive or the Info Soc Directive? According to Article 1 of the Info Soc Directive, the Info Soc Directive shall in no way effect existing Community provisions such as the Database Directive. Yet according to Recital 20 of the Info Soc Directive, the Info Soc Directive develops the principles and rules of the Database Directive and places them in the context of the Information Society.

36. These are clearly contradictory statements. The difficulties that arise from this contradiction manifest themselves where products purchased by libraries for use by their users simultaneously qualify as databases and as literary works of a different category.

Conclusions

37. The Database Directive has caused general confusion and legal uncertainty for users of databases.

38. Following the ECJ ruling, the sui generis right does not provide the right in library catalogues and other lists of non-original data that libraries previously thought they had under the Directive. eIFL.net is of the opinion that the ECJ's interpretation of the Database Directive runs counter to the original intention of the Commission in seeking to protect non-original databases in a wider sense.

39. eIFL.net therefore advocates improving the Database Directive as follows:

(1) to amend the sui generis right by defining "lawful user", taking into account the ECJ ruling^x that the mere act of consultation of a database is not covered by the database maker's exclusive rights;

(2) to introduce compulsory licences for access to databases as originally intended by the Commission^{xi};

(3) in the context of the ECJ decisions, to ensure that the creators of unoriginal databases accrue a benefit from the sui generis right;

(4) to ensure that the mere act of consultation of a database by a user is explicitly permitted in the Directive;

(5) to increase the coherence between the rights of users in original and non-original databases and in relation to the Info Soc Directive.

Rome, 12th March 2006

ⁱ eIFL.net works in Albania, Armenia, Azerbaijan, Belarus, Bosnia & Herzegovina, Botswana, Bulgaria, Cambodia, Cameroon, China, Croatia, Egypt, Estonia, Georgia, Ghana, Iran, Jordan, Kazakhstan, Kosovo, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Lithuania, Macedonia, Malawi, Mali, Moldova, Mongolia, Mozambique, Namibia, Nigeria, Palestine Territories, Poland, Russia, Senegal, Serbia & Montenegro, Slovakia, Slovenia, South Africa, Sudan, Swaziland, Syria, Tajikistan, Uganda, Ukraine, Uzbekistan, Zambia, Zimbabwe.

ⁱⁱ DG Internal Market and Services Working Paper. First evaluation of Directive 96/9/EC on the legal protection of databases. Section 1.4

ⁱⁱⁱ Ibid Section 1.4

^{iv} James Boyle: Two database cheers for the EU. Financial Times, 2.1.2006
<http://news.ft.com/cms/s/99610a50-7bb2-11da-ab8e-0000779e2340.html>

^v Metadata can be defined literally as "data about data," but the term is normally understood to mean structured data about digital (and non-digital) resources that can be used to help support a wide range of operations such as resource description and discovery, the management of information resources (including rights management) and their long-term preservation. Metadata adds value to content as it has become an increasingly important tool in searching for information on the web. <http://www.ukoln.ac.uk/metadata/>

^{vi} Directive COM(93) 464 final–SYN 393, Brussels 4 October 1993. Compulsory licences and arbitration were included in Article 8.1-3

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

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

^{ix} DG Internal Market and Services Working Paper. First evaluation of Directive 96/9/EC on the legal protection of databases p. 22

^x British Horseracing Board Ltd and Others (C-203/02)

^{xi} Directive COM(93) 464 final–SYN 393, Brussels 4 October 1993. Compulsory licences and arbitration were included in Article 8.1-3