



Policy Paper in reaction to the public consultation on the Database Directive

August 2017

1 Introduction

This policy paper is released in the context of the European Commission's public consultation on the application and impact of the Directive 96/9/EU on the legal protection of databases (Database Directive). The Directive aimed to harmonise the treatment of databases under copyright law and introduced the sui generis right for non-original databases.

The Database Directive came into force on 27 March 1996. The objective of the Directive was twofold. On the one hand it attempted to remove existing differences in the legal protection of databases by harmonising the rules that applied to copyright protection. And on the other hand it aimed to safeguard interests of businesses and users alike, namely the investment of database makers, and ensure that the legitimate interests of users of information contained in databases were secured.

We have taken note of the 2005 [First evaluation of Directive 96/9/EC on the legal protection of databases](#) (hereafter "evaluation report"), and we welcome the ongoing ex-post evaluation of the Commission, of which the public consultation is part, to determine whether the Directive fulfils its policy goals and is fit-for-purpose in a digital, data-driven economy. In light of the ongoing ex-post evaluation of the Commission, we have analysed whether the Directive has achieved its aims and set forth a series of recommendations.

2 Analysis

Before the Directive was implemented the criteria for receiving copyright protection for databases differed within the European Union. The biggest difference was that in common law countries no substantial creativity or originality was required to receive copyright in a database. Mere 'sweat of the brow' was enough to trigger a copyright protection in the database. In most of the other EU countries with a *droit d'auteur* tradition, there was some level of originality required to be granted copyright protection.

2.1 Copyright

The Directive has harmonised copyright concerning databases in the EU. The level of originality required for the application of copyright to databases has been raised in the common law countries in order to qualify for copyright protection. According to the [evaluation report](#) (p.17), it is unclear whether Chapter II (Copyright) of the Database Directive has played a substantial role in the enabling investments of database producers.

2.2 Sui Generis Right

In addition to harmonising copyright protection for databases in the EU, the 1996 Directive introduced a new sui generis right that protects databases, including “non-original” databases that do not qualify for copyright protection. The sui generis right protects extraction and reutilisation of the whole or a substantial part of the contents of a database. The right applies when there has been a qualitatively or quantitatively substantial investment in obtaining, verifying, or presenting the contents of a database.

There are no clear indications that the sui generis right helped to create a stronger EU database market. This fact is widely discussed in the [evaluation report](#), noting that, “its economic impact on database production is unproven [...] the new instrument has had no proven impact on the production of databases” (p. 24).

It is clear that the Database Directive has not produced legal clarity for both database producers and users. The directive has resulted in an unnecessary obstruction for the access to and reuse of information in a number of areas. It does not exclude public databases that fall under [Directive 2013/37/EU on the re-use of public sector information](#) (PSI Directive) from qualifying for the sui generis protection.

The Database Directive failed to give databases producers that wish to make their databases available on an open access basis the choice to opt out of the sui generis protection or a way to communicate conditions for reuse. This has led to some recent projects (such as Wikidata and Europeana) to simply sidestep the right altogether by releasing their data into the public domain using the [CC0 Public Domain Dedication](#), thus neutralising copyright and sui generis rights to ensure that their data is freely (re)usable. It should be noted that the most recent iteration of the Creative Commons suite (version 4.0 released in 2013) licenses sui generis database rights alongside copyright, but the extent of the use of the 4.0 licenses as a tool primarily to address the sui generis right is unclear.

The sui generis right has also led to an enclosure of the commons because it creates new rights for works that either do not qualify for copyright, for which copyright has expired, or which are otherwise in the public domain. As we have noted in our [policy paper](#) on the review of the EU copyright rules, this practice is highly problematic because it forms an unnecessary barrier to access and reuse of information in the public domain. This is worsened by the fact that the term of protection – which lasts for 15 years – can be renewed after any substantial investments to the contents of the database ([Database Directive, Art. 10](#)). This enables the possibility that a database could be protected in perpetuity. This mechanism can prevent databases from ever entering the public domain. The possibility of continuously renewing a right is a fundamental threat for the commons of information.

From the users perspective, the sui generis right has created legal uncertainty about if (or how) they may use data that is covered by the sui generis right. The evaluation report admits that the sui generis right is “difficult to understand”. The [evaluation report](#) (p.24) partially contributed to the fact that “None of these terms [referring to the terms laid down in article 7] has a precise legal meaning and none of them has an established tradition in copyright law.”

This produces a chilling effect. Users simply do not attempt to utilise databases out of confusion, or the fear that they may be infringing on a right that is difficult to understand. By introducing the sui generis right separate from copyright protection, it also further complicated the current framework by enabling even more parties to hold rights in a database. For example, there might be copyright on

the underlying data, and there could be a separate rightsholder under the sui generis right for the person/entity that aggregated the data. The evaluation report admits that the nature of the dual rights regime of the Directive has “caused confusion among users as the same database can be protected by both copyright and ‘sui generis’ right” (p. 23).

2.3 Limitations and Exceptions

The limitations and exceptions that apply to the Database Directive are not harmonised with those laid out in [Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society](#) (InfoSoc Directive). The limitations and exceptions applicable to both copyright in databases and the sui generis right are of a different scope (more limiting) than those in the InfoSoc Directive. More generally, the exceptions are optional – not mandatory – so member states can choose to ignore their implementation. The exceptions lack clarity and deviate from standard practices. For instance, article 9 of the Database Directive does not specify that for the private purposes or purposes of illustration for teaching or scientific research (re)use is allowed in addition to extraction. This has produced a complex patchwork of exceptions across Europe.

The exceptions to the sui generis right also put some users at an unfair disadvantage. For example, the exception for the purposes of illustration for teaching or scientific research is limited to the extraction of data for non-commercial purposes. The limitation to only extraction could prevent researchers from utilising the data in ways necessary for their research, such as text and data mining. The limitation for only non-commercial purposes ignores the fact that research and innovation takes place beyond the walls of the traditional not-for-profit research university, and oftentimes includes projects that involve the private sector too.

We have also noted above that there is a fundamental contradiction between the provisions of the PSI Directive – in which the sui generis right would still be applicable to databases that should be made available as public sector information. There is no limitation or exception to the sui generis right that would rectify this situation.

3 Recommendations

While the Database Directive may have partially harmonised the legal protection of databases with regard to copyright, the sui generis right has produced negative effects for database producers and users. We have [previously](#) called for the elimination of the sui generis right because it imposes additional restrictions to the use of data without demonstrating any additional benefit. The sui generis right has not ensured the legitimate interests of users to access information compiled in databases because it has produced a confusing legal environment in which users do not know if (or how) their uses are subject to the sui generis right. It has created a situation where open source projects prefer to sidestep the right by leveraging legal tools such as the CC0 Public Domain Dedication for the publishing and sharing of databases, because the sui generis right is at best cumbersome, and at worst directly opposed to the principles of sharing information without additional strings attached. Finally, there is no evidence that the sui generis right has improved EU competitiveness by increasing the production of databases.

The Commission should repeal the sui generis database right and harmonize the limitations and exceptions for the copyright section of the Database Directive with the Infosoc Directive. If it is not possible to fully revoke the sui generis right, the Commission should amend the Database Directive to introduce a system whereby producers of databases must register to receive protection under the sui generis right. It should also expand the sui generis exceptions and make them mandatory. Finally, it should set a maximum term so that there cannot be perpetual extensions.