



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12 December 2005

DG INTERNAL MARKET AND SERVICES WORKING PAPER

First evaluation of Directive 96/9/EC on the legal protection of databases

TABLE OF CONTENTS

1.	Introduction	3
1.1.	The scope and purpose of this evaluation	3
1.2.	What was evaluated?.....	4
1.3.	How was the evaluation conducted?	5
1.4.	What evidence was found?.....	5
1.5.	What conclusions were drawn?.....	5
2.	Objectives of the Directive.....	6
2.1.	Eliminate the differences in the legal protection of authors of databases.....	7
2.2.	Stimulate database creation by means of a “sui generis” right	8
2.3.	Safeguard the legitimate interests of lawful users.....	9
2.4.	Increase the EU database production as compared to the US	10
3.	Measures	10
4.	Impact.....	11
4.1.	Has the Directive eliminated the differences that existed between Member States in the legal protection of databases?	11
4.1.1.	Transposition into national laws	11
4.1.2.	Application of the Directive by national courts and authorities	11
4.1.3.	The opinion of stakeholders	12
4.1.4.	Has the ECJ’s interpretation of the scope of the "sui generis” right devalued the uniform levels of protection achieved for "non-original” databases?.....	13
4.2.	Has the provision of uniform protection in all Member States stimulated investments into the creation of databases?	15
4.2.1.	The growth of the overall EU information market.....	15
4.2.2.	Investments in databases: the opinion of database producers	16
4.2.3.	The development of database sales	17
4.3.	Has the balance between the legitimate interests of manufacturers and lawful users of databases been safeguarded?.....	21
4.4.	Has the EU database production increased as compared to the US?	22
5.	Analysis.....	23
5.1.	The “sui generis” right is difficult to understand	23

5.2.	“Sui generis” protection comes close to protecting data as property.....	24
5.3.	The economic impact of the “sui generis” right is unproven.....	24
6.	Policy Options.....	25
6.1.	Option 1: Repeal the whole Directive.....	25
6.2.	Option 2: Withdraw the “sui generis” right	25
6.3.	Option 3: Amend the “sui generis” provisions	26
6.4.	Option 4: Maintaining the status quo	27

1. INTRODUCTION

1.1. The scope and purpose of this evaluation

The purpose of this evaluation is to assess whether the policy goals of Directive 96/9/EC on the legal protection of databases¹ (the “Directive”) have been achieved and, in particular, whether the creation of a special “sui generis” right has had adverse effects on competition. This is the first time that the Directive is subject to an evaluation².

The aim of the Directive was to remove existing differences in the legal protection of databases by harmonising the rules that applied to copyright protection, safeguard the investment of database makers and ensure that the legitimate interests of users to access information compiled in databases were secured.

At the time of its adoption, the Commission reasoned that differences in the standard of “originality” required for a database to enjoy copyright protection impeded the free movement of “database products” across the Community. In particular, the Commission argued that the difference between the lower “sweat of the brow” copyright standard (i.e. involving considerable skill, labour or judgment in gathering together and/or checking a compilation) that applied in common law Member States and the higher “intellectual creation” standard that applied in *droit d’auteur* Member States created distortion of trade in “database products”.

In essence, the Directive sought to create a legal framework that would establish the ground rules for the protection of a wide variety of databases in the information age. It did so by giving a high level of copyright protection to certain databases (“original” databases) and a new form of “sui generis” protection to those databases which were not “original” in the sense of the author's own intellectual creation (“non-original” databases).

The approach chosen in the Directive was to harmonise the threshold of “originality”. Those “non-original” databases that did not meet the threshold would be protected by a newly created right.

- In a first step, this was done by adopting the higher standard that applied in *droit d’auteur* countries, which had the effect of protecting fewer databases by copyright (which was now limited to so-called “original” databases);
- In a second step, for those databases that would previously have enjoyed protection under the “sweat of the brow” copyright, but no longer according to the harmonised “originality” standard, a new right was created – the “sui generis” right to prevent extraction and

¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28.

² Article 16 of the Directive requires the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a "report on the application of this Directive, in which, *inter alia*, on the basis of specific information supplied by the Member States, it shall examine the application of the sui generis right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases”.

reutilisation of the whole or a substantial part of the contents of a database in which there has been substantial investment (“non-original” databases).

While “original” databases require an element of “intellectual creation”, “non-original” databases are protected as long as there has been “qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents” of a database. The “sui generis” right is a Community creation with no precedent in any international convention. No other jurisdiction makes a distinction between “original” and “non-original” databases.

1.2. What was evaluated?

The evaluation focused on the issue of whether the Directive has created a legal framework that would establish the ground rules for the protection of a wide variety of databases in the information age. In particular, the evaluation focused on whether the European database industry's rate of growth increased after the introduction of the new right; whether the beneficiaries of the new right produced more databases than they would have produced in the absence of this right; and whether the scope of the right was drafted in a way that targets those areas where Europe needs to encourage innovation.

Its detractors have criticised the “sui generis” right for the following reasons:

- (1) The new “sui generis” protection was unclear in scope and ill-suited to target areas where innovation and growth should have been stimulated;
- (2) The new form of protection locks up data and information to the detriment of the academic community or other industries that depend on the availability of data and information to conduct their business or research;
- (3) The new form of protection is too narrow in scope and thus fails to adequately protect investors in database products.

This report evaluates these criticisms. In doing so, it analyses:

- (1) The impact of the judgments delivered by the ECJ in November 2004³, the effect of which is to significantly curtail the scope of “sui generis” protection;
- (2) Whether the objectives of the Directive have been achieved effectively and efficiently, that is without triggering unnecessary costs for the academic community or industries that depend on the availability of data and information;
- (3) The evolution of EU database production⁴ in order to determine whether this sector of the EU economy has grown subsequent to the adoption of the Directive.

³ Cases C-46/02 (*Fixtures Marketing Ltd v. Oy Veikkaus Ab*); C-203/02 (*The British Horseracing Board Ltd and Others v. William Hill Organisation Ltd*); C-338/02 (*Fixtures Marketing Limited v. AB Svenska Spel*) and C-444/02 (*Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE -“OPAP”*). The text of the 4 judgments can be found at: www.curia.eu.int.

⁴ The database industry exists both as a sector in which the principal activity is the production of databases based on material derived under licence or otherwise from other sources and also as a service which underlies a variety of commercial, industrial and other activities.

1.3. How was the evaluation conducted?

The evaluation was conducted on the basis of a restricted on-line survey addressed to the European database industry⁵ carried out by the European Commission's Internal Market and Services Directorate General in August and September 2005 and information received from the *Gale Directory of Databases* (“the *GDD*”), the largest existing database directory which contains statistics indicating the growth of the global database industry since the 1970s. Individual rightholder views expressed outside the stakeholder survey have also been taken into account.

1.4. What evidence was found?

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. Data taken from the *GDD* (see Section 4.2.3) show that the EU database production in 2004 has fallen back to pre-Directive levels: the number of EU-based database “entries” into the *GDD*⁶ was 3095 in 2004 as compared to 3092 in 1998. In 2001, there were 4085 EU-based “entries” while in 2004 there were only 3095.

Is “*sui generis*” protection therefore necessary for a thriving database industry? The empirical evidence, at this stage, casts doubts on this necessity. The European publishing industry, which was consulted in a restricted online survey, however produced strong submissions arguing that “*sui generis*” protection was crucial to the continued success of their activities.

In addition, most respondents to the on-line survey (see Section 4.2.2) believe that the “*sui generis*” right has brought about legal certainty, reduced the costs associated with the protection of databases, created more business opportunities and facilitated the marketing of databases.

1.5. What conclusions were drawn?

At this stage, the evaluation concludes that repealing the Directive altogether or repealing the “*sui generis*” right in isolation would probably lead to considerable resistance by the EU database industry which wishes to retain “*sui generis*” protection for factual compilations.

While this resistance is not entirely based on empirical data (many factual compilations would, most likely, remain protected under the high standard of “originality” introduced by the Directive), this evaluation takes note of the fact that European publishers and database producers would prefer to retain the “*sui generis*” protection in addition to and, in some instances, in parallel with copyright protection.

⁵ The on-line survey was addressed to 500 European companies and organisations involved in the database industry (publishers, suppliers of data and information, database manufacturers, distributors, etc.). 101 replies were received. Most respondents are private companies (65%), based in the UK (30%), Italy, Germany, France and Belgium (46% together). All sizes of organisations are represented (from less than 10 to more than 500 employees); overall, these companies operate on an international scale and their business is based mostly on electronic formats (internet, CDs, DVDs).

⁶ For the purposes of the *GDD* a database “entry” represents a certain database regardless of the media on which it may be provided. Some entries represent a database on one or more media such as CD-ROM, diskette, on-line, etc.; the number of individual databases can be larger than the number of entries.

With regard to Member States, those that would be most affected by a repeal of the sui generis right would be the common law jurisdictions.

On the one hand, a repeal of the “sui generis” right would enable these jurisdictions to re-introduce “sweat of the brow” copyright; but on the other, these jurisdictions could also decide to maintain the higher level of protection, thereby limiting protection to “original” databases.

But repealing the “sui generis” right has its obvious drawbacks. It would require withdrawing, or “reverse”, legislation and that might reopen the original debate on the appropriate standard of “originality”.

Equally, any attempt to reformulate the scope of the “sui generis” right will require the Community legislator to revisit the compromise underlying the two-tier protection introduced by the Directive where a distinction is made between “original” databases that have to comply with a high standard of “originality” and “non-original” databases that enjoy a form of “sui generis” protection.

The paper therefore concludes that leaving the Directive unchanged is an additional policy option for the Commission. The argument could be made that, despite its limited effectiveness in creating growth in the production of European databases, the Directive does not impose significant administrative or other regulatory burdens on the database industry or any other industries that depend on having access to data and information.

In addition, the ECJ in November 2004 significantly curtailed the scope of “sui generis” protection, thereby pre-empting concerns that the right negatively affects competition.

2. OBJECTIVES OF THE DIRECTIVE

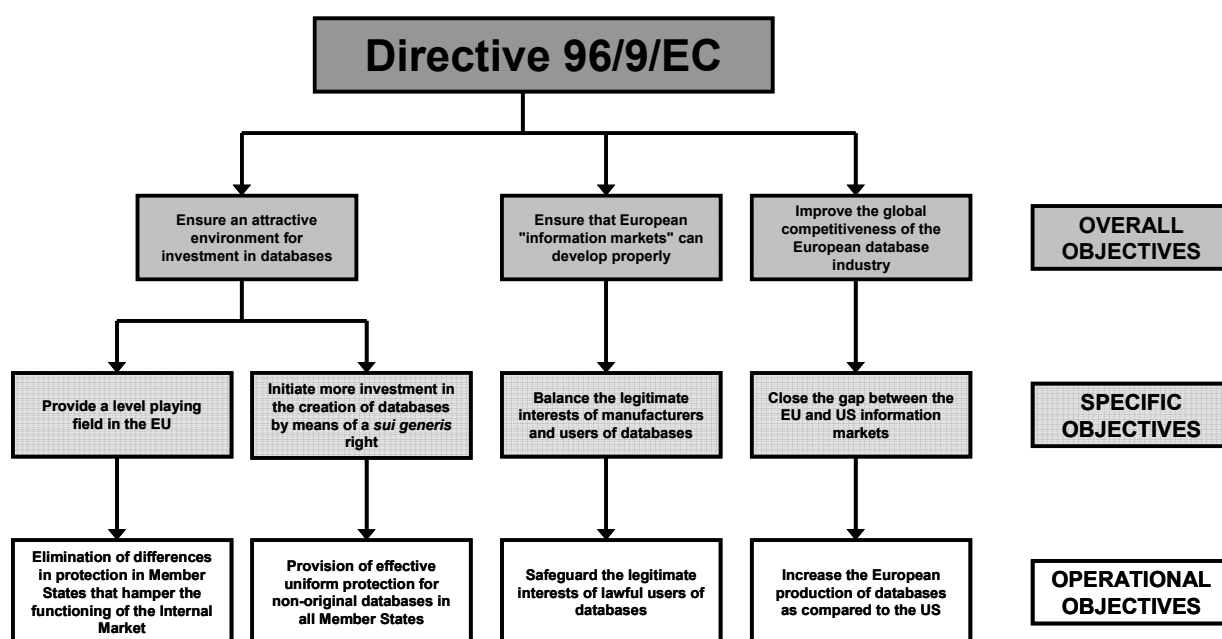
The Commission adopted a proposal for a Council Directive on the legal protection of databases on 13 May 1992⁷.

The aim of the proposal was to remove existing differences in the legal protection of databases by harmonising the rules that applied to copyright protection. The aim was also to safeguard the investment of database makers and ensure that the legitimate interests of users of information contained in databases were secured.

The Directive has been measured against the overall, specific and operational objectives as set out in the structure below.

⁷ Proposal for a Council Directive on the legal protection of databases COM(92)24 final – SYN 393, OJ C 156, 23.6.1992, p. 4 and Amended Proposal for a Council Directive on the legal protection of databases COM(93)464 final - SYN 393, OJ C 308, 15.11.1993, p. 1.

Figure 1 - General, specific and operational objectives of Directive 96/9/EC



When the Commission adopted the Proposal for the Directive in 1992, it considered that the Community market was “fragmented by many technical, legal and linguistic barriers”. By choosing to eliminate the different levels of “originality” that Member States required before protecting a database by copyright, the Directive set out to tackle the legal barriers. The Directive did not intend to harmonise technical barriers nor deal with linguistic barriers or the fact that certain producers of databases enjoy a competitive advantage by virtue of the language in which they produce their databases.

2.1. Eliminate the differences in the legal protection of authors of databases

Prior to the adoption of the Directive, national laws in different Member States differed with respect to the level of “originality” which was used to determine whether a database was protectable or not under copyright law. In particular, the threshold of “originality” for the copyright protection of compilations in common law jurisdictions was lower than the threshold of “originality” that prevailed elsewhere in the Community and in particular in the *droit d’auteur* Member States:

- While *droit d’auteur* Member States protected only “original” databases that required an element of “intellectual creation”, the common law Member States also protected “non-original” databases involving considerable skill, labour or judgment in gathering together and/or checking a compilation (“sweat of the brow” copyright).
- In practice, the higher standard of “originality” that applied in *droit d’auteur* countries had the effect of protecting fewer databases by copyright (protection was limited to so called “original” databases). The best known examples of compilations of data or information which were granted copyright protection under the “sweat of the brow” criterion as they

did not display any “originality” are the television programme listings which were the subject of the action in the case of *Magill*⁸.

- In certain Member States’ legislation there were other unique forms of protection⁹.

In 1992, the Commission argued that such differences in legal protection between common law and *droit d’auteur* Member States had negative effects on the free movement of “database products”, the provision of information services and the freedom of establishment within the Community. The Commission observed that undertakings producing databases in countries with clear and established protection for databases seemed to be in a more favourable position than those in countries in which protection was uncertain. Figures showed that the UK alone produced 50% of European on-line database services¹⁰.

The Directive attempts to establish a uniform threshold of “originality” for “original” databases. This level of protection has the effect that the United Kingdom and Ireland, which applied a lower threshold of “originality”, were required to “lift the bar” and accord copyright protection to only those databases which were “original” in the sense of the author’s own intellectual creation. As a result, databases which qualified for copyright protection under the “sweat of the brow” regime would no longer be protected. In exchange, and in order to compensate for the loss of the “sweat of the brow” protection, the “sui generis” form of protection for “non-original” databases was introduced as an entirely novel form of intellectual property.

2.2. Stimulate database creation by means of a “sui generis” right

In 1992, the Commission reasoned that the growth in the market for data required considerable investment (both human and financial) in producing and marketing of databases and that, consequently, the maker of such database product needed protection at European level.

The Commission recognised that copyright protection based on the standard of “originality” alone might not be an adequate tool to protect these often considerable investments. Therefore, in order to protect the selection or arrangement of the contents of a database which did not meet the standard of being “original”, the Commission considered it appropriate to

⁸ Judgment of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, Joined cases C-241/91 P and C-242/91 P). In the *Magill* case the European Commission found that three public television broadcasters whose images were broadcast in Ireland had abused their dominant position on the Irish broadcasting market in refusing to licence *Magill* to publish in its magazine a comprehensive weekly television guide, given that information about TV programme timings was indispensable to allow a firm to compete in the market for TV listings magazines. See also two earlier judgments, *Van Dale Lexicografie BV v. Rudolf Jan Romme and Feist Publications Inc. v. Rural Telephone Service Co. Inc.* where, respectively, the Dutch Hoge Raad and the US Supreme Court did not apply the “sweat of the brow” criteria to a dictionary and a telephone directory, but clearly required “originality” in the copyright sense as a condition for protection.

⁹ Denmark, Finland and Sweden protected “a catalogue, a table or another similar production in which a large number of information items have been compiled” under the so-called “catalogue rule”. At the time of the adoption of the proposal in 1992, Finland and Sweden had not yet acceded to the Community but did so in 1995. Norway and Iceland (EFTA States) also have sui generis regimes. The Netherlands protected under copyright certain “non-original writings” (“*Onpersoonlijke geschriftenbescherming*”).

¹⁰ Panorama of EC Industry 1990.

provide a form of “sui generis” protection for the investment involved in the making of a database.

The Commission believed that there was a need to protect investment in the creation of databases against parasitic behaviour by those who seek to misappropriate the results of the financial and professional investment made in obtaining and collection of data and information. While “original” databases require an element of “intellectual creation”, “non-original” databases are protected as long as there has been “qualitatively or quantitatively a substantial investment in either the obtaining, verification of presentation of the contents” of a database (Article 7.1).

The Commission argued that the introduction of a stable and uniform legal regime for the protection of database makers would increase the level of investments in information storage and processing systems (Recital 12). The scope of “sui generis” protection was intended to ensure protection of any investment in “obtaining, verifying or presenting the contents of a database” for the 15 year duration of the right (Recital 40), without giving rise to the creation of a new right in the works, data or material themselves (Recital 46).

2.3. Safeguard the legitimate interests of lawful users

The Community legislator also felt the need to find an appropriate balance between the legitimate interests of database authors/makers and users¹¹. Notwithstanding the exclusive rights of authors and database makers, the Community legislator felt the need to allow lawful users¹² to continue to perform certain acts necessary to access the contents of databases and facilitate the dissemination of information.

The issue of access to “information” is of concern to various categories of users as it may involve information in the public domain (e.g. an electoral register); information where the database constitutes the only available source of that information (e.g. a telephone directory); information pertaining to academic and scientific research and other public interest users such as consumers, the disabled, libraries; information which is “created” independently of any other activities where the primary purpose or principal activity is the creation of a database whether using own data or data acquired from another source (e.g. an encyclopaedia); information which is generated from “spin-off” databases¹³ (e.g. football fixtures lists).

With a view to safeguarding the legitimate interests of lawful users, an exhaustive list of optional exceptions to both copyright (Article 6) and the “sui generis” right (Article 9) was introduced and mandatory provisions in favour of lawful users were provided (Articles 6.1, 8 and 15).

¹¹ Under the original proposal, a licence had to be granted on fair and non-discriminatory terms when the works or materials contained in a database could not be independently created, collected or obtained from any other source that is when the database is the only source of a work of material and when the database maker is a statutory public body; the database had to be made publicly available and Member States had to provide for arbitration with respect to the conditions for granting licences. However, the provisions on non-voluntary licensing were deleted as a result of a compromise reached in the Council.

¹² The Directive does not provide a definition of “lawful user”. Recital 34 refers to a user authorised by agreement with the rightholder to access and use the database. The original proposal for the Directive referred to a “person having acquired a right to use the database” (see para 8.4, page 52).

¹³ That is databases which are by-products of a main or principal activity. The “spin-off” theory has been developed by the doctrine and case law of certain Member States; under such theory, “spin-off” databases do not enjoy “sui generis” protection.

2.4. Increase the EU database production as compared to the US

Finally, the Community argued that investments in the production of databases could not achieve adequate returns unless databases manufactured in the EU were awarded protection on a par with the protection awarded by its major trading partners.

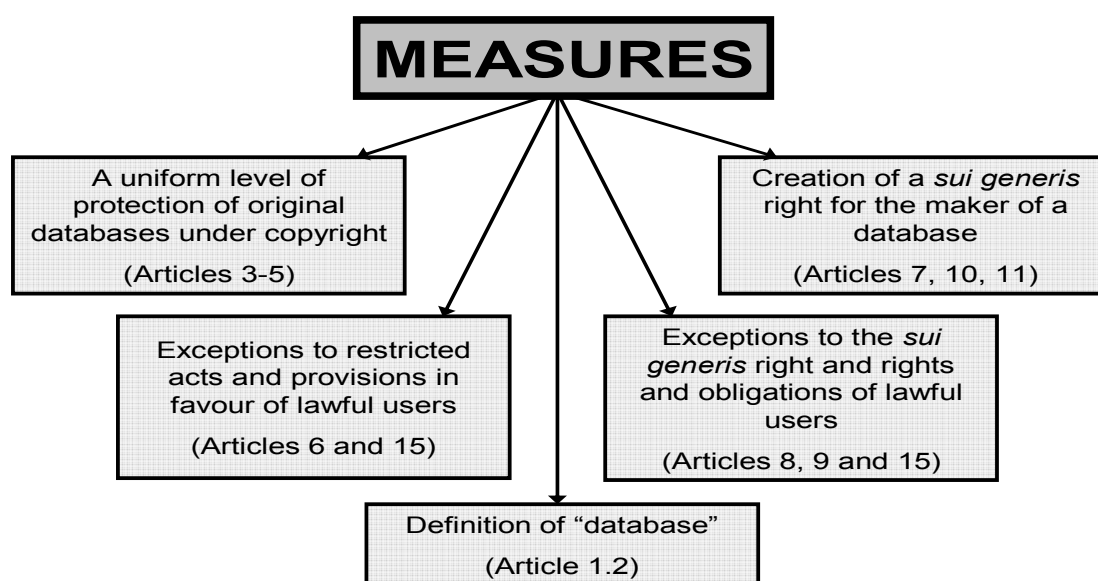
An imbalance in the level of investment between the Community and the world's largest database-producing third countries was observed (Recital 11). This conclusion was drawn in spite of the fact that the US did not protect "non-original" compilations, a stance confirmed by the Supreme Court's ruling in *Feist Publications v. Rural Telephone Service Company*¹⁴.

The creation of the "sui generis" right thus also aimed at enhancing global competitiveness of the European database industry in particular by filling in the gap between the EU and the US.

3. MEASURES

The diagram below sets out the measures taken by the Directive, which must be assessed against the policy objectives identified in figure 1 above.

Figure 2 - Measures of Directive 96/9/EC



The Directive provides a two tier protection: a harmonised level of protection of "original" databases under copyright (Articles 3-5) and the introduction of a new "sui generis" right to protect investments in databases (Articles 7, 10 and 11). Both rights differ in terms of criteria for protection, duration, acts prohibited, the exceptions or limitations that apply and the person or persons (both natural and legal) in whom each right vests (Articles 6, 8, 9 and 15). Article 1 defines a "database" for the purposes of the Directive and applies to both copyright and "sui generis" protection. The proposal for the Directive was originally limited to electronic databases but now includes analogue, including hard copy or traditional print media, and electronic forms, including digital or online.

¹⁴ See footnote 8 above.

4. IMPACT

The data reported here were collected from a restricted on-line survey addressed to the European database industry¹⁵ and from the *GDD* (see Section 1.3 above); the Internal Market and Services Directorate General has drawn its conclusions from the views expressed by stakeholders, interested parties, Member States and its own views and analysis.

4.1. Has the Directive eliminated the differences that existed between Member States in the legal protection of databases?

4.1.1. Transposition into national laws

All 25 Member States have transposed the Directive into national law. Germany, Sweden and the United Kingdom met the deadline of implementation (1 January 1998); Austria and France adopted laws during the course of 1998 whose provisions apply retro-actively from 1 January of the same year. Belgium, Denmark, Finland and Spain implemented in 1998; Italy and the Netherlands in 1999; Greece and Portugal in 2000; Ireland and Luxembourg in 2001. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia implemented between 1999 and 2003. The EEA countries (Iceland, Lichtenstein and Norway) have also implemented the Directive.

4.1.2. Application of the Directive by national courts and authorities

National case-law shows that the notion of “database” has been interpreted widely so as to include listings of telephone subscribers; compilations of case-law and legislation; websites containing lists of classified advertisements; catalogues of various information; lists of headings of newspaper articles. The ECJ has stressed the broad definition of “database” in the Directive¹⁶.

But national case law has also highlighted the textual ambiguities of the “sui generis” right. Battles have erupted over the precise meaning of “substantial investment” as contained in Article 7 of the Directive.

While the District Court of The Hague held that the cost of collecting and maintaining up-to-date information concerning several thousands of real estate properties amounted to a “substantial investment” (*NVM v. De Telegraaf*, judgment of 12 September 2000), the President of the District Court of Rotterdam held that newspaper headlines were a mere “spin-off” of newspaper publishing and therefore did not reflect a “substantial investment” (*Algemeen Dagblad a.o. v. Eureka*, judgment of 22 August 2000).

Where the Court of Appeal of Düsseldorf held that there has been no proven “substantial investment” in a website containing information on building construction (*baumarkt.de*, judgment of 29 June 1999), the German Supreme Court found recently that collecting and verifying data for the weekly German “Top 10” hit chart of music titles requires “substantial investment” and that a “substantial part” of the contents of the plaintiff’s database had been

¹⁵ See footnote 5 above.

¹⁶ See Case C-444/02 (*Fixtures Marketing Ltd v. Organismos prognostikon agonon podofairou AE - “OPAP”*), n. 20, 25.

“extracted” by the defendant who published his own compilation in printed form and on CD-Rom (*Hit Bilanz*, judgment of 21 July 2005)¹⁷.

Other divergent judgements concern “spin-off” databases – that is, databases which are by-products of a main or principal activity - especially where the database is a single source database¹⁸.

Another area of divergent case-law concerns the exploitation of on-line databases and Internet-related activities such as “hyper linking” or “deep-linking” using search engines¹⁹ (there have been no references to the ECJ on this issue).

In some cases, the heading, the Internet address (URL) and a brief summary of a press article have been held not to constitute a substantial part of a database²⁰ and the hyper linking of headings of press articles has been held not to infringe the owner's “sui generis” right²¹. However, in most cases the systematic bypassing of the homepage of the database maker (including banner advertisements) was found to be an infringement of the database maker's “sui generis” right²².

Divergences of interpretations seem to arise especially in jurisdictions that did not have any right comparable to “sweat of the brow” copyright. On the other hand, the English courts appear to have interpreted the Directive in a manner consistent with its intention. It is noteworthy that the English Court of Appeal made a reference to the ECJ²³ on the basis of the conflicting judgments elsewhere.

4.1.3. *The opinion of stakeholders*

75% of respondents to the Commission services' on-line survey are aware of the existence of the “sui generis” right; among these, 80% feel “protected” or “well protected” by such a right. 90% believe that database protection at EU level, as opposed to national level, is important and 65% believe that today the legal protection of databases is higher than before harmonisation. In the opinion of respondents, the “sui generis” right has brought about legal certainty, reduced the costs associated with the protection of databases, created more business opportunities and facilitated the marketing of databases. However, respondents also feel that the current situation is not totally harmonised throughout Europe: 31% believe that big gaps between several countries still remain. The negative consequences of the “sui generis” right have been attributed to: legal uncertainty, difficulty in accessing data, increased

¹⁷ The German Supreme Court follows the ECJ's reasoning in the judgments of November 2004 but concludes in favour of “sui generis” protection in the case at issue.

¹⁸ The “spin-off” theory has been developed by the doctrine and case law of certain Member States (in particular, the Netherlands); under such theory, “spin-off” databases do not enjoy “sui generis” protection.

¹⁹ Linking occurs when a connection is made between pages within a single web site or another website by the use of hypertext mark up language i.e. highlighted to identify the link. Clicking on a link transfers the user from the website to that of the linked page and the Uniform Resource Locator (URL). A “deeplink” bypasses the homepage of the URL to link directly with embedded web site pages.

²⁰ See High Regional Court Cologne, 27 October 2000; District Court Munich, 1 March 2002.

²¹ See judgment by the German Federal Court of Justice, 18 July 2003 (“*Paper Boy*”).

²² See “*Berlin Online*” – District Court Berlin 8 October 1998; “*Süddeutsche Zeitung*” – Landgericht Köln 2 December 1998. See also “*Newsbooster.com*” - District Court Copenhagen 16 July 2002.

²³ See Case C-203/02 (*The British Horseracing Board Ltd and Others v. William Hill Organisation Ltd*).

administrative burdens, increasing costs relating to database creation and fewer business opportunities.

4.1.4. Has the ECJ's interpretation of the scope of the "sui generis" right devalued the uniform levels of protection achieved for "non-original" databases?

Four cases concerning single-source databases of sports information in the areas of football and horseracing have been referred to the ECJ. The references came from national courts in Greece, Finland, Sweden and the United Kingdom. The ECJ gave its judgments in these cases on 9 November 2004²⁴.

With respect to the extensive lists of runners and riders drawn up by the *British Horseracing Board* (the "BHB") in its function as the governing body for the British horseracing industry, the ECJ simply stated that:

"The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears" (emphasis added)

The ECJ thus distinguishes between the resources used in the "creation" of materials that make up the contents of a database and the *obtaining* of such data in order to assemble the contents of a database. Only the latter activity is protected under the "sui generis" right. This leaves no protection for bodies like the *BHB* which "create" the data that makes up the contents of their database. Arguably, other industries like the publishers of directories, listings or maps, remain protected as long as they do not "create" their own data but *obtain* these data from others.

The ECJ distinction between "creation" and *obtaining* of data means that sports bodies such as the *BHB* cannot claim that they *obtained* the data within the meaning of the Directive. Therefore, such bodies cannot license their own data to third parties.

While going against the Commission's original intention of protecting "non-original" databases in a wide sense, the judgements have the merit of pointing to the serious difficulties raised by attempting to harmonise national laws by recourse to untested and ambiguous legal concepts ("qualitatively or quantitatively substantial investments in either the obtaining, verification or presentation of contents").

The ECJ's judgment would probably apply to the databases created by broadcasting organisations for the purposes of scheduling programmes: they would not be able to assert a "sui generis" right in the contents of such databases.

In addition, the European Court ruled that on-line betting activities on football matches and horse races carried out by betting companies such as *Svenska Spel* or *William Hill*, did not affect the whole or a substantial part of the contents of the plaintiffs' databases as they did not prejudice the substantial investment of the latter in the creation of their databases.

²⁴ See footnote 3.

On 13 July 2005, the British Court of Appeal applied the above interpretation, albeit on a slightly different basis²⁵, in its judgment in the *British Horse Racing Board v. William Hill*. The British Court dismissed the *BHB*'s arguments aimed at showing that its database was protectable by the “sui generis” right under Article 7(1) of the Directive.

These rulings imply that sports bodies like the *BHB* can only claim protection under the “sui generis” right where they have made a “substantial investment” in seeking existing material and collecting, verifying and presenting it in their databases. As the scope of the “sui generis” protection does not include, in the view of the Court, the “creation” of the underlying data²⁶, a soccer fixture list would usually not be protected under the “sui generis” right.

Commentators perceive the Court’s judgments as a major blow to funding plans envisaged by sports bodies. *BHB* was hoping to generate more than £100 million²⁷ (around 142m euros) a year in revenue by selling data on the runners and riders (so-called “data-licensing”). Football's governing bodies will very likely lose substantial revenue by not being able to charge for information contained in football fixtures lists.

Nevertheless, the Commission services' online survey reveals that 43% of the respondents believe that the legal protection of their databases will be the same as before the ECJ rulings (or even reinforced); only 36% believe that the scope of protection will be either weakened or removed.

On the other hand, 54% believe that fewer databases will be protected by the “sui generis” right. This view is expressed not only by the companies which have been primarily affected by the Court’s rulings, but also by other companies, such as database publishers and information suppliers, from both the *droit d’auteur* and common law Member States.

Other industries where data is “created” and concurrently stored and processed in a database, such as real estate or employment agencies, could be affected by the Court’s rulings. There is a risk that national courts applying the European Court’s case-law will conclude that relatively little of the investment in establishing a database appears to have been in collecting and verifying the information displayed on a website containing data on e.g. real estate or job advertisements.

On the other hand, the ECJ's narrow interpretation of the “sui generis” protection for “non-original” databases where the data were “created” by the same entity as the entity that establishes the database would put to rest any fear of abuse of a dominant position that this entity would have on data and information it “created” itself (so-called “single-source” databases).

²⁵ See paragraphs 28-30, Case No: A3/2001/0632 before Lord Justice Pill, Lord Justice Clarke and Lord Justice Jacob between 1) The British Horseracing Board Limited 2) The Jockey Club 3) Weatherbys Group Limited and William Hill Organization Limited.

²⁶ For example, the national football bodies establish the annual “football calendar” by pairing the teams, setting up home and away matches. This activity which comprises the basic activity of organising soccer tournaments involves the “creation” of data. The collection and verification of the data in order to set up the fixture list is only a by-product of this basic activity, but the by-product requires relatively little investment.

²⁷ Source : the *British Horse Racing Board*.

At national level, only few cases have been reported where owners of the “sui generis” right in a dominant position have been required to license their databases under certain conditions²⁸. Other cases are reported where no concrete violation of competition rules was found²⁹.

The Directive has been implemented into the legislation of the 25 Member States and the EFTA countries.

Interpreting the precise scope of the “sui generis” right has proved difficult, especially as no jurisdiction had a comparable legal instrument prior to the introduction of this new form of protection. The “sui generis” provisions have thus caused considerable legal uncertainty, both at the EU and national level.

The scope of the provision was severely curtailed in a series of judgments rendered by the ECJ in November 2004. This has, at least with respect to producers of databases that “create” the data and information that comprises their databases, decreased the protection for “non-original” databases.

Arguably, other industries like the publishers of directories, listings or maps, remain protected as long as they do not “create” their own data but obtain these data from others.

Nonetheless most respondents to the Commission services' on-line survey believe that the protection of databases is stronger than before adoption of the Directive. However, a majority of respondents feel that, after the ECJ's rulings, fewer databases will be protected by the “sui generis” right. This allays fears of monopoly abuses which were usually expressed with respect to “single-source” databases (databases where the database maker and the proprietor of the underlying information are the same person or entity).

4.2. Has the provision of uniform protection in all Member States stimulated investments into the creation of databases?

4.2.1. The growth of the overall EU information market

When the Commission adopted the Proposal for the Directive in 1992³⁰, it estimated that one quarter of the world's accessible on-line databases were of European origin, while the US

²⁸ See, for instance, Supreme Court of Austria, 9 April 2002, *Republic of Austria v. Compass Publishing Company*, where the Austrian public authority, holder of the sui generis right upon the official company register, was required to license its database under certain conditions to a competitor; Nederlandse mededingingsautoriteit, NMa, 10 September 1998, *De Telegraaf v. NOS and HMG*, where the Dutch competition authority ruled that, by refusing to license its own radio and TV programme listings, the Dutch broadcasting company had abused its dominant position. In both decisions, the national courts and authorities have made reference to the *Magill* case.

²⁹ See, for instance, Cour d'Appel de Paris 4^{ème} chambre, section A, 12 September 2001, *Société Tigest/Société Reed expositions France, société Salons français et internationaux Safi*; Tribunal de Grande Instance de Paris, 31 January 2001, *Miller Freeman v. Neptune Verlag*; Oberlandesgericht (Court of Appeal) München, 10 October 2002; Nederlandse mededingingsautoriteit, NMa, 6 July 2001, *Fiscaal up to date (Futd) v. Kluwer*.

³⁰ The facts and figures reported in this Section are taken from the Explanatory Memorandum of the Proposal for a Council Directive on the legal protection of databases (see footnote 7 above).

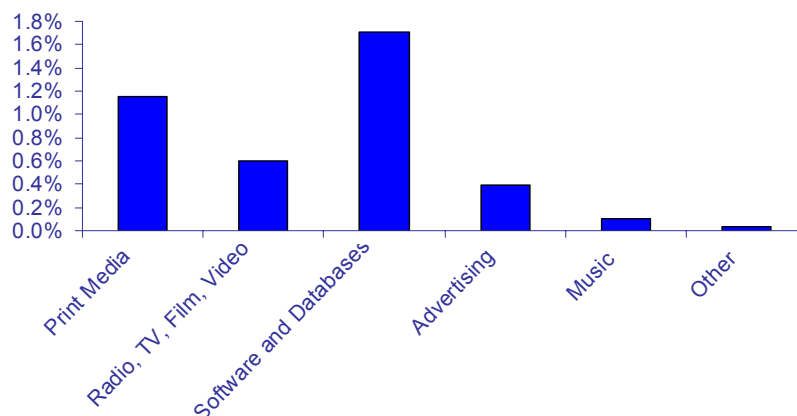
share of the world market amounted to 56%. Western Europe's on-line information market was estimated to be worth around 2.4 billion US dollars (or, at the time, 2.2 billion ECU).

The Commission considered that the European information market had great potential for growth: in terms of turnover, Europe's market in the "ASCII database services" was one third of the size of the US market; the use of "videotext services" was increasing in France (where over 90% of videotext users were located in 1989), Germany, the UK and Italy.

The European CD-ROM market was growing quickly and, although it accounted for only 15% of the production of commercial titles as compared to the 56% of the US, research showed that the number of titles published was doubling each year.

With the advent of the Internet and digital services, electronic databases have become an important platform for the distribution of content. Most new commercial services as well as an increasing number of public services originate from electronic databases. Databases are also important for a variety of businesses ranging from telecommunication companies to newspaper and directory publishers.

Figure 3 – Gross Value Added by EU Copyright Industry Sectors as Percent of Total GDP, 2000



Source: "The contribution of copyright and related rights to the European Economy" (2003)

The total turnover of the database and directory publishing industries in 2000 amounted to 8.2 billion euro³¹; the software and databases industries (including electronic publishing based upon those databases) and print media industries contributed in excess of 1% to the EU GDP.

4.2.2. Investments in databases: the opinion of database producers

49% of respondents to the Commission services' on-line survey estimate that, as of 1996, the annual increase in the level of their investments in database creation was more than 20%; 37% estimate that the increase was between zero and 20%; 15% consider that the level of investments has been the same or that it has decreased. Investments have mainly focussed on IT and staff.

³¹ See "The EU publishing industry: an assessment of competitiveness", available at http://europa.eu.int/comm/enterprise/ict/policy/doc/pira_2003_1046_en.pdf. See also the 2003 and 2004 EADP Annual Reports, available at <http://www.eadp.org>.

Figure 4 – Investments of the European database industry

What did you invest in?	% of total
Information technology	(85.1%)
Staff to feed data into a database	(69.3%)
Staff to run a database	(65.3%)
Marketing/advertising of a database	(64.4%)
Staff to collect data	(63.4%)
Acquisition of data	(62.4%)
Licences	(58.4%)
Office space	(35.6%)
Other	(21.8%)

Source: Commission services' on-line survey (August-September 2005)

Only a few respondents believe that the “sui generis” right has brought about additional costs (mainly enforcement and licensing costs). Although 36% of the respondents think that the “sui generis” right has helped the evolution of their business across the EU, there is no clear indication as to whether the “sui generis” right has helped businesses in the database sector to improve their competitiveness; 30% of the respondents think that the “sui generis” right created more business opportunities.

4.2.3. The development of database sales

While the Commission services' on-line survey identified increases in investments made in the production of databases, measuring the actual evolution of database sales has proved more difficult. This is linked to the wide interpretation that the notion of “database” has been subject to in national and EU jurisdictions.

It is extremely difficult to obtain reliable figures on the wide variety of industries that produce databases, such as website producers that list classified advertisements; producers of catalogues; producers of lists of headings of newspaper articles. All market data analysed can therefore serve only as a rough estimate.

According to a submission made by the European Publishers Council (EPC)³² the UK business-to-business (“B2B”) information industry was estimated to generate turnover of £ 15.5 billion in 2004. This compares to a turnover of £ 13.7 billion in 2000. According to the EPC, the “B2B market” comprises a wide range of databases, including business directories (print or online), electronic services, catalogues, business newspapers, magazines and even business conferences.

On the other hand, the EPC states that the “database share” of the overall UK “B2B” information industry continues to increase, thus implying that the “B2B” information industry is not equivalent to database sales. Figures on the overall development of the “B2B” industry therefore do not provide a reliable estimate for measuring the evolution of database sales.

³² Response from the European Publishers Council to the Draft Evaluation of Directive 96/9/EC, 30 September 2005.

According to a submission by the European Association of Directory and Database Publishers (EADP)³³ there has been “a significant increase in the supply of and information through databases since the Directive was adopted”. The EADP argues that a difference should be made between the number of databases and the amount of information delivered through databases.

It may be appropriate to evaluate the evolution of database sales not exclusively by means of measuring the number of databases produced. The amount of information delivered through databases may also be a relevant criterion to measure the evolution of database sales. However, the EADP does not propose how the information delivered through databases can be quantified and measured. Indeed, the EADP does not supply any empirical data on the amount of information delivered through databases.

In the absence of other empirical data, the evolution of database sales since the introduction of the Directive has to be measured by having recourse to the number of databases produced. In this respect, the data available are the statistics as compiled in the *GDD*³⁴. For the purposes of this directory, the size of the database industry is measured in terms of changes in the number of database “entries” into the directory³⁵.

But, in having recourse to the *GDD*, some important caveats have to be made. The Commission services cannot determine with the requisite level of legal certainty that a database “entry” in the *GDD* coincides with the wide definition of “database” under the Directive. This is due to the fact that the definition of a “database” as contained in the Directive is very wide and probably not exhaustive in character.

Thus, it appears entirely possible that certain compilations such as newspapers, magazines and electronic programme guides, which would fall within the scope of the Directive, have not been counted as a database “entry” in the *GDD* statistics.

The following figures extracted from the *GDD* should therefore only be seen as a rough estimate to measure the evolution of the Western European database market.

The number of “entries” into the *GDD* from “Western Europe”³⁶ has been fairly stable during the period since the Directive was implemented into national laws (as of 1998).

Nevertheless, as it is shown below, the number of Western European database “entries” was 3095 in 2004 as compared to 3092 in 1998.

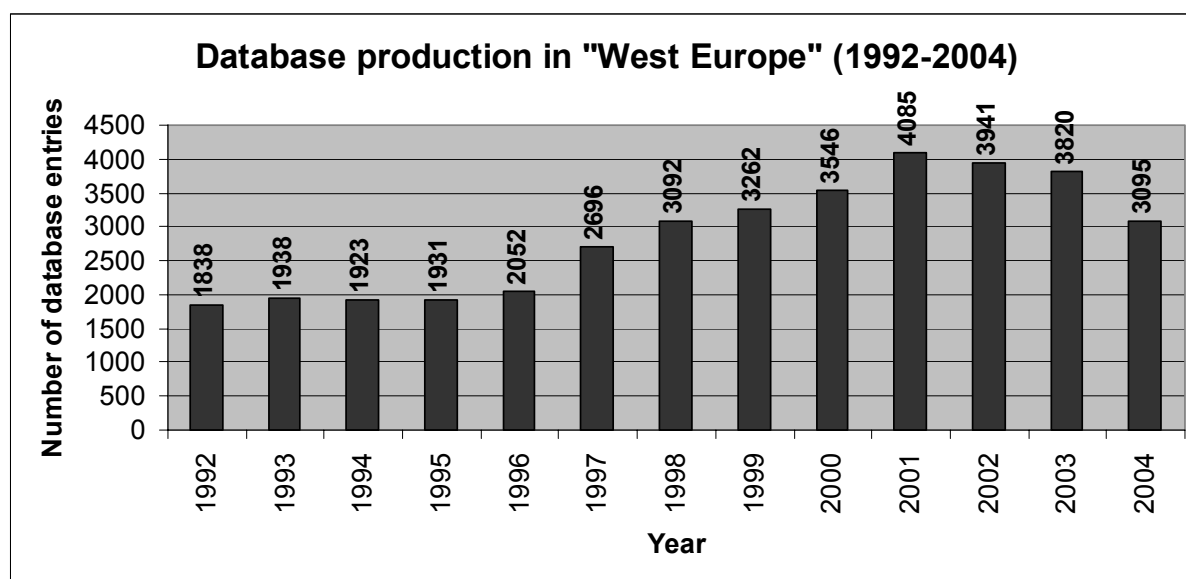
³³ Comments on the Draft Evaluation of Directive 96/9/EC, 15 September 2005.

³⁴ The facts and figures reported in this paragraph are taken from the *Gale Directory of Databases 2005*, Vol. 1, Part 2.

³⁵ See footnote 6 above.

³⁶ The *GDD* does not define the “Western Europe” market but reports that the UK should be included in such market. Other EU countries’ markets for which the *GDD* reports significant figures are Germany, France, the Netherlands, Finland, Sweden.

Figure 5 - Trend of the database sector in “West Europe” (1992-2004)



Source: The *Gale Directory of Databases* 2005, Vol. 1, Part 2.

With respect to the overall decline of database “entries” as of 2001, the EADP argues that database “entries” decreased due to a shift toward the online provision of information.

While some media, such as magnetic tape, diskettes, print and CD-ROMs may have decreased, the overall provision of information by means of databases has not decreased. Thus, if some types of databases have disappeared, this is not necessarily an indication of a decrease in database sales.

The EADP further points out that database delivery has shifted from stand-alone database products, such as CD-ROMs and dedicated on-line access to specific databases, to “portal” based applications which enable a single point of access to many databases. According to the EADP, this trend is not reflected in the *GDD* statistics.

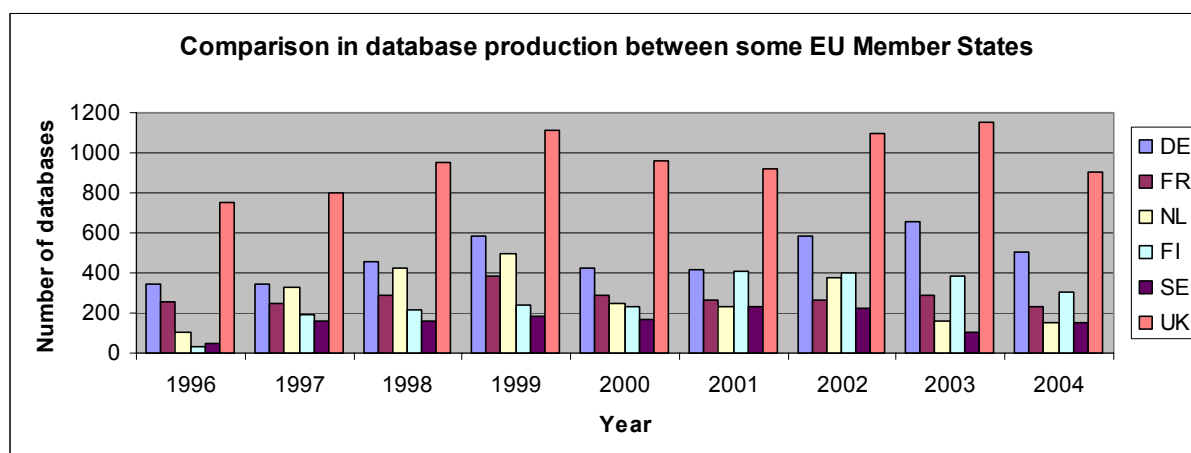
The *GDD* itself observes that “the number of word-oriented databases continues to grow with the increase of: telephone directory databases, particularly non-US ones; newspaper databases; chemical, genome, patent and company data databases”³⁷.

In conclusion - while the *GDD* statistics are the only empirical figures available at this stage to measure the evolution of the database markets - these figures are subject to considerable uncertainty.

Further empirical analysis thus appears necessary before firm policy conclusions on the usefulness of the Directive in developing European database sales can be drawn.

³⁷ « The State of Database Today : 2005 », *Gale Directory of Databases* 2005, Vol. 1, Part 2, page XIX.

Figure 6 - Comparison in database production between some EU Member States (1996-2004)



Source: The Gale Directory of Databases (1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005 editions)

The figure above shows that the UK remains the Member State with the highest relative database production.

There might be various reasons for this long-time success. For instance, the EPC has submitted that these reasons might include the relative maturity of the UK database industry and the success of databases that are produced in English.

Introduced to stimulate the production of databases in Europe, the “sui generis” protection has had no proven impact on the production of databases.

According to the Gale Directory of Databases, the number of EU-based database “entries” was 3095 in 2004 as compared to 3092 in 1998 when the first Member States had implemented the “sui generis” protection into national laws.

It is noteworthy that the number of database “entries” dropped just as most of the EU-15 had implemented the Directive into national laws in 2001. In 2001, there were 4085 EU-based “entries” while in 2004 there were only 3095.

While the evidence taken from the *GDD* relies on the number of database “entries” and not on the overall turnover achieved or the information supplied by means of databases, they remain the only empirical data available.

Although stakeholders have criticised this data as being of little probative value, no alternative data has been supplied. There is thus no conclusive data available as to whether European database production has been significantly influenced by the Directive. Nevertheless, the European publishing and database industries claim that “sui generis” protection is crucial to the continued success of their activities.

75% of respondents to the Commission services’ on-line survey are aware of the existence of the “sui generis” right; among these, 80% feel “protected” or “well protected” by such right. 90% believe that database protection at EU level, as opposed to national level, is important and 65% believe that today the legal protection of databases is higher than before harmonisation.

4.3. Has the balance between the legitimate interests of manufacturers and lawful users of databases been safeguarded?

Certain rightholders (publishers, public rightholders, private users of databases) interviewed in the context of an independent study finalised in 2002³⁸ were of the opinion that the Directive – with certain exceptions – achieves a satisfactory balance between the legitimate interests of rightholders and users and expressed the view that the Directive should remain unchanged since it has proved to be an incentive for the further development of an Internal Market in databases. Publishers claim that the “sui generis” right provides an incentive for wide dissemination of information and encourages specialisation and differentiation on the market. At the same time, certain users (libraries, academic organisations, libraries, public users of databases) have expressed concern as to whether the scope of the “sui generis” right has led to an over-broad protection. Fewer concerns have been expressed in relation to databases protected by copyright. Certain users have pleaded for an extension in the scope of the exception for private purposes to digital databases, but rightholders (in particular, publishers) fear that such a move would lead to abuse and would increase the risks of theft and piracy.

Certain members of the academic and scientific community were concerned that the exceptions to the “sui generis” right were too restrictive with regard to the access to and use of data and information for scientific and educational purposes³⁹.

Claims were also made for the enlargement of the scope of certain exceptions (e.g. in support of the private use of digital databases), for the application of traditional exceptions also to the “sui generis” right (i.e. exception for fair dealing reporting of current events, in particular in the field of sports data) and for the introduction of new exceptions (i.e. for the benefit of the physically disabled). Certain libraries claim that the “sui generis” right has resulted in a concentration of leading database producers, for example electronic journals, monopolizing information.

Furthermore, there is an increasing demand for consumer access to information contained in databases owned by public bodies, such as weather data, maps and statutory registers⁴⁰.

It has been observed that the complexity of the “sui generis” regime due to the two tier approach of the Directive has caused confusion among users as the same database can be protected by both copyright and “sui generis” right. In particular, the association of European academies represented by ALLEA (“All European Academies”) revealed serious concerns about the effect of the Directive upon scientific research. The main concern is that the Directive limits access and the use of data and information for scientific and educational

³⁸ “The implementation and application of Directive 96/9/EC on the legal protection of databases” (http://europa.eu.int/comm/internal_market/copyright/docs/studies/etd2001b53001e72_en.pdf).

³⁹ In the context of the above study, the UK Copyright Directorate of the UK Patent Office reported that research based industry estimated that the requirement – imposed by the Directive – to restrict the UK’s copyright research exception relating to databases to non-commercial research would cost £ 1 million per year (see page 552).

⁴⁰ The re-use of public sector information is now the subject of Directive 2003/98/EC (OJ L 345, 31.12.2003, p. 90). Under such Directive, Member States are required to ensure that the documents held by public sector bodies shall be re-usable for commercial or non-commercial purposes. The Directive is without prejudice to Directive 96/9 and does not apply to documents for which third parties hold intellectual property rights and the obligations imposed must be compatible with the Berne Convention and the TRIPS Agreement (Recitals 22, 24).

purposes. This is held to impede research and reduce the public benefit which might otherwise be derived from research. In the view of ALLEA, the Directive is designed for the commercial sector whilst scientific data and the way in which scientists have traditionally used it is different in many ways⁴¹.

Furthermore, the reports of two workshops organised by the Commission's Research Directorate General⁴² revealed that in both the US and in Europe there is reluctance to use the "sui generis" right due to its complexity and its limitations.

It is noteworthy that the ECJ and some national judges appear to fear that the balance between users and rightholders is inappropriate. Indeed, the interpretation adopted by the European Court may have been influenced by the concern that the "sui generis" right might otherwise significantly restrict access to information. Thus, for instance, the ECJ has ruled that the mere act of consultation of a database is not covered by the database maker's exclusive rights⁴³.

Most rightholders (mainly, publishers) believe that the Directive safeguards the balance of interests of rightholders and users; however, the two-tier approach of the Directive and the complexity of the "sui generis" regime may have caused confusion among certain users, in particular the academic and scientific community.

However, the interpretation of the ECJ may allay the fear of those who believed that the Directive would lock up information otherwise publicly available, at least with respect to those databases which contain data "created" by the database maker himself.

4.4. Has the EU database production increased as compared to the US?

55% of the respondents to the Commission services' on-line survey believe that the introduction of "sui generis" protection for "non-original" databases has helped Europe to catch up with US database production.

On the other hand, very few respondents believe that the "sui generis" right has created more business opportunities. Some respondents suggested that, with a view to improving the level of European investments as compared to the US, there is a need to provide for clear and simple rules which would stimulate businesses to invest in the creation of databases.

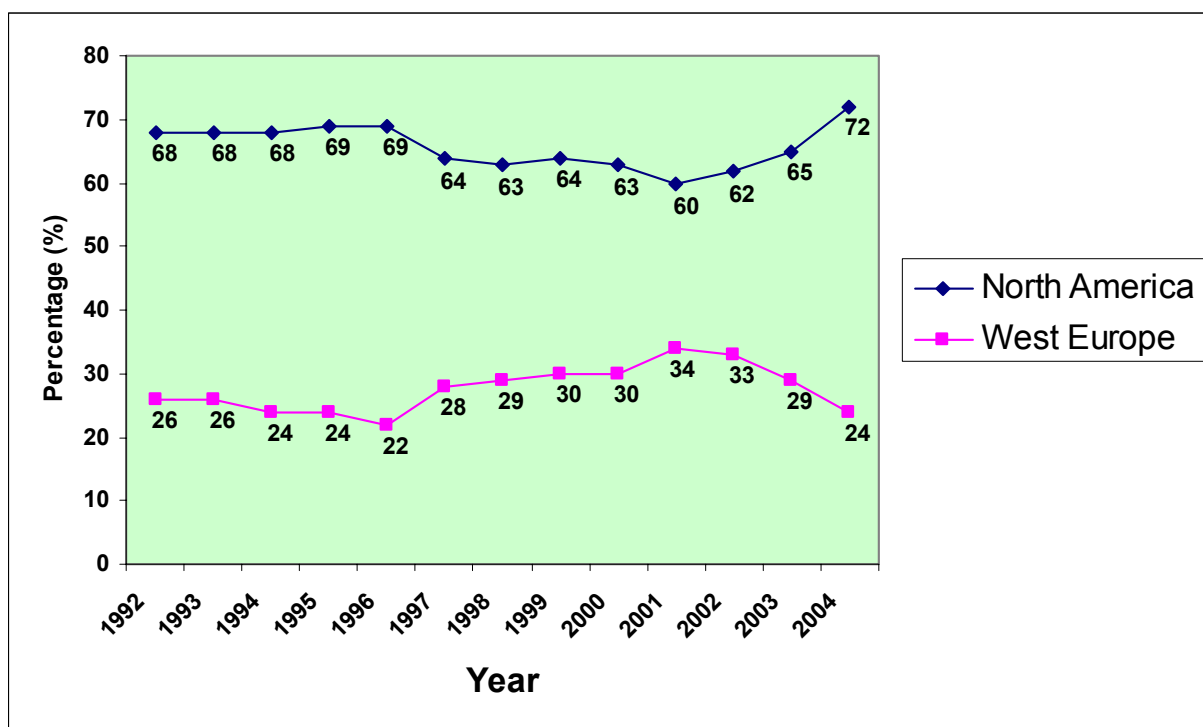
The *GDD* reports that, during the period 1996-2001, Western Europe's share in global database production increased from 22% to 34% while the "North American" share decreased from 69% to 60% during the same period.

Between 2002 and 2004, the European share decreased from 33% to 24% while the US share increased from 62% to 72%. The ratio of European/US database production, which was nearly 1:2 in 1996, has become 1:3 in 2004.

⁴¹ ALLEA's letters addressed to Internal Market Commissioners Bolkestein (2002) and McCreevy (2005).
⁴² See "IPR issues in bio-informatics" and "IPR issues in Internet-based research", available at http://europa.eu.int/comm/research/era/ipr_en.html.

⁴³ "However, it must be stressed that the protection of the *sui generis* right concerns only acts of extraction and re-utilisation as defined in Article 7(2) of the directive. That protection does not, on the other hand, cover consultation of a database. Of course, the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people. However, if he himself makes the contents of his database or a part of it accessible to the public, his *sui generis* right does not allow him to prevent third parties from consulting that base", case C-203/02, n. 54, 55.

Figure 7 - Database production in North America and West Europe (1992-2004)



Source: The Gale Directory of Databases 2005, Vol. 1, Part 2.

Globally, the number of US database “entries” has grown from 6000 in 1996 to over 8000 in 2004.

Most respondents to the on-line survey believe that the “sui generis” right has helped Europe to catch up with the US in terms of investment but, at the same time, that the “sui generis” right did not help to significantly improve the global competitiveness of the European database sector. The data taken from the *GDD* reveal that the economic gap with the US has not been reduced.

5. ANALYSIS

From the outset, there have been problems associated with the “sui generis” right: the scope of the right is unclear; granting protection to “non-original” databases is perceived as locking up information, especially data and information that are in the public domain; and its failure to produce any measurable impact on European database production.

5.1. The “sui generis” right is difficult to understand

First and foremost is the lack of clarity in the text of the relevant provisions of the Directive. The “sui generis” right is formulated as follows in Article 7 of the Directive:

“Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or reutilisation of the whole or a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.”

None of these terms has a precise legal meaning and none of them has an established tradition in copyright law. Sections 4.1.2. and 4.1.4. demonstrate how national courts and the ECJ have struggled over the precise meaning of the “sui generis” protection.

But the November 2004 decisions of the ECJ restrict the scope of protection for “non-original” databases by introducing a distinction between “creation” of data and *obtaining* it. The Court thereby refuses to count any investment before or at the time of “creating” data as constituting a substantial investment in the database itself. It can be expected that database makers will devise legal strategies to get around the distinction drawn in the ECJ judgments and that this might result in online databases increasingly being secured by systems of access control.

5.2. “Sui generis” protection comes close to protecting data as property

There is a long-standing principle that copyright should not be extended to cover basic information or “raw” data. However, as evidenced by the ECJ’s differentiation between the “creation” of data and its *obtaining* demonstrate, the “sui generis” right comes precariously close to protecting basic information.

The United States has rejected a similar course. In *Feist Publications v. Rural Telephone Service Company*, the Supreme Court found that the “bits of information” contained in a telephone directory are not protected under copyright laws. Moreover, the Court held that the arrangement of the data in a telephone book was dictated by the identities of its subscribers and the need for alphabetization, making it “devoid of even the slightest trace of creativity.” In conclusion, third parties were free to copy or make other use of this information as they wished. The *Feist* case is often interpreted as the culmination of a gradual trend in copyright law. In recent years, fewer and fewer courts have been willing to protect compilations solely under the “sweat of the brow” doctrine.

Nevertheless, as the figures discussed below demonstrate, there has been a considerable growth in database production in the US, whereas, in the EU, the introduction of “sui generis” protection appears to have had the opposite effect. With respect to “non-original” databases, the assumption that more and more layers of IP protection means more innovation and growth appears not to hold up.

5.3. The economic impact of the “sui generis” right is unproven

The second problem with the “sui generis” right is that its economic impact on database production is unproven. Introduced to stimulate the growth of databases in Europe, the new instrument has had no proven impact on the production of databases. According to the *Gale Directory of Databases*, the number of EU-based database “entries” was **3095** in 2004 as compared to **3092** in 1998 when the first Member States had implemented the “sui generis” protection into national laws. More significantly, the number of database “entries” dropped just as most of the EU-15 Member States had implemented the Directive into national laws in 2001. In 2001, there were **4085** EU-based “entries” while in 2004 there were only **3095**.

Nevertheless, the Internal Market and Services Directorate General has received strong representations from the European publishing industry that “sui generis” protection is crucial to the continued success of their activities. In addition, 75% of respondents to the on-line survey are aware of the existence of the “sui generis” right; among these, 80% feel

“protected” or “well protected” by such right. 90% believe that database protection at EU level, as opposed to national level, is important and 65% believe that today the legal protection of databases is higher than before harmonisation. In the opinion of respondents, the “sui generis” right has brought about legal certainty, reduced the costs associated with the protection of databases, created more business opportunities and facilitated the marketing of databases.

While this endorsement of the “sui generis” right is somewhat at odds with the continued success of US publishing and database production that thrives without “sui generis” type protection, the attachment to the new right is a political reality that seems very true for Europe.

6. POLICY OPTIONS

6.1. Option 1: Repeal the whole Directive

Withdrawing the Directive in its entirety would allow Member States to revert to the situation that applied in national law prior to the adoption of the Directive. This would allow *droit d'auteur* Member States to keep their threshold of “originality”, to protect “original” databases under copyright law and to choose other means e.g. unfair competition or the law of misappropriation, to protect “non-original” compilations. Common law Member States, for their part, would be allowed to revert to the “sweat of the brow” standard as a relevant copyright test.

But withdrawing the Directive in its entirety would give rise to a pre-directive scenario where Member States could protect “original” databases under diverging levels of “originality”. In particular, the UK and Ireland would be allowed to revert to the “sweat of the brow” copyright test and Sweden, Denmark and Finland (and Norway and Iceland) would be allowed to revert to their “catalogue rule”⁴⁴.

In this scenario, one could expect that the terms of use for collections of data or compilations would be dealt with only by contract law and right-holders would increasingly protect their databases (especially online databases) by means of access control systems. However, this option would have the disadvantage of doing away with the harmonised level of copyright protection for “original” databases which has not caused major problems so far.

6.2. Option 2: Withdraw the “sui generis” right

Another possibility would therefore be to withdraw the “sui generis” right in isolation and thus maintain the harmonised level of copyright protection for “original” databases.

Arguably, this partial withdrawal would still allow *droit d'auteur* Member States to keep their threshold of “originality”, to protect “original” databases under copyright law and to choose other means e.g. unfair competition or the law of misappropriation to protect “non-original” compilations. It would also allow common law Member States to revert to the “sweat of the brow” standard as a relevant test to protect “non-original” compilations.

⁴⁴ See footnote 9.

The arguments for partial withdrawal would largely be based on a strict application of the “better regulation” principles. These principles would probably suggest that the “sui generis” right be withdrawn as it has revealed itself to be an instrument that is ineffective at encouraging growth in the European database industry and, due to its largely untested legal concepts, given rise to significant litigation in national and European courts. Empirical data underlying this evaluation show that its economic impact is unproven. In addition, no empirical data that proves that its introduction has stimulated significant growth in the production of EU databases could be submitted so far.

Furthermore, withdrawal of the “sui generis” right appears to be in line with an emerging trend in common law jurisdictions as the high standard of “originality” introduced by the Directive would put them on a par with the US, thereby protecting fewer rather than more databases⁴⁵. It may thus well be that even the common law jurisdictions within the Community (UK and Ireland) would maintain the higher threshold for protection, thereby only protecting “original” databases. The ruling in the *Feist* case and the economic evidence that points at the US as being a leader in database production could lead to significant reluctance in reintroducing “sweat of the brow”.

Finally, withdrawing the “sui generis” right would still leave companies with factual compilations that may not be fully protected under the standard of “originality” as prescribed in copyright law, free to protect their works by other means such as contract law or use of technological protection measures or other forms of access control when the work is delivered on-line. It would also not exclude producers of compilations to claim protection by stating that their arrangements met the threshold of “originality”. However, this paper acknowledges that European publishers and database producers would clearly prefer to retain the “sui generis” protection.

6.3. Option 3: Amend the “sui generis” provisions

Another option would be to amend and clarify the scope of protection awarded under the “sui generis” provisions. Attempts could be made to reformulate the scope of the “sui generis” right in order to also cover instances where the “creation” of data takes place concurrently with the collection and screening of it. Amendments could also clarify the issue of what forms of “official” and thereby single source lists⁴⁶ would be protected under the “sui generis” provisions.

Amendments could also be proposed to clarify the scope of protection and clarify whether the scope would only cover “primary” producers of databases (*i.e.* those producers whose main business is to collect and assemble information they do not “create” themselves) or would also include producers for whom production of a databases is a “secondary” activity (in other words, a spin-off from their main activity). Amendments could, in addition, clarify the issue of what actually constitutes a substantial investment in either the obtaining, verification or presentation of the contents of a database. On the other hand, reformulating the scope of the “sui generis” right entails a serious risk that yet another layer of untested legal notions would be introduced that will not withstand scrutiny before the ECJ.

⁴⁵ Canada, as the other common law jurisdiction affected has also now adopted the high level of "originality" in its case law.

⁴⁶ See the arguments of the British Court of Appeal regarding the *BHB*'s “official” list of riders and runners (see footnote 25).

6.4. Option 4: Maintaining the status quo

On the other hand, even if a piece of legislation has no proven positive effects on the growth of a particular industry, withdrawal is not always the best option. Removing the “sui generis” right and thereby allowing Member States to revert to prior forms of legal protection for all forms of “non-original” databases that do not meet the threshold of “originality”, might be more costly than keeping it in place. Arguably, the limitations imposed by the judgments of the ECJ mean that the right is now only available to “primary” producers of databases and not those who for whom databases are a “secondary” activity.

Before deciding on its future policy approach with respect to the “sui generis” protection for “non-original” databases, the Commission services deem it appropriate to further consult stakeholders on the four policy options outlined above.

Stakeholder consultation should also provide further evidence on the economic impact of “sui generis” protection in stimulating the production of European databases.

Stakeholders are invited to submit their observations by 12 March 2006.