



*The European Consumers' Organisation*

**BEUC/X/012/2006**

10 March, 2006  
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***Directive 96/9/EC on the legal protection of databases –  
BEUC position paper***

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Evropska potrošniška organizacija  
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Euroopan Kuluttajaliitto  
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Den Europæiske Forbrugerorganisation  
Den Europeiska Konsumentorganisationen

BEUC, the European Consumers Organisation, is the representative organisation of 40 independent consumer organisations from all over Europe. Our job is to try to influence, in the consumer interest, the development of EU policy and to promote and defend the interests of all European consumers.

BEUC welcomes the opportunity to comment on the Commission working paper reviewing Directive 96/9 EC on the legal protection of databases (the "Directive"). We attach great importance to the development of a balanced regime of intellectual property rights.

### **1. Introduction**

The Directive was originally adopted to facilitate the free movement of databases, and to promote and protect investments in the database industry, thus providing European undertakings with a competitive edge in relation to third country counterparts, particularly American.<sup>1</sup> The reason for reviewing the Directive is to ascertain whether these goals were met.

Also, as recent court cases have shown, the ambiguous concepts that the directive introduces, makes it difficult to assess whether and in what way, a database is protected. This is another issue that is addressed by the review.

The working paper asks stakeholders to comment on four policy options set out by the Commission. Furthermore, the Commission asks stakeholders to provide evidence on the positive economic impact of the "sui generis" database protection.

### **2. General comments**

BEUC welcomes an evaluation of the Database Directive. By questioning the need for a special database protection, and asking the industry to provide evidence of the supposed benefits of such protection, the Commission has taken an approach to the review which BEUC fully supports. We would like to stress that the burden of proof should be on the proponents for the continuation of the special data base protection. If the database industry cannot provide sound and conclusive evidence of the societal benefits from the Directive, the Directive should be repealed.

This type of critical evaluation should also be applied to the entire intellectual property acquis when it is now being reviewed by the Commission.

Why is the Database Directive important to European consumers? The Directive is important because it increases the barriers to entry for potential competitors in the database market, thus raising costs and stifling innovation to the detriment of, amongst others, the consumer.

### **3. Policy options**

As previously mentioned the working paper asks for comments on four policy options set out by the Commission: i) repealing the whole directive, ii) withdrawing the "sui generis" right, iii) amending the "sui generis" provisions, iv) maintaining the status quo.

It is our opinion that **the Database Directive should be repealed**. There are several reasons for this, many of which are mentioned in the working paper:

- **The Directive has not facilitated growth in the database industry**

As pointed out in the working paper, data provided by the Gale Directory of Databases shows that the special protection awarded to databases in Europe has neither lead to an increase in the production of these, nor given the European industry a competitive edge over its US counterparts. On the contrary, the US share in global database output is larger than it was before the directive was adopted.

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<sup>1</sup> Cf. *e.g.* recitals 2, 11 and 40 of the Directive.

The industry has not provided evidence to the contrary.

Other IP friendly jurisdictions, like the US, has realised that giving databases a special protection does not contribute to growth. As a consequence neither they, nor WIPO has adopted similar database protection even after intense lobbying by the industry.

- **The Directive impedes competition**

Awarding database authors with special intellectual property rights necessarily entails conferring a monopoly with all the costs this entails: Competition is eliminated leading to less innovation and higher prices for customers.

As mentioned by the working paper, the rulings of the ECJ in four recent court cases limit the ambit of the “sui generis” right.<sup>2</sup> However, the consequences of these rulings should not be overestimated. Even after these rulings the Directive has a significant impact on competition in the database market. In a recent article published in *European Intellectual Property Review* Davidson and Hugenholtz argues that the database industry will develop different strategies to circumvent these decisions.<sup>3</sup> The authors mention two such strategies: database makers could invest more in the presentation of the data, or they could prevent the data from being publicly available, and sell the exclusive right to them. Arguably, purchasing access to data might be deemed a substantial investment.

- **The Directive impedes access to information**

Academics have voiced concerns over the consequences of the directive. BEUC fully supports their view that the directive as it currently stands impedes academic research by limiting the fair use exception to non-commercial extraction “for the purposes of illustration for teaching and academic research”.<sup>4</sup>

- **The Directive does not provide legal certainty**

One of the aims of the directive was to develop a stable legal environment for the protection of databases.<sup>5</sup> Arguably, the Directive has not produced the legal certainty envisaged by the Commission. Recent ECJ decisions have given some guidance as to the interpretation of the Directive, but there are still many questions which remain unanswered: e.g. does a database get a new period of protection if it is amended;<sup>6</sup> what is a substantial investment, and what is a substantial part of a database pursuant to Art. 7 (1).

Also, the Courts decisions raise new issues. Distinguishing between investments in creating and obtaining information can be difficult especially in relation to scientific databases collecting for instance genetic sequences and metrological data.<sup>7</sup> McGee and Scanlan argue in an article that the distinction “is difficult if not impossible to apply [...] on a workable or practical basis. This aspect of the judgement can only lead to uncertainty in the application of the law to databases.”<sup>8</sup>

The Commission argues against repealing the directive by stating that “this option would have the disadvantage of doing away with the harmonised level of copyright protection for “original” databases

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<sup>2</sup> Cases C-46/02, C-444/02, C-338/02, C-203/02.

<sup>3</sup> See “Football fixtures, horseraces and spin-offs : the ECJ domesticates the database right” / Mark J. Davison and P. Bernt Hugenholtz, *European Intellectual Property Review* 2005, v. 27, n. 3, March, p. 113-118.

<sup>4</sup> Cf. the directive Art. 9 b) and the report by the Royal Society:

<http://www.royalsoc.ac.uk/displaypagedoc.asp?id=11403>

<sup>5</sup> Cf. recital 12

<sup>6</sup> The Advocate General in the BHB decision (C-203/02) argued that each time a substantial change to the content of a database is made, a new database emerges that qualifies for its own term of protection, cf. para. 143-154 of the AG opinion.

<sup>7</sup> Cf. the article mentioned in footnote 3.

<sup>8</sup> See “The Database Directive - sui generis and copyright: a practicable distinction?” / Andrew McGee, Gary Scanlan, *The Journal of Business Law* 2005, July, p. 422.

which has not caused major problems so far.”<sup>9</sup> First of all this fails to acknowledge the essence of the review: The key question is not whether the directive has done any harm, but whether the directive, and all its constituent parts, has produced any benefits.

Secondly, the copyright of databases are only partially harmonized. The current directive does not prevent Member States from having different levels of copyright protection provided it is above the threshold set out in the directive.<sup>10</sup> To our knowledge, all Member States protected databases through its copyright legislation even before the directive was adopted. Repealing the database directive would not adversely affect the functioning of the internal market as it is doubtful whether abolishing a partially harmonised copyright for databases will create an obstacle to free movement of goods or services.

- **The Commission’s “better regulation” initiative**

One of the key elements in the Commission’s Communication on better regulation, COM(2005) 97, is the simplification of existing EU legislation. Repealing a directive that has no proven benefits to neither industry, nor society as a whole, contributes to the simplification of the Community acquis. Thus, withdrawing the Database Directive would be consistent with the objectives of the better regulation initiative.

If the Commission decides not to repeal the directive, the ‘sui generis’ database right should at least be withdrawn for the above-mentioned reasons.

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<sup>9</sup> Page 25 of the working paper.

<sup>10</sup> Cf. recital 60 of the Directive.