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Implementing the European Database Directive

1. Introduction

On 11 March 1996, almost six years after the first proposal was presented to the Council¹, the European Database Directive was finally adopted.² The Directive has created a unique two-tier protection scheme of electronic and non-electronic databases. Member States are to protect databases by copyright as intellectual creations. More importantly, the Directive provides for a novel sui generis right to prevent unauthorized extraction or reutilization of the contents of a database.

Member States were to implement the provisions of the Directive by 1 January 1998. Only a handful of states have met this deadline. In many states implementation bills are still pending in national parliaments; in some countries no legislative activities have occurred at all.

In the first part of this article (§§ 2-3) the main provisions of the Directive will be critically reviewed. The second part (§ 4) comprises a status report on the implementation of the Directive in the Member States.

2. Background

¹ Proposal for a Council Directive on the Legal Protection of Databases, COM (92)24 final, Brussels, 13 May 1992, OJ 1992 C156/4.

² Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, 11 March 1996, OJ No. L 77/20 of 27 March 1996.

The Directive has its roots in the *Green Paper on Copyright and the Challenge of Technology*, which was published by the European Commission in 1988.³ In this policy paper the Commission announced its agenda for the future harmonization of various copyright issues involving information technology. Not surprisingly, the chapter on the protection of computer programs attracted the most attention. A separate chapter on the protection of databases went more or less unnoticed.

In the Green Paper the Commission observed that copyright might be inadequate in protecting database producers. The Commission tentatively suggested that protection might be extended to databases containing material not protected by copyright. In this context the Commission drew an analogy with the neighbouring rights protection enjoyed, in nearly all European countries, by phonogram producers.

Initially, the ideas of the Commission on database protection, which were presented in the Green Paper, did not receive the attention they deserved. At a hearing that took place in Brussels in April 1990 interested parties were given the opportunity to express their views. During the hearing a general preference for a copyright approach was expressed. As the Commission reported in its *Follow-up to the Green Paper* no support at all was given to a "sui generis" approach.⁴

The opinions expressed at the hearing were, at that time, illustrative of legal thinking on the protection of databases in Europe. For many years, copyright protection was generally considered an appropriate instrument for protecting database producers. This consensus was due, in part, to two important decisions by the French Supreme Court (Cour de Cassation) in the *Le Monde v. Microfor* case.⁵ According to the Court a database containing references and brief quotations qualifies for copyright protection as an 'information work' (oeuvre d'information).

Perhaps, in retrospect, the European consensus was also influenced by a certain amount of wishful thinking. As in the case of computer programs, copyright is a very attractive solution.

³ Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology. Copyright Issues Requiring Immediate Action*, COM (88) 172 final, Brussels, 7 June 1988.

⁴ European Commission, *Follow-Up to the Green Paper*, COM (90) 584 final, Brussels, 5 December 1990.

⁵ Cour de Cassation 9 November 1983, *Droit de l'informatique* 1984/1, 20; Cour de Cassation 30 October 1987, *Droit de l'informatique* 1988/1, 34.

Copyright offers worldwide protection on a non-discriminatory basis, for a relatively long period of time, under relatively soft conditions.

In early 1991 the Supreme Court of the Netherlands (Hoge Raad) issued a first warning that copyright might not be the appropriate vehicle for database protection.⁶ In the *Van Dale v. Romme* case copyright protection was sought for the approximately 230,000 alphabetically ordered headwords contained in the 1984 edition of Van Dale's dictionary, the authoritative dictionary of the Dutch language. A certain Rudolf Jan Romme, whose hobbies included the solving of crossword puzzles, had copied the headwords onto computer disks and entered them into a database. In combination with a simple searching algorithm Romme was now able to speed up, or practically automate, the process of solving these puzzles.

Van Dale was granted copyright protection in two instances. The Supreme Court of the Netherlands [reversed. = reversed the decision.?] According to the Court a collection of words will only be protected by copyright "if it results from a selection process expressing the author's personal views". Since this severe test had not been applied by the Court of Appeal, the Supreme Court remanded the case to the Court of Appeals in The Hague for further decision.⁷

The *Van Dale v. Romme* decision was followed, a few months later, by the better-known *Feist* decision by the US Supreme Court.⁸ Under the *Feist* rule a compilation of data may qualify as an original work of authorship only if sufficient creativity is involved in either the selection, the arrangement or the coordination of the facts contained in the compilation. Invested labour (sweat of the brow) as such does not merit copyright protection.

Both the *Van Dale* and the *Feist* decision strengthened the European Commission in its belief that copyright was not the optimal instrument in protecting databases. In the Explanatory Memorandum to the original proposal⁹ the relevance and scope of traditional copyright protection, based on original arrangement and selection, are critically examined. The Commission observes that in many cases the arrangement of the data in the database is not the work of any original creator, but rather the product of the database management software which is applied to the data. In addition, the Commission observes that originality

⁶ Supreme Court of the Netherlands 4 January 1991 (*Van Dale Lexicografie B.V. v. Rudolf Jan Romme*), published in English in: E.J. Dommering & P.B. Hugenholtz (eds.), *Protecting Works of Fact*, Deventer/Boston 1991, p. 93.

⁷ Court of Appeals The Hague 1 April 1993, *Nederlandse Jurisprudentie* 1994, 58 (decision of Court of Appeals Amsterdam upheld, considering that Van Dale's lexicographers *had* expressed their personal views in selecting headwords for entry in the dictionary).

⁸ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 111 S.Ct. 1282 (1991).

⁹ Note 1.

based on selection has only limited practical value, since most databases tend to be comprehensive rather than `selective'. In sum, traditional copyright leaves the essence of the database unprotected: the aggregate of the data compiled.

On 13 May 1992 the Commission presented its initial proposal to the Council. More than a year later (23 June 1993), the European Parliament voted in support of the proposal, subject to a large number of amendments. The amendment process resulted in an amended proposal, which was presented by the Commission on 4 October 1993.¹⁰ Thereafter, a period of relative silence set in until on 10 July 1995 the Council, rather suddenly, adopted a Common position, which was markedly different from the amended proposal.¹¹ The Common position was accepted by the European Parliament, in a second reading, on 14 December 1995.¹² On 11 March 1996 the Directive was finally enacted.

3. The Database Directive in detail

The Directive "concerns the legal protection of databases in any form" (Article 1 § 1). Unlike the original proposal, the Directive protects not only electronic databases, but also databases in `paper' form, such as telephone directories, and hybrid databases using microfilm. This expansion of the scope of the Directive must be applauded. Now that scanners are becoming standard equipment of the information consumer, there is no compelling reason to treat `paper' and electronic data compilations in different ways. Already, the TRIPs Agreement of 1995 provided for copyright protection of databases "whether in machine readable or other form" (Article 10 § 2 TRIPS). Similarly, Article 5 of the WIPO Copyright Treaty of 1996 calls for copyright protection of compilations of data or other material "in any form".

Article 1 § 2 defines the Directive's object of protection:

`Database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

¹⁰ European Commission, Amended proposal for a Council Directive on the Legal Protection of Databases, COM (93) 464 final, Brussels, 4 October 1993, OJ C 308/1.

¹¹ Common position adopted by the Council on 10 July 1995, OJ C 288/14.

¹² OJ C 17 of 22 January 1996.

Thus, a `database' is more than a mere collection of simple data. A collection of works of authorship, such as an anthology, encyclopedia or multimedia CD, may also qualify as such. A database may even consist of other `materials', i.e. pieces of information that do not qualify as either works or data, such as sound recordings, non-original photographs, etc. According to the Explanatory Memorandum, the database may contain all sorts of works or materials. The contents of the database is described as "'information' in the widest sense of that term".¹³

The individual elements comprising a database must be `independent'. Not every collection of works, data or materials is a database within the meaning of the Directive. The collection of moving images together constituting a movie (film) is not a `database'. Recital 17 expressly excludes "a recording or an audiovisual, cinematographic, literary or musical work as such".

The individual elements of the database must be "arranged in a systematic or methodical way". The proverbial shoe box containing random notes, therefore, does not qualify as a database; neither does a hard disk containing unsorted, raw data. The Explanatory Memorandum excludes from the definition of a database "the mere stockage of quantities of works or materials in electronic form".¹⁴

However, according to Recital 21, "it is not necessary for those materials to have been physically stored in an organized manner". It follows that a collection of unsorted data fixed on a hard disk or other digital medium would qualify as a database if combined with database management software enabling retrieval of the stored data.

The elements collected in the database must be `individually accessible by electronic or other means'. In other words: the stored works, data or other materials must be retrievable. Thus, a diskette with neatly arranged data, but without a searching algorithm, would not qualify as a database.

According to Recital 20, the protection granted under the Directive also applies to "the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems". These important bibliographic tools, therefore, are protected as (parts of) a database. The Directive does not, however, protect the computer software

¹³ Explanatory memorandum (note 1), p. 19.

¹⁴ Explanatory Memorandum (note 1), p. 41.

driving the database as such (Article 1 § 3). Computer programs are protected by the Software Directive of 1991.¹⁵

3.1 Copyright protection

The copyright part of the Directive is set out in Chapter 2. Databases will enjoy copyright protection only if "by reason of the selection or arrangement of their contents, [they] constitute the author's own intellectual creation" (Article 3 § 1). The 'selection or arrangement' criterion is reminiscent of Article 10 § 2 of the TRIPs Agreement. It has been developed in case law, inter alia by the Supreme Court of the United States in re *Feist*. The level of originality required ("the author's own intellectual creation") is the same as in Article 1 § 3 of the Software Directive and Article 6 of the Terms of Protection Directive¹⁶ (in respect of photographs). It is a typical European compromise, higher than the British requirement of 'skill and labour', but lower than the test of 'Überdurchschnittlichkeit', well known from the *Inkassoprogramm* decision of the German Federal Supreme Court.¹⁷

According to Gaster, the Commission official who was directly involved with the drafting of the Directive, *all* continental European member states would have to lower the existing requirement of originality in respect of databases:

*Politically speaking the common law Member States will have to lift the bar for application of copyright protection, whereas the continental civil law countries will have to lower it. This bridging the gap between copyright and droit d'auteur is certainly not de minimis.*¹⁸

Legislators in most Member States in continental Europe tend to disagree. The Directive's requirement resembles the originality test developed in doctrine and case law to such a degree that no need for express implementation would arise.

¹⁵ Council Directive 91/250 on the legal protection of computer programs, OJ L 122/42 of 17 May 1991.

¹⁶ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9 of 24 November 1993.

¹⁷ Federal Supreme Court of Germany, 9 May 1985, *Computer und Recht* 1985, 22. See G. Schricker, Farewell to the 'Level of Creativity' (Schöpfungshöhe) in German Copyright Law?, *IIC* 1995, 41.

¹⁸ Jens L. Gaster, The EU Council of Ministers' common position concerning the legal protection of databases: a first comment, *Entertainment Law Review* 1995, 260.

Article 5 enumerates the rights protected under copyright: a broadly phrased right of reproduction (including "temporary or permanent reproduction by any means and in any form, in whole or in part"), rights of adaptation, distribution (subject to Community exhaustion), and communication to the public. Article 5 exemplifies the *acquis communautaire* frequently referred to in the Commission's recent proposal for a *Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*, which was presented on 10 December 1997.¹⁹

Somewhat superfluously, Article 6 § 1 of the Directive provides that a lawful user may perform all restricted acts necessary for normal use. Interestingly, this exemption may not be overridden by contract (Article 15); similar mandatory exemptions are found in the Software Directive.

The Directive fails to harmonize copyright ownership or authorship in respect of databases. A provision in the original proposal that would allocate the economic rights to the employer of the creator of the database (similar to Article 2 § 3 of the Software Directive), was eventually deleted. What remains is the Member States's freedom to allocate authorship to a legal person (Article 4 § 1).

The Directive allows for all exemptions traditionally found in the copyright laws of the Member States (Article 6 § 2 d). However, unauthorized copying for private purposes from *electronic* databases is not permitted. Clearly, the European legislature has been convinced, by the rightsholders' persistent lobbying, that 'digital is different'. Whether such an all-encompassing exclusive right will be enforceable in practice, taking into account the freedom of expression and information and the right of privacy protected in (inter alia) the European Convention on Human Rights, remains to be seen.

Copyright in databases offers relatively 'thin' protection. Copying parts of the database without appropriating, either in whole or in part, the structure (selection or arrangement) of the data, does not amount to copyright infringement. In practice, therefore, the copyright protection granted under Chapter 2 of the Directive will remain relatively unimportant. It is the sui generis right of Chapter III that is the essence of the Directive.

3.2 *Sui generis right*

¹⁹ Brussels, COM (97) 628; <http://europa.eu.int/comm/dg15/en/index.htm>

The sui generis right of the Directive has undergone a significant evolution between the presentation of the first proposal and the final adoption of the Directive. Initially, the right was conceived as a special rule of unfair competition.²⁰ In the original proposal (Article 2 § 5) it was defined as a right to prevent *unfair* extraction, protecting only against (unauthorized) acts of *commercial* usage:

Member States shall provide for a right for the maker of a database to prevent the unauthorized extraction or reutilization, from the database, of its contents, in whole or in substantial part, for commercial purposes...

In the amended proposal (Article 10 § 1) the right was redefined as a "right to prevent *unauthorized* extraction". In the final version of the Directive even the word 'unauthorized' has disappeared.²¹ As is illustrated by Recital 42, the right applies not only in competitive situations, but also "to acts by the user which go beyond his legitimate rights and thereby harm the investment".²²

Article 7 § 3 of the Directive confirms that the right has become a full-fledged property right: it is transferable, and can be subject to licensing. The sui generis right has become a right similar in nature to the topography right protecting the design of semiconductor chips.

In the end, the sui generis right appears to have acquired most of the traits of a right of intellectual property. According to Gaster, the sui generis right is an economic right that "has nothing in common with unfair competition remedies because it does not sanction behaviour *a posteriori* and because it provides for a term of protection."²³ If this is true, the consequences of the Directive for the European information market will be far-reaching. Prior to implementation, intellectual property protection for non-original compilations existed in just a few Member States (the United Kingdom, Denmark, Sweden and the Netherlands). Most Member States provided only for unfair competition remedies, to be applied in special circumstances, or none at all.

²⁰ J.H. Reichman and P. Samuelson, Intellectual property rights in data?, 50 *Vanderbilt Law Review* 51, at 81 (1997).

²¹ Traces of the sui generis right's unfair competition law origins remain visible in the Directive. For instance, Recital 6 explains the need for the creation of the right "in the absence of a harmonized system of unfair-competition legislation or of case-law".

²² H.M.H. Speyart, De databank-richtlijn en haar gevolgen voor Nederland (II), *Informatierecht/AMI* 1996/9, p. 176.

²³ Gaster (note 18), at 259.

The scope of the sui generis right has expanded horizontally as well. In the original and amended proposals, the right was designed as a safety net, to be applied only in respect of subject matter not otherwise protected by copyright or neighbouring rights. In its final form, the sui generis right adds an extra layer of protection, which may cumulate with existing rights of intellectual property.

Subject matter

The sui generis right protects the 'sweat of the brow' of the database producer, i.e. the skill, energy and money invested in the product. This investment must be 'substantial'. According to Recital 7 "the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the costs needed to design them independently". Apparently, this leaves some room for the protection of databases resulting from artificial intelligence (computer generated databases).

The Directive offers little guidance as to the minimum quantum of investment required. For political reasons, the Commission has attempted to exclude musical recordings on CD from the scope of the Directive. Recital 19, rather unconvincingly, explains that "as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the sui generis right".

The investment protected must be either 'qualitative' or 'quantitative' in nature. A qualitative investment may result from the expertise of a professional, e.g. a lexicographer selecting the key words for a dictionary. In practice, however, most databases will probably result from a quantitative investment, involving "the deployment of financial resources and/or the expanding of time, effort and energy" (Recital 40).

According to Article 7 § 1, a substantial investment must be made "in either the obtaining, verification or presentation of the contents" of the database. The 'obtaining' obviously refers to the collection of data, works or other materials comprising the database. 'Verification' relates to the checking, correcting and updating of data already existing in the database. 'Presentation' involves the retrieval and communication of the compiled data, such as the digitalization of analog files, the creation of a thesaurus or the design of a user interface.

The Directive defines the owner of the sui generis right as the "maker of a database" (Article 7 § 1). Pursuant to Recital 41, the "maker of a database is the person who takes the initiative and the risk of investing"; subcontractors are excluded from the definition.

Scope

The sui generis right is defined in Article 7 § 1 as a right

to prevent extraction and/or reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

Extraction is defined as "the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form". The right pertains to the downloading, copying, printing, or any other reproduction in whatever (permanent or temporary) form.

Reutilization is defined as "any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission." The Directive does not define a 'substantial part', an omission that has been criticized in literature.²⁴ According to the Explanatory Memorandum "no fixed limits can be placed in this Directive as to the volume of material which can be used".²⁵

The taking of insubstantial parts of the database does not infringe the sui generis right, unless this is committed in a "repeated and systematic" manner to the detriment of the database producer (Article 7 § 5). Thus, incidental browsing and piecemeal copying from databases, even by unauthorized users, appear to be lawful. On the other hand, librarians, scientists, journalists and other information providers who routinely search databases in preparing their information products, will encounter severe problems in complying with this provision.²⁶

²⁴ W.R. Cornish, 1996 European Community Directive on database Protection, 21 *Columbia-VLA Journal of Law & the Arts* 1 (1996), at 8.

²⁵ Explanatory Memorandum (note 1), p. 52.

²⁶ Cf. *Bits of Power: Issues in Global Access to Scientific Data*, Committee on Issues of Transborder Flow of Scientific Data, US National Committee of CODATA, National Research Council, National Academy Press, Washington DC, 1997; J.H. Reichman and P. Samuelson, Intellectual property rights in data?, 50 *Vanderbilt Law Review* 51, at 113 (1997).

Exemptions

The Directive allows for only limited statutory exemptions in respect of the sui generis right. Article 9 leaves no room for many traditional limitations, such as journalistic freedoms, quotation rights, library privileges or reuse of government information. Apparently, the users' freedom to extract and reutilize insubstantial parts of the database was considered, by the European legislature, to be sufficient. In view of the lack of certainty as to what constitutes a 'substantial' part, this is questionable. Moreover, the makers of the Directive seem to have overlooked the fact that extracting or reutilizing even substantial parts of a database may constitute a perfectly legitimate use. European users will find comfort in the freedom of expression and information guaranteed in Article 10 of the European Convention on Human Rights, which is part of Community law. It will be interesting to see whether national legislatures or courts will have the courage to legitimize unauthorized uses not listed in Article 9 of the Directive.

An especially tragic figure in the Directive's scheme of things is the 'lawful user'. Whereas unlawful users remain free (as the proverbial bird) to compete with database producers and rightsholders, the lawful user may not:

- perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database; or
- cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database (Article 8 § 2 and 3).

Fortunately, the user may at least extract and reutilize insubstantial parts of the database of which he is a lawful user (Article 8 § 1). Again, the terms of the database license may not provide otherwise (Article 15).

Compulsory licenses

The initial proposal of the Directive provided for a scheme of compulsory licenses. If certain data or pieces of information could be acquired from only one source (i.e. the database concerned), the maker of the database could be compelled to license under fair and non-discriminatory terms the use of such data (Article 8 § 1 and 2 of the initial proposal). These provisions have been deleted from the final Directive.

This is somewhat surprising in view of the decision of the European Court of Justice in re *Magill*.²⁷ The Court upheld the compulsory licenses imposed by the European Commission on public broadcasters BBC, ITV and RTE, who owned the copyrights in their TV programme listings. Irish publisher Magill had been refused the licenses necessary to publish a 'comprehensive' TV guide, including all programme listings relevant to the Irish viewers. No such guides were available at the time to Irish or British audiences. BBC, ITV and RTE each published their own TV guide, containing only proprietary programme listings. According to the European Commission, the broadcasters' behaviour was an abuse of a dominant position in the sense of Article 86 of the EEC Treaty; the European Court agreed.

All that is left of the compulsory licensing scheme originally proposed is Recital 47, admonishing that "in the interests of competition between suppliers of information products and services, protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value..." The recital further clarifies that the provisions of the Directive are without prejudice to the application of Community or national competition law. Moreover, the Directive obliges the Commission to submit before 2001 a report on the application of the Directive to the other EC organs, with special focus on possible abuses of the sui generis right (Article 16 § 3).

Duration

The duration of the extraction right is 15 years from the date of completion of the making of the database (Article 10 § 1), or if later, the first making available to the public (Article 10 § 2). In practice, most databases will be protected for a much longer period. According to Article 10 § 3, "any substantial change, evaluated qualitatively or quantitatively, to the contents of the database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own terms of protection". Thus, a regularly updated database is awarded *permanent* protection. According to Recital 55, a mere "substantial verification of the contents of the database" would be enough to qualify for a new term of protection, presumably even if this would not substantially alter the contents of the database.

²⁷ European Court of Justice, 6 April 1995, 1 C.E.C. 400 (RTE v. Commission of the European Communities).

Beneficiaries of protection

In view of the Member States' commitment towards the Berne Convention, the assimilation principle applies in respect of the Directive's copyright regime. Thus, US copyright owners may invoke copyright protection of databases in Europe under the rules of national treatment. Things are different in respect of the *sui generis* right. According to Article 11 of the Directive only nationals of a Member State or Community citizens will qualify for protection under the *sui generis* right. Also, companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, will qualify (Article 11 § 2). The Council of the European Union may extend protection to nationals or residents of third countries on the basis of special agreements (Article 11 § 3). Surely, material reciprocity will be required for any such agreement to come into existence.

Undoubtedly, the European Commission's wish to portray the *sui generis* right as something completely different from existing intellectual property rights or unfair competition law is directly linked to the issue of reciprocity. According to Gaster "the requirement of reciprocity is consistent with international obligations since the *sui generis right* is a legal innovation and is not therefore covered by any international instrument."²⁸ Independent commentators are not so sure. According to Cohen Jehoram, if the *sui generis* right is to be qualified as a right of industrial property, the rule of national treatment of the Paris Convention for the Protection of Industrial Property (Article 2 § 1) applies.²⁹ Similarly, Cornish suggests that Article 11 may fall short of Article 10*bis* of the Paris Convention (unfair competition).³⁰

The recently published Brittan Plan for the creation of a common market between the European Union and the United States suggests that the US would qualify for a special bilateral agreement if legislation securing a comparable level of protection to database producers were adopted by Congress.³¹

4. Implementing the Directive

²⁸ Gaster (note 18), at 261.

²⁹ H. Cohen Jehoram, *Ontwerp EG-richtlijn databanken*, *IER* 1992/5, p. 133.

³⁰ Cornish (note 24), at 10.

³¹ Agence Europe, 25 March 1998.

Article 189 of the EC Treaty leaves Member States the freedom to choose the means of implementing a Directive.

An obvious choice for the implementation of the copyright chapter of the Directive is to amend national copyright laws in accordance with its provisions. In respect of the *sui generis* right, the Directive offers Member States little guidance. In the Explanatory Memorandum to the original proposal the Commission suggests such a right may be included in existing legislation in the field of unfair competition.³² In view of the gradual evolution of the *sui generis* right, it is doubtful whether this remains true for the Directive in its present form. So far, Member States have chosen to deal with the *sui generis* right either in a special section of the copyright law or in a special law.

Member States were to implement the provisions of the Directive by 1 January 1998 (Article 16 § 1). Only a handful of states have met this deadline. In most Member States implementation bills are still pending in national parliaments; in some countries no visible legislative activities have occurred at all.

Since directives are not directly binding upon the citizens of the European Union, in those Member States where implementation is not complete, the Directive does not apply. Even so, the European Court of Justice has, on several occasions, instructed national courts to interpret existing laws as much as possible in conformity with a directive.³³ For reasons of legal security, however, such interpretation must not contradict existing law.³⁴ In other words, a directive may not be interpreted *contra legem*.³⁵

The Database Directive has effect not only in the European Union, but in the entire European Economic Area, including the three EEA countries that have remained outside the European Union, i.e. Norway, Iceland and Liechtenstein. Central and Eastern European countries aspiring for EU membership have also indicated they will comply with the Directive by 31 December 1999. Eventually, the Directive will be implemented in some 30 European states.³⁶

³² Explanatory memorandum (note 1), p. 54.

³³ European Court of Justice, Case 14/83, *Jur.* 1984, p. 1891 (Von Colson); *id.*, Case C-106/89, *Jur.* 1990, p. I-4135 (Marleasing).

³⁴ European Court of Justice, Case 80/86, *Jur.* 1987, p. 3969 (Kolpinghuis).

³⁵ Supreme Court of the Netherlands (Hoge Raad) 25 October 1996, *Informatierecht/AMI* 1997/2, p. 29 (Pink Floyd), with case comment S. Prechal, p. 23.

³⁶ Th. Hoeren, *EU leads world towards database protection*, <http://www.ipww.com/jul97/p23eu.html>.

Germany

The German legislature was the first to implement the Database Directive. The *Information and Communication Services Act*³⁷ (also known as the Multimedia Act), which was adopted on 1 August 1997, contains a special section (Article 7) which transposes the Directive into the German Copyright Act. The Act rather loosely follows the wording of the Directive.

Copyrightable databases are defined as 'database works', as part of a broader class of 'collections' (§ 4 (1)). Interestingly, the German legislature has refused to transpose the Directive's originality requirement literally ("the author's own intellectual creation"). Instead, database works must pass the traditional test of "*personal* intellectual creation" (§ 4 (1)). Apparently, the legislature has considered the latter test to be equivalent to the Directive's originality requirement. Indeed, so-called small change (*kleine Münze*) has traditionally enjoyed copyright protection in Germany under comparatively soft conditions.³⁸ The more severe test of *Überdurchschnittlichkeit*, requiring a more than average quality of the work, has been applied by the Federal Supreme Court mainly in respect of computer software and other information products of a technical nature.

A new Chapter 6 of the Copyright Act deals with the sui generis right. Judging from its place in the German Copyright Act (Part II), it is considered a neighbouring right.³⁹ This part contains relatively broad limitations to the sui generis right, including a right to reproduce a substantial part of a database "for the purposes of personal scientific use, if and to the extent that the copying for this purpose is necessary and the scientific use does not serve commercial purposes" (§ 87 c (1) 2), as well as "for personal use in teaching, in non-commercial institutions of education and further education and in vocational training in a quantity required for one school class" (§ 87 c (1) 3).

United Kingdom

³⁷ English translation available at: <http://www.iid.de/rahmen/>.

³⁸ P.B. Hugenholtz, Protection of compilations of fact in Germany and the Netherlands, in E.J. Dommering & P.B. Hugenholtz (eds.), *Protecting works of fact*, Deventer/Boston: Kluwer (1991), pp. 59-65.

³⁹ M. Vogel, Die Umsetzung der Richtlinie 96/9 über den rechtlichen Schutz von Datenbanken in Art. 7 des Regierungsentwurfs eines Informations- und Kommunikationsdienstegesetzes, *ZUM* 1997, p. 594.

In the United Kingdom the Database Directive has been implemented by way of the Copyright and Rights in Databases Regulations 1997⁴⁰, which were adopted by the Secretary of State for Trade and Industry on 18 December 1997 (effective 1 January 1998). Part II of the Regulations amends the Copyright, Designs and Patents Act 1988 (CDPA). Databases are treated as a subset of the category of literary works. As expected, the originality standard is raised in respect of databases. According to section 3A (2) "a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation." Thus, in respect of databases the traditional skill and labour test no longer applies in the United Kingdom.

The Regulations do not alter the originality standard in respect of compilations that do not qualify as databases. In respect of such 'non-database' compilations the skill and labour test is maintained. The net result is that in the UK a compilation may be protected in three ways: by database copyright, 'skill and labour' copyright, and database right (*sui generis* right). It remains to be seen whether this is in accordance with the Directive.⁴¹

Part III of the Regulations deals with the *sui generis* rights and its exemptions. The *sui generis* right, aptly called a *database right*, is defined as a property right (Section 13). Typically, many of the recitals of the Directive have been transposed into material provisions of the law. For example, the 'maker of a database' is defined in section 14 (1) as "the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation". If the database is made by an employee in the course of his employment, the employer shall be regarded as the maker, subject to any agreement to the contrary (Section 14 (2)). The Regulations also provide for Crown database rights (Section 14 (3)).

Furthermore, the Regulations provide for a fair dealing exemption allowing for extractions for the purpose of illustration for teaching or research. The Regulations also contain detailed exemptions for the purpose of public administration, specified in a Schedule 1 appended to the Regulations.

Departing from the Directive, the Regulations protect the innocent infringer in cases where it is not possible by reasonable inquiry to ascertain the identity of the maker, and it is reasonable to assume that the database right has expired (section 21 (1)).

⁴⁰ Copyright and Rights in Databases Regulations 1997, SI 1997/3032, HSI -Issue 302, p. 10145.

⁴¹ Stanley Lai, Database Protection in the United Kingdom: the New Deal and its Effects on Software Protection, [1998] *EIPR* 33.

Austria

Austria has transposed the Directive into the Austrian Copyright Act⁴² much in the same way as Germany. Copyright protected databases are defined as 'database works'. The harmonized originality requirement has not been implemented. Austrian law has maintained its requirement of "individual intellectual creation". A novel Chapter IIa of the Copyright Act deals with the sui generis right.

Nordic countries

The sui generis right appears to be inspired, at least in part, by the so-called catalogue rule, a traditional (and unique) feature of Scandinavian law. The copyright acts of all five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) contain provisions expressly protecting non-original compilations of data, such as catalogues, tables and similar compilations, provided they comprise "a large number" of items.⁴³ For the Nordic countries, therefore, the Database Directive is of only limited consequence.

Implementation bills expand the catalogue rule to expressly protect non-original databases that meet the Directive's substantial investment test. Apparently, databases that fail this test, but do contain a sufficiently large number of items, will continue to enjoy catalogue protection. Pursuant to Recital 52 of the Directive, the Nordic countries may retain all existing exceptions to the catalogue rule.

⁴² Bundesgesetzblatt 1998, nr. 25; effective 1 January 1998.

⁴³ Gunnar W.G. Karnell, the Nordic Catalogue Rule, in: E.J. Dommering & P.B. Hugenholtz (eds.), *Protecting Works of Fact*, Deventer/Boston, 1991, p. 67.

Spain

In Spain the Database Directive was implemented by the Act of 7 March 1998, effective 1 April 1998, amending the Spanish Law on Intellectual Property.⁴⁴ The Act closely follows the wording of the Directive. The copyright provisions of the Directive are integrated in the copyright part (Book I) of the Law. The sui generis right is regulated in Book II of the Law, together with existing neighbouring rights.

France

A bill amending the French Code de la Propriété Intellectuelle was submitted to the Assemblée Nationale on 22 October 1997. The bill would create inter alia a new Title IV of the Code, comprising the sui generis right and relevant exemptions.

Belgium

In April 1998 a bill transposing the Database Directive was adopted by the Belgian Cabinet, and introduced into the Belgian Parliament.⁴⁵ The copyright provisions of the Bill would amend the existing Belgian Copyright Act (Act of 30 June 1994). A separate law would deal with the sui generis right and its exemptions.

The Netherlands

On 22 February 1998 a draft bill implementing the Database Directive was adopted by the Cabinet of Ministers and submitted to the Council of State. Constitutional provisions prohibit publication of the bill during this stage of the legislative process. Previously, several preliminary drafts had been circulated by the Ministry of Justice. Interestingly, the first draft would have transposed the sui generis right as a (special) rule of unfair competition law. The second draft, which probably more closely resembles the bill currently being scrutinized by

⁴⁴ BOE 7 March 1998 (Num. 57).

⁴⁵ Text of proposal not yet available.

the Council of State, departs from this approach. Instead, the sui generis right is now formulated as a right of intellectual property.

The Dutch Copyright Act has traditionally protected so called *non-original writings*, i.e. texts, compilations of data and other information products expressed in alpha-numerical form, that do not meet the test of originality. This regime, a remnant of an eighteenth-century printer's right, closely resembles the sui generis introduced by the Database Directive. Will the ancient regime survive the new Directive? Judging from the second draft bill, probably not. Applying the harmonized standard of originality, databases may no longer be qualified as (non-original) 'writings'.

It is unlikely the Dutch legislator will 'lower the bar' for normal copyright protection of databases. Even though the test applied by the *Van Dale* court seems rather severe, the Directive's requirement of "the author's own intellectual creation" fits in rather well with established case law and doctrine. The Dutch legislator will probably wish to avoid a double standard of originality.

It is unclear whether the Directive leaves room for exceptions to the sui generis right beyond the exceptions enumerated in the Directive. In view of the existing Dutch copyright in non-original writings, the Netherlands might, arguably, invoke Recital 52, and retain traditional exceptions.

A recent court case involving wholesale copying from a CD-ROM containing laws and regulations, has inspired controversy. According to the President of the District Court of The Hague, judging in summary proceedings, the Database Directive would not allow for a statutory limitation of the sui generis right in respect of such compilations. Under the Directive the CD-ROM publisher would, therefore, have been protected. However, since no implementation had taken place, and Article 11 of the Dutch Copyright Act clearly places laws and regulations in the public domain, no injunction was granted.⁴⁶

⁴⁶ President District Court of The Hague 20 March 1998, No. 98/147, *Informatierecht/AMI* 1998/4, p. 65 (Vermande/Bojkovski).