

## DIRECTIVE 96/9/EC

### *(Database Directive)*

#### of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

#### [Introductory remarks]

**1. General.** The Database Directive has created a two-tier protection regime for electronic and non-electronic databases. Member States are to protect databases by copyright as intellectual creations (Chapter 2), and provide for a *sui generis* right (database right) to protect the contents of a database in which the producer has substantially invested (Chapter 3). Both rights may apply cumulatively if the prerequisites for both regimes are fulfilled. The introduction of *sui generis* protection was considered necessary after supreme courts in the Netherlands and the US had held that copyright does not protect databases reflecting merely economic investment or intellectual effort (see *Feist* (US) and *Van Dale* (Netherlands)). 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). Many Member States provided only for unfair competition remedies, to be applied in special circumstances, or no remedies at all. However, the absence of a harmonized legal framework for unfair competition in Europe necessitated the introduction of a *sui generis* right to complement copyright protection for databases (recital 6).

**2. Harmonization.** The Directive is based on arts. 47(2), 55 and 95 of the EC Treaty, and is aimed at harmonizing the legal protection of databases across the European Community. The copyright chapter of the Directive harmonizes the originality standard for databases, which prior to the implementation differed greatly between Member States, especially between countries of the authors' right tradition where a measure of creativity, personal character or personal imprint was required, and the two Member States (Ireland and the UK) of the British copyright tradition where mere skill and labour sufficed. The *sui generis* database right serves in part to compensate the latter two States for having to raise the originality standard; databases resulting merely from skill and labour may no longer receive copyright protection, but will benefit from database right protection instead.

**3. Legislative history.** The Directive has its roots in the European Commission's Green Paper on Copyright and the Challenge of Technology (1988) in which the Commission first suggested that copyright might be inadequate in protecting database producers, and a special protection regime might be needed. On 13 May 1992, the Commission presented an Initial Proposal to the Council, which was accepted by the European Parliament in first reading

subject to a large number of amendments. This led to an Amended Proposal, which was presented by the Commission on 4 October 1993. On 10 July 1995, the Council adopted a Common position, which was markedly different from the amended proposal, and accepted by the European Parliament in second reading on 14 December 1995. On 11 March 1996, the Directive was finally adopted. A report assessing the economic impact of the sui generis right pursuant to art. 16(3), was published by the European Commission on 12 December 2005 (Report on the Database Directive). The report is skeptical about the beneficial effect the introduction of the sui generis right has had on the production of databases in the Community. It proposes various future policy options, including repealing the Directive.

**4. International context. (a) Database copyright.** Art. 2(5) of the Berne Convention protects ‘collections of literary or artistic works such as encyclopaedias and anthologies’, but denies copyright protection to ‘news of the day or to miscellaneous facts having the character of mere items of press information’ (see art. 2 BC, notes 6 and 9). While the BC thus leaves open the question of copyright protection for compilations of unprotected facts, art. 5 of the WIPO Copyright Treaty and art. 10(2) TRIPS, more broadly, require protection for ‘compilations of data or other material’, which ‘by reason of the selection or arrangement of their contents constitute intellectual creations’ (see art. 5 WCT, note 2). **(b) Sui generis right.** The sui generis right is a legal invention of the European Commission, and has never become an international standard despite an attempt by WIPO to propose a ‘WIPO Database Treaty’ in 1996. Nevertheless, a number of countries outside the EU, especially those with trade-related ties with the EU such as the EEA states and Turkey, have also adopted the sui generis right. Variants of the right exist in Russia, South Korea and Mexico.

### [Bibliography]

T. Aplin, ‘The ECJ Elucidates the Database Right’ (2005) *Intellectual Property Quarterly* 204-221

A.C. Beunen, *Protection for Databases: The European Database Directive and Its Effects in the Netherlands, France and the United Kingdom* (Wolf Legal Publishers 2007)

L.A. Bygrave, ‘The Data Difficulty in Database Protection’ (2012) *EIPR* 25

M.J. Davison, *The Legal Protection of Databases* (Cambridge University Press 2003)

M.J. Davison & P.B. Hugenholtz, ‘Football Fixtures, Horse Races and Spin-offs: The ECJ Domesticates the Database Right’ (2005) *EIPR* 113-118

E. Derclaye, ‘What is a Database? A Critical Analysis of the Definition of a Database in the European Database Directive and Suggestions for an

International Definition' (2002) *Journal of World Intellectual Property* 981–1011

E. Derclaye, 'Database Sui Generis Right: What Is a Substantial Investment? A Tentative Definition' (2005) IIC 2-30

E. Derclaye, 'IPR on Information and Market Power: Comparing the European and American Protections of Databases' (2007) IIC 275-298

E. Derclaye, *The Legal Protection Of Databases: A Comparative Analysis* (Edward Elgar Publishing 2008)

J.L. Gaster, 'The New EU Directive Concerning the Legal Protection of Databases' (1997) 20(4) *Fordham International Law Journal* 1129-1150

J. Gaster, "'Obtinere" of Data in the Eyes of the ECJ. How to Interpret the Database Directive after *British Horseracing Board Ltd et al. v. William Hill Organisation Ltd.*' (2005) *Computer Law Review International (CRI)* 129-135

P.B. Hugenholtz, 'Implementing the Database Directive' in Jan J.C. Kabel & Gerard J.H.M. Mom (eds.), *Intellectual Property and Information Law, Essays in Honour of Herman Cohen Jehoram* (Kluwer Law International 1998)

A. Kur, et al., 'First Evaluation of Directive 96/9/EC on the Legal Protection of Databases' (2006) IIC 551-558

## [Preamble]

**The European Parliament and the Council of the European Union, Having regard to the Treaty establishing the European Community, and in particular Article 57 (2), 66 and 100a thereof,**

**Having regard to the proposal from the Commission,<sup>1</sup>**

**Having regard to the opinion of the Economic and Social Committee,<sup>2</sup>**

**Acting in accordance with the procedure laid down in Article 189b of the Treaty,<sup>3</sup>**

**(1) Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;**

---

1. OJ No. C 156, 23 June 1992, p. 4 and OJ No. C 308, 15 November 1993, p. 1.

2. OJ No. C 19, 25 January 1993, p. 3.

3. Opinion of the European Parliament of 23 June 1993 (OJ No. C 194, 19 July 1993, p. 144), Common Position of the Council of 10 July 1995 (OJ No. C 288, 30 October 1995, p. 14), Decision of the European Parliament of 14 December 1995 (OJ No. C 17, 22 January 1996) and Council Decision of 26 February 1996.

(2) Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on the basis of harmonized legal arrangements throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation in this field, which is now taking on an increasingly international dimension;

(3) Whereas existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising;

(4) Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community;

(5) Whereas copyright remains an appropriate form of exclusive right for authors who have created databases;

(6) Whereas, nevertheless, in the absence of a harmonized system of unfair-competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;

(7) Whereas 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 cost needed to design them independently;

(8) Whereas the unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences;

(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;

(10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;

(11) Whereas there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries;

(12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;

(13) Whereas this Directive protects collections, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;

(14) Whereas protection under this Directive should be extended to cover non-electronic databases;

(15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;

(16) Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;

(17) Whereas the term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed; whereas this means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive;

(18) Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; whereas the protection of databases by the sui generis right is without prejudice to existing rights over their contents, and whereas in particular where an author or the holder of a related right permits some of his works or subject matter to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or subject matter subject to the required consent of the author or of the holder of the related right without the sui generis right of the maker of the database being invoked to prevent him doing so, on condition that those works or subject matter are neither extracted from the database nor re-utilized on the basis thereof;

(19) Whereas, 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;

(20) Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems;

(21) Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner;

(22) Whereas electronic databases within the meaning of this Directive may also include devices such as CD-ROM and CD-i;

(23) Whereas the term 'database' should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs;<sup>4</sup>

(24) Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property;<sup>5</sup>

(25) Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights;<sup>6</sup>

(26) Whereas works protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the rightholder or his successors in title;

(27) Whereas copyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database;

(28) Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;

(29) Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions

---

4. OJ No. L 122, 17 May 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No. L 290, 24 November 1993, p. 9.).

5. OJ No. L 346, 27 November 1992, p. 61.

6. OJ No. L 290, 24 November 1993, p. 9.

given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;

(30) Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;

(31) Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;

(32) Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;

(33) Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides;

(34) Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;

(35) Whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment;

(36) Whereas the term 'scientific research' within the meaning of this Directive covers both the natural sciences and the human sciences;

(37) Whereas Article 10(1) of the Berne Convention is not affected by this Directive;

(38) Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorization,

to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;

(39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

(40) Whereas the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;

(41) Whereas the objective of the sui generis right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;

(42) Whereas the special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment;

(43) Whereas, in the case of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;

(44) Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder;

(45) Whereas the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data;

(46) Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves;

(47) Whereas, 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; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national competition rules;

(48) Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aim of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,<sup>7</sup> which is to guarantee free circulation of personal data on the basis of harmonized rules designed to protect fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;

(49) Whereas, notwithstanding the right to prevent extraction and/or re-utilization of all or a substantial part of a database, it should be laid down that the maker of a database or rightholder may not prevent a lawful user of the database from extracting and re-utilizing insubstantial parts; whereas, however, that user may not unreasonably prejudice either the legitimate interests of the holder of the sui generis right or the holder of copyright or a related right in respect of the works or subject matter contained in the database;

(50) Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-utilization of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where extraction and/or re-utilization are/is carried out in the interests of public security or for the purposes of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not be commercial;

(51) Whereas the Member States, where they avail themselves of the option to permit a lawful user of a database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institution;

(52) Whereas those Member States which have specific rules providing for a right comparable to the sui generis right provided for in this Directive should be permitted to retain, as far as the new right is concerned, the exceptions traditionally specified by such rules;

7. OJ No. L 281, 23 November 1995, p. 31.

(53) Whereas the burden of proof regarding the date of completion of the making of a database lies with the maker of the database;

(54) Whereas the burden of proof that the criteria exist for concluding that a substantial modification of the contents of a database is to be regarded as a substantial new investment lies with the maker of the database resulting from such investment;

(55) Whereas a substantial new investment involving a new term of protection may include a substantial verification of the contents of the database;

(56) Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by legal persons not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community;

(57) Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database;

(58) Whereas, in addition to the protection given under this Directive to the structure of the database by copyright, and to its contents against unauthorized extraction and/or re-utilization under the sui generis right, other legal provisions in the Member States relevant to the supply of database goods and services continue to apply;

(59) Whereas this Directive is without prejudice to the application to databases composed of audiovisual works of any rules recognized by a Member State's legislation concerning the broadcasting of audiovisual programmes;

(60) Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned,

Have adopted this Directive:

## CHAPTER I. SCOPE

### [Scope]

#### Article 1

(1) This Directive concerns the legal protection of databases in any form.

(2) For the purposes of this Directive, '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.

(3) Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.

**1. General.** Art. 1 defines the general notion of database, and thereby determines the scope of the Directive. The definition applies both to the copyright provisions of the Directive (arts. 3-6), and to the provisions on sui generis protection (arts. 7-11). Note that a database that complies with the definition will only be protected by copyright or sui generis database right if the corresponding prerequisites (originality and substantial investment, respectively) are met.

**2. Databases in any form (para. 1).** The Directive is not merely concerned with electronic databases (recital 13), but with databases 'in any form' including non-electronic compilations (recital 14) such as card-based catalogues, telephone directories, encyclopaedias, and microfilm databases. According to the ECJ, the European legislature should 'give the term database as defined in the directive, a wide scope, unencumbered by considerations of a formal, technical or material nature' (*Fixtures/OPAP*). Similarly, art. 10(2) of the TRIPS Agreement provides for copyright protection of databases 'whether in machine readable or other form', and art. 5 of the WIPO Copyright Treaty calls for copyright protection of compilations of data or other material 'in any form'. Digital databases are protected both in on-line (internet-based) form and as off-line versions, such as databases on CD-ROM (recital 22).

**3. Definition of database (para. 2).** Art. 1(2) defines the notion of database. **(a) Collection of independent works, data or other materials.** A 'database' is any collection of works, data or other informational matter. A collection of works of authorship, such as an anthology, encyclopedias or multimedia work, therefore qualifies as a database. Note that the works collected need not be protected by copyright; a collection of works in the public domain (e.g., works in which copyright has expired) can also constitute a database. A database might even consist of 'other materials', that is, subject matter that is neither work nor data, such as sound recordings and non-original photographs that might be protected by neighbouring rights. The Explanatory Memorandum describes the contents of the database as

“information” in the widest sense of that term’, while making it clear that the notion of database does not encompass collections of physical objects, such as stamp or butterfly collections. The definition does not provide for a minimum number of elements; this is for the courts to determine. According to the ECJ, the definition does not imply that a ‘large number’ of data be collected (*Fixtures/OPAP*). Case law from national courts in Europe indicates that the definition of database covers a wide variety of information products, such as telephone directories, collections of legal materials, real estate information websites, bibliographies, encyclopedias, address lists, company registries, exhibition catalogues, etc. **(b) Independent.** The elements (works, data or other materials) must be independent, ‘that is to say, materials which are separable from one another without their informative, literary, artistic, musical or other value being affected’ (*Fixtures/OPAP* (ECJ)). Therefore a literary work, a musical composition or a sound recording is not a database, even if it can be perceived as a collection of moving images, words, notes or sounds (recital 17). Thus a total overlap between the Directive and existing copyright and neighbouring rights law is avoided. For example, the data in a midi music file lacks sufficient independence (see *Midi files* (Germany)), whereas a hit parade (i.e. chart of bestselling music) does qualify as a database, because the individual chart listings do have independent information value (*Hit Balanz* (Germany)). **(c) Arranged in a systematic or methodical way.** The individual elements of the database must be arranged in a systematic or methodical way. A collection of random notes does not qualify as a database, nor does a hard disk containing unsorted data. The Explanatory Memorandum excludes from the definition of a database ‘the mere stockage of quantities of works or materials in electronic form’. However, it is not necessary for the contents of a database to be physically stored in an organized manner (recital 21). A large number of unsorted data fixed on a hard disk, for example, will still qualify as a database if combined with database management software that arranges and enables retrieval of the stored data. **(d) Individually accessible.** The elements collected in the database must be individually accessible (that is, retrievable) by electronic or other means. Thus a website containing hyperlinks to a number of web pages was deemed a database because the links made the information on the sites individually accessible (*C. Villas* (Austria)). But perfect arrangement and accessibility does not always seem to be required. For example, the roughly indexed jobs section of a daily newspaper was held by a Dutch appeals court to qualify as a database (*Wegener* (Netherlands)). By contrast, in a Belgian case the description in writing of a sightseeing bus tour through Brussels was not deemed a database because the data could not be individually accessed (*Dochy/Nice Traveling* (Belgium)).

**4. Database software (para. 3).** The Directive does not protect the computer software driving the database as such. **(a) Computer programs excluded.** Computer programs are protected independently by the Computer Programs Directive. Art. 2 confirms in more general terms that the Directive does not deal with subject matter harmonized by previous directives.

**(b) Thesaurus and index.** But the Directive does apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems (recital 20). These bibliographic tools are protected as (parts of) a database.

## [Limitations on the scope]

### Article 2

**This Directive shall apply without prejudice to Community provisions relating to:**

- (a) the legal protection of computer programs;**
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;**
- (c) the term of protection of copyright and certain related rights.**

**1. Scope.** The Directive respects the *acquis* of previous directives and does not affect or alter the rules of these directives. Subject matter protected by copyright or neighbouring rights remains fully protected despite being incorporated in a database (recital 26; see also recital 18), regardless of whether a separate copyright or *sui generis* right in the database as such exists (recital 27). The Directive does not provide for a general limitation or exception to use works in databases. Moral rights of database creators also remain outside the scope of the Directive (recital 28). Subsequent Directives, in particular the Information Society Directive, are without prejudice to this Directive, except for the provisions on technological measures and rights management information (arts. 6 and 7 of the Information Society Directive) that do apply to subject matter protected by the Database Directive.

**2. Previous directives unaffected.** The provisions of the Directive are without prejudice to the three directives preceding it, the Computer Programs Directive, the Rental Right Directive and the Term Directive. **(a) Computer programs.** Computer programs are specifically dealt with in the Computer Programs Directive. Art. 1(3) expressly excludes computer programs from the definition of database. **(b) Rental rights, lending rights and related (neighbouring) rights.** The Directive does not amend the Rental Right Directive that harmonizes rental and lending rights for authors, performing artists, phonogram producers and film producers. Therefore, the author of a database that satisfies the test of art. 3.1 will enjoy these rights (recital 24), but not the maker (producer) of a database within the meaning of art. 7; the *sui generis* right does not comprise rights of lending and rental. **(c) Term of protection.** Databases that are protected by copyright will enjoy the terms harmonized by the Term Directive. Art. 10 sets a special term for the *sui generis* right to which the Term Directive does not apply.

## CHAPTER II. COPYRIGHT

### [Object of protection]

#### Article 3

(1) In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

(2) The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

**1. Copyright protection (para. 1).** Art. 3 harmonizes copyright protection for databases. The sui generis database right is dealt with in Chapter III, arts. 7-11. **(a) Author's own intellectual creation.** Databases are protected by copyright if by reason of the selection or arrangement of their contents they constitute the author's own intellectual creation. The standard of 'the author's own intellectual creation' can also be found in art. 1(3) of the Computer Programs Directive and art. 6 of the Term Directive. Although art. 3(1) does not expressly mention originality, it is assumed that this is the essential prerequisite. According to the ECJ a database is protected by copyright 'provided that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author' (*Football Dataco and others* (ECJ)). This is a stricter test than the traditional British requirement of skill and labour ('sweat of the brow'). The ECJ has held that 'the significant labour and skill required for setting up [a] database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains' (*Football Dataco and others* (ECJ)). There is also no originality 'when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom' (*Football Dataco and others* (ECJ)). Courts in author's rights countries often combine a test of originality (creativity) with an additional requirement of 'personal character' or 'personal imprint' (see e.g. *Van Dale* (Netherlands)). Whether this standard is on a par with *Football Dataco and others* remains to be seen. **(b) Selection or arrangement.** Databases will qualify for copyright protection only if by reason of the selection or arrangement of their contents, they constitute the author's own intellectual creation. A nearly identical test is laid down in art. 10(2) of the TRIPS Agreement and in art. 5 of the WIPO Copyright Treaty. The selection or arrangement of the elements of the database (or structure) must result from an act of creation. According to the ECJ, 'the criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices'. For example, a list of the author's

favourite restaurants in Amsterdam will probably qualify, while a list of the most expensive restaurants most likely will not. Completeness is not creative, nor is an arrangement of data based on objective criteria, such as alphabetical ordering. Note that selection and arrangement are not cumulative criteria. **(c) No other criteria.** Member States may not apply other (local) standards to determine whether a database qualifies for copyright protection. In particular no aesthetic or qualitative criteria should be applied (recital 16). The standard set by the Directive is clearly intended as full harmonization. Member States may not maintain or introduce more restrictive or more lenient standards that were previously applied in several Member States. Thus the Directive pre-empts the British skill and labour test that courts in the United Kingdom traditionally applied to compilations (*Football Dataco and others* (ECJ)). The same holds true for the protection of non-original writings ('geschriftenbescherming') that existed for over a century in the Netherlands, but was first rejected by the Dutch Supreme Court (*Ryanair/PR Aviation* (Netherlands), and shortly thereafter abolished in 2014. German courts have in the past regularly awarded copyright protection to low-originality 'small change' ('kleine Münze'), such as a lexicon of trademarks. In so far as such low-originality productions qualify as 'databases' they have now become subject to the higher standard of the Database Directive. For example, the Federal Supreme Court has denied copyright protection to a telephone directory because its contents did not reflect intellectual creation (*Deutsche Telekom* (Germany)). **(d) Non-database compilations.** Compilations that do not qualify as databases may still benefit from lower-threshold copyright regimes existing at the national level. In the light of the Directive's broad definition of 'database', this remaining category will probably be of limited practical importance.

**2. No copyright in contents of the database (para. 2).** Database copyright based on selection or arrangement does not extend to its contents, that is, the works, data or other elements as such. Art. 10(2) of the TRIPS Agreement contains similar language. Copyright protects only the expressive features or the structure (recital 15) of the database. Users that extract (part of) the contents of the database without appropriating the selection or arrangement as such do not infringe the copyright in the database (see e.g., *Meltwater* (United Kingdom)), but might infringe copyright in the individual elements of the database. Database copyright thus offers at best a thin layer of protection. **(a) No prejudice to rights in contents of the database.** The second part of para. 2 is inspired by art. 2(5) of the Berne Convention that deals with collections of works. The Initial Proposal of the Database Directive provided for a direct reference to art. 2(5) BC, but this was later deleted since the notion of database extends beyond a collection of works. Copyright protection of the database does not affect any pre-existing rights in the contents of the database, such as copyrights or neighbouring rights in works or phonograms collected in the database. A database producer cannot invoke copyright or sui generis database right to prevent the author of a work that was licensed

non-exclusively to the producer from granting a subsequent licence to a third party (recital 18). Also, copyright protection of the database may co-exist with database right in its contents; both regimes may apply cumulatively to the same database. **(b) No special exceptions to permit incorporation into database.** Art. 4 of the Initial Proposal of the Database Directive provided for a special exception that would have permitted the incorporation of bibliographic data, short excerpts and summaries, but this was eventually deleted (see recital 26).

## [Database authorship]

### Article 4

**(1) The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.**

**(2) Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.**

**(3) In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.**

**1. General.** Art. 4 is modelled on art. 2 of the Computer Programs Directive, except that it does not provide for a special rule for databases created by employees (see art. 2 Computer Programs Directive, notes 1 and 2). The Directive establishes a general rule of database authorship and, by implication, copyright ownership in art. 4(1), but leaves Member States considerable freedom to deviate from this rule.

**2. Database authorship (para. 1).** The author of a database shall be the natural person(s) who created the database. The wording of art. 4(1) suggests that a 'group' of natural persons may also qualify as the author, but as para. 3 clarifies what is meant here is joint authorship. Art. 4(1) does not explicitly state that authors are also initial owners of the copyright, but this can be inferred from art. 4(3) and recital 30. **(a) Legal persons as authors and owners.** Member States remain free to designate a legal person as the author or first owner of the copyright. For instance, in the Netherlands authorship and ownership vest directly in the employer of the author (usually a legal person) and in a legal person that publishes a work without indicating the actual creator. In the UK copyright vests directly in a legal person arranging for the creation of computer-generated works (see art. 2 Computer Programs Directive, note 1(c)). **(b) Database created by employees.** Databases are often created in employment relationships. The Initial Proposal would have allocated the economic rights directly to the employer of the creator of the database, like art. 2(3) of the Computer Programs Directive, but this rule was

not included in the final Directive. Member States however remain free to stipulate in their legislation that where a databases are created by employees in the execution of their duties or following the instructions given by their employers, the employers shall be exclusively entitled to exercise all economic rights in the database so created, unless otherwise provided (recital 29). Such rules exist in several Member States.

**3. Collective works (para. 2).** In Member States where so-called collective works ('oeuvres collectives') enjoy special copyright status, like France, the economic rights (under copyright) in the database shall be allocated to the owner of the collective work, which in all likelihood will be a legal person (see art. 2 Computer Programs Directive, note 1(d)).

**4. Joint ownership (para. 3).** The copyright in a database that was jointly created by several natural persons will be owned jointly by those persons. Art. 4(3) does not require that the individual parts of the work not be capable of individual exploitation, as some Member States require. Nor does the Directive provide for special rules on the exercise of jointly owned copyrights. This too is left to the discretion of the Member States (see art. 2 Computer Programs Directive, note 2(b)).

## [Restricted acts]

### Article 5

**In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:**

- (a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;
- (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
- (d) any communication, display or performance to the public;
- (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

**1. General.** Art. 5 enumerates the economic rights protected under database copyright. The rights are granted only to the 'author of a database', but clearly successors in title will enjoy these rights as well. The rights apply only in respect of 'the expression of the database', which probably means the same as 'the selection or arrangement of their contents' (art. 3) or 'the structure of the database' (recital 15). The rights do not extend to the individual elements

of the database. The enumeration of exclusive rights in (a) to (e) applies to copyright protection of databases only, not to the sui generis database right which is exclusively dealt with in arts. 7-11 and the common provisions (arts. 12-17) of the Directive. The enumeration has not been amended or superseded by the Information Society Directive, since databases remain outside the scope of that Directive (see art. 1(2)(e) Information Society Directive). The enumeration is very broad, and by including a right of adaptation goes well beyond the Information Society Directive. It includes all economic rights relevant to databases, and even some rights that will rarely or ever be invoked by the author of a database, such as a performance right. Moral rights however are not included; this is left to the discretion of the Member States, taking into account art. 6bis of the BC (recital 28).

**2. Reproduction right (art. 5(a)).** Database authors enjoy a broad right of reproduction that includes temporary reproduction and therefore goes beyond the definition of the reproduction right in the BC (art. 9(1) BC), but appears to fall short of the even broader reproduction right of the Information Society Directive (art. 2) that also includes 'direct or indirect' reproduction. The wording of art. 5(a) is almost identical to that of art. 4(a), first sentence, of the Computer Programs Directive (see art. 4 Computer Programs Directive, note 2). Although art. 5(a) suggests a broad meaning of reproduction, it does not define reproduction. **(a) Temporary reproduction.** The reproduction right includes temporary reproductions, such as non-permanent copies made in random-access memory (RAM) or in temporary caches on computer servers or personal computers. The Directive does not provide for a (mandatory) exception allowing the making of such copies by intermediaries or lawful users, such as art. 5(1) of the Information Society Directive. Since the latter Directive does not affect the Database Directive, making such copies of databases appears not to be allowed. This is one of the incongruences addressed by the Commission's 2004 Staff Working Paper on Copyright Review. **(b) By any means and in any form.** These words clarify that copying onto a medium other than the original (e.g., scanning a database, i.e. converting it from paper form to digital medium) may be regarded as reproduction (see also art. 2 Information Society Directive, note 3). **(c) In whole or in part.** Reproduction of a part of a database will also amount to reproduction insofar as a relevant part of its expressive features (structure) is copied. This is a normal copyright principle, and most likely applies also to the other rights enumerated in art. 5. The Directive offers no guidance on what constitutes a relevant part of a database. However, the ECJ's *Infopaq International* decision interpreting the scope of the reproduction right enshrined in art. 2 Information Society Directive might offer guidance.

**3. Adaptation (art. 5(b)).** Database copyright includes the right of translation, adaptation, arrangement and any other alteration. The wording of art. 5(b) is reproduced literally from art. 4(b), first half sentence, of the

Computer Programs Directive (see art. 4 Computer Programs Directive, note 3). **(a) Translation.** Since copyright in a database concerns only its structure, not its contents, a translation right will exist mostly in theory. **(b) Other alteration.** An example of an adaptation covered by art. 5(b) might be the making of a database that reproduces the expressive features of a prior database, such as its menu structure, rubrics, visual design, and so on. **(c) Any subsequent reproduction, distribution, communication or display to the public of an adaptation (art. 5(e)).** Art. 5(e) clarifies that any further reproduction, distribution, communication to the public or display of an adaptation or alteration of a database will constitute a separate restricted act. This provision is most likely redundant, since this rule already follows from the general principles of copyright law.

**4. Distribution (art. 5(c)).** The rights granted to database authors include a right of distribution, similar to the distribution rights in other Directives (art. 4(c) Computer Programs Directive, art. 9 Rental Directive, art. 4 Information Society Directive). Although distribution usually refers to the sale of physical copies, the wording 'in any form' suggests that the term might also encompass distribution in electronic form. Exhaustion of the distribution right however may only occur in respect of the sale of physical copies; (recital 33). **(a) Community exhaustion.** Like similar rights in other directives, the distribution right is exhausted following the first sale in the Community of a copy of the database by the rightholder or with his consent (see art. 4 Computer Programs Directive, note 5(a)). Note that pursuant to the EEA Agreement, the exhaustion rule also applies to the first sale in the other countries of the European Economic Area. **(b) No electronic exhaustion.** Exhaustion is limited to the first sale of copies in physical form. Recital 33 clarifies that exhaustion does not occur in the case of on-line databases; the downloading of (parts of a) database does not give rise to exhaustion. For other copyright subject matter this is confirmed by art. 3(3) Information Society Directive (see art. 3(3) Information Society Directive, note 4). In respect of computer programs however the ECJ has opened the possibility of electronic exhaustion (*UsedSoft* (ECJ); see art. 4 Computer Programs Directive, note 4(e)). The clear language of recital 33 however arguably precludes application by analogy of the *UsedSoft* rule to databases. **(c) Rental and lending.** As the Directive leaves the provisions of the Rental Directive intact, it does not provide expressly for rights of rental and lending (recital 24). The Rental Directive applies to all copyright works (arts. 1(1) and 2(1)), including databases. Therefore database copyright also includes rights of rental and lending.

**5. Any communication, display or performance to the public (art. 5(d)).** The author of a database shall also have the exclusive right of communication to the public, public display and even public performance. This includes making databases available by means other than the distribution of copies (recital 31). Presumably this comprises making the database

available ‘in such a way that members of the public may access them from a place and at a time individually chosen by them’ (art. 3(1) Information Society Directive), albeit such a right is not expressly mentioned in art. 5(d). **(a) Communication to the public.** The right of communication to the public covers a spectrum of acts whereby the database is transmitted to the public in non-tangible form, by wired or wireless means (see art. 3(1) Information Society Directive, note 2(a)). **(b) Public display.** The right of display (to the public) concerns displaying databases on viewing screens in public areas, such as airline arrival or departure information in airports. It might also have the broader meaning of covering the transmission of the database in such a way that its users may consult it on screens and terminals. In this sense it is equivalent to the right of making available to the public. **(c) Performance.** Since it is difficult to conceive how a database can be performed, this right will be of theoretical interest only. **(d) Public.** The Directive does not define the term public. Guidance may be found in the ECJ’s jurisprudence regarding the right of communication to the public of art. 3(1) of the Information Society Directive (see art. 3(1) Information Society Directive, note 2(a)).

#### [Exceptions to restricted acts]

#### Article 6

**(1) The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.**

**(2) Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:**

- (a) in the case of reproduction for private purposes of a non-electronic database;**
- (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;**
- (c) where there is use for the purposes of public security of [or] for the purposes of an administrative or judicial procedure;**
- (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).**

**(3) In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably**

**prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.**

**1. General.** Art. 6 deals with exceptions to database copyright. Aside from the mandatory 'lawful user' exception of art. 6(1) and the prohibition on having a private copying exception apply to electronic databases (art. 6(2) (a)), it leaves Member States broad discretion to provide for exceptions to the economic rights granted under art. 5. Note that exceptions to database copyright will concern the use of the expressive features (structure, selection or arrangement) of the database, and not the individual elements of the database (recital 35).

**2. Acts necessary for access to database and normal use (para. 1).** Art. 6(1) provides that a lawful user may perform restricted acts that are necessary to access the database or for normal use. Since access to and use of a database normally entails acts of reproduction, art. 6(1) primarily concerns the reproduction right. Absent an express provision to this effect, the freedom of the lawful user to perform these acts (sometime termed the 'user right') might be merely implied, but could be limited or even ruled out altogether under the terms of a user license agreement. The wording of art. 6(1) ('shall not require') indicates that this is a mandatory limitation that all Member States must implement. More importantly, it may not be overridden by contract (art. 15). In this respect art. 6(1) goes further than art. 5(1) of the Information Society Directive. **(a) Authorized part of database.** If the user is authorized to use only part of the database, the 'user right' of art. 6(1) applies only to that part. This allows database producers to somewhat restrict the ambit of the lawful use exception. **(b) Lawful user.** The term lawful user is similar but not identical to the term lawful acquirer of art. 5(1) Computer Programs Directive (see art. 5 Computer Programs Directive, note 2(d); see also art. 5 Information Society Directive, note 2(f)). A lawful user will be any end user contractually authorized to use the database (recital 34). This will include users implicitly licensed, as will be the case for most websites offered freely on the Internet. But the term also applies to persons having legally acquired copies of the database, such as the purchaser of a database in paper form or on CD-ROM. Moreover it can be argued that a person or entity invoking a copyright exception is a lawful user and can therefore benefit from art. 6(1). The acquirer of an illegal copy of the database however will not be regarded as a lawful user. **(c) Necessity of act.** The act must be necessary for the purposes of accessing the databases and normal use. This is an objective requirement that does not require that the intended purpose can only be achieved by performing the restricted act (see art. 5 Computer Programs Directive, note 2(b)). Necessity does not mean that the act is absolutely indispensable or essential. **(d) Necessary acts to access the database.** Acts that are necessary to access the database include for instance searching (querying) and browsing on-line database and downloading the results of a search.

**(e) Necessary acts for normal use.** Whether an act is necessary for normal use will have to be determined both in the light of the terms and conditions of the user license agreement (recital 34) and, objectively, in the light of normal practice, particularly in cases where a user license is absent. Acts of browsing and downloading certainly constitute normal use, but are probably already excepted as acts necessary to access the database. Although back-up copies are not expressly mentioned, as in art. 5(2) Computer Programs Directive, it can be argued that making a back-up copy is necessary for normal use. **(f) No contrary contractual stipulation.** Any contractual provision contrary to art. 6(1) shall be null and void (art. 15).

**3. Optional exceptions (para. 2).** Art. 6(2) enumerates the exceptions that Member States may provide to limit database copyright. Note that the exceptions may only apply in respect of the structure (selection or arrangement) of the database. The catalogue of exceptions is optional and leaves Member States the freedom to maintain most exceptions traditionally found in national copyright laws. The exceptions listed in art. 6(2) have not been amended or superseded by the closed list of exceptions in arts. 5(1) and (2) of the Information Society Directive. **(a) Reproduction for private purposes.** Member States may permit reproduction for private purposes, but only as regards non-electronic database. Allowing private copying from digital versions of a database would have permitted the making of ‘perfect’ copies, and was therefore deemed too far-reaching. By contrast, art. 5(2)(b) Information Society Directive does allow exceptions for private copying from digital sources. Nonetheless, compensation of right owners (through a scheme of levies), as mandated by art. 5(2)(b) of the Information Society Directive, is not required here. In respect of electronic databases a levy is even ruled out since a levy scheme presupposes that copying is permitted. The Directive does not define what private purposes are. However, it is clear that copying for public or commercial purposes may not be exempted. **(b) Teaching or scientific research.** Member States may permit use of a database for the sole purpose of illustration in teaching or scientific research, subject to certain conditions (indication of source, non-commercial purpose). Permitted uses may affect all rights protected under art. 5, namely reproduction, adaptation, distribution and communication to the public. Uses must be justified by (that is, proportional to) the non-commercial purpose to be achieved. The wording of art. 6(2)(b) is inspired by art. 10(2) of the Berne Convention, reminiscent of art. 10(1)(d) of the Rental Right Directive and nearly identical to art. 5(3)(a) of the Information Society Directive (see art. 10(2) BC, note 3). Even though the educational or scientific purpose of the use must be non-commercial, this does not rule out that commercial entities, such as scientific institutes, benefit from the exception. The term scientific research covers both the natural sciences and the human sciences (recital 36). **(c) Public security, administrative or judicial procedure.** Art. 6(2)(c) permits excepting uses for the purposes of public security or of administrative or judicial procedure. Art. 5(3)(e) of the Information Society Directive allows for similar

exceptions. **(d) Traditional exceptions.** Art. 6(2)(d) allows Member States to except other uses ‘which are traditionally authorized under national law’. The likely meaning of this provision is that it permits the continued application in national law of exceptions that already applied to databases prior to the adoption of the Directive. If for instance a Member State’s news reporting exception encompassed databases, the exception may survive. However, it can also be argued that the provision permits a broad range of exceptions that are generally applicable to copyright works. **(e) Without prejudice to points (a), (b) and (c).** Whether interpreted narrowly or more broadly, art. 6(2)(d) does not allow Member States to go beyond the limits set in points 6(2)(a), (b) and (c). For instance, a Member State that ‘traditionally’ allowed private copying from electronic databases is no longer free to do so. **(f) Quotation.** Recital 37 recalls that the quotation right enshrined in art. 10(1) BC is not affected by the Directive. It is however difficult to conceive how the quotation right might apply to databases given that database copyright is limited to the structure (selection or arrangement) of its contents, not to the contents themselves.

**4. Three-step test (para. 3).** According to art. 6(3) any exception permitted under art. 6 may not unreasonably prejudice the rightholder’s legitimate interests or conflict with normal exploitation of the database. These are two of three criteria of the so-called three-step test enshrined in art. 9(2) BC, art. 13 TRIPS Agreement, art. 10 WIPO Copyright Treaty and art. 5(5) Information Society Directive (see art. 10 WIPO Copyright Treaty, notes 1, 4 and 5, and art. 5 Information Society Directive, note 6). The express reference in art. 6(3) to the BC is somewhat misleading, since the three-step test in art. 9(2) BC only applies to exceptions to the reproduction right, whereas the exceptions permitted under art. 6 of the Directive apply to all economic rights granted pursuant to art. 5.

## CHAPTER III. SUI GENERIS RIGHT

### [Object of protection]

#### Article 7

(1) 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 re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

(2) For the purposes of this Chapter:

- (a) ‘extraction’ shall mean 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;

(b) ‘re-utilization’ shall mean 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 first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community; Public lending is not an act of extraction or re-utilization.

(3) The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

(4) The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

(5) The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

**1. General.** Chapter III (arts. 7-11) of the Directive concerns the sui generis database right. **(a) Purpose.** The sui generis right protects the investment of the database producer, that is, the human, technical and financial resources invested in the contents of the database (recitals 7 and 40). The right is meant to protect the investment in databases that are especially vulnerable to misappropriation if they exist in digital form (recital 39). The right is intended to protect ‘financial and professional investment’ (recital 39). This investment must be substantial. Whereas copyright protects only the original structure of the database (that is, the selection or arrangement of its contents), the sui generis right protects the contents themselves (see Introductory remarks, note 1). The sui generis right was initially devised as a safety net for databases that could not find protection under copyright (Initial Proposal of the Database Directive). Both rights, however, may apply cumulatively if the prerequisites for both regimes are fulfilled. The sui generis right is a right of intellectual property not primarily rooted in principles of natural justice, but rather in utilitarian arguments. The principal reason for introducing the sui generis right was to promote investment in the (then emerging) European database sector (recital 10). At the time, investment in the European database sector was well behind other countries, in particular the US (recital 11). Creating a ‘stable and uniform legal protection regime’ was considered a necessary precondition for investment in ‘modern information storage and processing systems’ in the EU (recital 12). **(b) Nature of sui generis (database) right.** The right prescribed by art. 7 is a sui generis intellectual property right (i.e.,

of its own kind). In other words, it is not a copyright and does not as such fit into any other general category of intellectual property rights. In view of its intended purpose to protect economic investment in database production, the *sui generis* right is more closely related to the neighbouring (related) rights of phonogram producers or film producers. Indeed in many Member States, including Germany, France, Spain, Portugal and Italy, the right has been transposed as a special neighbouring right. In other Member States, such as the Netherlands and Belgium, the right has been enacted in a special act, illustrating its *sui generis* status. The right has undergone an evolution between the Initial Proposal and the final adoption of the Directive. Initially conceived as a special rule of unfair competition, defined as a right to prevent ‘unfair’ extraction, it would have protected database producers only against unauthorized acts of commercial use. In the final version of the Directive the words ‘unfair’ and ‘unauthorized’ have disappeared. The *sui generis* right has become a full-fledged and fully transferable intellectual property right that applies not only in competitive situations, but can be invoked against ‘any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment’ (recitals 39 and 42). **(c) Transfer and licence.** The *sui generis* right may be transferred, assigned or granted under contractual licence (art. 7(3)). In all likelihood partial transfers or licences of the *sui generis* right that are limited to specific acts of exploitation are also permitted. The Directive does not mention formalities in relation to the transfer or licensing of the *sui generis* right, such as the requirement of a written deed; this is left to the discretion of the Member States.

**2. Maker of a database.** Art. 7(1) grants the *sui generis* right to the maker of a database, namely, the database producer. Recital 41 defines the maker of a database as the person who takes the initiative and the risk of investing. Subcontractors are excluded from this definition; producing a commissioned database will therefore not be rewarded with *sui generis* right, even if most of the ‘sweat of the brow’ is done by the commissioned party. To qualify as database maker a producer must be involved both in the initial organization of the database and in its financing. In cases of databases produced by not-for-profit organizations or amateurs, the required investment will be bearing the cost of database production. In many cases the maker of the database will be a legal person (company) rather than a natural person. This explains the absence in Chapter III of the Directive of special provisions regarding databases produced in employment relationships. If several (legal) persons collaborate in initiating and investing, this might result in joint ownership of the *sui generis* right. The Directive however does not give any guidance on this issue, and leaves this to the Member States.

**3. Substantial investment. (a) General.** The main prerequisite of the *sui generis* right is substantial investment. This is a threshold requirement. Absent substantial investment the right does not exist. Art. 7 does not define how much ‘substantial’ is or how this should be established. Recital 19

offers some limited guidance by explaining 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 example suggests that compiling a small number of items (e.g., a dozen recordings on a CD) will not qualify as substantial investment, at least not quantitatively. According to the German Federal Supreme Court ‘substantial investment’ is not a high standard. The standard is met if ‘viewed objectively, the investment in the database is not wholly insignificant and easy to be made by anyone’ (*Zweite Zahnarztmeinung II* (Germany)). The ECJ has yet to pronounce itself on the height of this threshold criterion. **(b) Qualitative or quantitative investment.** The investment protected must be qualitative or quantitative. According to the ECJ, ‘the quantitative assessment refers to quantifiable resources and the qualitative assessment to efforts which cannot be quantified, such as intellectual effort or energy’ (*Fixtures Marketing/Svenska Spel*). A qualitative investment may result from applying the skill of a professional, for example, a lexicographer selecting the key words for a dictionary or a website designer using his skills to develop an on-line database. If the intellectual effort invested in the database is both substantial and the result of creative selection or arrangement, the database will be protected by sui generis right and copyright. A quantitative investment will involve the deployment of financial resources and/or the expense of time, effort and energy (recital 40). Courts will usually assess this on the basis of invested financial resources (see *Deutsche Telekom* (Germany), *Lectiel/France Télécom* (France)). However, the financial costs of acquiring an entire database, or a licence thereto, may not be factored in (*Elektronischer Zolltarif* (Germany)). In practice many databases, resulting from both skill and labour, will reflect both qualitative and quantitative investment. Computer-generated databases will also qualify for protection if they are the result of substantial qualitative or quantitative investment. **(c) Obtaining, verification or presentation of the contents.** The substantial investment must be done in either the obtaining, verification or presentation of the contents of the database. *Obtaining.* Obtaining refers to the acts of seeking out existing independent materials, and collecting them in the database (*British Horseracing Board* (ECJ)), in other words to the gathering of pre-existing data, works or other materials. This does not include producing (‘creating’) data (see below, note (d)). *Verification.* Investment in the verification of the contents refers to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. However, the resources used for verification during the stage of creation of materials which are subsequently collected in a database may not be taken into account (*British Horseracing Board* (ECJ)). Verification thus involves the checking, correcting and updating of data that already exists in the

database, but not the verification of ‘created’ data (see note (d)). *Presentation*. According to the ECJ, ‘the expression “investment in ... the ... presentation of the contents” of the database concerns [...] the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility’ (*Fixtures Marketing/Svenska Spel*). Presentation therefore includes such activities as digitalizing analog files, producing a thesaurus or designing a user interface. **(d) Created data**. The sui generis right does not protect investment that is not directed towards the making of a database. As mentioned above, according to the ECJ, ‘the expression “investment in ... the obtaining ... of the contents” of a database in Article 7(1) [...] must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database’ (*British Horseracing Board* (ECJ) and *Fixtures Marketing/Svenska Spel* (ECJ); see also recital 46). In these cases the ECJ ruled out sui generis protection for such ‘created’ data as horse racing schedules and football fixture lists. Similarly, investment in the creation of web advertisements may not be taken into account (*Précom* (France)). However, facts observed, such as the scoring of a goal, are probably not ‘created’ data; subjective comments and interpretation, on the other hand, are (*Football Dataco/Stan James* (UK)). **(e) No rights in data per se**. The sui generis right protects the investment in the contents of the database, not the works, data or other compiled materials themselves (recital 46). The right is not to be seen as ‘an extension of copyright protection to mere facts or data’ (recital 45). **(f) Public sector databases**. Whether the sui generis right protects databases produced by state entities or other public authorities is not entirely clear. While some case law suggests that public bodies do indeed qualify for sui generis protection (see *Bodenrichtwertsammlung* (Germany), *Compass-Datenbank* (ECJ)), some commentators have argued that such bodies do not merit protection, since activities undertaken by public authorities are normally financed by public funds, and therefore not the result of ‘investment’. Based on this argument the Dutch Council of State denied database right to the City of Amsterdam in a case involving an environmental database produced by the municipality (*Landmark* (Netherlands)). A preliminary reference to the ECJ that might have shed light on this issue was later withdrawn (*Sächsischer Ausschreibungsdienst* (Germany)).

**4. Rights protected (para. 2)**. The sui generis right comprises two distinct rights: a right of extraction, which is somewhat similar to the reproduction right protected under copyright, and a right of reutilization, which might be described as a composite of a distribution right and a right of communication to the public. Together, both rights are meant to protect database producers’ investment against harm, and secure remuneration (recitals 42 and 28). **(a) Extraction**. 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 any, permanent or temporary form. According to the ECJ extraction does not require an act of technical reproduction (e.g. 'cutting and pasting'). While consulting a database as such remains outside the scope of protection (*British Horseracing Board* (ECJ)), regularly and systematically consulting a database may give rise to (infringing) extraction (*Directmedia Publishing* (ECJ)). Solely retrieving the updated data from a database might also qualify as extraction (*Elektronischer Zolltarif* (Germany)). If the physical and technical characteristics of a sui generis protected database reappear in another database this may be seen as evidence of extraction, regardless of whether the extracted data are rearranged (*Apis-Hristovich* (ECJ)). **(b) Reutilization.** 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, or by on-line or other forms of transmission. Reutilization 'must be understood broadly, as extending to any act, not authorised by the maker of the database protected by the sui generis right, of distribution to the public of the whole or a part of the contents of the database' (*Football Dataco/Sports Radar* (ECJ)). Reutilization covers both acts of physical distribution and other acts of communication to the public, notably by on-line transmission. According to the ECJ the provider of a 'dedicated meta search engine' that systematically searches and retrieves data from a sui generis protected database reutilizes the whole or a substantial part of that database (*Innoweb*). Although rental is covered by the reutilization right, the rental provisions of the Rental Directive do not apply. Moreover, public lending is not an act of extraction or reutilization, so sui generis right owners do not qualify for public lending rights. **(c) Exhaustion.** Like similar rights in other Directives, the right of reutilization is exhausted following the first sale in the Union of a copy of the database by the right-holder or with his consent. Likewise, exhaustion does not occur in respect of acts of on-line transmission (recital 43). See art. 5, notes 4(a) and (b). **(d) Viewing.** The Directive does not determine whether the on-screen display of the contents of a database is a restricted act. According to recital 44 this would be the case if the on-screen display 'necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium'. However, according to the ECJ the sui generis right does not cover the act of 'consulting' a database by an end user (*British Horseracing Board* (ECJ)). The ECJ appears to hold that once a producer makes its database available to the public, it has implicitly consented to members of the public viewing the contents of the database that are made available in that way. Note however that the Database Directive, in contrast with the Information Society Directive, does not provide for a mandatory exception permitting temporary copies by lawful users (see art. 5 Information Society Directive, note 2). **(e) No direct access to database required.** The terms extraction and reutilization must be interpreted as referring to any unauthorized act of appropriation

and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned (*British Horseracing Board, Directmedia Publishing* (ECJ)). In other words, extracting data from a database that is itself a copy of another database may amount to infringement of the sui generis right in that database. On the other hand, the database right does not confer upon the database producer a patent-like monopoly. Producing an identical database without directly or indirectly extracting data from a previously existing database is not infringement.

**(f) Substantial part.** The sui generis right will be infringed in case of extraction and/or reutilization of a substantial part of the contents of the database. Whether or not the ordering or arrangement of the contents are misappropriated is irrelevant for the purpose of applying the sui generis right (*Hit Balanz* (Germany)). What matters is whether a ‘substantial’ part has been used. The Directive however does not define this. According to the Explanatory Memorandum ‘no fixed limits can be placed in this Directive as to the volume of material which can be used’. In considering what constitutes a substantial part of a database, it must be considered whether the human, technical and financial efforts put in by the maker of the database in obtaining, verifying and presenting those data constitute a substantial investment (*British Horseracing Board* (ECJ)). In other words, if the appropriated data do not reflect substantial investment on the part of the database producer, there is no infringement of the sui generis right (see recital 42). If a database consists of multiple parts that each qualify as a separate database, then the substantiality of the extraction or reutilization must be assessed relative to each sub-database (*Apis-Hristovich* (ECJ)).

**(g) Qualitative and quantitative substantial part.** Whether or not a substantial part has been appropriated is to be evaluated qualitatively and/or quantitatively (for an explanation of these terms, see note 3(a)). The taking of relatively large amounts of data would normally amount to extraction of a quantitatively substantial part, whereas appropriating a relatively small amount would not. For example, according to the German Federal Supreme Court the extraction of 10% of the total reviews and 1.5 % of the number of dentists listed on an on-line dentist rating website did not amount to substantial extraction (*Zweite Zahnarztmeinung II* (Germany)). The intrinsic value of the data extracted does not constitute a relevant criterion for assessing whether the part in question is substantial, evaluated qualitatively. Even so, a quantitatively negligible part of the contents of a database may in fact represent, in terms of obtaining, verification or presentation, significant human, technical or financial investment (*British Horseracing Board* (ECJ)). In other words, the market value of the appropriated data is irrelevant, but the extraction or reutilization of a relatively small number of data may nevertheless amount to infringement if those data reflect substantial qualitative investment.

**(h) Further investment by infringer irrelevant.** The sui generis right may be invoked regardless of whether the party that has extracted or reutilized a substantial part of the contents of the database has subsequently invested substantially in the derivative database (*Baukompass*

(Austria). **(i) Repeated and systematic extraction of insubstantial parts.**

The extraction of insubstantial parts of the database does not infringe the sui generis right. Thus, incidental browsing and piecemeal copying from databases, even committed by unauthorized users, are lawful acts. However the repeated and systematic extraction of insubstantial parts may amount to infringement (art. 7(5)). The ECJ has noted that the purpose of this provision is to prevent repeated acts by a user which would lead to ‘the reconstitution of the database as a whole or, at the very least, of a substantial part of it’ (*British Horseracing Board* (ECJ)). In other words, the systematic extraction of insubstantial parts will amount to infringement only if the aggregate parts are substantial. The second half-sentence of art. 7(5) partly reproduces the three-step test (see art. 6, note 4). According to the German Federal Supreme Court, posting (deep) hyperlinks to on-line newspaper articles collected in a database by copying the headlines is not covered by art. 7(5), because there was no conflict with a normal exploitation of the database (*Paperboy* (Germany)). Note, however, as mentioned above, that the ECJ has held that the provider of a ‘dedicated meta search engine’ that systematically searches and retrieves data from a database reutilizes the whole or a substantial part of that database (*Innoweb*). **(j) Place where infringing act occurs.** In cases of cross-border infringement, difficult questions may arise regarding the locus of the infringing act(s). According to ECJ, the ‘mere fact that the website containing the data in question is accessible in a particular national territory is not a sufficient basis for concluding that the operator of the website is performing an act of re-utilisation [in that jurisdiction]’. However, there will be an act of re-utilization in that Member State ‘where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public [in that Member State]’ (*Football Dataco/Sports Radar*).

**5. Relation to copyright and other rights in contents of database (para.**

**4).** The sui generis right applies irrespective of the eligibility of the database, or its contents, for protection by copyright or by other rights (art. 7(4)). In other words, sui generis right may co-exist with copyrights or neighbouring rights in the database. The Initial Proposal would have excluded such cumulation; sui generis protection would have applied only if the database were not protected by copyright. Art. 7(4) also underscores that the sui generis right in the database shall not affect underlying copyrights or neighbouring rights in its contents.

**[Rights and obligations of lawful users]**

**Article 8**

**(1) The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated**

**qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.**

**(2) A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.**

**(3) A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.**

**1. General.** Art. 8 guarantees lawful users of a database that has been made available to the public certain minimum user rights that may not be overridden by contract (art. 15). Notwithstanding contractual provisions to the contrary, lawful users may extract and reutilize insubstantial parts of the contents of the database. Since such acts are normally outside the scope of the sui generis right, the purpose of art. 8 is clearly to prevent contractual expansion of database protection beyond the scope of the sui generis right. See art. 6, note 2. The insubstantial extraction or reutilization may be done 'for any purposes whatsoever', that is, for private and commercial purposes. The lawful user's rights may be invoked not only against the database producer but also against its successor in title (recital 49), such as a licensed distributor.

**2. Lawful user.** A lawful user will be any end user who is contractually authorized to use the database (recital 34). This will include users implicitly licensed, as will be the case for most website offered freely on the Internet. But the term also applies to persons having legally acquired copies of the database, such as the purchaser of a database in paper form or on a CD-ROM (see art. 6, note 2(b)). It can be argued that art. 8 may also be invoked by the successor in title to a lawful user. Where the lawful user is authorized to extract and/or reutilize only part of the database, the user's right shall apply only to that part (art. 8(1), second sentence). See art. 9, note 1(b); see also art. 5 Computer Programs Directive, note 2(d), regarding the similar, but not necessarily identical notion of the 'law acquirer' of a computer program.

**3. No prejudice to database producer or other right owners.** Art. 8(2) and 8(3) admonish that a lawful user may not perform acts which unreasonably prejudice the legitimate interests of the maker of the database or cause prejudice to the holder of a copyright or related right in the contents of the database (see recital 49). Read by themselves these provisions would expand the rights of database producers and other content owners in relation to lawful users far beyond the scope of the sui generis right, copyright or neighbouring rights. The likely meaning of these provisions, therefore, is to limit the scope of the non-overridable 'user right' of the lawful user provided

by art. 8(1), much in the same way as the three-step test limits the scope of exceptions to exclusive rights.

### [Exceptions to the sui generis right]

#### Article 9

**Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:**

- (a) **in the case of extraction for private purposes of the contents of a non-electronic database;**
- (b) **in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;**
- (c) **in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.**

**1. General. (a) Few exceptions allowed.** The Directive allows for only limited statutory exceptions in respect of the sui generis right (see note 2). Art. 9 leaves no room for many limitations traditionally found in copyright law, such as journalistic freedoms, quotation rights and library privileges (but see note (c) below). Apparently, the user's freedom to extract and reutilize insubstantial parts of the database was considered, by the European legislature, to be sufficient. Where sui generis right and copyright overlap, as for instance in the case of an encyclopaedia, this may lead to incongruences. Users are prevented from effectively invoking copyright exceptions insofar as these exceptions are not recognized in art. 9 (see, for example *Wegener* (Netherlands)). The short catalogue of exceptions to the sui generis right is exhaustive. In principle, no other exceptions are allowed. However, it is argued that art. 13 leaves some room to the Member States for additional limitations grounded in the laws or interests recognized in that provision (see note (d)). **(b) Lawful users.** Only 'lawful' users may benefit from the exceptions permitted under art. 9. This is unusual, because elsewhere in the law of intellectual property limitations usually apply to all users, whether lawful or not (except in the case of computer programs, see art. 5(1) Computer Programs Directive). For instance, the catalogue of optional exceptions to database copyright of art. 6(2) does not require lawful use. The Directive provides no guidance on how to interpret the term lawful user in this context. Clearly, it must have a broader meaning than in art. 8, which focuses on the contractual relationship between database producer and user. By contrast art. 9 deals with users that would normally not have a contractual relationship with the database producer. The likely meaning of the term then is a user who has gained access to or acquired a copy of the

database without breaking the law. This would exclude for instance a ‘hacker’ having illegally gained access to the database. **(c) Traditional exceptions.** Recital 52 makes an exception for ‘those Member States which have specific rules providing for a right comparable to the *sui generis* right’ to retain ‘the exceptions traditionally specified by such rules’. This obviously refers to the catalogue rule that already existed in the Nordic countries before the adoption of the Directive. In those countries exceptions that applied to the catalogue right (that is, normal copyright exceptions) may be carried over to the *sui generis* right. **(d) Other exceptions.** Art. 13 arguably leaves some room for additional limitations grounded in any of the laws or interests recognized in that provision as not being prejudiced by the Directive. Notably, the public interest in granting access to public documents (freedom of information) may legitimize a statutory limitation on *sui generis* protection of public databases, as is the case in the Netherlands.

**2. Optional exceptions.** Art. 9 expressly allows exceptions to the *sui generis* right in only three cases. This catalogue of exceptions is exhaustive, but not mandatory. Member States may elect not to implement any or all of the exceptions mentioned. **(a) Extraction for private purposes.** Art. 9 permits an exception for private extraction, but only from non-electronic databases. Art. 6(2)(a) allows a similar exception under copyright (see art. 6, note 3(a)). Such an exception might, for instance, allow private photocopying from an almanac, but not downloading from a web-based database. Compensation of right owners, as required by art. 5(2)(b) of the Information Society Directive, is not required here. **(b) Extraction for teaching or scientific research.** Member States may also permit extraction for the sole purpose of illustration for teaching or scientific research, subject to certain restrictions (indication of course, non-commercial purpose). Art. 6(2)(b), more broadly, allows the use for similar purposes of a database protected under copyright (see art. 6, note 3(b)). **(c) Public security, administrative or judicial procedure.** Exceptions permitting uses for the purposes of public security or for the purposes of an administrative or judicial procedure are similarly allowed. Art. 6(2)(c) allows a similar exception under copyright (see art. 6, note 3(c)).

## [Term of protection]

### Article 10

(1) The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.

(2) In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.

**(3) Any substantial change, evaluated qualitatively or quantitatively, to the contents of a 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 term of protection.**

**1. General.** Art. 10 determines the term (duration) of the sui generis right. The term of the sui generis right is fifteen years from the date of completion of the database (art. 10(1)), or if later, after it is first made available to the public (art. 10(2)). This term can be extended ad infinitum upon each additional substantial investment in the contents of the database (art. 10(3)). The Initial Proposal would have limited the term to only ten years, but in the end a longer basic term of fifteen years was established. This is still substantially shorter than the copyright term of 70 years after the author's death mandated by the Term Directive, which does not apply to the sui generis right.

**2. Fifteen years from date of completion (para. 1).** The sui generis right 'shall run from the date of completion of the making of the database' (art. 10(1)). This language suggests that incomplete databases will not receive sui generis protection. It may be argued, however, that an incomplete database still merits sui generis protection if the legal prerequisites for protection are met, in other words, if it fulfils the definition of a database and is the result of substantial investment. For databases that are not made available to the public (see art. 10(2)), the protection expires fifteen years from the first of January of the year following the date of completion. The burden of proof regarding the date of completion of the making of a database lies with the maker of the database (recital 53).

**3. Fifteen years from first making available to the public (para. 2).** For databases that have been made available to the public, the term expires fifteen years from the first of January of the year following the date when the database was first made available to the public. Since the average database will not immediately be made available to the public upon completion, the total term of protection of the database will be more than 15 years, since the term of art. 10(2) may commence at any time as long as the term of art. 10(1) has not yet expired. The term of art. 10(2) will start running upon the first making available to the public of the database 'in whatever manner'. This includes all forms of reutilization (see art. 7, note 4(b)), including the distribution of copies and on-line transmission. Again, the Directive does not define the notion of public. This is left to the discretion of the Member States.

**4. Prolonged protection after substantial change (para. 3).** The term of sui generis protection will be prolonged after each additional substantial investment in the contents of the database. **(a) Substantial change.** Such a

‘substantial change’ may be the result of a series of insubstantial additions, deletions or alterations, as long as the aggregate changes are substantial. Thus, a regularly updated (dynamic) database is likely to receive perpetual protection (but see note (b) below). The burden of proof of such a substantial change lies with the database producer (recital 54). Even a mere ‘substantial verification of the contents of the database’ is enough to trigger a new term of protection, presumably even if this does not alter the contents of the database (recital 55). **(b) Dynamic databases.** The Directive does not clarify how to apply the term provisions to dynamic databases, in other words databases that are in constant flux. It is not clear whether such a database should be considered as a single database, or as a series of databases each with its own term of protection, commencing every time a substantial change to the database is made, as suggested by the Advocate-General in *British Horseracing Board* (ECJ). The ECJ has left this question unanswered.

## [Beneficiaries of protection under the sui generis right]

### Article 11

**(1) The right provided for in Article 7 shall apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community.**

**(2) Paragraph 1 shall also apply to 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; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.**

**(3) Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.**

**1. General. (a) Beneficiaries of sui generis right.** Art. 11 names the beneficiaries of the sui generis right. Since this right is not a copyright, neighbouring right or other right of intellectual property covered by an international treaty, such as the BC, Rome Convention, Paris Convention or TRIPS Agreement, the rule of national treatment (assimilation principle) need not apply. Instead, the Directive has reserved sui generis protection to nationals or residents of a Member State (art. 11(1)), and to 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 (art.

11(2)). However, the Council of the European Union may extend protection to nationals or residents of third countries on the basis of special agreements (art. 11(3)). **(b) European Economic Area (EEA).** Pursuant to the EEA Agreement, arts. 11(1) and 11(2) also apply to the EEA countries that are not members of the European Union (Norway, Iceland and Liechtenstein).

**2. EU nationals or residents (para. 1).** The sui generis right shall apply to databases whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community (art. 11(1)). **(a) Maker or rightholders.** If the rightholder does not meet the criteria of art. 11(1) or 11(2), the database will receive sui generis protection nonetheless if its maker (producer) qualifies. Sui generis rights may therefore be assigned to non-Community persons or entities without forfeiting sui generis protection. **(b) Habitual residence.** The term habitual residence refers to either the domicile of the database producer or his place of establishment.

**3. Companies established in the EU (para. 2).** 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 also benefit from the sui generis right (art. 11(2)). This rule is a direct application of art. 48 of the EC Treaty (ex art. 58). **(a) Companies or firms.** Companies or firms are 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making' (art. 48 EC Treaty). **(b) No 'mailbox' firms.** Where a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State (art. 11(2), second sentence). This prevents the circumvention of art. 11 by the setting up of 'mailbox' companies. The company's European office must engage in genuine economic activities in a Member State.

**4. Extension to third countries (para. 3).** **(a) Reciprocity.** Art. 11 's departure from the principle of national treatment was largely inspired by the US Semiconductor Chip Protection Act of 1984, that introduced sui generis protection for the 'topography' (that is, design) of semiconductor chips. Protection of non-US designers was made subject to reciprocity. Similarly, the Council of the European Union may extend sui generis protection to nationals or residents of third countries on the basis of special agreements with such countries (art. 11(3)). Certainly, material reciprocity will be required for any such agreement to come into existence. According to recital 56, such an extension will be granted 'only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community'. It is not clear how closely the database protection regime in a third country must resemble the sui generis right. At present, only one extension has been granted, notably to the Isle of Man. **(b) WIPO Draft Treaty.** An attempt to adopt a WIPO Treaty on the Protection of Databases that would have provided for

multilateral sui generis database protection, failed at the 1996 WIPO diplomatic conference, largely due to a lack of support from the United States, and resistance from the developing nations.

## CHAPTER IV. COMMON PROVISIONS

### [Remedies]

#### Article 12

**Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.**

**1. General.** Art. 12 instructs Member States to provide ‘appropriate remedies’ against infringement of the rights dealt with in the Directive, namely, database copyright and sui generis right. However, no remedies are specified; this is left to the discretion of the Member States. With regard to copyright Member States will find guidance in the enforcement chapter of the TRIPS Agreement (arts. 41-61), which prescribes both civil and criminal remedies and sanctions, but the TRIPS Agreement is not concerned with sui generis database protection. The more recent Enforcement Directive prescribes specific civil remedies that must be provided by the Member States in respect of both copyright and sui generis protection (art. 2(1) Enforcement Directive). The Enforcement Directive, however, does not include criminal sanctions. Member States are thus under no obligation to provide for criminal sanctions in respect of the sui generis right.

### [Continued application of other legal provisions]

#### Article 13

**This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.**

**1. General. (a) Other legal provision not affected.** The Directive leaves intact other legal rules relevant to contents of a database, such as copyright, neighbouring right and other rights of intellectual property. Note that this only concerns rights relating to works and other subject matter incorporated into a database. It does not allow low-threshold copyright regimes, such as British copyright in ‘skill and labour’, Dutch protection of non-original writings or

the Nordic ‘catalogue rule’, to survive in tandem with the Directive’s harmonized rules on database copyright (*Football Dataco* (ECJ)). It remains to be seen whether and to what extent unfair competition remedies are similarly preempted by the Directive’s sui generis right (see *Précom* (France)). The words ‘in particular’ indicate that the enumeration of legal domains in art. 13 is non-exhaustive. Art. 9 of the Computer Programs Directive contains a similar provision. Art. 13 also mentions a variety of legal domains that are not intended to protect intellectual property, but protect the interests of the general public, such as data protection law and access to public documents. **(b) Data protection.** Data protection law (which is often confused with sui generis database protection) will be applicable to databases containing personal data. The existence of sui generis protection does not in any way diminish or affect obligations on the part of the database producer to comply with national data protection laws pursuant to the Personal Data Protection Directive. **(c) Access to public documents.** The express reference in art. 13 to the law on access to public documents (freedom of information) may be seen as legitimizing a statutory limitation on sui generis protection of public databases, as is the case in the Netherlands (see art. 9, note 1(d)). **(d) Contract.** The reference to the law of contract is somewhat misleading. Art. 15 declares any contractual provision contrary to arts. 6(1) and 8 null and void.

### [Application over time]

#### Article 14

**(1) Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to [in] Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.**

**(2) Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailment in that Member State of the remaining term of protection afforded under those arrangements.**

**(3) Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.**

**(4) The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts concluded and rights acquired before the date referred to in those paragraphs.**

**(5) In the case of a database the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1),**

**the term of protection by the right provided for in Article 7 shall expire fifteen years from the first of January following that date.**

**1. General.** Art. 14 contains transitional provisions. In principle the Directive has retroactive effect. Its rules shall apply not only to new databases but also to databases that already existed prior to the implementation deadline (1 January 1998). Art. 14 contains different transitional rules for copyright and sui generis protection. Arts. 14(1) and (2) deal with copyright, while arts. 14(3) and (5) concern the sui generis right. Art. 14(4) clarifies that the Directive shall be without prejudice to any acts concluded and rights acquired before the implementation date. The Directive does not comprise any special rules on the term of copyright protection; the general provisions of the Term Directive apply.

**2. Retroactive effect: copyright (paras. 1 and 2).** Copyright protection under the terms of the Directive shall apply to all databases created prior to the implementation deadline (January 1, 1998). Nevertheless, copyright protection for databases that do not meet these criteria, but were protected on the date of publication of the Directive (27 March 1996) under softer conditions, as in the United Kingdom, Ireland, the Nordic countries and the Netherlands, will not be lost or curtailed upon implementation. In other words, pre-existing old-style British copyrights in databases reflecting mere 'skill and labour', not intellectual creation, are not reduced to short-lived sui generis rights, but will expire after the full term of copyright has elapsed (recital 60).

**3. Retroactive effect: sui generis right (paras. 3 and 5).** Sui generis protection under the terms of the Directive shall be available for databases completed no more than fifteen years prior to the implementation deadline (1 January 1998). In other words, the sui generis right retroactively applies to all databases that were made on or after 1 January 1983 (see, for example, *Hit Balanz* (Germany)). Although the language of art. 14(5) is not very clear, the likely meaning of it is to grant to such pre-existing databases a full term of sui generis protection, commencing on 1 January 1998.

**4. No prejudice to acts concluded before implementation (para. 4).** The Directive affects only acts concluded after the implementation deadline. The provisions of art. 14 shall be without prejudice to any acts concluded and rights acquired before that date. The phrase 'acts concluded' refers, firstly, to acts of exploitation of databases that were legal prior to implementation, for instance because in the Member State where they occurred no database protection existed. Second, it refers to contracts concluded before the implementation deadline, for instance between database producers and distributors. These remain valid, even if the underlying rights (e.g., an old-style British database copyright) no longer comply with the prerequisites of the Directive (e.g., the database does not constitute an intellectual creation). Similarly, the Directive does not prejudice 'rights acquired'; an assignment of old-style

British database copyright therefore remains valid. Art. 14(4) is inspired by art. 9(2), second half-sentence of the Computer Programs Directive. Art. 10(2) Information Society Directive contains similar language.

### [Binding nature of certain provisions]

#### Article 15

**Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.**

**1. General.** Arts. 6(1) and 8 grant certain minimum user rights to lawful users of a database. These rights may not be overridden by contract (see art. 6, note 2, and art. 8, note 1). Any contractual provision contrary to arts. 6(1) and 8 'shall be null and void'. The Directive however does not determine the consequences of such a nullity. Whether the nullity is absolute or relative (that is, only in respect of the user) is to be determined by the Member States.

**2. Non-protected databases.** The user rights guaranteed by arts. 6(1), 8 and 15 apply only in respect of databases that are protected by copyright or sui generis right pursuant to the Directive. The Directive does not preclude similar contractual limitations on users of non-protected databases (*Ryanair* (ECJ)).

### [Final provisions]

#### Article 16

**(1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998. When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.**

**(2) Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.**

**(3) Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the 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 in particular 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.**

**1. Implementation deadline (para. 1).** Member States were required to implement the provisions of the Directive by 1 January 1998. Most countries completed the implementation process in the course of 1998–1999.

**2. Report (para. 3).** As many other Directives, the Commission is required to submit regularly a report on the application of the Directive. The first review was published by the Commission on 12 December 2005 (Report on the Database Directive). The report is skeptical about the beneficial effect the introduction of the *sui generis* right has had on the production of databases in the Community. It proposes various policy options, including repealing the Directive. **(a) Abuse of dominant position.** The report mentioned in art. 15(3) should focus on the *sui generis* right, and more particularly on ‘whether the application of this right has led to abuse of a dominant position or other interference with free competition’. This language reflects concerns by interested parties that the introduction of the *sui generis* right would lead to or strengthen information monopolies that might easily be abused, notwithstanding the fact that the provisions of the Directive are without prejudice to the application of Community or national competition law (recital 47). **(b) Compulsory licences.** To remedy the possible abuse of the *sui generis* right, the Initial Proposal would have provided for a scheme of compulsory licences. If certain data were available only from a single (‘sole-source’) database, the producer of that database would be compelled to license under fair and non-discriminatory terms the use of such data. A similar compulsory licence was proposed in respect of data held in government-controlled databases. These provisions were later deleted from the Directive following *Magill* (ECJ). All that is left 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 ...’.

## [Addressees]

### Article 17

**This Directive is addressed to the Member States.**

**1. General.** According to art. 249 EC-Treaty, Directives are binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method.

**2. European Economic Area (EEA).** Pursuant to the EEA Agreement, the Directive also applies to the EEA countries that are not members of the European Union, namely, Norway, Iceland and Liechtenstein.