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Protection for databases : the European Database Directive and its effects in the Netherlands, France and the United Kingdom

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Introduction

In 1996, the European Database Directive complemented the existing copyright regime for collections with a new right for database producers. This right offers protection to producers who undertake a substantial investment in the production of a database. It was presented by the European legislator as a right *sui generis* without precedent. Still, its scope closely resembles an intellectual property right, while its rationale – preventing misappropriation of another's investment – is related to the tenet of unfair competition.

This *sui generis* right is the main focus of this study. Although we will also discuss the copyright protection which the Directive confers to databases, we have chosen to concentrate on the *sui generis* right because of its newness. Copyright for databases, on the other hand, already has a precedent in the equivalent protection for collections introduced in the Berne Convention in 1908. Moreover, the protection by copyright is of only slight importance to databases, because many of them will not meet the required level of originality.

The first chapter of this study tells the story of the coming into being of the Database Directive. It describes the evolution of the *sui generis* right from a regime based on unfair competition to an exclusive right comparable to copyright. Attention is also given to the different methods by which the Directive has been implemented in the EU Member States. Moreover, the fate of the 1996 WIPO Draft Database Treaty is studied. The chapter ends with a commentary on the individual provisions of the Database Directive.

The second chapter deals with the broad definition of databases provided in the Directive, which also dwells upon the notion of collections, being the forerunner of databases. We will propose some restrictions to the database definition in the Directive to prevent its two-tier protection being applied to several far-fetched categories of collections.

In chapter three, we will take a closer look at the copyright protection which already existed for collections while comparing it to the same protection for databases under the Directive. This chapter discusses, for example, the required level of originality, the scope of the Directive's copyright protection and the question of how this regime relates to existing copyright acts and

national case law. In this study, we have chosen to focus on the EU Member States of the Netherlands, France and the United Kingdom, although Germany¹ and Italy are also occasionally referred to.

Chapter four – which is the largest in volume – concentrates on the *sui generis* right. The Directive attaches important concepts to this right, such as the substantial investment requirement, but does not define them. Therefore, we make a comparative study of the interpretations suggested for these concepts in Dutch, French and British literature, and in the case law of these countries. Decisions on databases are especially abundant in the Netherlands and France. Moreover, in November 2004, the European Court of Justice delivered four important judgments in which it spoke out concerning several concepts of the *sui generis* right.

Chapter five concentrates on information monopolies given that the Directive itself expressed the concern as to whether the *sui generis* right might lead to abuses of the legal monopoly which it confers. Thus, we consider the remedies provided by European competition law, and also give a detailed discussion of the compulsory licensing provision which was foreseen in earlier proposals for the Directive. The *sui generis* right may indeed threaten the principle of free competition. We therefore propose to introduce a compulsory licensing provision and make several suggestions for its contents.

Finally, chapter six contains a summary and our conclusions. It provides a critical discussion of the current *sui generis* right as well as proposals for a review.

(The manuscript was completed in August 2006).

¹ Several studies have already been published on Germany in relation to the Database Directive, for example, Hornung 1998, Grützmacher 1999, and Leistner 2000.