Response to the European Commission on the evaluation of EU rules on databases

[DG Internal Market and Services Working Paper. First evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 12 December 2005]

EBLIDA, the European Bureau of Library, Information and Documentation Associations, is an independent, non-profit umbrella organisation of national library, archive and information sectors associations and institutions in Europe. EBLIDA represents the interests of its members to the European Institutions with a focus on intellectual property rights, information society, professional education and culture matters.

EBLIDA expresses the view that the Database Directive is a confusing law. Complying with it is difficult for ordinary citizens, and non-specialist companies, even though the use and re-use of databases is a common everyday activity. EBLIDA, the European Bureau of Library, Information and Documentation Associations, is an independent, non-profit umbrella organisation of national library, information, documentation and archive associations in Europe.

The Commission's study of 12 December 2005 (First evaluation of Directive 96/9/EC on the legal protection of databases) is doubtful of the value of the Directive, recognises its faults, and considers its repeal in whole or in part. We should like to expand on some problematic features of the Directive, identified in the study, which have caused difficulty for libraries. As professional practitioners in information storage and delivery, we offer these views perhaps more importantly as our assessment of how the Directive has affected people generally – beyond the reach of the 'stakeholders'. In our opinion it is hard for an ordinary citizen not to be a stakeholder in this matter, given the ubiquity of databases.

First, the Directive is ambiguous. In a database of copyright components, it is difficult to see where copyright and *sui generis* right begin and end. In a database resulting from original creation, copyright protection and *sui generis* protection almost inevitably subsist concurrently. The provision in Article 7(4) that *sui generis* right subsists 'without prejudice to' copyright or other rights offers no clarity as to how the different rights are to be respected. Article 7(1) relies heavily on interpretation of the term 'substantial'. It also gives 'qualitative' investment as a criterion for the subsistence of *sui generis* right. Yet 'qualitative' investment is almost indistinguishable from the intellectual creativity that gives rise to copyright. Since copyright and *sui generis* right have different terms and different exceptions, adherence to the provisions of the Directive is problematic.

Furthermore, Article 10(3) provides that where significant additions are made incrementally to a database, the term of protection is re-set at fifteen years from each addition. Thus the term of protection even for non-original elements in the database is extended on an indefinite basis. Indefinite protection is contrary to the principles of intellectual property rights: and in practice it is virtually impossible for a user to determine the expiry date of the protection.

Against these levels of vagueness, Article 1(2) is fairly clear that virtually anything created on a computer is either a database or a part of a database. And in addition to obvious databases like encyclopaedias and telephone directories, the definition inevitably embraces such varied creations as a daily newspaper, a scholarly journal, and a university library. Under a commonsense interpretation of Article 1(2), a compact disk of string quartets is also a database, though confusingly, recital 17, after embracing 'musical collections of works' in its definition, eliminates any 'recording' from the scope of the Directive. It is clumsy that the question of compilations of musical recordings is treated only in a recital which is internally contradictory.

Europe has succeeded in working with the extraordinarily wide scope of the Database Directive by almost totally ignoring it. In the library world, for example, a trend over many years has been to combine, or link, the catalogue of one library (a database) with those of other libraries.

For the purpose of the Directive this is 're-utilisation' on a large scale. At www.copac.ac.uk one can consult the combined catalogues of the major research libraries of the UK, and at www.cornucopia.org.uk one can see a list of special collections in a variety of libraries all over the UK. As far as EBLIDA is aware, these re-utilisations of library databases, which go beyond any exceptional uses listed in Article 9, have been, and are being, made without any assignment or waiver of *sui generis* right. If formalities were to be insisted upon, the process of permissions and clearances would be regarded as a wasteful bureaucratic imposition.

Being close to the academic world, EBLIDA is aware that the creation and consultation of databases is nowadays the life-blood of research activity. Databases are created cooperatively (often internationally, very often across the EU borders) by reutilising the contents of independent databases and without any regard to the exigencies or even existence of database right. The permissions and waivers theoretically required by the Directive would be regarded by academic researchers (if they were to think of them at all) as wholly obstructive to the research process. More seriously, while the Directive remains in force it presents the risk that a database produced cooperatively by teams of scientists might be claimed as intellectual property by one or more individuals. We believe that the human genome sequence came close to disappearing from the public domain because of an attempt to assert rights over it. The non-availability of the human genome sequence as a public scientific resource, open to addition and use, would have been a severe blow for scientific endeavour. Yet the scenario is all too plausible while the *sui generis* right remains available.

The information society prospers though the efficient transmission of information. Sometimes the transmission occurs through commercial channels but very often it happens outside the realm of commerce. It is clear to EBLIDA that many, if not all, non-commercial database producers can function efficiently only by disregarding the Directive. The Directive has evidently not achieved its object of giving European commercial databases producers an advantage over their competitors in other continents. It is easy to see that a relatively few commercial enterprises would like to retain the Directive in case it becomes useful at some later date. But the creation and re-use of databases outside commerce is a widespread activity wholly beneficial to education, research, and the information society. In those circumstances the Directive is a perverse obstruction whose effects can be neutralised only by innumerable routine clearances of rights.

In practice the information society has survived the implementation of the Directive by a mass denial of its existence. We feel strongly that if intellectual property laws are to be respected they should be workable. We suggest that the Database Directive fails that test and that the information economy would benefit if it were repealed or substantially modified.

We suggest for consideration the following changes to the Directive in order to make adherence to it more practicable and equitable.

1. *Sui generis* right should subsist only in electronic databases.

Otherwise the scope of the Directive is needlessly broad; indeed is so inclusive as to bring the law into disrepute.

2. *Sui generis* right should arise only at the point when a database is re-utilised for a commercial purpose. If, for a commercial purpose, a new database re-utilises an existing database, then *sui generis* right would arise in the existing database and the maker of the new database, before exploiting it commercially, would need the permission of the right holder of the existing database for the re-utilisation of its data.

On the other hand, if a new database re-utilises an existing database for a non-commercial purpose, *sui generis* right would not arise and no permission would be needed for any non-commercial exploitation of the existing database within the new one.

This modification would allow the creation and re-use of non-commercial databases for non-commercial purposes without the need for permissions or waivers: as indeed already happens in

the public sector.

3. The exclusion of compilations of films and musical recordings should appear in Article 1(2), rather than being consigned to a recital.

The current text is confused.

4. References to 'qualitative investment' in Article 7 should be removed because in themselves they lack clarity and they are particularly ambiguous in relation to any copyright subsisting in the database.

5. Exceptions to the *sui generis* right should be exactly the same as exceptions to copyright: e.g. library privilege, for preservation, judicial proceedings, etc.

6. The term of *sui generis* right should be limited to fifteen years from the first publication of the database: though portions of it might have the term extended if reliable, authenticated date-stamping is applied to the revised parts.

The Hague, March 2006