

European Association of Directory and Database Publishers

Comments on the Commission Draft Evaluation of Directive 96/9/EC on the legal protection of
databases

September 15th 2005

Founded in 1966, the EADP (European Association of Directory and Database Publishers) represents publishers of telephone directories, yellow pages and business-to-business database publishers producing information products for both B2C and B2B markets. Membership consists of 187 members in 37 countries worldwide, including companies based in 24 of the EU Member States as well as in the Eastern European countries (Bulgaria, Romania and Russia) and Norway. Database publishers generate an estimated turnover of at least 11 billion euro in Europe, employ roughly 37 000 people and produce products and information services which are used daily by most EU citizens and are in day-to-day commercial contact with more than four million advertisers. Our member companies provide both paper and on-line databases.

1. EADP initial Comments on the Evaluation document

EADP members welcome the opportunity to comment on the Commission's Evaluation document which reviews some aspects of the Directive 96/9/EC on the legal protection of Databases.

EADP members wish to congratulate the Commission on the support shown to the European database industry through this and other initiatives which seek to encourage and protect the European information economy and re-iterate EADP support for the objectives of the directive recalled in the evaluation report.

EADP is concerned that the document deals with only the economic impact and consequences of the directive without regard to the legitimate intellectual property rights of database makers who take significant risks and initiatives and make substantial investments in the creation of databases.

We wish to comment on, in general terms, about the process of evaluation and, in specific terms, about the content of the draft evaluation document. EADP would like to express serious concerns on the conclusions of the document relating to the implementation of the directive and its potential impact on the creation of databases and the investment made in this field. Finally, EADP members would like to present the Commission a list of proposals which would inform and improve the harmonised and efficient implementation of the directive through the European Union.

2. EADP Comments

2.1. Concerns over the Evaluation document and process adopted by the European Commission in dealing with this matter.

Concerning the online questionnaire, EADP members notice that some concepts are not defined and that some questions ask for opinions which can be easily manipulated. Thus, the results of such a survey cannot be considered as reliable. Data collected during the consultation process should be supported with specific evidence.

The European Commission provide us with an evaluation document which appears to pre-judge the debate by providing any other policy options. In such conditions, stakeholders will only be able to comment on the conclusions made in this report.



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Some conclusions of the report suggest that the European Commission tries to justify legislative action without valid rationale. It seems that figures are used to confirm the theory decided beforehand by the Commission without consulting database makers and publishers.

The evaluation report has been put on the webpage of the European Commission only eight days before the expiration of the deadline allowing the submission of comments. EADP members consider such an attitude as unfair, since this does not allow a comprehensive answer to the Commission.

2.2. Comments on the conclusions of the evaluation report

2.2.1. On the first impact stated under point 4.1. – Harmonisation and Internal Market:

The European Commission states that divergent interpretations of the directive have been made by European and national courts. EADP members would like to mention that this is not a problem specific to this directive, as this occurs with a large number of European laws. These divergences should not lead the Commission to modify the text of the directive, but to consider the undertaking of guidelines indicating how the text should be applied in a harmonised manner.

2.2.2. On the second point under 4.2. – Sustainable Growth in Investments:

EADP members refute the conclusions drawn by the Commission from the single piece of research it quotes to support its comments. The EADP experience is that there has been a significant increase in the supply and availability of information through databases since the Directive was adopted. In particular EADP wishes to highlight the following points.

There is a difference between the number of databases and the amount of information delivered through databases. Our members have significantly increased the use of databases as a delivery medium since the Directive was adopted.

There is a definitional issue with the data quoted. Database delivery has shifted from stand alone database products such as CD-Rom's disks and dedicated on-line access to specific databases to "portal" based applications which enable a single point of access to many databases. Included in this has been the significant impact of search engines in enabling access to disparate databases.

The source of data concerned is from a publisher which has focussed editorially on databases from "not for profit" organisations such as trade associations and the academic community in North America. The editorial process is based on secondary research and did not, EADP believes, involve primary research and interviews with European database producers. We believe that specific research needs to be commissioned to consider the European situation.

With the investment peak in internet activity in 2001 it is likely that the rapid growth up until then would have diminished.

The Gale information suggests that the decrease of databases observed since 2003 results mainly from the **decrease of some media** (magnetic tape, diskette, print and CD-ROMs). In the meantime, the author states that "online increased". This evolution from printed media to online



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version can be observed in many fields, not only concerning databases and this should not particularly be considered as a negative fact.

The Gale information states that the “number of word-oriented databases continues to grow with the increase of telephone directory databases, particularly non-US ones, [...] and company data databases”. Thus, if some types of databases disappeared, this is not absolutely an indication of the decrease of the whole sector.

EADP members consider that the **implementation** of the directive in some European countries is **too recent** to already make an analysis of the consequences of its implementation in Europe. Some “old” EU countries first implemented it in 2001, and the new entrants did so between 1999 and 2003. Thus, the *sui generis* right is effective in national law only for 3 to 4 years.

2.2.3. On the point 4.3. – Contribution of the Academic and Scientific Community:

The evaluation report contains supporting arguments coming from the **academic and scientific community**. EADP members would like to question the way such information is to be evaluated. How was the claimed increased cost to UK academic community of £1 million estimated? Besides, EADP members do not see how the information and contributions provided by them during the process of drafting the report has been used. Consequently, they would like to ask the Commission to take all contributions into account, and not only those supporting its opinion.

2.2.4. On point 4.4. – EU Database Production Compared with the US one:

EADP members would like to stress that the access to **Public Sector Information** is still so difficult in some EU countries, that the investment made in collecting data and in the constitution of databases has to be protected in some way. Otherwise, the investment made is too important compared to the return on investment that can be expected if databases are protected by the *sui generis* right. Such barriers are less restrictive in the USA as information is more easily accessible.

Furthermore, EADP members would like to state out that the **US definition of the database concept** differs from the legal concept defined by the European Database Directive. Databases are defined in a technical way, “in terms of geographic region and status of producers, of forms of representation of the data, of the subject matter or intellectual content of the data, and of media for access and/or distribution”. Thus there is no legal definition of “database” in the USA. As a consequence, a large amount of materials that would be defined as databases under the European Directive, are not even considered in the Gale Database that constitutes the basis for the US figures. If all databases considered so by the European law were included in the figures of the Gale Database, the amount of databases would certainly increase.

2.2.5. EADP members would like to point out some contradictions in the conclusions of the report. According to the evaluation report, the implementation of the *sui generis* right explains the decrease of the amount of databases. Besides, the Commission also state out that the *sui generis* right is not really applied by the Member States (at least some of them). How should something that does not even exist hinder growth and innovation?



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2.2.6. EADP members would like to stress that, after such a short period of implementation the European industry has drawn comfort from the protections of the Directive and felt encouraged to make investments in creating new database products.

2.2.7. The ECJ court judgment in the BHB vs William Hill case has, erroneously in the EADP view, been used to argue that there is weakening of the *sui generis* right. In restating the need for risk, initiative and investment in the creation of the database EADP members believe that their activity is confirmed as being protected. In Norway, a recent Court decision supported this position for Yellow Pages publishers. EADP would welcome a discussion with the European Commission to clarify the differing interpretations of this ECJ judgment and to ensure that its members continue to have the protections they need to invest in the creation of database products which support the European knowledge economy.

2.3. Comments concerning the potential consequences of a modification of the directive (weakening of the *sui generis* right or abolishing of the directive)

Such a decision would have significant consequences in some countries like the UK where without the *sui generis* right no more intellectual property right protects the investment made in the constitution of databases. The only protection would result from a contractual relation between the database maker and the user. Such a solution would not make the access and the re-use of the data collected in the database easier nor cheaper for the user, as no database maker would agree to let such an open access without protection and a fair remuneration. In consequence, such a proposal would be a solution neither for the owner of the database nor for its user.

2.4. EADP members would like to point out the contradictions in the action of the Commission concerning this text.

For two years, the European Commission was defending the Database Directive, particularly the *sui generis* right, in the WIPO as a text protecting database owners as well as facilitating innovation. Two years later, the European Commission seems to consider that such a text has had a negative impact on the creation of new databases. The Evaluation document also appears to contradict the stated policy aims of the European Commission (DG Information Society and Media) to liberalise access and re-use of public sector information.

3. Conclusions

3.1. **Databases are not specific products.** They are a delivery medium which have been adopted by a wide range of content owners from traditional publishers (directories, magazines, newspapers, books) to new industry players (search engines, aggregators) and non-traditional publishers who have used database and internet technology to deliver content in innovative ways to EU citizens. In doing so they have created a new and growing source of economic activity which needs to be protected for the benefit of all sectors of society.

3.2. EADP members urge the European Commission to **engage with database producers' issue** to ensure that the database industry and its activities are better understood to enable effective protection for the investments made by the sector and to rectify any uncertainty during the implementation and interpretation by the courts of the directive.



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3.3. The EC should **focus on the core of the problem**: how does the European Union want to protect the database industry? What kind of protection for this sector? The review of the Database Directive does not imply solely competition issues towards the USA.

3.4. The European Commission should reject arguments to **review the exceptions to the *sui generis* right**. The exception for “non-commercial” research ensures full and adequate safeguards for the academic and research community.

3.5. EADP members would be very interested in hearing the inputs of other stakeholders concerning the impact of this directive on their business. That is the reason why they ask the Commission to organise a **Round Table** at which all stakeholders interested would be invited to comment on the Commission policy options.

3.6. EADP members urge the Commission not to take into account only one aspect of the issue. The opinion of all the stakeholders should be considered. **Database owners’ and publishers’ opinion should be considered as well.**

3.7. EADP members believe that **specific research needs to be commissioned to consider the European situation.**

