

QUESTIONNAIRE

To national authorities and interested parties

Concerning the goals, means and practical effects of and
possible adjustments to
the Database Directive 96/9/EC, as well as
the evolution of the database industry and
the information society

Commissioned by the European Commission

Date : 17 June 2002

INTRODUCTION

NautaDutilh has been appointed by the European Commission (Directorate General for the Internal Market) to draw up a report on the implementation and application of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (hereafter “the Directive”), in preparation of the report on the application of the Directive to be submitted by the Commission to the European Parliament, the Council and the Economic and Social Committee pursuant to Article 16.3 of the Directive.

During the first stage, NautaDutilh carried out a full-scale analysis of the transposition of the Directive in all Member States, indicating to the Commission which parts of the Directive were either not or wrongly transposed and how the Directive’s principles were applied by national courts.

During the present second stage, NautaDutilh is required to consult national authorities and interested parties about their practical experiences with the Directive, in particular with the application of the *sui generis* right, its impact on free competition, the resulting risks for abuses of a dominant position and its impact on the development of the Information Society.

NautaDutilh is also required to assess if, and to what extent, the purposes of the Directive, including the intended balance of rights and interests, have been achieved and to identify issues which should be the subject of further harmonisation. In this respect, NautaDutilh is required, especially with regard to non-voluntary licences, to indicate to the Commission whether the Directive should be amended.

Our methodology includes the holding of two hearings on 1st July 2002 to separately collect the opinions and concerns of rightholders and users, and the consultation of the national authorities and interested parties by means of the present questionnaire, in order to gather expert opinion and validate some findings. Your answers to this questionnaire will be used as input to our report and therefore represent a unique opportunity for you to express key opinions or concerns to be heard by the regulatory authorities.

We very much value your opinion and will be honoured if you accept to take part in this process.

Please note that our draft final report must be submitted to the Commission on 28th July 2002. Since one of the purposes of this questionnaire is to prepare the hearings to be held on 1st July 2002, we need to receive your responses by 28th June 2002 at the latest. **We will therefore not be able to take into account replies to this questionnaire which will be received later than 28th June 2002.**

If you have further queries or remarks or wish to receive the questionnaire in paper or electronic version, please call or e-mail us using the following contact details.

We thank you in advance for answering this questionnaire and providing us with your opinion.

The NautaDutilh Team

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**PLEASE SEND IN YOUR REPLIES TO THE QUESTIONNAIRE BY
EITHER E-MAIL, FAX OR LETTER TO THE ABOVE MENTIONED ADDRESSES,
FOR THE ATTENTION OF CHARLES-HENRY MASSA**

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1. Your profile

A. Interviewee information

First name: John
Last name: Enderby
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Email address: mark.scott@royalsoc.ac.uk
Phone number: +44 (0)20 7451 2592
Fax number: +44 (0)20 7451 2692

If you complete this questionnaire on behalf of your company/organisation/national authority, please indicate:

Its name: The Royal Society
Its address: 6-9 Carlton House Terrace, London SW1Y 5AG, London, UK
Date of constitution: 1660
Your function: Physical Secretary and Vice-President.

This response is Royal Society policy document 18/02, delivered on 28 June 2002.

- I agree that NautaDutilh quotes my remarks and name
 I agree that NautaDutilh quotes my remarks
 I do not agree that NautaDutilh quotes my remarks

PRIVACY POLICY

NAUTADUTILH will not use the information provided except for the purposes of this study. Only data which are reasonably necessary for the indicated purposes will be processed and stored for the time necessary. NAUTADUTILH does not provide or sell any of this information to third parties.

If you have any questions about this privacy statement, the practices of NAUTADUTILH or any other aspect, or wish to use your access right to your data and the right to correct your data, please contact Charles-Henry Massa (see above for contact details).

Belgian law applies to this privacy statement.

B. Company information

B.1 Profile

You would describe your company/organisation as a :

- Private rightholder (of database rights)
 Public rightholder (of database rights)
 Private user (of a database)
 Public user (of a database)
 National authority

Other (please specify): The Royal Society is an academy representing 1300 distinguished scientists.

B.2 Industry

In your opinion, your company/organisation belongs to (choose the closest, or specify another, sector):

- Database publishers
- Service providers
- Consumer protection groups
- The scientific community or the education sector
- Public libraries
- Public authorities
- Other (please specify):

B.3 Market

The market for which your database is used / you use a database is that of:

- Telephone directories
- Catalogues
- Television programs
- Classified ads (jobs, real estate,...)
- News and journal data
- Educational and scientific data
- Sport data
- Medical or pharmaceutical data
- Collections of legal materials
- Other (please specify):

B.4 Type of database

The database you own (as a rightholder) or use (as a user) exists:

- On line
- Off line
- Both on- and off-line

B.5 Turnover

The turnover of your company/organisation in 2001 was in between:

- < 1 million EUR
- 1-10 million EUR
- 10-50 million EUR
- 50-200 million EUR
- > 200 million EUR
- Please specify if you wish

B.6 Size

The size of your company/organisation in 2001 was in between:

- < 50 employees
- 50-100 employees
- 100-500 employees
- 500-2000 employees
- > 2000 employees
- Please specify if you wish
1300 Fellows (and 130 staff)

2. Goals of the Directive

For each of the following goals pursued by the Directive, please specify whether in your opinion they have been achieved or not. If not, please specify why.

A. Functioning of the Internal Market

By eliminating the differences existing between the Member States' legislation as regards the legal protection of databases, the Directive has (had) a positive effect on the free movement of database-related goods or services within the Community:

I agree

I disagree because (please specify and give any suggestions):

B. Unbalance in the levels of investments

B.1 As between the Member States

The Directive has (had) positive effects on the unbalance, as between Member States, in the levels of investment in the database sector:

I agree

I disagree because (please specify and give any suggestions):

B.2 As between the Community and third countries

The Directive has (had) positive effects on the unbalance, as between the European Community and the world's largest database producers in third countries, in the levels of investment in the database sector:

I agree

I disagree because (please specify and give any suggestions):

C. Protection of investments

By creating the new *sui generis* right, the Directive sufficiently protects the investments (whether human, technical or financial) made for the creation, updating or maintenance of a database:

I agree

I disagree because (please specify and give any suggestions):

Protection is certainly sufficient and, in some situations indicated below, excessive.

D. Information Society

By securing protection to investments, the Directive encourages the making of new investments in advanced information processing systems related to databases:

I agree

I disagree because (please specify and give any suggestions):

E. Balance of rights and interests

The directive achieves a satisfactory balance between the rights and interests of the rightholders and users:

I agree

I disagree because (please specify and give any suggestions):

The balance should differ from area to area - important factors being the relative costs and effort involved in production of the data and its incorporation into a database. Specifically, the exceptions for education and research are too restrictive - more so than in the 2001 copyright Directive.

3. Means of the Directive

In this chapter, we solicit your opinion on the legal means proposed by the Directive in order to achieve the goals referred to above. The questions will be briefly explained, and reference will be made to the relevant provision of the Directive. If you wish to consult the Directive, it is available on the Commission's website, at http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm.

Except where indicated otherwise, the questions relate to both copyright and *sui generis* protection of databases.

A. Definition of a database

In your opinion, the definition of a database, whether original or not, see Articles 1 and 2) is:

- Too broad
 Satisfactory
 Too narrow
 Too uncertain

Please explain your opinion, give an example or provide any comments:

The definition appears to be so broad as to include, for example, libraries - potentially restricting access to works no longer covered by copyright.

B. Requirements for protection

B.1 Copyright

In your opinion, the originality threshold for database copyright (see Article 3.1) is:

- Too high
 Satisfactory
 Too low
 Too uncertain

Please explain your opinion, give an example or provide any comments:

B.2 Sui generis right

In your opinion, the substantial investment criterion for database sui generis right (see Article 7.1) is:

- Too high
- Satisfactory
- Too low
- Too uncertain

Please explain your opinion, give an example or provide any comments:

'Substantial' is not a sufficiently precise term, and 'qualitatively substantial' is particularly difficult to judge.

C. Ownership of rights

C.1 Copyright

The vesting of copyright ownership in the author (see Article 4) is :

- Satisfactory
- Unsatisfactory (please explain your opinion) :

C.2 Sui generis right

The vesting of sui generis ownership in the database maker (see Article 7) is :

- Satisfactory
- Unsatisfactory (please explain your opinion) :

Without substantial exceptions, the vesting is too great a right.

D. Scope of rights

D.1 Copyright

The scope of the author's rights (see Article 5) is :

- Too broad
- Satisfactory
- Too narrow
- Too uncertain

Please explain your opinion:

This is acceptable if fair dealing exceptions apply.

D.2 Sui generis right

a) The scope of the database maker's rights (see Article 7) is :

- Too broad
- Satisfactory
- Too narrow

Too uncertain

Please explain your opinion:

The exceptions are insufficient; fair dealing exceptions should be available to everyone.

Please see 3E below.

b) Database makers may prohibit the repeated and systematic use of insubstantial parts of the database (see Article 7.5). In your opinion, this prerogative:

Insufficiently protects the rightholder

Sufficiently protects the rightholder

Excessively protects the rightholder

Please explain your opinion:

This protection is sufficient in some cases, but excessive in others such as much scientific research which requires repeated and systematic re-use of parts of the data. Such utilisation is especially reasonable because the data will have generally been obtained at great public expense by the scientific community; the database provider has incurred relatively little trouble and expense. It is of course recognised that it would be wrong to use fair dealing exceptions to construct the whole from its parts.

E. Lawful use

The lawful user of the database may perform acts necessary for the purposes of access and normal use of the database (see Articles 6.1 and 8). In your opinion, these exceptions are:

Too broad

Satisfactory

Too narrow

Please explain your opinion:

Fair dealing exceptions should be generally available - one should not have to be a 'lawful user' with e.g. a contract anyway, to extract and re-utilise insubstantial parts (Article 8). The term 'lawful user' has not been clearly defined, and it needs to be.

F. Optional exceptions (see Articles 6 and 9)

F.1 Private use

The Member States have the option to exempt the reproduction for private purposes of non-electronic databases. In your opinion, this exception is:

Too broad

Satisfactory

Too narrow

No opinion, since this exception has not been transposed by my Member State.

Please explain your opinion:

Reproduction for private purposes should also apply to electronic databases.

F.2 Education and science

The Member States have the option to exempt the use of databases for purposes of teaching or scientific research. In your opinion, this exception is:

- Too broad
 Satisfactory
 Too narrow
 No opinion, since this exception has not been transposed by my Member State.

Please explain your opinion:

My letter of 31 May, to Mr Stuart Booth of the Patent Office, notes several major concerns about the exceptions. The exceptions as presently formulated are, in my view, unsatisfactory because:

- they are not mandatory;
- they are confined to lawful users. The term is not defined and is likely to cause confusion; but is widely interpreted to mean those who already have permission from the maker of the database to extract or re-utilise data. This restriction severely undermines their usefulness - fair dealing exceptions can normally be utilised by those without an agreement with the rightholder;
- they allow only extraction and not re-utilisation of data;
- the wording for “the purposes of illustration for teaching or scientific research” is ambiguous. If illustration is meant also to apply to scientific research it is not at all clear what this allows; and
- restriction to “for a non commercial purpose” is also ambiguous since much scientific research may have commercial implications which are difficult to define in its early stages. It is certainly important that "for a non commercial purpose" is recognised to refer to the objective of the research - and not e.g. the publication of papers (containing information from a database) in books and journals.

Since, as has been emphasised, scientific data are different from those used in the purely commercial sector, the problems could be dealt with most effectively by extending the exceptions which are already enshrined in Article 9 of Chapter III of the Directive. I have given potential wording in the answer to 7A, below.

F.3 Administration and justice

The Member States have the option to exempt the use of databases for purposes of public security, administrative or judicial procedure. In your opinion, this exception is:

- Too broad
 Satisfactory
 Too narrow
 No opinion, since this exception has not been transposed by my Member State.

Please explain your opinion:

Such purposes must in general be allowed, but access need not be free.

F.4 Other traditional exceptions

The Member States have the option to maintain traditional copyright exceptions. In your opinion, this exception is:

- Too broad

- Satisfactory
- Too narrow
- No opinion, since my Member State has not taken advantage of this provision.

Please explain your opinion :

The exceptions are important and should be maintained.

G. Initial term of the *sui generis* right and substantial new investments

1. *Sui generis* protection lasts for 15 years as from completion (or making available within this term) of the database (see Article 10.1-2). In your opinion, this term is:

- Too long
- Satisfactory
- Too short

Please explain, and if too long or too short, propose the term you would deem adequate:

Sufficient income should be derived in a shorter time, and then the database be generally available (unless substantially updated). 10 years should certainly be enough time. Increasingly, scientific journals are allowing free access two years after publication - consistent with the wishes of many in the scientific community. This is consistent with Royal Society policy.

2. If a substantial new investment is made in an existing database, the database resulting from this new investment may benefit from a new term of protection of 15 years (see Article 10.3). In your opinion, this provision:

- Insufficiently protects the rightholder
 Sufficiently protects the rightholder
 Excessively protects the rightholder.

Please explain your opinion:

'Substantial new investment' is likely to be a fraction of the investment required to improve or update a product protected by a patent - where an extension of a patent is expensive and indeed unlikely to be achievable. A 15-year extension for databases is far too long and too readily achieved. 'Substantial new investment' requires clarification.

H. Beneficiaries of the *sui generis* right

Broadly, *sui generis* protection is limited to companies and firms having their registered office (provided that its operations are genuinely linked with a Member State), central administration or principal place of business within the Community as well as Community nationals or habitual residents (see Article 11). In your opinion, such limitation is :

- Satisfactory
 Unsatisfactory (please explain your opinion) :

There are flaws in *sui generis* protection as enacted, but we should encourage database construction anywhere.

I. Coexistence with other rights

The possible coexistence of other protections on the contents of database (such as protection of personal data, patents, trademarks and designs, national treasures) with copyright or *sui generis* protection (see Article 13):

- Is an obstacle to the exploitation of your database
 Is not an obstacle to the exploitation of your database
 Is an obstacle to my use of others' database
 Is not an obstacle to my use of others' database

Please explain and, if applicable, refer to your own database and market:

J. Transitional provisions

The transitional provisions of Article 14 are :

- Satisfactory
 Unsatisfactory (please explain your opinion) :

They are fair and reasonable.

4. Practical effects of the Directive

A. Shifting from public domain to legal protection

Has the Directive influenced the status of protection of your database?

- Yes, my database was not copyright-protected and is now protected by both copyright and sui generis right
- Yes, my database was not copyright-protected and is now protected by sui generis right only
- Yes, my database was not copyright-protected and is now protected by copyright only
- No, my database was not copyright-protected and remains unprotected
- Yes, my database was copyright-protected and is now protected by both copyright and sui generis right
- Yes, my database was copyright-protected and is now protected by sui generis right only
- No, my database was copyright-protected and remains copyright-protected
- Yes, my database was copyright-protected and is now fully unprotected
- No opinion since I own no database

Has the Directive influenced the status of protection of a database you were using?

- Yes, it was not copyright-protected and is now protected by both copyright and sui generis right
- Yes, it was not copyright-protected and is now protected by sui generis right only
- Yes, it was not copyright-protected and is now protected by copyright only
- No, it was not copyright-protected and remains unprotected
- Yes, it was copyright-protected and is now protected by both copyright and sui generis right
- Yes, it was copyright-protected and is now protected by sui generis right only
- No, it was copyright-protected and remains copyright-protected
- Yes, it was copyright-protected and is now fully unprotected
- No opinion since I use no database

B. Evidence of a substantial investment

- Sui generis* protection only benefits to producers who made a substantial investment in either the obtaining, verification or presentation of the database. Such substantial investment must be proved by the claiming rightholder. Do you take or plan to take measures to secure evidence of any such substantial investment? Please comment and illustrate:

If 'substantial investment' is claimed, to allow protection, it is important that there is a transparent mechanism to show the costs involved. In particular, it is not easy for lone users or even groups in education or scientific research to question or challenge such claims.

C. Evidence of the date of completion

The burden of proof as to the date of completion of a non-original database lies with the maker of the database. Has this obligation influenced or will it influence your behaviour as regards your database in any way? Please comment and illustrate:

It is important that the date of completion is transparent; in particular, it is not easy for lone users or even groups in education or scientific research to question or challenge such claims.

D. Evidence of substantial new investments

The burden of proof that the criteria are met for a substantial modification of the contents of a database to be regarded as a substantial new investment, lies with the maker of the database resulting from such investment. Do you take or plan to take measures in order to secure evidence of new substantial investments you have made or will make in your database? Please comment and illustrate :

If 'substantial investment' is claimed, to allow extension of protection, it is important that there is a transparent mechanism to show the costs involved. In particular, it is not easy for lone users or even groups in education or scientific research to question or challenge such claims.

E. Evidence of infringement by substantial or repeated insubstantial taking

In case of non-original databases, a competitor may offer the same contents as those in your own database, provided this competitor has not derived its contents from your database. Infringement will only be recognised if the database maker can prove that the competitor has copied contents of his database, in particular by systematic and repeated taking. Has the Directive influenced or will it influence your behaviour in this respect in any way ? Please comment and illustrate:

F. Subsequent new terms

When a database is constantly updated by means of new substantial investments, subsequent new terms of protection might apply for an indefinite period of time. In your opinion, this possibility:

- Insufficiently protects the rightholder
- Sufficiently protects the rightholder
- Excessively protects the rightholder

Please explain your opinion:

There should be encouragement to maintain databases well. Of course, fair dealing exceptions (that, as indicated, are broader than those currently available) should still apply!

Consideration should be given to achieving unfettered access to earlier data, as indicated in the response to 3G1.

G. Most influential provisions

Which provisions of the Directive have had the strongest impact on your business?

The greatest impact is almost certainly due to the removal of the right of anyone to limited use and re-use of data, for scientific research and for education.

5. Evolution of the database industry & the Information Society

A. Trends in the sector

- A.1 What have proved the most influential trends on your database-related business in the past? Explain briefly.

The increasingly electronic basis of databases.

- A.2 What will be, in your opinion, the most influential trends on your database-related business in the near future (say, over the next 3 years)? What could be their impact? Explain briefly.

The increasing size of databases.

- A.3 What will be, in your opinion, the most influential trends on your database-related business in the long run ? What could be their impact? Explain briefly.

Manipulation of data using the Grid.

B. Origin of database contents

Where/from whom do/will you get the contents of your database? You (will) –

- Produce it yourself
 Buy it
 Build partnerships
Other (please specify):

If your preference goes to partnerships, please specify which types of partners and from which country:

C. Evolution of investment costs

Which are the main costs involved with the creation, update or maintenance of your database today and what do you expect them to be in the near future (say, over the next 3 years) and in the long run? Please answer according to importance (1 = most important).

	Today	Near future	Long run
<input type="checkbox"/> Contents			
<input type="checkbox"/> Personnel costs			
<input type="checkbox"/> Equipment costs			
<input type="checkbox"/> Internet related costs			
<input type="checkbox"/> Software related costs			
<input type="checkbox"/> Technological innovations			
<input type="checkbox"/> Other (specify):			

D. Evolution of income

How do you expect your income to perform in the near future (say, over the next 3 years) ? It will:

- Increase dramatically
- Increase
- Stabilise
- Decrease

How do you expect your income to perform in the long run ? It will:

- Increase dramatically
- Increase
- Stabilise
- Decrease

What could be the impact of such increase/decrease ?

E. Side-effects on access to information

Has the Directive had side-effects on access to information ? And is the Directive likely to have side-effects on access to information in the near future or the long run? If so, please describe them.

It will inhibit education and scientific research.

F. The Information Society

F.1 Which provisions of the Directive have had / will have the strongest impact on the Information Society? Please elaborate.

The withdrawal of fair dealing rights for scientists and teachers (especially if they have no contract with the database provider).

F.2 Which provisions of the Directive will need further adjustment to usefully apply to

Digital databases ?

On-line digital databases ?

On-demand on-line digital databases ?

F.3 Which provisions of the Directive will need further adjustment as the database market goes developing ?

The exceptions should be extended to use for scientific research and for education without any contract.

F.4 Which provisions of the Directive raises difficulties when applied or interpreted in combination with the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (available at http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm)?

Exclusive rights

Exceptions

Technological measures

Please explain your opinion:

The exceptions are too restrictive (please see my answer to 7A).

6. Competition issues

A. Free competition

Has the Directive, and in particular the creation of the *sui generis* right, had negative effects on free competition?

I disagree

I agree (please indicate reasons and give examples – if applicable, refer to your own market):

B. Abuse of a dominant position

B.1 Strengthening of the market leader's position

The Directive has strengthened the position of the market leader in my sector.

I disagree (please specify and refer to your market):

I agree (please specify and refer to your market):

If you agree, do you think a non-voluntary licence would have the effect of re-establishing the market leader into its earlier position?

B.2 Abuse

The Directive has caused or enabled the market leader in my sector to abuse its dominant position.

I disagree (please specify and refer to your market):

I agree (please specify and refer to your market):

If you agree, do you think a non-voluntary licence would have the effect of disabling the market leader to abuse its dominant position?

C. Non-voluntary licences

C.1 Principle

Do you think a non-voluntary licence should be introduced in respect of databases? If so, in what cases and under what conditions?

Where databases contain at least some scientific data that has been obtained at public expense, providers should be required to make databases available on reasonable terms for education and scientific research. As discussed, broader fair dealing exceptions should also apply.

C.2 Sector-related

If you agree with C.1, do you think such a non-voluntary licence should be limited to certain sectors ? Please indicate what sectors.

C.3 Use-related

If you agree with C.1, do you think such a non-voluntary licence should be limited to certain kinds of uses ? Please indicate what uses.

7. Adjustments

A. Expectations

What measures do you expect the European regulator to pass in relation to the legal protection of databases? Specify whether they concern either mandatory or optional provisions of the Directive, or else matters not covered by the Directive.

The wording in the penultimate paragraph of my letter of 31 May 2002, to Mr Stuart Booth of the UK Patent Office, would be a useful mandatory new provision. Suitable wording to strengthen the exceptions in Article 9 might be to add, after 9(c):

"Member States should stipulate that extraction and/or re-utilisation for the purposes of scientific research or illustration for teaching is allowed without the authorisation of its maker for any database which is made available to the public in whatever manner."

B. Stimulating local production

What regulatory measures will be most effective in order to stimulate local production of databases?

C. Allowing local use

What regulatory measures will be most effective in order to allow local use of databases?

THANK YOU FOR ANSWERING THIS QUESTIONNAIRE
