CPTech Comments on DG Internal Market and Services Working paper

First evaluation of Directive 96/9/EC on the legal protection of databases

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Michelle Childs, Head of European Affairs
Consumer Project on Technology
24 Highbury Crescent, London N5 1RX
e-mail michelle.childs at cptech.org

1. Introduction

1.1 The Consumer Project on Technology[1] (Cptech) welcomes the opportunity to comment on the working paper evaluating Directive 96/9/EC on the legal protection of databases (The Database Directive).

1.2 The legal frameworks that facilitate and shape the development and management of knowledge resources are crucial for all European citizens for both cultural and economic reasons. It is essential that EU policy both promotes innovation and creativity, and access to knowledge.

1.3 The information resources that are subject to the Database Directive restrictions are important. Businesses depend upon information to innovate, evaluate investments and market products and services. The public's ability to monitor the activities of businesses or governments requires information. Everyday discourses over politics, sports and cultural activities are enriched and empowered by access to information. Scholars, educators and scientists depend upon access to information. Information is the fuel of the knowledge economy.

1.4 The rules that control such access to information have a profound effect on both the creation of new knowledge goods and services, and the public's access to knowledge. Overbroad, excessive and unnecessary restrictions on the use, reuse and sharing of information harm Europe by undermining innovation, and increasing prices and reducing access to information.

1.5 Summary

1.6 We commend the Commission's approach to the evaluation of this Directive, which is based on seeking empirical evidence to test whether or not the original objectives behind the implementation of the Directive have been fulfilled. There

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[1] Cptech is an NGO, with offices in London, Geneva and Washington DC. Currently much of our work concerns intellectual property policy and practices, focusing on access to knowledge, but some of it concerns different approaches to the production of knowledge goods, including for example new business models that support creative individuals and communities. Full details can be found on our website www.cptech.org. We are also a member of the Transatlantic Consumer Dialogue (www.tacd.org) which regularly meets with US and EU officials to discuss IP policy.

are further improvements that could be made, but we think such an approach should be adopted in relation to all reviews of community law and in particular the upcoming review of the Copyright law aquis.

1.7 We are concerned however about the reliance on subjective data from the database industry (a questionnaire to the European database industry on their views of the projection) and apparent over sensitivity to the views of the beneficiaries of this special database protection.

1.8 The eventual outcome of this evaluation is a test of the Commission's, and Member States, commitment to the application of evidence based policymaking and better regulation principles. The report overemphasises the problems of changing regulation in the face of industry opposition. While a pragmatic statement in a working paper, it is a dangerous precedent to use to guide the direction of future policy making. Such an approach will undermine the Commissioners deregulation agenda, encourage protectionism, and foster the cynical view amongst EU citizens and civil society that deregulation is a one-way street. The Commission must 'stick to its guns' on this point and place the burden on those seeking the benefit of special protection to provide objective evidence of its benefits. The Commission must then test both the benefits and detriments of the Directive for all stakeholders, not just the right holders.

1.9 The results of the evaluation itself point to only one outcome: Option one, the repeal of the Directive. Of the three objectives stated for the creation of the Database Directive, legal certainty, increased investment in databases and access for users, none have been successfully achieved. Nor is it possible in our view, and that of legal experts, to successfully amend the Directive, and the *sui generis* right in particular, to overcome these problems. Even with withdrawal of the Directive, original databases will still be protected under the copyright laws of Member States.

Background

1.10 The purpose of the Commission's evaluation is to assess whether the original policy goals of the Database Directive have been achieved. These were: to remove existing differences in the legal protection of databases in different Member States, by harmonising rules that applied to copyright protection; safeguard investment of database makers and to ensure that the legitimate interests of users to access information complied in databases were secured. It sought to achieve these goals by creating a two tier legal protection for databases. One gave copyright protection to certain databases ('original' databases) if sufficient creativity was used to create the database. The second tier created a new form of protection for other databases that is based on projecting investment in compiling the data rather than originality. This protection is known as a '*sui generis'* database right'.

1.11 The Database Directive has been controversial from the start, particularly the *sui generis* regime, which can cover facts and data that are generally already in the public domain. It has been called 'one of the least balanced and most

potentially anti-competitive intellectual property rights ever created.'[2] As the Report points out ''The *sui generis'* right is a Community creation with no precedent in any international convention'[3]. The US, which is seen as the main competitor to Europe on the production of databases, has no such right. Opposition to similar legislation in the United States has been led by a broad coalition of groups, including libraries, consumers organisations, scientists, innovative database companies, and the US Chamber of Commerce. All of these groups argue that a database right similar to that recognized by the European Directive would make it more difficult to create new databases, and create unwanted restrictions on the dissemination of information to businesses, educators, scientists, other non-profit organizations and the public at large.

1.12 An attempt to adopt an International Treaty on the Protection of Databases was rejected at a 1996 diplomatic conference held by the World Intellectual Property Organisation (WIPO). Over the past 10 years, every effort to schedule a new diplomatic conference at WIPO has been rejected.

1.13 The Commission working paper ends by asking for comment on which of four policy options should be chosen: Option One: repealing the whole Directive, Option Two: withdrawing the '*sui generis* ' right, Option Three: amending the '*sui generis'* provisions, Option Four: maintaining the status quo i.e. do nothing and leave the Directive as it is.

Comments on the Approach to Evaluation

1.14 We commend the Commission's approach to the evaluation of this Directive, which is based on seeking empirical evidence to test whether or not the original objectives behind the implementation of the Directive have been fulfilled. It is also important that it now has sought comments on the four policy options, there needs to be a wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments.[4] Such an approach should be adopted in relation to all reviews of community law and in particular the upcoming review of the Copyright law aquis.

1.15 The evaluation could be further improved, by analysing the evidence collected in this comment period using the revised list of impacts contained in the Commission Staff Working Paper : Impact Assessment: Next Steps.[5] The Working paper at present generally defines stakeholders narrowly, as the beneficiaries of the protection, rather than the larger group including users. The Impact list mandates that the analysis review the broader impacts relevant to this area. For example, the review of the impact on innovation and research, impact on specific regions, sectors and workers (e.g. does it have specific negative consequences for particular groups of workers?), impact on consumer rights, impact on access to social protection, health and educational goods and

[2] J Reichman and P Samuelson 'Intellectual Property Rights in Data?' 50 Vanderbilt L Rev 51, 81.
[3] section 1.1 Page 4
[4] http://www.adelphicharter.org/
[5] SEC (2004)1377

services (Does the option have an impact on services in terms of their quality and access to them?).

1.16 We are concerned about the evaluation's reliance, on subjective data from the database industry (a questionnaire to the European database industry on their views of the projection), which appears to be given equal weight in the analysis with the empirical study, and the apparent over sensitivity to the views of the beneficiaries of this special database protection.

1.17 The outcome of this evaluation is a test of the Commission's, and Member States, commitment to the application of evidence based policymaking and better regulation principles. The purpose of objective evaluation and impact assessments is to help avoid the perception of bias and to seek to achieve the best policy outcomes. Objective analysis has shown that the policy objectives have not been met: production of databases has not been stimulated, in fact the reverse is true: the ratio of European to US databases has fallen from nearly 1:2 in 1996 to 1:3 in 2004. Key users such as academics and librarians have provided evidence of the Directive's effect on restricting access to knowledge.

1.18 The report overemphasises the problems of changing regulation in the face of industry opposition. Repealing the *sui generis* right would probably lead to 'considerable resistance by the EU database industry.' While a pragmatic statement in a working paper, it is a dangerous precedent to use to guide the direction of future policy making. Such an approach will undermine the Commissioners deregulation agenda, encourage protectionism, and foster the cynical view amongst EU citizens and civil society that deregulation is a one-way street. While deregulation has its place, it could appear that it is only rolled back in areas to benefit business in the face of civil society opposition, and retained to protect industry special interests in the face of civil society opposition. The Commission must 'stick to its guns ' on this point and place the burden on those seeking the benefit of special protection to provide objective evidence of its benefits. The Commission must test both the benefits and detriments of the Directive for all stakeholders, not just the right holders.

Comments on Policy options

1.19 The results of the evaluation itself point to only one outcome: Option one, the repeal of the Directive. Of the three objectives stated for the creation of the Database Directive, legal certainty, increased investment in databases and access for users, none has been successfully achieved.

1.20 In relation to legal certainty the report states that: 'National case law has highlighted the textual ambiguities of the sui generis right…Battles have erupted over the precise meaning of 'substantial investment' as contained in Article 7 of the Directive'…This has caused considerable legal uncertainty both at EU and national level.' Nor will this uncertainty be mitigated by the rulings of the ECJ, which limit the ambit but do not resolve the problems associated with the sui generis right. In addition, as legal experts have pointed out, the database industry will develop different strategies to circumvent these

decisions[6]. Repeal will still provide for copyright protection within Member States for original databases, and the internal market would not be affected, as the regimes have never been fully harmonised.

1.21 In relation to the stimulation of the production of databases in Europe, the report is damning, and even states that it 'has had no proven impact on the production of databases'. Indeed data has shown that EU database production has fallen back in relation to the US, which does not have such protection. The database industry disputes this finding but does not provide alternative empirical evidence to back up this claim. The Association of Directory and Database Publishers argued that the decline in database 'entries' is due to a shift towards the provision of online information and a move away from CD- ROMs and other such media. This point is in fact an argument for the repeal of the Directive, not its retention.

1.22 The Database Directive when originally conceived was based on the idea of a database as a fixed set of data, sold as a tangible item in products like CD – ROMs. The shift to on-line databases had significant impacts on laws that sought to protect collections of information, as Andrew Oram, Editor of O'Reilly media recently argued:[7]

- Copying becomes more difficult (rendering the laws even less relevant)
- In regard to determining how much copying is too much, the new structure of information makes it hard to determine how much of a total collection was copied.
- The frequent updating of information renders copies less valuable, reducing the incentive for someone to profit by making extensive copies.
- Expiration times, which were designed to protect the public by placing deadlines on the restrictions imposed by database manufacturers, become moot because the manufacturers keep updating the data. Database owners are thus awarded a perpetual protection (a further grant of 15 years) every time the database is amended in a substantial way.

1.23 These technological and social changes call into question the value and relevance of the Database Directive, they do not support it.

1.24 In contrast users from the academic and scientific community have provided evidence that the exceptions to the *sui generis right* are too restrictive with regard to access to and use of data and information for scientific and educational purposes. Library representatives have called for broader exceptions and expressed fear about the monopolisation of information.

1.25 Option Four- Maintaining the status quo is also a non-starter. The Report offers several reasons for this option, none of which are convincing. First, database companies want to keep the Directive. Though the report notes that their "endorsement is somewhat at odds with the continued success of US publishing

[6] 'Football fixtures, horse races and spin-offs: the ECJ domesticates the database right' M.J. Davison and P.B Hugenholtz, EIPR 2005 v27 n3 March.

[7] 'Submission to the U.S WIPO delegation concerning webcast rights'. Andrew Oram, Jan 9, 2006. Available at: http://www.cptech.org/ip/wipo/bt/oram01092006.pdf

and database production that thrives without... [such] protection" but nevertheless appears to be "a political reality".) Second, repealing the Directive would reopen the debate on what level of protection is needed. Third, change may be costly[8]. The arguments in relation to industry opposition and certainty have been dealt with above.

1.26 It is worth reinforcing though, the absurdity of applying such reasoning to decisions over regulation, which was highlighted in a recent article by Professor James Boyle:

'Imagine applying these arguments to a drug trial. The patients in the control group have done better than those given the drug, and there is evidence that the drug might be harmful. But the drug companies like their profits, and want to keep the drug on the market. Though "somewhat at odds" with the evidence, this is a "political reality." Getting rid of the drug would reopen the debate on the search for a cure. Change is costly – true. But what is the purpose of a review, if the status quo is always to be preferred?'[9]

Time to Consider an EU Directive on Access to Knowledge

1.27 The EU Directive on the legal protection of databases was the wrong paradigm for innovation and access to knowledge. The EU needs not only to evaluate the impact of the directive on the creation, dissemination and use of knowledge, but to evaluate the policy assumptions that have lead us to a wrong-headed and harmful result. Clearly key EU policy makers have not fully appreciated the relationship between access to knowledge and the creation of new knowledge resources. Nor is there a clear understanding of the benefits to the broad dissemination and sharing of knowledge.

1.28 Over the past 10 to 15 years, the growth of the Internet and the World Wide Web, the creation of a plethora of public domain databases of scientific, economic and cultural information, and the many new innovations in collaborative and innovative mechanisms to create, manage and share knowledge resources, have shed light on the benefits of access to knowledge, as a paradigm for development, innovation, empowerment and growth.

1.29 WIPO is now debating if there is a need for a new global treaty on access to knowledge, a topic that has been the subject of an extensive multistakeholder consultation. CPTech and others are now calling for a new general agreement on the provision of public goods (GAPPG) within the World Trade Organization (WTO), modelled in some ways after the WTO general agreement on trade in services (GATS). These new ideas point to a more modern paradigm for the global governance of the knowledge ecology -- influenced by recent evidence that access, dissemination and sharing of knowledge resources have very important positive contributions to the economy and the public.

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[8] James Boyle 'Two database cheers for the EU':The Financial Times 02/01/06. at http://news.ft.com/cms/s/99610a50-7bb2-11da-ab8e-0000779e2340.html

[9] James Boyle : as above

1.30 CPTech recommends the EU hold a public consultation to consider the possibility or nature of an EU directive on access to knowledge.

Further Information

Cptech would be happy to provide additional information. Please contact in the first instance Michelle Childs, Head of European Affairs, Consumer Project on Technology, 24 Highbury Crescent, London N5 1RX, e-mail michelle.childs at cptech.org