

DATABASE PROTECTION IN EUROPE – RECENT DEVELOPMENTS AND A MODEST PROPOSAL

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ABSTRACT

The controversial provisions in the European Union's Database Directive have created considerable uncertainty for commercial producers of databases, while recent case law has emasculated much of the Directive. However, researchers and academics must still work in a restrictive copyright environment within Europe. This paper reviews the Directive in the light of two recent UK reports that suggest a more liberal copyright regime is both culturally and economically desirable. The author suggests that unfair competition problems should be addressed by new unfair competition laws for Ireland and the UK and not through revision of the Directive.

Keywords: Copyright, Database protection, Europe, Research, Innovation, Unfair competition

1 INTRODUCTION

The 1996 Database Directive¹ was initially sold to Europeans as an innovative measure, one that would stimulate the European database industry, an industry that was seen even by the European Commission as lagging behind other competitors, particularly the USA². The twin track approach to protection, providing a “harmonised” copyright for the makers of an original database, while at the same time providing a separate sui generis (of its own kind) right in respect of the unauthorised extraction and/or reutilisation of the contents of the database, provided a measure of cohesion for the European information industry. However, it did not take long for flaws in the Directive to emerge³. These include:

- vague and at times confusing drafting and language⁴;
- confusion about where the boundary between the two rights lies⁵;
- uncertainty over the duration of the sui generis right⁶;

¹ Adopted on 11 March 1996; 96/9/EC; OJL77, 27.3.1996. For an early critique see Hicks, Copyright and Computer Databases [1993] EIPR 113.

² See the Explanatory Memorandum to the first draft of the proposed directive – COM (92) 24 final – SYN393 Brussels, 13 May 1992, paragraphs 1.2 and 2.1.1.

³ See generally the discussion in Davison, Mark J., The Legal Protection of Databases (Cambridge) 2003 Ch. 3 (hereafter Davison). For a U.S. perspective, see Reichman, J.H. and Uhler, P.F., Database Protection at the Crossroads [1999], 14 Berkeley Technology Law Journal, available at <http://www.law.berkeley.edu/journals/btlj/articles/vol14/Reichman/html/reader.html>.

⁴ E.g., the (over)broad definition of database (Davison, p. 71) and the meaning of “obtaining, verification and presentation” in article 7, problems not entirely dispelled by the William Hill/Fixtures Marketing judgements: see Davison and Hugenholtz, Football Fixtures, horse races and spin-offs: the E.C.J. domesticates the database right [2005] EIPR 113.

⁵ Davison at p.81; Kay, The Proposed EU Directive for the Legal Protection of Databases [1995] EIPR 583.

⁶ Smith, Legal Protection of Factual Compilations and Databases in England – how will the Database Directive change the law in this area? [1997] IPQ450; Chalton, The Copyright and Rights in Databases Regulations 1997 [1998] EIPR 178.

- the definition of ‘substantial investment’ for the sui generis right⁷;
- concern over the narrowness of the exceptions to the sui generis right⁸;
- the anti-innovative, anti-intellectual and anti-competitive dimensions of the Directive⁹; and
- the fact that a harmonisation measure gave EU member states too much choice on policy issues, resulting in some senses in less harmonisation after member states had completed the transposition process¹⁰.

2 IMPLEMENTATION OF THE E.U. DATABASE DIRECTIVE IN NATIONAL LAW

As a harmonisation measure the Directive had to come up with language that could be acceptable to 15 member States with different legal traditions. However, as Davison has demonstrated, the Directive that was the subject of the initial proposal, and the finished product, were very different creatures in a number of respects¹¹. The copyright in the compilation itself was subjected to a higher standard of originality, one that was much more difficult to reconcile with the ‘sweat of the brow’ test found in most common law jurisdictions.

In relation to copyright and the originality test, the two common law jurisdictions, Ireland and the UK, had very high levels of protection for compilations because the test for originality was easy to meet. As long as a collection was not copied from elsewhere, precious little innovation was necessary. Street directories, television listings, alpha-numerical phone books were all protected;

“It has long been held in the field of literary copyright that, in order to secure protection, it is not necessary that there should be any literary merit at all. If you work hard enough, walking down the streets taking down the names of people who live at houses and make a street directory as a result of that labour, this has been held to be an exercise sufficient to justify you in making a claim to copyright in the work which you ultimately produce.”

Whitford J. in J.C. Gleeson v H.R. Denne¹² (1975).

UK and Irish law reflected a unitary system of protection for compilations. If X produced a compilation, the compilation was protected by copyright. That protection was “thin”, however. Fact-based collections were difficult to establish as original and even where there was the exercise of skill or judgement (e.g., William Hazlitt’s best 13 essays) another literary critic could produce a similar work or result without infringing copyright by slight re-arrangements, additions or deletions (Cambridge U.P. Case¹³ (1928)). Also, the contents

⁷ Contrast Davison at 83-84 with the outcomes of the ECJ decisions in William Hill/Fixtures Marketing [2005] ECDR 1, 2, 3 and 4.

⁸ Davison at p. 91-92 makes the point that for the copyright provisions the exceptions are narrow because of the higher originality standard, reflecting a Civil Law rather than Common Law perspective and these ‘flaws’ have been carried over in an even more restrictive way for the sui generis right.

⁹ See generally Davison, Ch. 7 and Reichman and Samuelson Intellectual Property Rights in Data? (1997) 50 Vanderbilt Law Review 51.

¹⁰ See Gaster, The EC Sui Generis right revisited after 2 Years [2000] Comms. Law 87; Davison, Ch. 4 sets out the transposition pattern within EU states. On the UK see also Chalton, Implementation in the UK of EC Directive 96/9 on the Legal Protection of Databases [2000] Comms. Law 79.

¹¹ Not least the movement away from an unfair competition model underpinning the sui generis right to a quasi-copyright model in the final version of the Directive, a shift that proved disastrous when linked exceptions to the sui generis right remained and the licensing provision was dropped.

¹² [1975] RPC 471 at 483; see Laddie J. in Autospin (Oil Seals) Ltd. v. Beehive Spinning [1995] RPC 683 at 968.

¹³ Cambridge University Press v. University Tutorial Press (1928) 45 RPC 335. Plaintiff’s publication of 13 of Hazlitt’s essays not infringed by defendant’s examination primer of 20 Hazlitt essays (including the 13 selected

of the collection could be protected from copying by reference to a substantial copying test. Again, cases indicated that protection would be available, but that facts could not be protected *per se*¹⁴. Certain defences, such as research and private study, criticism, or review would also prove to be useful to someone building upon earlier collections¹⁵.

Certainly, there were a few cases where database creation was inhibited in English law, the rights being invoked by commercial publishers against pirates who had borrowed or plagiarised the contents of commercial collections¹⁶. But there were also instances in which fact-based works (e.g., maps) were facilitated¹⁷. The Directive changed all that for the British and Irish. Those countries surrendered their low threshold originality test and broader exemptions from liability, especially for content extraction and reutilisation, obtaining in return:

- a higher threshold originality test for the compilation (author's own intellectual creation), a right that only protected a compilation *qua* compilation; and
- an uncertain sui generis right dependent upon an equally uncertain substantial investment test with limited defences confined to the lawful use and extraction of contents only. Re-use was prohibited, making allegations that the law was over-protective difficult to refute.

Other EU jurisdictions did not have as much to accommodate when transposing the Directive: the Scandinavians¹⁸ thought the sui generis right was just an extension in the existing Catalogue Rule¹⁹; the originality test was assumed to be only a restatement of the (high) 'personality of the author' test found in many Continental codes²⁰; earlier decisions²¹ against protecting T.V. listings, phone books could be accommodated, especially in the Netherlands, via "spin-off" theory etc.; and many continental countries have narrower defences and exemptions than the UK and Ireland and most have levies for use, whereas Ireland and the UK are opposed to levies²².

National courts in the EU generally interpreted the copyright provisions narrowly. National courts also interpreted the sui generis right narrowly, either by saying the collection in question was purely factual or had no significant separate existence, being merely a 'spin-off' from a core business (e.g., T.V. listings, phone books). The suspicion exists that many national courts did not consider whether the author's own intellectual

in plaintiff's compilation) when re-arranged and supplemented by defendant's notes on Hazlitt, of a kind inferior to plaintiff's own notes on the author.

¹⁴ Cramp v. Smythson [1944] AC 329; Warwick Film Productions Ltd. v. Eisinger [1969] 1 Ch. 508.

¹⁵ E.g., "incidental inclusion" Football Association Premier League v. Panini [2003] ECDR 215.

¹⁶ E.g., lawyers' directories; Waterlow Publishers v. Rose [1995] FSR 207.

¹⁷ Geographia Ltd v. Penguin Books Ltd [1985] FSR 208.

¹⁸ E.g., see the Swedish Transposition, discussed by Davison at 141. The Danish transposition has been found to be improper under case-law from February 2006.

¹⁹ Karnell, G., The Nordic Catalogue Rule, in Dommering, E.J. and Hugenholtz, P.B., Protecting Works of Fact: Copyright, Freedom of Expression as Information, Deventes, Kluwer 1991. This rule prohibits slavish reproduction in whole or in part of catalogues, tables and similar compilations in which a large number of details and particulars have been summarised or digested. Protection lasts for 10 years following publication. Adjustment or manipulation of content can side-step liability.

²⁰ Although in this context the tests are often uncertain in application: see Davison at 113-115 for France and the decision in Le Serveur Administratif SA v. Erhman [2005] ECDR 151 (Cour De Cassation). For Germany see Davison at 118-122 and Unauthorised Reproduction of Telephone Directories on CD-ROM [2002] ECDR3 (Bundesgerichtshof). In the Netherlands no change to the originality standard was made.

²¹ Again, decisions were inconsistent even in individual States. Contrast Dutch case-law in particular: Davison, p. 133-137. See also Hugenholtz, Programme Schedules, Event Data and Telephone Subscriber Listings under the Database Directive – The "Spin-off" Doctrine in the Netherlands and elsewhere in Europe" Eleventh Annual Conference on International IP Law and Policy, Fordham University, 14-25 (2003), available at www.ivir.nl/publications.

²² For a very recent restatement in the UK of opposition to levies see Gowers, Review of Intellectual Property [2006] (hereafter Gowers), available at www.hm.treasury.gov.uk/independent_reviews/gowers.

creation test in the Directive was lower than the national originality standard, e.g., for literary works, but because both the compilation copyright and sui generis right were seen as being intellectual property (I.P.) rights (rather than as an I.P. right and an unfair competition law respectively), the Directive was doomed at the outset.

3 THE EUROPEAN COURT OF JUSTICE'S NARROW INTERPRETATION OF THE SUI GENERIS RIGHT

In a set of four cases²³, the European Court of Justice (ECJ) ruled on the meaning of “substantial investment”, for the purposes of a database holder being able to invoke the sui generis right against persons who had used database contents without permission. The Court drew a distinction between the work and investment that goes into the capture and arrangement of data (which is not protected), and the work and investment needed to obtain, verify and present the data (which is protected). Thus, “back office” expenditure and work is problematical, but “front office” or end-user related investment is protectable. This distinction greatly reduced the scope of the sui generis right. It is certainly not representative of UK and Irish pre-Directive case-law²⁴ and it is also not a meaningful distinction in US case-law under Feist²⁵.

The consequences of the ECJ's William Hill decision for the UK and Ireland are extreme, at least for database producers. Neither of the binary rights outlined in the Directive will be available in many instances. Given that neither the UK nor the Irish have a coherent unfair competition law, commercial predators are able to utilise low-brow, investment-rich databases. As the compilation copyright may not be available at all, because the database may be a low-authorship collection of materials that do not constitute copyright able material, the author's own intellectual creation test may be set too high. Even if the test is not set too high, substantial taking from a database may be difficult to determine under English law²⁶, should copyright compilation infringement remain open to a plaintiff as some commentators, including Davison, appear to think²⁷. After William Hill the possible use of the sui generis right appears to be highly unlikely if the investment and effort goes into creation rather than presentation of the works or materials²⁸. The prospects of using passing off are not bright according to the relevant case-law²⁹.

For the scientific and academic communities, William Hill represents a good decision insofar as it suggests that the sui generis right is now virtually dead in the water. Perhaps this is not a balanced view, however. Some collections are commercially valuable and their legal I.P. protection can be justified in many instances. The real issue is how to reconfigure national laws in such a way as to provide a more balanced approach to the rights of ownership, both in terms of private entitlement to compilations of data and the broad public interest.

²³ British Horseracing Board Ltd v. William Hill Organisation Ltd [2005] ECDR 1; Fixtures Marketing Ltd v. Oy Veikkaus AB [2005] ECDR 2; Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou [2005] ECDR 3; Fixtures Marketing Ltd v. Svenska Spel AB [2005] ECDR 4.

²⁴ Autospin (Oil Seals) Ltd v. Beehive Spinning [1995] RPC 683; Radio Telefis Eireann v. Magill TV Guide [1990] ILRM 534. This approach is not peculiar to English law or Irish law. In Australia, see A-One Accessory Imports Pty Ltd v. Off Road Imports Pty (1996) 34 IPR 306 and, in particular, Autocaps (Aust) Pty v. Pro-Kit Pty Ltd (1999) 46 IPR 339 at 352-4, discussing two contrasting English cases on this point.

²⁵ Feist Publications Inc. v. Rural Telephone Service Co. 499 US 340 (1991).

²⁶ See the analogous situation relating to the publisher's copyright in a published edition in Newspaper Licensing Agency v. Marks and Spencers plc [2001] 3 All ER 577.

²⁷ E.g., Chalton, The Effect of the EC Database Directive [1997] EIPR 278 at 279.

²⁸ Contrast Autospin (Oil Seals) Ltd v. Beehive Spinning [1995] RPC 683 at p.698 where Laddie J. stressed that in relation to compilations the work in presenting the outcome of research is not protected under the traditional English approach, but rather it is “the author's skill and effort expended in gathering together the information which [the compilation] contains” that justifies copyright protection.

²⁹ Cambridge University Press v. University Tutorial Press (1928) 45 RPC 355; on individual books, however, see also Buddulph v. De Vries (1998) 43 IPR 199 which contrasts with the Cambridge case. On newspapers, see also 2703203 Manitoba Inc. v. Parks (2006) 47 CPR (4th) 276.

It may be that the way forward is to opt for a more pragmatic, case-by-case analysis based upon unfair competition principles rather than by the construction of a new neighbouring exclusive property right. In this context it should be possible to draw distinctions between commercial and non-commercial uses, and research and transformative uses of databases, as well as injecting flexible mechanisms that reflect national concerns and local cultural traditions. Indeed, one suspects that several European jurisdictions have interpreted both the database copyright and the sui generis right strictly simply because domestic competition law and consumer protection law often provide more intelligible misuse standards than those afforded under the Database Directive.

The paradox now is that US database protection may be more extensive than it is in Europe. Compare, for instance, the Dutch case, NVM v ZAH³⁰ (2006), with the US case, Montgomery County of Realtors v Realty Photo Master Corp.³¹ (1995).

The facts of these cases are similar. The plaintiff produced an on-line real property sales website carrying descriptions of the property and photographs. The defendants reproduced this material on their own sites, appropriating the investment made by the plaintiff. The US Court, applying *Feist*, found the contents and the database were protected as literary and artistic works *and* as a compilation. On the question whether individual items describing the location of the property and describing the property itself could be protected, the US Court concluded that the descriptive material was “marketing puffery that cannot be described as factual”³² – in other words, literary works in themselves – while the Dutch Court simply held that the descriptions were purely factual and not protected.

The Dutch Court found insufficient literary or artistic merit in the descriptors and photographs (for copyright purposes) and that the investment made was insufficient to attract the sui generis database right. The US Court specifically said that the earlier *Feist* decision did not deny copyright protection to the plaintiff.

*Feist does not help [defendant’s argument]. RPM argues that MCAR’s database, like the telephone book in Feist, is merely a collection of simple facts entitled to no copyright protection. Unlike a telephone directory however, the arrangement of the information in MCAR’s database, “possesses at least some minimal degree of creativity.”*³³

4 THE EUROPEAN COMMISSION’S REVIEW OF THE IMPLEMENTATION OF THE E.U. DATABASE DIRECTIVE

In late 2005, the European Commission reviewed the Database Directive³⁴ and outlined for options for the European Union:

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|-----------------|---|
| Option 1 | Repeal the Directive and allow all previous forms of protection to be reintroduced. |
| Option 2 | Withdraw the <u>sui generis</u> right and continue with the unified copyright standard. |
| Option 3 | Amend the <u>sui generis</u> right to bring the cost of creating the data to come within the substantial investment standard. |
| Option 4 | Preserve the status-quo and do nothing. |

³⁰ Arnhem City Court, Civil Division, decision of March 16, 2006. See Clark, Sui generis database protection: a new start for the UK and Ireland? [2007] *JIPLP* 86.

³¹ 878 F. Supp 804 (1995) (US District Court for the District of Maryland).

³² *Ibid.* at p. 810.

³³ *Ibid.* On *Feist* generally see Ginsberg, No “Sweat”? Copyright and Protection of Works of Information 92, *Colum. L.R.* 338 (1992).

³⁴ DG Internal Market and Services Working Paper, First Evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 12 December 2005.

The European Commission's on-line survey of European database producers came up with the figure that 80% of respondents felt "protected" or "well protected" by the sui generis right, while in the separate survey of those database producers 36% felt the ECJ rulings had "weakened" or "eliminated" the sui generis right.

Following publication of the first evaluation Report³⁵, the European Commission invited responses from interested parties. Fifty-five responses were obtained, the majority of which were from database producers. Options 3 and 4 were the most popular choices, hardly surprising given the nature of both the exercise and the identity of the contributors. Interestingly enough, a number of US voices were raised against the sui generis right and its continued existence.

Jonathan Band and others (Band, et al.) commented³⁶ that "the sui generis right should be withdrawn". They argued that the European Commission itself acknowledges that:

- (i) the right has not contributed to improved production figures of databases³⁷;
- (ii) its scope is difficult to determine and created difficulties of interpretation³⁸; and
- (iii) it has created confusion among certain users, in particular the academic and scientific communities.

Band, et al. see the Directive as an illustration of the dangers of over-protection and that a shrinking public domain can stifle innovation. While the Directive recognised that I.P. rights in fact are not the traditional bailiwick of copyright laws, the Directive may come precariously close to protecting basic information, as the European Commission 2005 Report itself acknowledges. Band, et al. see the decline in the European database industry as being a result of this (over) protection. They also argue that the repeal of the sui generis right would stimulate the expansion of the publishing sector because producers who 'buy in' content may still invoke the sui generis right and lock up information from competitors.

The contribution of Band, et al. is also directed at undermining demands from publishers in the United States for a similar sui generis right. The publishers in the United States have argued that the reciprocity provisions mean that U.S. databases in Europe are not protected because of the absence of a U.S. counterpart law.

Other sectors have taken a different perspective, however. For example, the Data Publishers Association (DPA) rejects the Gale statistics, which track the relative decline of the European database industry. The DPA suggests both that their own survey shows that the European database industry is expanding and that the European Commission needs to undertake more statistical work on the economics of the European database market. The DPA thus argues in favour of retaining of the legal status quo³⁹.

All European Academies (ALLEA) took the opportunity to reiterate their position taken earlier on the Directive. The copyright provisions are regarded as operating satisfactorily by ALLEA because of the exclusion of mere facts or data from the provisions of copyright and because of the scope of the (copyright) exceptions. However, the sui generis right is criticised because the exceptions:

- are more tightly drawn than in the case of copyright law;
- apply to teaching and research vis-à-vis extraction only and not to re-use by teachers or researchers;

³⁵ www.ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report.

³⁶ www.forum.europa.eu.int/Public/irc/markt/markt_Consultations/library (signatories included organisations such as the American Association of Law Libraries, Netcoalition and 20 distinguished law professors).

³⁷ The European Commission itself acknowledged this by citing figures given in the Gale Directory of Databases – Evaluation report para. 1.3 and 1.4.

³⁸ Jonathan Band's views on the state of the debate in the USA can be gleaned from writings such as "Response to the Coalition against Database Privacy Memorandum" (2004), 21 *The Computer and Internet Lawyer* 7 and "The Database Debate in the 108 Congress: Déjà Vu All Over Again" (2005), 22 *The Computer and Internet Lawyer* 1.

³⁹ www.forum.europa.eu.int/Public/irc/markt/markt_Consultations/library.

- are unclear in scope and meaning; and
- are incapable of applying to any commercial outputs from research which is unacceptable and impractical: the authors argue that research outputs are difficult to quantify and difficult to disentangle from research activities per se.

ALLEA also indicated that a preference for Option 1 or 2 was favoured, but stated that if the sui generis right were to survive, ALLEA “would press for a modification of the Exceptions to make them at least as extensive as those traditionally enjoyed under copyright”⁴⁰.

The British Academy Review Group on Copyright⁴¹ expressed a number of concerns. Their report stated that “the Database Directive is at once vague and wide-ranging and fails to contain the exemptions for private study and research and for criticism and review, both in respect of database copyright and the sui generis database right. These exemptions are essential to the balance of rights and interests inherent in copyright and associated legislation. As an increasing proportion of material takes a digital form, the scope of even the current exemptions may be seriously undermined”.

The Review Group in particular highlighted the narrow defence of non-commercial teaching or research by a lawful user, a defence that only applies to acts of extraction. No defence in relation to reutilisation exists and no “criticism or review” defence is available, even to a lawful user. The Review Group also pointed to the oppressive commercial clout that compilers of databases may have when producing databases from single sources or through considerable financial “muscle” that can lock out competition and create “what is virtually a natural monopoly”. In recommendation 9, the Review Group indicated that these trends needed to be monitored by public authorities and academic communities so as to ensure that the assertion of database rights and the changes made in the law to access to database contents do not become a growing impediment to scholarship.

On the critical question of the research and private study exceptions the Review Group, in recommendation 3, made a number of very pertinent observations that could, it is suggested, form the basis of either judicially adopted benchmarks or statutory presumptions:

- Under its wording, “research” is to be treated as distinct from “private study”. “Research” for these purposes should not only encompass the initial stages of an academic project when material is being collected, but also subsequent stages, which involve the analysis and publications of the results.
- “Research” in this context should be regarded as “non-commercial” in any circumstances where the taking of copyright material is fair and the presentation of the results will be without charge to the recipients, or will be at a price that can only be expected to cover the reasonable costs of production and distribution, including the reasonable profits of a commercial publisher.
- Research that is financed by a research council or charitable foundation is presumptively non-commercial.
- Charges that are not covered by the exemptions, because the research to which they relate is commercial, should be reasonable and competition authorities and the copyright tribunal should be able to restrain abuse.

One could go further by recommending that the propositions found in recommendation 3 should be adopted as statutory presumptions, or at the very least, statutory definitions that could be inserted into copyright law generally, requiring any argument seeking to displace the presumption or statutory definition to be made in copyright litigation by a person or legal entity that holds a contrary view. “Soft law” provisions of this kind

⁴⁰ Ibid.

⁴¹ Copyright and Research in the Humanities and Social Sciences (September 2006). (A working group of 8 members, which included Professor W.R. Cornish and Professor H. MacQueen), available at www.britac.ac.uk/reports/copyright/contents.html, as the Kay Report, named after the Chairperson, Professor John Kay.

would not in any way confront the existing Community *acquis*, that is, the rules and principles that can be built up in European legislation, because such expressions are not fully defined in the Copyright Directive.⁴²

5 THE GOWERS REVIEW OF INTELLECTUAL PROPERTY

Most recently, the UK Chancellor of the Exchequer, Gordon Brown – widely regarded as Tony Blair’s likely successor as Prime Minister in 2007 – commissioned a report on the state of the intellectual property system within the United Kingdom. A primary task was an evaluation of those laws to determine whether they deliver incentives, while minimising inefficiency⁴³. The Review, produced by Andrew Gowers and published on December 6, 2006 mentions database protection only in passing⁴⁴, but, significantly, the review remarks that “new technologies such as...databases require IP protection but do not fit easily into existing categories”⁴⁵. Although it is not clear that Gowers is actually criticising existing database protection legislation, there are other parts of the Review that suggest that greater flexibility may be injected into UK intellectual property law in general.

A number of recommendations, therefore, are very pertinent to the database debate. Gowers comments that fair dealing and other defences are much narrower than the US fair use defence and that “this is stunting new creators from producing work and generating new value”⁴⁶. This general observation finds specific expression in the form of recommendation 11, which suggests that the Information Society Directive should be amended to allow for “creative, transformative or derivative works” to be possible without infringing copyright, as long as the work in question can subsist within the parameters of the Berne Convention three-step test in article 9.⁴⁷ Gowers also seeks a broadening of the research exemptions in existing UK copyright law so as to “help research institutes to further knowledge by using ideas protected by others”⁴⁸, but Gowers is rather weak and unclear about how to achieve this⁴⁹, in contrast with the British Academy Report discussed above.

Gowers is rather more helpful in relation to anti-competitive practices, opining that competition authorities must have the ability to curb any abuse or monopoly power stemming from IP rights⁵⁰. However, the Review again is not very specific on how such an outcome is to be achieved, pointing out that the Unfair Commercial Practices Directive⁵¹ is not likely to be of much use in a business-to-business transaction, or one in which a consumer is not involved.

6 CONCLUSION

The ambitious programme of copyright harmonisation that started in 1988 may have effectively run its course. One does not detect any real enthusiasm within the European Commission for any new legislative process that would be as controversial or as acrimonious as that which surrounded the Information Society Directive, to name just one example. Indeed, the work in hand, on collecting societies and the enhancement of criminal

⁴² See the Information Society Directive, Directive 2001/29/EC, recitals 34 and 42, fleshing out article 5.3 (a).

⁴³ Gowers Revision of Intellectual Property, available at (hereafter Gowers). On this specific point see Gowers, para. E. 5.

⁴⁴ The one point of substance being on observation that the value of the database right is “widely disputed”, at para. 2.36.

⁴⁵ Gowers, paras. 2.16 and 2.30.

⁴⁶ Gowers, para. 4.68.

⁴⁷ This is a principle of International Treaty Law that requires exceptions to copyright to be well defined, limited to special cases and not prejudicial to the economic interests of the rightsowner.

⁴⁸ Gowers, para. E. 9.

⁴⁹ The broadening of section 29 of the Copyright Patents and Designs Act 1988 seems to be the primary focus – see para. 4.77.

⁵⁰ Gowers, para. 5.39.

⁵¹ Gowers, paras. 5.86 – 5.87; the reference is to Directive 2005/29/EC on Unfair Commercial Practices OJL 167/10 of 11.6.2005.

sanctions following upon copyright piracy, suggest that the Internal Market DG favours a rather quieter life than hitherto. For this and other reasons it is this writer's belief that the 'do nothing' option is the most likely outcome of the first evaluation process.

In terms of substantive law reform there may be some tinkering with the existing texts but one suspects that the mood in Europe has changed and that nation States may be about to "repossess" intellectual property as a matter of domestic economic and cultural policy. Nowhere is this more evident than in the United Kingdom. The two recent reports discussed in the preceding two sections suggest that the focus may well shift dramatically to national legislation, at least in relation to areas and issues that are not 'core' elements in the acquis communautaire. In other words, many of the problems raised by the Database Directive may be addressed through rather elliptical national initiatives that can step around European Community legislation.

While the Directive has been largely sidelined by the ECJ and hostile interpretation in some national courts, it is unlikely to be repealed or significantly altered. While the Directive remains in force, however, greater flexibility and clarity is required. The British Academy recommendations, if given statutory force as outlined above, may be of great assistance. Gowers also suggests a broadening of defences and exceptions, as well as a rather optimistic argument for amending Directive 2001/29/EC for transformative use of existing works.

But perhaps the way forward, at least for both Ireland and the United Kingdom, is the adoption of some form of unfair competition law of the kind found in Germany⁵². As such a law is neither a copyright nor a neighbouring right, the European legislator could not complain about such legislative action by Ireland or the United Kingdom. The question of how to address parasitic commercial practices would be solved through an unfair competition law and not a quasi-copyright law. If such a law were confined to commercial activities by (in European Community jargon) 'undertakings' this would exclude much of the academic community (but not necessarily academic institutions) and many of the fears raised by the Database Directive could be ameliorated. Nevertheless, the real battle of course has yet to be fought: how to deal with contractual practices such as releasing information only in expensive publications and the use of digital locks that exclude the research community altogether?

⁵² On the interpretation of the old German Unfair Competition law, contrast the reasoning in Unauthorised Reproduction of Telephone Directories on CD-ROM [2002] ECDR 22, with that in Paperboy [2005] ECDR 7. This law, based upon a standard of good moral behaviour, has been replaced by legislation that is based upon counteracting unfair competition. This law, Gesetz gegen den Unlauteren Wettbewerb (UWG), contains a general clause and some later provisions on dishonest replication of another's goods and services (article 4(9)), and systematic obstruction of competitions (article 4 (10)). The new law is regarded as raising the status of the consumer interest to rival that of undertakings and other market actors. The UWG came into force on July 8, 2004. In the USA similar approaches have been advocated from time to time. The unfair competition model for the legal protection of databases in commerce was recommended in a 1999 National Research Council Study, A Question of Balance: Private Rights and the Public Interest in Scientific Databases, which examined the two main U.S. legislative database protection models at that time. The NRC report is available at: www.nap.edu.