

30th August 2017

Dr. Ros Lynch
Director
Director of Copyright and IP Enforcement Directorate
IPO
4 Abbey Orchard Street
London SW1P 4HT

By e-mail to: ros.lynch@ipo.gov.uk

Dear Ros,

European Commission public consultation on Directive on the legal protection of databases (96/9/EC)

In May 2017 the European Commission launched a consultation¹ to understand better how the Database Directive is used, to evaluate its impact on users and to identify possible needs of adjustment. The BCC has reviewed the online survey questionnaire provided by the European Commission for responses to this evaluation and has concluded that it is not suited to the type of high-level response we would wish to make nor can we provide the detailed data requested by the Commission.

The BCC's views have not changed substantially since our March 2006 response to the first evaluation of Directive 96/9/EC on the legal protection of databases. We believe those views continue to make good sense so we have attached that submission as an Annex to this letter. This submission is also available on the BCC's website²

The BCC therefore asks that, in its own submission to the Commission on the Directive's evaluation, IPO takes account of the following summary of the views of UK right holders:-

- The protection afforded by the Database Directive is still fit for purpose. The BCC supports maintenance of the status quo.
- The BCC understands from its publishers members that the existence of the *sui generis* right has worked alongside the copyright based right to assist them in safeguarding their investment and its removal would put that investment at risk. The BCC continues to support retention of the *sui generis* right.
- Future development of this area of the law should focus on the needs of those, such as our members, for whom the Database Directive was originally envisaged.
- Any change to the Database Directive must be based on a full Regulatory Impact Assessment based on reliable data from which to evaluate all the option.

¹ <https://ec.europa.eu/digital-single-market/en/news/commission-launches-public-consultation-database-directive>

² http://www.britishcopyright.org/files/8415/0331/5987/BCC_Database_Consultation_Final.pdf

I hope this is helpful. The BCC would welcome the opportunity to discuss its views with IPO officials.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Janet Ibbotson', written over a light grey rectangular background.

Janet Ibbotson
Chief Executive Officer

Annex:

BRITISH COPYRIGHT COUNCIL

Response to the First Evaluation of Directive 96/9/EC on the legal protection of databases

The British Copyright Council is an association of bodies representing those who create, or hold interests or rights in, literary, dramatic, musical and artistic works in which rights of copyright subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988), and those who perform such works. The British Copyright Council also numbers amongst its members bodies representing publishers of literary works. We thus have an interest in the subject of database protection, and wish to make submissions in relation to the Commission's First Evaluation of Directive 96/9/EC on the legal protection of databases of 12 December 2005.

As a general point, as representatives of creators of copyright works and publishers of literary works, we are concerned that the future development of this area of the law should be driven by the needs of those, such as our members, for whom the Database Directive was originally envisaged, rather than by the concerns expressed on behalf of those who have subsequently seen fit to seek to establish and to structure business models on their understanding, since proved to be wrong, of the application and scope of the sui generis right that it established. As our members come from a legal tradition which uniquely, as the Commission Evaluation recognises, was required by the Database Directive to "lift the bar" in terms of the threshold for copyright protection for databases they have a particular interest in and perspective on such matters.

Thus, whilst we applaud the open way in which the Commission Evaluation recognises that the judgments of the European Court of Justice in the *BHB - William Hill* and *Fixtures Marketing* cases have given occasion for reflection as to the sui generis aspect of the measure, we are equally concerned that nothing more be done to disrupt the framework within which our members have been operating since the introduction of the Directive, especially since the sui generis right introduced by it was in part intended to fulfil the role met uniquely in our jurisdiction by the law of copyright, a role which the Directive removed. In particular we would wish to emphasise the very special nature of those entities that sought to assert the sui generis rights in those cases – in essence entities in the area of sports who devised the very fixtures information that they sought to protect by means of the sui generis right. Thus we do not regard the judgments of the European Court of Justice as in any way adversely impacting those publishing activities that involve the aggregation of pre-existing content. Indeed, we see such judgments as strengthening the sui generis right as applied to such

activities, in that these adopt a broad interpretation of the restricted acts under the sui generis right that favours the rights owner.

In the light of these considerations, we would strongly urge against the Second Option presented in the Commission evaluation, the withdrawal of the sui generis right, as this would have the effect of depriving our members of a protection that was in part intended to fulfil the role previously met uniquely in our jurisdiction by the law of copyright, which role the Directive removed.

Neither do we see the First Option, the repeal of the whole directive, as realistic, as the clock cannot be turned back in practice and the law reinstated as was, because much of that law will have rested on tacit assumptions as to its scope that may now, in the light of what has happened, be open to challenge.

We also have serious reservations about the Third Option, that of amending the sui generis provisions. Not only will this reopen the whole issue of sui generis database protection again, which might ultimately result in reduced protection, but it will inevitably introduce new concepts and possible uncertainties which will themselves require interpretation by the European Court of Justice.

We thus favour the Fourth Option presented in the Commission Evaluation, which is to maintain the status quo. However, certain questions arising from judgments of the European Court of Justice in the above cases should be authoritatively clarified, namely:

(1) The European Court of Justice refers to “the creation of data”. The word “creation” in copyright/author’s right is applied exclusively in the context of originality: *vide* the criterion of “authors own intellectual creation” in the Computer Program, Term and Database Directives. Does the Court’s use of the term “creation” in relation to data imply that data may constitute an original work? If not, this should be clarified and a more suitable term, e.g. “production” should be used in place of “creation”, which term we consider to be inappropriate and confusing in this context.

(2) Is the investment in the obtaining of information about facts which already exist (e.g. the height of mountains) to be excluded from the assessment of qualifying investment?

(3) How is investment in “creation” of data (to use the European Court of Justice term) to be distinguished, as a matter of practice, from investment in obtaining data?

Authoritative answers to these questions will ensure harmony of interpretation throughout the Community, and avoid the necessity of amending the Database Directive. We would therefore suggest that consideration might also be given to the preparation of a Commission interpretative communication which might serve to clarify the scope of the Directive in the light of the decisions of the European

Court of Justice with particular reference to the questions posed above and to those areas which the Directive was intended at the outset to address.

30th March 2006
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