

THE EUROPEAN UNION DATABASE DIRECTIVE

By Mark Schneider

Directive 96/9/EC on the Legal Protection of Databases¹ (the Directive) by the European Union (EU) constitutes a noteworthy event in the evolution of database protection worldwide. First, the Directive provides uniform copyright protection among EU Member States² for the creative selection and arrangement of a database in a manner similar to United States copyright law.³ More remarkably, however, the Directive goes substantially further by establishing a *sui generis*⁴ right against unauthorized extraction of the contents of a database for a term of fifteen years from the date of creation of the database.⁵ In contrast to the copyright protection, acquisition of the *sui generis* right is based on a "sweat of the brow" theory and its fifteen-year term is renewable on a perpetual basis following subsequent "substantial investments" in the database.⁶

While European states have been legislating under a prescribed deadline to achieve compliance with the Directive in 1998, the United States Congress and the World Intellectual Property Organization have been unsuccessful in adopting proposals for database protection that would provide equivalent U.S. protection.⁷ Many agree that continued development

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1. See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 [hereinafter Database Directive].

2. See Thomas Hoeren, *EU Leads World Towards Database Production: Despite US objections, International Sui Generis System is Needed*, IP WORLDWIDE July-Aug. 1997 (visited Nov. 1996) <<http://www.ljx.com/copyright/7-8eudbase.html>>. The Directive will apply to the fifteen states of the European Union as well as to the additional states of the European Economic Area (*i.e.*, Iceland, Liechtenstein, and Norway). Additionally, central and eastern European states have agreed to provide an equivalent level of protection by December 31, 1999. The Directive will apply at least indirectly to thirty countries. See *id.*

3. See, *e.g.*, 17 U.S.C. § 102(a) (1994); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (rejecting "sweat of the brow" doctrine as a legal basis for protecting database contents).

4. "Sui generis" is defined as "of its own kind or class." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

5. See Database Directive, *supra* note 1, art. 10(1).

6. See *id.* arts. 7(1), 10(3).

7. See, *e.g.*, Proposal Submitted by the European Community and its Member States to the World Intellectual Property Organization Committee of Experts on a Possible Protocol to the Berne Convention, 6th Sess., Geneva, WIPO Doc. BCP/CE/VI/13,

of the information industry in the digital era requires a new form of protection for database makers.⁸ Notwithstanding its commercial impact in Europe, the EU Database Directive may serve as a model of what database protection should or should not look like for other countries. Moreover, the fact that the Directive requires non-EU member states to offer an equivalent level of protection in order to enjoy the benefits of the sui generis right has created pressure for worldwide acceptance of the European model of database protection.⁹

I. BACKGROUND TO THE DATABASE DIRECTIVE

Broadly speaking, lawmaking by way of Directive in the EU seeks uniformity among national laws of Member States on the grounds that "inequalities and/or inadequacies among them justify intervention."¹⁰ The EU attempts to do this by way of "harmonization." In other words, the EU accomplishes uniformity by requiring the enactment of national laws to comply with Directives.¹¹ The Database Directive arose from the differ-

Feb. 1-9, 1996; Collections of Information Antipiracy Act of 1997, H.R. REP. NO. 105-2652 (1997); Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. REP. NO. 104-3531 (1996); *see also infra* Part III of this comment.

8. *See, e.g.*, Hoeren, *supra* note 2 ("There is a clear need to safeguard databases, and such safeguards would best be established on a global basis."); E. Leonard Rubin, *U.S. Fails to Guard Data Base Henhouse: Other Nations Seek to Protect Compilations of Facts, but Congress Lays an Egg in Failing to Take Up Legislation to Circumvent Feist*, NATIONAL LAW JOURNAL at B07 (June 9, 1997) <<http://www.ljx.com/copyright/0609feist.html>> ("The United States . . . must hurry. The huge developing markets of the EU and the Pacific Rim intensify global competition. Solutions to this new technological dilemma are attainable, but only if Congress reaches out and grabs them."); Lisa H. Greene & Steven J. Rizzi, *Database Protection Developments: Proposals Stall in the United States and WIPO*, 9 No. 1 J. PROPRIETARY RTS. 2, 7 (1997) ("[A] new form of legal protection is needed . . ."); J.H. Reichman & Paula Samuelson, *Intellectual Property Rights in Data?* 50 VAND. L. REV. 51, 55 (1997) ("While this Article accordingly agrees that database makers need a new form of protection, it contends that the current European and United States initiatives are seriously flawed.").

9. For further discussion, *see infra* Part III of this comment.

10. W.R. Cornish, *European Community Directive on Database Protection*, 21 COLUM.-VLA J.L. & Arts 1, 1 (1996).

11. *See* Robert Carolina, *The European Database Directive: An Introduction for Practitioners*, 8 No. 9 J. PROPRIETARY RTS. 17, 17 (1996).

It is not a truly "federal" system as that term is understood in the United States or Canada. As a result, Europeans have, in most legal areas including most parts of computer law, chosen "harmonization" of individual Member State laws rather than "preemption" as their primary means of achieving a single marketplace.

Id.

ing levels of legal protection that existed in the various Member States for databases. In response, the European Commission has aimed to harmonize EU law among all Members through the adoption of uniform provisions for the protection of databases. Moreover, in the context of the internal European market, the Commission has sought greater protection for the capital investment required for database production and continued profit incentive for the producers.¹²

The Recitals of the Directive offered several justifications for the harmonization measure.¹³ To begin with, existing legislation in the Member States was deemed insufficient to protect databases, and even where such protection existed, it had different attributes.¹⁴ These differences thwarted the functioning of the internal European market by impeding efforts to provide on-line database goods and services throughout the Community.¹⁵ Additionally, the Recitals noted that such differences could become more pronounced through Member States' independent legislative acts.¹⁶ Furthermore, unharmonized intellectual property rights with respect to differences in scope and conditions of protection were considered a barrier to the free movement of goods and services within the Community.¹⁷

The Directive was also a response to advances in digital technology.¹⁸ Databases were becoming an increasingly valuable and profitable product.¹⁹ Indeed, the electronic information industry was one of the fastest growing sectors of the economy.²⁰ At the same time, computer technology made electronically-stored data compilations vulnerable to piracy. The low cost and simplicity of copying data made it easy for free-riding competitors to exploit the efforts of original data compilers.²¹ Because the

12. *See id.*

13. *See Database Directive, supra* note 1, Recitals. Recitals are the official comments accompanying a directive and are useful for determining legislative intent.

14. *See id.* Recital 1. For example, the United Kingdom recognized the "sweat of the brow" approach and routinely granted fifty-year copyright protection for works such as printed directories or database printouts under this scheme while most other countries in Europe offered no comparable protection. *See M. Matthew Wayman, International Database Protection: A Multilateral Treaty Solution to the United States' Dilemma*, 37 SANTA CLARA L. REV. 427, 439-40 (1997).

15. *See Database Directive, supra* note 1, Recital 2.

16. *See id.* Recital 3.

17. *See id.* Recital 4.

18. *See id.* Recitals 7-12, 38-40.

19. *See Carolina, supra* note 11, at 17.

20. *See Debra B. Rosler, The European Union's Proposed Directive for the Legal Protection of Databases: A New Threat to the Free Flow of Information*, 10 HIGH TECH. L.J. 105, 111 (1995).

21. *See id.* at 106; Reichman & Samuelson, *supra* note 8, at 66.

production of databases could be such an expensive, laborious, and time-consuming enterprise, the Database Directive grew out of the demand for a form of protection that would provide incentive for investing in database creation.²²

The Database Directive is the most recent in a series of directives that has attempted to form a legal framework in the European Union to respond to modern technological challenges.²³ Other recent directives have pertained to intellectual property rights in the EU, including Council Directive on the legal protection of computer programs,²⁴ Council Directive on the rental right and lending right and certain rights related to copyright in the field of intellectual property,²⁵ Council Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,²⁶ and the Council Directive harmonizing the term of protection for copyright and certain related rights.²⁷ Along with the Database Directive, this procession of directives aims to form a uniform and comprehensive legal regime for contending with proprietary issues in the modern digital era.

With regard to the legal effect and authority of directives generally, it is important to note that a directive is not a self-executing law, but rather a direction to EU Members to amend their law as necessary to bring it in accordance with the directive. Although the legal effect of a directive is harmonization of Community law, the methods chosen by Member States to implement the directive may vary substantially.²⁸ Therefore, practitioners cannot rely on a directive as a statement of the law applicable to a commercial transaction.²⁹ Directives can serve, however, as useful points of general guidance for planning a business operation in Europe. Additionally, they function in a practical way as advance notice of an impending change in the law.³⁰

A. History of the Directive

During the 1980's, the European Commission began to investigate intellectual property protection in relation to the growing technology indus-

22. See Rosler, *supra* note 20, at 106.

23. See Robert Bond, *EC Database Law and the Information Society*, Sec. 3, (visited Oct. 1997) <<http://dialspace.dial.pipex.com/town/place/ps92/databas.htm>>.

24. Council Directive 91/250.

25. Council Directive 92/100.

26. Council Directive 93/83.

27. Council Directive 93/98.

28. See Carolina, *supra* note 11, at 17.

29. See *id.*

30. See *id.*

try in Europe.³¹ In its 1988 publication *Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Attention*, the Commission proposed that alteration of intellectual property rights within the Community would be necessary in order to facilitate the "free movement of information."³² Following a series of hearings involving the participation of information industry representatives,³³ the Commission drafted a proposal in 1992.³⁴ This proposal provided uniform copyright protection for the creative formal elements of a database in accordance with the Berne Convention for the Protection of Literary and Artistic Works, while simultaneously introducing a new *sui generis* protection against unauthorized use of the database contents throughout the Community.³⁵ The *sui generis* right was based on the Scandinavian states' "Catalog rule" from the 1960's, which granted to noncopyrightable compilations short-term protection against reproduction and identical imitation.³⁶

The 1992 proposal limited protection to electronic databases exclusively and provided a term of ten years for the *sui generis* protection.³⁷ It subsequently encountered opposition primarily from the United Kingdom, where electronic and non-electronic databases alike enjoyed a lengthy fifty-year term of protection under the broad and generous British copyright scheme.³⁸ A coalition of lobbyists, including the Confederation of British Industry, the Direct Marketing Association, and the Periodical Publishers Association, argued that, as it stood, the proposal would reduce drastically the level of database protection granted under British law.³⁹ At that time, the United Kingdom's database industry accounted for 60% of the EU's database business.⁴⁰

31. See Rosler, *supra* note 20, at 106.

32. COM(88)172 final.

33. A majority of representatives testifying at the Commission hearings on Database protection favored the enhancement of copyright protection for databases over *sui generis* protection. The Commission went forward with *sui generis* legislation despite this widespread opposition. See Rosler, *supra* note 20, at 106.

34. See Commission Proposal for a Council Directive on the Legal Protection of Databases, COM(92)24 final at 2 [hereinafter 1992 Proposal].

35. See Berne Convention for the Protection of Literary and Artistic Works (1971) [hereinafter Berne Convention].

36. See Hoeren, *supra* note 8; Reichman & Samuelson, *supra* note 8, at 74.

37. See 1992 Proposal, *supra* note 34, art. 1(1).

38. See Wayman, *supra* note 14, at 439.

39. See *id.*

40. See *id.*

The Commission responded by amending the proposal to enhance the *sui generis* protection. It expanded the *sui generis* term of protection from ten to fifteen years. The Commission also broadened the definition of database to include non-electronic—in addition to electronic—databases. By late 1994, the proposal had become an important plank of the European Commission and Council Information society initiatives, and in 1995, political agreement on the proposal resulted in the rapid progress.⁴¹ The EU Council of Ministers formally adopted it as a Directive in March 1996.

II. THE DATABASE DIRECTIVE

The Directive defines a database as “a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means.”⁴² Both electronic and non-electronic databases fall within this definition. The ambiguous language of the Directive, however, leaves the scope of protection relatively uncertain at this time. Indeed, some have argued that its broad definition would include not only CD-ROM-based multimedia collections, electronic and paper library card catalogs, and the like, but also World Wide Web sites, or even a library itself.⁴³ In any case, it is doubtful that recordings or audiovisual, cinematographic, literary, or musical works will fall within the scope of the Directive because these are not collections of “independent” works.⁴⁴ The Recitals state explicitly that a compilation of several musical performances on CD does not qualify as a database.⁴⁵ Similarly, the Directive does not protect computer programs “used in the making or operation of databases.”⁴⁶

A. Copyright Protection under the Directive

Copyright for databases under the Directive is a form of author’s right which protects the original selection or arrangement of contents, but not the contents themselves.⁴⁷ The term of protection is seventy years after

41. See Robert Bond, *The Database Directive* (visited Oct. 1, 1997), <<http://www.hobsonaudley.co.uk/lawyrs/databas.htm>>.

42. Database Directive, *supra* note 1, art. 1(2).

43. See Carolina, *supra* note 11, at 18; Bond, *supra* note 41.

44. See Database Directive, *supra* note 1, Recital 17.

45. See *id.* Recital 19.

46. *Id.* art. 1(3).

47. See *id.* art. 3. The Directive provides the following with respect to copyright:
Art. 3 (1): ... databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation

the death of the author.⁴⁸ According to the Recitals, the sole question that determines copyright protection is whether the structure of the database is the author's own original intellectual creation, and no further aesthetic or qualitative criteria should be applied.⁴⁹ As under U.S. copyright law since *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,⁵⁰ the threshold for protection requires a non-trivial level of creativity. Consequently, most collections of factual data, particularly those arranged in a predictably-ordered manner, fail to have the requisite originality to merit copyright protection. Copyright for "works" contained within a database remain unaffected with respect to the eligibility of the database for copyright protection.⁵¹

The harmonization measure prescribed by the Directive eliminates existing differences in the copyright law within the Community. Most notably, it derogates the "sweat of the brow" copyright regime in the United Kingdom and Ireland.⁵² The "sweat of the brow" approach under British law has protected the effort that goes into the creation of a work rather than the artistic value of its content.⁵³ Consequently, the British regime has required a lower standard of eligibility than that traditionally required in most of continental Europe, where, as in the U.S., the emphasis has been on the creative input of the author.⁵⁴ The Directive fails to specify, however, what level of creativity is necessary to merit copyright protection, and thus the standard is presently unclear. Presumably, the Directive has left the standard for determining copyright eligibility open for the

shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

Art. 3(2): The copyright protection of databases ... shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

Id.

48. See Database Directive, *supra* note 1, Recital 25. Because this right falls within the Berne Convention for the Protection of Literary Works, the term of protection is the life of the author plus seventy years. See Berne Convention, *supra* note 35, art. 7.

49. See Database Directive, *supra* note 1, Recitals 15 & 16.

50. 499 U.S. 340 (1991).

51. See Database Directive, *supra* note 1, Recital 27. Similarly, the *sui generis* right does not extend copyright protection to the data. *Id.* Recital 45.

52. See Cornish, *supra* note 10, at 5.

53. See Carolina, *supra* note 11, at 18-19. Robert Carolina points out that case law in France, the Netherlands, Germany, and Belgium has asserted that compilations such as a dictionary or a calendar of sports matches do not display the necessary creativity for copyright protection. See *id.*

54. See *id.*

Member State legislatures and the European Court of Justice to develop further.⁵⁵

The Directive provides the author of a database protected by copyright with a number of exclusive authorization rights including the following: temporary or permanent reproduction by any means and in any form, in whole or in part; translation, adaptation, arrangement or any other alteration; any form of distribution to the public of the database or copies thereof (subject to first sale exhaustion); and any reproduction, distribution, communication, display or performance to the public of a translation, adaptation, arrangement, or other alteration.⁵⁶ A lawful user of the database, however, may perform any of the acts above if they are necessary to access or use the contents of the database.⁵⁷ Arguably, the Directive gives the Member States the option to craft additional exceptions, including those for fair use.⁵⁸

B. Sui Generis Protection Under the Directive

The Directive requires Member States to provide a new proprietary right for the protection of database contents. In order to obtain this sui generis right, a database maker must show that there has been a "substantial investment" in either the obtaining, verification, or presentation of the contents.⁵⁹ In contrast to copyright protection, the Directive prescribes a "sweat of the brow" approach to allocating the sui generis right.⁶⁰ Rather than defining what constitutes a "substantial investment," however, the Directive says little more than that this determination is to be made qualitatively and/or quantitatively.⁶¹ The sui generis right applies irrespective of the database's eligibility for copyright or other protection.⁶² The right is also transferable, assignable, and may be granted under contractual license.⁶³

55. See *id.* at 19; G.M. Hunsucker, *The European Database Directive: Regional Stepping Stone to an International Model?*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 727 (1997).

56. See Database Directive, *supra* note 1, art. 5.

57. See *id.* art. 6(1).

58. See *id.* art. 6(2).

59. See *id.* art. 7(1).

60. See *id.* Recital 39.

61. See *id.* art. 7(1). Recital 40 states that "such investment may consist in the deployment of financial resources and/or the expenditure of time, effort and energy." *Id.* Recital 40.

62. See Carolina, *supra* note 11, at 20-21.

63. See Database Directive, *supra* note 1, art. 7(3).

This is not the first instance of *sui generis* protection for databases in Europe. Germany has employed competition law to prevent a competitor from using substantial parts of a database for commercial uses.⁶⁴ As noted above, the Scandinavian states have offered *sui generis* protection under the Catalog rule since the 1960s. This rule grants protection to the producer of a sizable database even if the collection does not exhibit creativity.⁶⁵

Sui generis protection under the Directive gives the database maker the right "to prevent extraction and/or re-utilization of the whole or of a substantial part" of the database contents.⁶⁶ Actions relating only to insubstantial parts are therefore non-infringing.⁶⁷ An "extraction" involves either the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.⁶⁸ Even the viewing of database contents on-screen constitutes an action subject to authorization by the rightholder because it involves the transfer of all or a substantial part of the contents to another medium.⁶⁹ "Re-utilization" means any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, or by other forms of transmission, including on-line.⁷⁰ However, the first sale of a copy of the database by the rightholder exhausts the right to control resale of that copy within the Community.⁷¹ Furthermore, public lending is specifically excluded from definitions of either extraction or re-utilization.⁷²

The term of protection for the *sui generis* right begins when the database is completed and ends fifteen years from the first of January follow-

64. See Hoerden, *supra* note 8; See generally RALF JERSCH, ERGÄNZEDER LEISTUNGSSCHUTZ UND COMPUTER SOFTWARE (1993).

65. See Hoerden, *supra* note 8; Reichman & Samuelson, *supra* note 8 at 74-75.

66. See Database Directive, *supra* note 1, art. 7(1).

67. But note that some actions involving only insubstantial parts may be infringing if they are "repeated and systematic." The Directive states in pertinent part:

Article 7(5): The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents ... implying acts which conflict with normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database will not be permitted.

Database Directive, *supra* note 1, art. 7(5).

68. See *id.* art. 7(2)(a).

69. See *id.* Recital 44.

70. See *id.* art. 7(2)(b).

71. See *id.*

72. See *id.*

ing the date of completion.⁷³ If the database is made available to the public before the fifteen-year term expires, then a new fifteen-year term begins from the first of January following the date that the database was first made available to the public.⁷⁴ Interestingly, any substantial change to the contents of the database that constitutes a "substantial new investment" entitles the database to a new fifteen-year term of protection.⁷⁵ Depending on what level of investment is ultimately required to be "substantial," the provision for a renewable *sui generis* right could last in perpetuity if the contents are regularly updated.

Member States ostensibly have the option of providing a fair use exemption to the *sui generis* right as they do for copyright.⁷⁶ The Directive, however, restricts acts by lawful users that "conflict with normal exploitation of the database" or "unreasonably prejudice the legitimate interests of the database maker."⁷⁷ This is the case even for insubstantial parts of the contents if the use is repeated and systematic.⁷⁸ Professors J.H. Reichman and Pamela Samuelson have argued that the Directive may foreclose potential "fair" uses should database owners maintain that such use interferes with their right to exploit the database by charging for each use.⁷⁹

C. Protection of EU Non-member Databases

Because copyright protection falls within the Berne Convention for the Protection of Literary Works, not only EU nationals, but also nationals of other countries belonging to the Berne Convention are beneficiaries of copyright protection under the Directive.⁸⁰

By contrast, the Directive limits the *sui generis* right to database makers or rightholders who are nationals of a Member State or who have their residence in the territory of the Community.⁸¹ Entities seeking the right must have been formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community; a company having only its registered office in the Community must have operations linked on an ongoing basis with the economy of a Member State.⁸²

73. Database Directive, *supra* note 1, art. 10(1).

74. *See id.* art. 10(2).

75. *See id.* art. 10(3).

76. *See id.* art. 9.

77. *Id.* art. 8(2).

78. *See id.* art. 7(5).

79. *See* Reichman & Samuelson, *supra* note 8, at nn.173-75 and accompanying text.

80. *See* Berne Convention, *supra* note 35, art. 7(8).

81. *See* Database Directive, *supra* note 1, art. 11(1).

82. *See id.* art. 11(2). The Directive states in pertinent part:

Individuals outside the EU and entities, including wholly-owned subsidiaries, not meeting the above requirements may not claim the *sui generis* right unless they reside or were incorporated or formed in a jurisdiction which provides comparable protection for EU databases.⁸³ The EU Council may conclude reciprocal arrangements with countries that have an equivalent form of protection upon a proposal from the Commission.⁸⁴ This so-called reciprocity provision has placed additional pressure upon countries outside the EU to adopt a similar *sui generis* right for databases in order to take advantage of EU protection.⁸⁵

D. Impact of the Directive in Practice

Some practitioners who have written about the Database Directive have noted that the change in law has important practical implications. For example, the Directive may create serious problems for the makers of U.S. database and CD-ROM products because of the different levels of protection for Member-State and non-Member-State works.⁸⁶

According to Robert Carolina, although Article 5 of the Directive grants a database copyright owner the right to authorize reproductions "in any means and in any form, in whole or in part," the owner would not necessarily have the right to authorize acts that would potentially infringe on an underlying copyright in the database contents.⁸⁷ Therefore, such an owner should secure the permission of all rightholders in the contents before authorizing or carrying out a reproduction of the collection.⁸⁸

Similarly, Robert Bond has suggested that publishers of EU databases should make suitable contractual arrangements with employees and third

Art. 11 (2): [The *sui generis* right] shall also apply to companies and firms formed in accordance with a law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked in an ongoing basis with the economy of a Member State.

Id. Nowhere, however, does the Directive define what it means to be "linked in an ongoing basis." *See id.*

83. *See id.* Recital 56; Carolina, *supra* note 11, at 22.

84. *See* Database Directive, *supra* note 1, art. 11(3); Dinah Nissen & Jamie Barber, *The EC Database Directive* (visited May 1, 1996) <<http://www.gold.net/users/af82/may96.htm>>.

85. *See* Hoerden, *supra* note 8.

86. *See* Anna Kraske & Thomas A. Unger, *Protecting Works on CD-ROM and Internet*, 2 No. 5 INTELL. PROP. STRATEGIST 8, 9 (1996).

87. Database Directive, *supra* note 1, art. 5.

88. *See* Carolina, *supra* note 11, at 20.

parties to cover copyright and moral rights issues to ensure that all database material can be fully exploited.⁸⁹ They should keep an audit trail of the work allocated to a database, the criteria used to determine selection, and all expenses.⁹⁰ They should also keep proof of the date of creation or publication of a database and of any subsequent updates or verification efforts.⁹¹ Furthermore, databases should contain any required copyright legend, and copyright registration, if required, should also take place.⁹²

III. PROSPECTS FOR DATABASE PROTECTION IN THE U.S.

The reciprocal requirement of the Database Directive has created pressure on the United States to adopt *sui generis* protection. But even without such pressure, many agree that U.S. databases are in need of greater protection.⁹³

A. Proposals

1. WIPO

In December 1996, the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, held a diplomatic conference to discuss changes to the Berne Convention involving three proposed treaties.⁹⁴ The WIPO conference resulted in the adoption of a copyright treaty and a treaty on the production and performance of sound recordings.⁹⁵ Although the agenda also included negotiations on a database treaty, the WIPO Draft Database Treaty was the only one that the conference did not enact. The database treaty resembled the Database Directive in many respects and, had it been adopted, would have introduced an international *sui generis* system of database protection that would have included the United States in its scope of coverage.⁹⁶ It was deferred,

89. See Bond, *supra* note 23, § 8.

90. See *id.*

91. See *id.*

92. See *id.*

93. See sources cited *supra* note 8.

94. See *id.* The conference was entitled "Diplomatic Conference on Certain Copyright and Neighboring Rights Questions." See also Wayman, *supra* note 14, at 428-29.

95. The two treaties that were adopted were the WIPO Copyright Treaty, which clarified the rights of authors in the digital environment, and the WIPO Performers and Phonograms Treaty, which increased protection for performers and producers of sound recordings. See generally Julie Sheinblatt, *The WIPO Copyright Treaty*, 13 BERKELEY TECH. L.J. 535 (1998).

96. See Wayman, *supra* note 14, at 450. According to the author of this article, many of the Draft Treaty provisions were modeled after the EU Database Directive such

however, due to the protests of several groups including the American Association of Law Libraries (AALL).⁹⁷ Despite the conference's failure to reach agreement on the Draft Treaty, delegates expressed their interest in continuing to examine the prospect of a *sui generis* system of databases protection at an international level.⁹⁸

2. U.S. Congress

Representative Howard Coble introduced the Database Investment and Intellectual Property Antipiracy Act of 1996 (H.R. 3531) during the 104th Congress to strengthen database protection in the U.S.⁹⁹ Having attributes similar to the Database Directive, the bill proposed a term of protection of twenty-five years. A controversial aspect of H.R. 3531 was that, rather than requiring a "substantial investment" as the Database Directive and WIPO Draft Treaty specify, it would have extended protection for another twenty-five year term for each time the database underwent a change of "commercial significance."¹⁰⁰ The bill was not successful.

Representative Coble has introduced a new database protection enhancement bill in the 105th Congress entitled the Collections of Information Antipiracy Act (H.R. 2652).¹⁰¹ This bill claims to differ radically from H.R. 3531 because it is "grounded in unfair competition principles as a complement to copyright," rather than a new form of *sui generis* protection.¹⁰²

B. The Domestic Debate

Opposition by the American Association of Law Libraries to the *sui generis* regime proposed by the WIPO Draft Database Treaty and H.R. 3531 focused on four key points.¹⁰³ First, it would legislatively change the result in *Feist*, which held that originality is required for copyright pro-

as the fifteen-year term of protection. See Hunsucker, *supra* note 55, at 722 ("[T]he WIPO Proposal generally tracks the Database Directive"). But cf. Reichman & Samuelson, *supra* note 8, at 110 ("in most respects [the Draft Treaty] adhered more closely to the United States model than the European model.").

97. See Julius J. Marke, *Database Protection Acts and the 105th Congress*, NEW YORK LAW JOURNAL (March 18, 1997) <<http://www.ljx.com/copyright/0318dbase.html>>. The arguments of the AALL are discussed in greater detail *infra*.

98. See Hoerden, *supra* note 8. See also Recommendation concerning databases adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/100.

99. H.R. REP. NO. 104-3531 (1996).

100. See Hunsucker, *supra* note 55, at 732.

101. H.R. REP. NO. 105-2652 (1997).

102. See Introduction of the Collections of Information Antipiracy Act, Remarks (October 9, 1997).

103. See Marke, *supra* note 97.

tection and that "sweat of the brow" is not sufficient.¹⁰⁴ Second, it would provide factual data with greater protection than has traditionally been contemplated by Congress or the courts. Third, the term of protection, renewable each time a significant change were made to the database, would provide protection that could last in perpetuity. And finally, there would be the potential for monopoly over public data because government information created outside a government agency would be protected.¹⁰⁵

Similarly, the Digital Future Coalition has raised several concerns surrounding the proposals of H.R. 2652.¹⁰⁶ Analogous to the EU Database Directive, the bill's bar against uses or extractions that would "harm" the database maker's actual or potential market may eliminate traditionally "fair" uses by educational, scientific, or cultural institutions. It would also give proprietary rights in data currently in the public domain, and thereby actually harm the market for the database. Further, the broad subject matter covered by the bill would include not only databases and other factual compilations, but also a wide range of copyrightable works subject to Copyright Act limitations and exceptions to exclusive rights.¹⁰⁷

IV. CONCLUSION

Alongside similar U.S. and international proposals under consideration, the passage of the European Union Database Directive constitutes a noteworthy development in the field of international intellectual property rights. Although its ultimate scope remains unclear, the Directive's sui generis protection of database contents is a bold and controversial step with significant commercial ramifications. It remains to be seen whether comparable protection will eventually be implemented in the United States and to what extent such protection resembles the European approach.

104. See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

105. See *Marke*, *supra* note 97. Under H.R. 3531, protected data would include basic scientific data such as weather information compiled by the National Oceanic and Atmospheric Administration.

106. See Digital Future Coalition, *Letter to Chairman Coble re H.R. 2652* (visited Oct. 30, 1997) <<http://www.ari.net/dfc/docs/dbaslet.htm>>.

107. See *id.*