

ARTICLE

THE EUROPEAN UNION'S PROPOSED DIRECTIVE FOR THE LEGAL PROTECTION OF DATABASES: A NEW THREAT TO THE FREE FLOW OF INFORMATION

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I. INTRODUCTION

The electronic information industry emerged two decades ago as American businesses sought to recoup their investment in databases by

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selling the information they had originally collected for their own internal use.¹ Today, the electronic information industry—including information retrieval software, delivery services and electronic databases—is one of the fastest growing sectors of the economy.² Databases contain a wide range of information, including demographic, bibliographic, medical, technological, news, financial, and travel-related material.³ The United States currently dominates this market.⁴ The information industry, however, is rapidly expanding around the globe through the increasing reliance on cross-border flows of information and the expansion of complex information delivery systems.⁵

The global rise in the use of databases challenges existing legal systems worldwide by creating tensions between presently applicable laws and important public policy concerns. Information stored in databases is often critical to medical treatment, scientific research, education, and other areas which contribute to the advancement of society. In these areas, free use of information is vital. At the same time, the creation of databases is expensive, labor-intensive and time-consuming. Such costs demand some form of protection from copying to provide incentive for investment in database creation.

Legal protection for database contents is of paramount importance because of the ease and low-cost with which digitally-stored data can be pirated.⁶ If data piracy remains penalty-free, second-comers will have an immense free-rider advantage. The inherent vulnerability of electronically-stored databases thus amplifies the need for applicable laws to achieve two contradictory goals: providing economic incentives that will encourage investment in database production, while simultaneously preserving the free flow of information necessary to foster

1. One of the first commercially-marketed databases was Knight-Ridder's Dialog Information Services, which evolved from a government contract with Lockheed Aerospace Company to catalog NASA's files. Note, *Information Liability: New Interpretations for the Electronic Age*, 11 *COMPUTER L.J.* 482, 486-87 (1992).

2. 161 *STANDARD & POOR'S, INDUSTRY SURVEYS* 10/7/1993 C107; *DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK* 1994.

3. *Id.*

4. 1991 Report on the Impact Program: Main Events and Developments in the Electronic Information Services Market, COM(93)156 final, at 1a, 2, 44 [hereinafter 1991 Impact Report].

5. 161 *STANDARD & POOR'S, INDUSTRY SURVEYS* 10/7/1993 C75; Christopher Millard, *Comments on the Proposed EC Database Directive*, 6 *WORLD INTELL. PROP. REP.* 76 (1992); Amended Proposal for a Council Directive on the Legal Protection of Databases, COM(93) 464 final-SYN 393 (1993), Preamble no. 9 [hereinafter Amended Directive].

6. Amended Directive, *supra* note 5, Preamble no. 6; PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICES*, § 1.2 (1989 and Supp. 1991); Paul Durdick, *Ancient Debate, New Technology: The European Community Moves to Protect Computer Databases*, 12 *B.U. INT'L L.J.* 153 (1994).

social advancement. Such laws must strike a delicate balance between access and protection.

The European Union (E.U.) is currently trying to address the complex issues surrounding the rising use of electronic databases. Unsatisfied with the protection currently offered to databases, the European Commission has proposed a Directive on the Legal Protection of Databases (the Directive). The Directive would supplement the current level of protection with a separate *sui generis* right against unauthorized use of the actual contents of electronic and paper-based databases.⁷

This new right would apply solely to database contents that are not protected under copyright, without interfering with the rights accorded to compilations under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).⁸ The Directive incorporates the copyright protection of the Berne Convention, the primary multilateral copyright treaty, to which all of the member states of the European Union are signatories. Berne solely protects elements of databases that contain some level of originality, a policy consistent with U.S. copyright laws.⁹

The Directive grew out of the Information Market Policy Actions Program, the E.U. policy framework for building a common information technology system.¹⁰ This program specifically addresses many critical issues facing the E.U. in its efforts to enter the information marketplace, including the strengthening of intellectual property laws, and the protection of new technology, international trade and the European economy.¹¹ The European Commission drafted the Directive with the apparent intention of addressing a wide range of issues in its plan for stimulating the growth of the E.U.'s faltering database industry. This scattered approach has resulted in legislation based upon a patchwork of policy.

This Article examines the main provisions of the Directive and argues against its adoption by the European Union. The article discusses problems that would arise from the implementation of the Database Directive, and notes the international reactions of the information industry to the proposed Directive.

7. 1991 O.J. (C 53) 4; *see also* IP (95) 572 (European Union press release issued regarding the formal adoption of an amended draft of the Database Directive by the Council of Ministers, which would protect both electronic and paper-based databases. This draft is before the European Commission under the co-decision process.); *see also infra* note 20 (discussing the co-decision procedure).

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

9. Copyright Act of 1976, 17 U.S.C. §§ 101, 102 (1976).

10. 1991 Impact Report, *supra* note 4, at ii.

11. *See infra* notes 236-38 and accompanying text.

In addition, the Article examines the many roles the European Commission planned for the Directive to play, and concludes that the Directive will ultimately fail both as an international trade mechanism and as an E.U. economic policy.

Part II begins with a review of legislative history of the Directive, including a brief overview of the database industries in the European Union and the United States, and an examination of Europe's regulatory goals for new technology. Part III provides a detailed discussion of the main provisions of the proposal, including an examination of the structure and scope of the bi-level protection offered by the Directive—through copyright and new *sui generis* rights. Part III also reviews the repeated attempts by E.U. legislative bodies to clarify ambiguous terms in the Directive, attempts which have failed to eliminate fundamental flaws in the language of the proposal and address many concerns voiced by industry members.

Parts IV, V, and VI look at the Directive in its global context. First, Part IV discusses the potential impact of the Directive upon database producers in the United States. The European Commission drafted the Database Directive to include reciprocity provisions aimed specifically at boosting the production of databases in the E.U. and protecting European databases against worldwide competition. These reciprocity provisions limit the grant of protection under the Directive to database producers with their principal place of business in the E.U. and to producers in countries which grant similar legal protection. Consequently, most database producers in the United States will not be protected under the Directive, because U.S. laws lack reciprocal protection of database content. The E.U.'s quest for market share has evidently targeted the United States, which accounts for the vast majority of the worldwide production of databases.

Part V notes international reactions to the Directive by industry members and trade associations, including potential governmental and industrial reactions to its enactment in the United States. Part VI of the article analyzes the policy problems arising from the numerous roles the E.U. intends for the Directive to play. This Part argues that the long-term effects of the Directive would be extremely harmful to the E.U.'s culture and economy. As a pioneer in the search for a solution to the global problem of protecting databases from piracy, the E.U. has drafted legislation that merits serious attention. However, in its current form, the Directive would do more harm than good, primarily because it completely ignores the harm to society that would result from the stifling of the free-flow of information. Laws in the United States that encourage the free flow of information have not prevented the United States from dominating the global information industry. The Article concludes by urging the E.U. to address economic problems and international trade

issues by more direct means, rather than through the reckless grant of intellectual property protection.

II. IMPETUS FOR THE DIRECTIVE: LEGISLATIVE HISTORY

Databases contain a wide range of information indispensable to numerous industries, including marketing, finance, credit, news and tourism.¹² Companies increasingly depend on electronically-stored information, which reaches end-users in many different forms, including audiotext telephone services, on-line databases, and compact disk read-only memory (CD-ROM).¹³ A large percentage of electronically-stored databases contain raw data, often organized in alphabetical or chronological order.¹⁴

Spurred by the expansion of information delivery systems, the electronic information technology sector has been growing at a very rapid rate, especially in the United States,¹⁵ which has been both the largest producer and consumer of electronic information technology.¹⁶ The United States maintains many advantages in this industry, including first entry, an essentially monolingual market, and economies of scale from years of consolidation and industry experience.¹⁷ By contrast, Europe faces many obstacles to developing a strong, unified information technology system. Above all, the E.U. is hampered by linguistic fragmentation of its market and onerous labor laws. Europe holds a 30 percent share of the world's database production, but its industry maintains a much slower growth rate than that of the United States.¹⁸ Database publishers in the United States outnumber their European counterparts by a ratio of two to one; for business-related databases, the ratio increases to three to one.¹⁹ In addition, the European industry is

12. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994, at 25-2.

13. *Id.*

14. *Id.*

15. *Id.* at 25-1; 160 STANDARD & POOR'S, INDUSTRY SURVEYS 12/31/92 at C75-C77.

16. Worldwide revenues from the information technology market (information hardware, software and services) were \$360 billion in 1992. 161 STANDARD & POOR'S, INDUSTRY SURVEYS 10/7/1993 at C107. Revenues from U.S. electronic information services alone grew 16% in 1993 to about \$13.6 billion, and 1994 estimates are \$15.6 billion. The U.S. dominated database production in 1993, when 2,221 companies produced about 5,210 databases. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994 at 25-1, 25-2.

17. *See infra* note 20.

18. News services dominate the E.U. information industry, while technological and bibliographic databases are its major growth sectors, as they remain unhindered by the language barriers prevalent in the European Union. 1991 Impact Report, *supra* note 4, at ii.

19. Vincent Parajon Collada, *Information Supermarket: Electronic Services Across Europe*, XIII MAGAZINE, July 1991, at 4. The database industry produced revenues of \$3.5 billion in western Europe in 1992. *Fighting International Piracy of Data Bases: European Commission Proposes to Harmonize Legal Protection in the Community*, RAPID, Jan. 29, 1992.

highly concentrated in one country, Great Britain, which holds about a 65 percent share of Europe's database revenues.²⁰

The disparity in database industry market share among nations within the E.U. is reflected in the disparity among its intellectual property regimes. The E.U. does not have a unified system for protection of electronic databases.²¹ While the copyright laws of most member states protect the formats of databases,²² only a handful of these countries protect the database contents themselves.²³ The Directive would harmonize the laws of the member countries under provisions in the Treaty Establishing the European Economic Community (EEC Treaty)²⁴ that enable E.U. governing bodies to harmonize existing member state laws and enact commercial regulations and trade restrictions deemed necessary to protect European intellectual property.²⁵

As mandated by the EEC Treaty, the European Council of Ministers (Council of Ministers) follows the development of new technology very closely.²⁶ The Council of Ministers has made a concerted effort to foster the growth of the information services market. In 1984, the Council of Ministers instituted a preliminary plan to build a common information services market,²⁷ and in 1988, it enacted the Information Market Policy Actions Program (Impact), directed by Director General XIII (DG-XIII), the European Commission's division on electronics, telecommunications, and technology.²⁸ Impact was established to promote the growth of the information services industry and to remove legal and administrative

20. The next largest market shares belong to France and Germany, *Commission to Extend Term of Protection of Databases*, REUTERS EUR. COMMUNITY REP., June 22, 1993; Commission of the European Communities, Directorate-General for Economic and Financial Affairs, 1993 Annual Economic Report of the European Economy 86-87 (1993) (followed by Japan and Canada); DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994, at 25-3.

21. *EP Approves the Strengthening of the Directive on the Legal Protection of Databases*, REUTERS AGENCE EUROPE, June 25, 1993.

22. Berne Convention, *supra* note 8, art. 2(5); *see also infra* note 62 and accompanying text.

23. *See* text accompanying *infra* notes 45-46.

24. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 57(2) [hereinafter EEC TREATY]; *see also infra* notes 233-35 and accompanying text; Durdick, *supra* note 6, at 153.

25. EEC TREATY, *supra* note 24, at art. 36.

26. Amended Directive, *supra* note 5, at Preamble no. 1; EEC TREATY, *supra* note 24, art. 36.

27. Council Decision 84/567, 1984 O.J. (L 314) 19. The Council also established ESPRIT, the European Strategic Program for R&D in Information Technology, and, one year later, the RACE initiative (R&D in Advanced Communications Technologies for Europe), a program to spur research and development in broadband communications and facilitate the establishment of an integrated broad band fiber optic communications network across the European Union. Margaret Sharp & Keith Pavitt, *Technology Policy in the 1990s: Old Trends and New Realities*, 31 J. OF COMMON MKT. STUD. 129, 138-39, tbl. 1 (1993).

28. Council Decision 88/524, 1988 O.J. (L 288).

barriers to its development.²⁹ In 1991, Impact's research arm—the Information Market Observatory—called for heightened attention to this market by reporting that “the commercial value of timely and relevant information” necessitated a stronger, more user-friendly information services industry.³⁰ That same year, the Council of Ministers extended Impact for four more years as Impact 2,³¹ with a primary agenda that included intellectual property protection for information technology.³²

In the late 1980's, the European Commission (the Commission) began conducting studies and hearings seeking industry opinion on whether new technologies required additional intellectual property protection. The Commission published a report of its findings in a 1988 study entitled the Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action,³³ which argued that the E.U. needed to overcome “obstacles to the free movement of information.”³⁴ In April 1990, the Commission held another round of hearings and published a follow-up report to the Green Paper.³⁵ At these hearings, the Commission invited comments regarding the effectiveness of the legal protection of databases. The Commission specifically inquired whether the formats of electronic databases should retain copyright protection, and whether the contents of such databases should be protected by copyright or *sui generis* legislation.³⁶

A majority of the electronic information industry representatives who testified at the Commission hearings on database protection preferred enhanced copyright protection for databases over a grant of *sui generis* protection. Widespread opposition arose against *sui generis*

29. Information and Communications Technologies in Europe, Commission of the European Communities, Directorate-General XIII on Telecommunications, Information Industries and Innovation 66-8 (1991).

30. COM(93)156 final at ii, 1. Prior reports on the development of the information services market include SEC (90)1788 final (report on 1988-89), and SEC (92)1536 final (report on 1989-1990).

31. Council Decision 91/691 1991 O.J. (L377).

32. *Id.*; see also Collada, *supra* note 19, at 5.

33. COM(88)172 final. The Commission is comprised of individuals from the member countries who address 23 policy areas, without separately representing the interests of their own countries.

34. Council Decision 88/524, *supra* note 28.

35. Working Program of the Commission in the Field of Copyright and Neighboring Rights, COM(90)584 final. Three directives emerged from these studies, including the Council Directive on the Legal Protection of Computer Programs; the Council Directive on Rental Right and Lending Right and on certain Rights relating to Copyright in the Field of Intellectual Property; and the Council Directive on the Legal Protection of Mask Works. More recent technology-oriented directives address biotechnology, including the availability of patents for living matter and fostering the biotechnology market; E.U.-wide trademarks and patents; and copyright and neighboring rights for satellite broadcasting and cable retransmission. *Completing the Internal Market*, INFO-92, Feb. 13, 1989.

36. Millard, *supra* note 5, at 76; see also *supra* notes 22 and 28.

legislation. Despite such opposition, in 1992, the Commission began crafting a proposal for the legal protection of electronic databases to grant both copyright and *sui generis* protection for electronic databases.³⁷ The Commission intended the proposed directive to protect the copyrightable format elements of databases under the primary international copyright agreement, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),³⁸ as well as create a new *sui generis* protection against the unauthorized use of the contents of databases. The result was the Directive.

The Directive underwent several revisions after the Commission issued its first version. On November 24, 1992, the Economic and Social Committee (ECOSOC)—an intermediate Commission subcommittee which examines proposals and issues opinions with suggestions and comments³⁹—unanimously approved the Directive with many suggested amendments. On June 23, 1993, the European Parliament reviewed the Directive and suggested another thirty-seven amendments.⁴⁰ Finally, on October 4, 1993, the Commission released its latest draft of the Directive, adding thirty-two of the Parliament's amendments.⁴¹ The Council of Ministers formally adopted an amended version of the Directive as a Common Position on June 29, 1995, and sent the amended version of the Directive (text unavailable at the date of publication) back to the European Parliament for its second reading under the co-decision procedure.⁴² The Parliamentary review of the Database Directive should have been the final stage in the legislative process,⁴³ after which each E.U.

37. COM(92)24 final-SYN 393, 1992 O.J. (C 156) 4 [hereinafter Draft Directive].

38. Berne Convention, *supra* note 8.

39. 1993 O.J. at C19.

40. Amendments to the Proposal for a Council Directive on the Legal Protection of Databases, 1993 O.J. (A 183) 10 [hereinafter Parliament Amendments]. The Parliament returned the Directive to the Commission for substantive revisions and changes to clarify ambiguous language under procedures codified at Articles 57(2), 66, 100a, and 149(3) of the EEC Treaty, 1992 O.J. (C 271); *see also Commission to Extend Term of Protection of Databases*, REUTERS EUR COMMUNITY REP., June 22, 1993; *The EP Approves the Strengthening of the Commission Proposal on the Legal Protection of Databases*, AGENCE EUROPE, EC, June 25, 1993.

41. Amended Directive, *supra* note 5.

42. *See* IP(95)572 (European Union press release issued regarding the formal adoption of an amended draft of the Database Directive by the Council of Ministers, which would protect both electronic and paper-based databases. This draft is before the European Commission under the co-decision procedures of the Council and Parliament.)

43. Certain other E.U. groups are currently meeting to discuss the Directive and report their opinions to the Council. The Council's working group on intellectual property issues recently met to discuss the Directive, where the representatives voiced varying and often contradictory positions on the terms of the Directive. *Data Protection EU Council Examines Sui Generis Rights*, TECH EUROPE, Mar. 1, 1995. The European Union's Internal Market Council, which meets regularly in Europe to discuss internal market issues, has

member country was obligated to enact the Directive as part of its national laws within two years.⁴⁴ More than three years after its initial introduction, however, the Database Directive still awaits final legislative approval.

III. THE MAIN PROVISIONS OF THE DATABASE DIRECTIVE

A. Rights Granted by the Directive

1. SUBJECT MATTER

The Directive is modeled after a provision in the Danish Copyright Act,⁴⁵ which grants protection, for a period of ten years, to the contents of both printed and electronically-stored databases:

Catalogues, tables and similar productions in which a great number of items of information have been compiled, as well as programmes, may not be reproduced without the consent of the producer until ten years have elapsed from the year in which the production was published. . . . If productions of the said nature or parts thereof are subject to copyright or other protection, such may also be applied for.⁴⁶

Unlike its Danish model, the original version of the Directive only protected electronic databases. The Commission targeted electronically-stored information because of its rising importance to the E.U.'s economic growth and its heightened vulnerability to piracy.⁴⁷ The Preamble of the Directive states, "the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be downloaded and rearranged electronically without his authorization to produce a database of identical content but which does not infringe any copyright in the arrangement of his database."⁴⁸ The original Directive's limited scope also arose from the Commission's concern that the electronic information industry was disadvantaged by the well-established print publishing industry that perpetuates "a relatively underdeveloped market for electronic information" in the European Union.⁴⁹

announced that the Database Directive is also on its agenda for discussion for its meeting on June 6, 1995. *Id.*; see also REUTERS EUR. COMMUNITY REP. Nov. 29, 1994.

44. Amended Directive, *supra* note 5, at art. 16(1).

45. Danish Copyright Act §49, reprinted in EUROPEAN UPDATE, INTELLECTUAL PROPERTY, Mar. 3, 1994.

46. *Id.*

47. Amended Directive, *supra* note 5, at Preamble, nos. 6 & 27, art. 2(2).

48. Draft Directive, *supra* note 37, at Preamble, § 27.

49. 1991 Impact Report, *supra* note 4, at 8.

The definition of "database" in the Directive has evolved considerably throughout the rounds of amendments, to the current broad definition which includes both electronic and paper-based databases.⁵⁰ The definition excludes from its scope "any computer program used in the making or operation of the database,"⁵¹ such as software used to access a database, which is separately protectable under the Council Directive on the Legal Protection of Computer Programs.⁵²

The Directive also protects "the materials necessary for the operation of the database, such as its thesaurus, index, or system for obtaining or presenting information."⁵³ This definition is broad and ambiguous and could even be interpreted to include the on-line learning tools that accompany many databases to facilitate their use. Moreover, the phrase does not explicitly limit the media in which these materials may be produced and still receive protection. Thus, the Directive could conceivably be interpreted to protect *printed* manuals, indices, thesauruses, and other user aids. Unfortunately, further clarification of this ambiguous definition is unlikely at this final stage in the legislative process, leaving the scope of protection open to interpretation.

2. COPYRIGHT AND SUI GENERIS RIGHTS AND REMEDIES

The Directive provides bi-level protection to databases. Copyright protection contained in Article 6 of the Directive grants a database owner the exclusive rights of reproduction, translation, adaptation, arrangement, and alteration of the database.⁵⁴ Article 6 also protects a database owner's right to distribute the database to the public, including rental rights, and to provide services related to the authorized use of the database.⁵⁵

The Directive's copyright protection extends to databases produced in the E.U. and in non-E.U. countries "who fulfill the requirements laid down in national legislation or international agreements on copyright applicable to literary works."⁵⁶

The Directive incorporates by reference copyright protection provided by the Berne Convention, other international agreements, and the national legislation of other countries that protect databases "as

50. See, e.g., Amended Directive, *supra* note 5, at art. 1(1) (containing prior definition of database, which was limited to electronically-stored and accessed information). Collections of factual data are unprotectable subject matter under U.S. copyright law, as discussed *infra*.

51. *Id.*

52. 1991 O.J. (L 122) 42.

53. *Id.* at art. 1(1).

54. *Id.* at art. 6.

55. *Id.* at art. 5(a)-(e).

56. *Id.* at art. 4.

collections within the meaning of Article 2(5) of the Berne Convention."⁵⁷ The Berne Convention grants a minimum of fifty years of copyright protection to the elements of a database that reflect "intellectual creation,"⁵⁸ and denies protection to "news of the day or to miscellaneous facts having the character of mere items of press information."⁵⁹ The Berne provision defining the protectable elements of a database reads:

Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.⁶⁰

The Directive does not extend *copyright* protection to the factual contents of databases,⁶¹ just as the Berne Convention denies protection to "news of the day" or to miscellaneous "facts."⁶² The Directive separately protects database contents through *sui generis* rights that are the source of most of the controversy over the Directive. These *sui generis* rights do not extend protection to contents copyrightable in themselves, such as poems in an on-line literature anthology.⁶³ They solely protect database contents that are uncopyrightable.⁶⁴ Thus, the *sui generis* rights exist separately from Berne's copyright protection, and are "not to be considered in any way as extensions of copyright protection to mere facts or data."⁶⁵

The Directive grants database owners the "right to prevent *unauthorized* extraction" of the contents of their databases.⁶⁶ The earlier versions of the Directive initially granted a "right to prevent *unfair* extraction of the contents of a database."⁶⁷ The provision was later changed by the Commission, which decided that the question of whether a database user is authorized to access information is easier to determine

57. *Id.* at art. 4.

58. Berne Convention, *supra* note 8, at art. 7(1). Article 7(6) allows signatory countries to extend protection beyond the terms provided by Article 7, and the term under Berne will soon be extended to 70 years.

59. *Id.* at art. 2(8).

60. *Id.* at art. 2(5).

61. Amended Directive, *supra* note 5, at art. 2(4).

62. Berne Convention, *supra* note 8, at art. 2(8).

63. Amended Directive, *supra* note 5, at art. 5(1). If additional protection is also available under other laws, that protection would not be affected by the Database Directive. Article 15(1) of the Amended Proposal states that the Directive "shall be without prejudice to . . . legal provisions such as patent rights, trade marks, design rights, unfair competition, trade secrets, confidentiality, data protection and privacy, and the law of contract applicable to the database itself or to its contents." *Id.* at art 15(1).

64. *Id.*

65. *Id.* at Preamble, no. 29.

66. *Id.* at art. 10 (emphasis added).

67. *Id.* at art. 1(2) (emphasis added).

than whether a certain use is unfair. This charge fortunately obviated the need for any judicial interpretation of "fairness."

The remedies that database owners may pursue against database users who infringe upon their sui generis rights remain unclear even in these final stages of the Directive. Article 14 of the Directive allows member states to provide whatever "appropriate remedies" they choose.⁶⁸ Therefore, violators may receive widely varying penalties, depending upon such factors as the jurisdiction in which the owner sues the infringer, the jurisdiction where the sui generis rights attached, the jurisdiction where the information was collected, the domicile of the infringer, and other yet unknown factors left to be determined by the courts if the Directive is enacted.

3. OWNERSHIP AND AUTHORSHIP

The initial draft of the Directive contained definitions of the ownership and authorship of a database that were highly ambiguous and generated much confusion in the database industry. These early definitions extended the exclusive rights in Article 6 to an author of a database, but not the owner of the database.⁶⁹ The latest draft of the proposal establishes that the "owner" of the database is also the holder of the exclusive rights in the database.⁷⁰ The "owner" can now be the holder of a copyright in the database format, a database producer holding sui generis rights in the database contents, or an author's grantee of any extraction rights.⁷¹ Thus, under the work made for hire terms in Article 3(4), a company producing a database is both the owner of the database created by its employees and the holder of the exclusive rights granted in the Directive.⁷²

In the draft of the Directive that went before the Council of Ministers, the Commission also changed the definition of ownership to accord with the Berne Convention grant of "moral rights" to "authors" of the copyrightable elements of a database.⁷³ Berne grants certain non-economic moral rights to natural authors of artistic works.⁷⁴ These rights include the right of paternity, the artist's right to be recognized as the creator of the work, and the right of integrity, the artist's right to protect the work from distortion.⁷⁵ Thus, the owner of a database completely

68. *Id.* at art. 14.

69. Draft Directive, *supra* note 37, at art. 5.

70. Amended Directive, *supra* note 5, at art. 1(2).

71. *Id.*

72. *Id.* at art. 3(4).

73. *Id.* at Preamble, no. 22; Berne Convention, art. 2.

74. Berne Convention, *supra* note 8, at art. 6^{bis}.

75. *Id.*

lacking in copyrightable elements (the contents, or the coordination, selection, or arrangement of the contents) will obtain no moral rights in the work.⁷⁶

4. THE TERM OF PROTECTION

The Directive establishes bi-level terms of protection for databases. The copyrightable elements of a database would receive the same term of protection granted to literary works under the Berne Convention—a minimum of fifty years.⁷⁷ A fresh term of copyright protection would begin each time any “substantial changes to the selection or arrangement of the contents are made to the database.”⁷⁸ If a database owner made a “substantial change” in a database’s copyrightable elements, the database would be considered to be a new database or new edition of the database, separately protectable from the moment of its creation. In that situation, the term of protection already accorded the original remains unchanged.⁷⁹

The *sui generis* protection, on the other hand, has a much shorter term. The Commission initially proposed a ten-year term of *sui generis* protection⁸⁰ and received widespread criticism, despite the Commission’s defense of the duration as a compromise between the need for database producers to recoup their investments and the need to disseminate information.⁸¹ Several technology policy experts argued for “strict time limits . . . deliberately cut back over . . . a five year period.”⁸² On the other side of the spectrum, ECOSOC—an intermediate E.U. governing body that reviewed the Directive—remarked that the term was randomly chosen and inadequate, and recommended that the term mirror that of copyright protection for equal weight and effect.⁸³

In March 1993, the European Parliament conducted hearings on the initial draft of the Directive, where industry members lobbied for a longer term of protection.⁸⁴ The speakers also testified that the Commission should draft more specific provisions regarding the effects that revisions and additions to a database would have on the start date of a term of

76. *Id.* at art. 2.

77. *Id.* at art. 9(1).

78. *Id.* at art. 9(3)(a).

79. *Id.* at arts. 9(2)(a)-(b).

80. Draft Directive, *supra* note 37, at art. 9(3). The protection would also apply retroactively to databases created before the enactment of the Directives.

81. See, e.g., Suzanne Perry, *Longer Protection in Database Directive Proposed*, REUTERS EUR. COMMUNITY REP., March 17, 1993 (quoting Bridget Czarnote, official of DG III, the E.U. Commission’s committee on industry and internal market).

82. Sharp & Pavitt, *supra* note 27, at 145.

83. Economic and Social Committee, Opinion on the Proposal for a Council Directive on the Legal Protection of Databases, §§ 2(3b), 2(4) & 3(13), 1993 O.J. (C 19) 3, 4.

84. Perry, *supra* note 81.

protection.⁸⁵ These provisions would be critical to determining the length of the sui generis protection, since many databases are continuously updated to remain current. One industry representative proposed a term of twenty-five years, noting that otherwise "[the] effect of the Directive would be to impose on producers a requirement to reconstitute their database design every ten years"⁸⁶ simply to refresh the term of protection.

The European Parliament recommended a fifteen-year term of sui generis protection as a compromise,⁸⁷ which the Commission adopted in the latest draft of the Directive. The Commission also changed the effect of additions and revisions⁸⁸ to provide that the initial term of protection begins on the date when the database is first made available to the public, and recommences upon any substantial change to the database.⁸⁹ As one commentator notes, the sui generis protection could now become limitless: "[A]ny database protected by extraction right, and regularly updated, may have in effect perpetual protection provided that regular updating produces substantial modifications of all or part of the contents at least once in every 15 years."⁹⁰

Unfortunately, the latest draft did not sufficiently clarify ambiguities regarding the measure of the "substantiality" of change that would restart the clock on the term of protection. The new definition of a change substantial enough to restart the clock is "the successive accumulation of insubstantial additions, deletions or alteration in respect to the contents of a database, resulting in substantial modification of all or part of the database."⁹¹ "Insubstantial changes" that would not restart the term are defined as "insubstantial additions, deletions or alterations

85. *Id.*

86. *Id.* The speaker was Richard Baker, legal director of Reed International PLC, the publishing and information group. In fact, the database receives fifty years of copyright protection under Berne, and the contents would receive the 15 year term of the sui generis protection.

87. Parliament Amendments, *supra* note 40, at no. 24, art. 9(3).

88. Perry, *supra* note 81.

89. Amended Directive, *supra* note 5, at art. 12(1); *see also* Parliament Amendments, *supra* note 40, at no. 24, art. 9(3). The Member Countries still do not agree on the appropriate term of protection. Some delegates to the intellectual property working group of the Council of Ministers are arguing for increasing the term to up to fifty years. *Data Protection EU Council Examines Sui Generis Rights*, TECH EUROPE, Mar. 1, 1995.

90. Simon Chalton, *The Amended Database Directive Proposal: A Commentary and Synopsis*, 3 EUR. INTEL. PROP. REV. 94, 97 (1994).

91. Amended Directive, *supra* note 5, at art. 12(2)(b); *see also* *Data Protection EU Council Examines Sui Generis Rights*, TECH EUROPE, Mar. 1, 1995 (noting that the representatives to the Council's intellectual property working group who recently met to discuss the Database Directive are unsure about this provision and would like further "clarification of the criteria that databases have to fulfill" to renew these rights).

which, taken together, do not substantially modify the contents of a database."⁹²

An explanation of "insubstantial change" as change that does not "substantially modify" contents will provide no objective way for a database publisher to know when it will refresh the term of protection. These poorly written clauses merely re-describe the phrases in their own terms, and therefore, they do not define concrete standards useful to the information industry.

B. Provisions Limiting the Use of Database Contents

1. PERMISSIBLE REFERENCES, QUOTATIONS, AND EXTRACTIONS

The Database Directive requires a database creator to seek various levels of permission to include certain contents in a database. The level of permission needed depends on the kind of material added to a database. For example, if a database creator intended to incorporate a copyrighted work into a database, the owner would first have to obtain the prior authorization of the copyright holder under Article 5 of the Directive.⁹³

The Database Directive contains several exceptions to the prior authorization requirement.⁹⁴ Bibliographic references, brief quotations and abstracts do not require prior authorization if the database clearly indicates the author and source, provided that the information does not rise to the level of a substantial description or a summary of the contents of the underlying work.⁹⁵ Databases may also include material by "quotation" and "illustration" if they comply with Article 10(3) of the Berne Convention,⁹⁶ whereby "mention shall be made of the source, and of the name of the author if it appears thereon."⁹⁷

The Database Directive also permits certain uses of database contents without prior authorization. The basic requirement is that a database user may only extract "insubstantial parts" of a database without authorization. The initial draft of the Directive provided that any "insubstantial parts" extracted without authorization be "evaluated quantitatively and qualitatively in relation to the database from which they are copied . . . not to prejudice the exclusive rights of the maker of that database to exploit the database."⁹⁸ This early draft did not define

92. Amended Directive, *supra* note 5, at art. 12(3)(b).

93. *Id.* at art. 5(1).

94. *Id.* at art. 5(2).

95. *Id.*

96. *Id.*

97. Berne Convention, *supra* note 8, at art. 10(3).

98. *Id.* at art. 1(3).

"commercial purposes" or "personal private use,"⁹⁹ or indicate what amount of copying would trigger infringement.¹⁰⁰

Members of the database industry were concerned about the muddled language of the provisions and lobbied the European Commission for clearer definitions and objective standards.¹⁰¹ Many industry associations complained that actual percentage levels were necessary to determine whether copying rose above the level of "insubstantial parts" and thus infringed upon any rights in the databases.¹⁰² The director of the European Association of Information Services argued, "Consider an electronic database of medical data. The recommended dosage of a drug may be only one number amongst millions in that database but it may be the most important item of information concerning that drug. Is it an 'insubstantial part'?"¹⁰³ Many database producers did not want to compromise any of their sui generis rights and lobbied the Commission to eliminate the exception in its entirety.¹⁰⁴ The European Parliament's comments to the Commission recommended revisions to these provisions as well.

In response to industry pressure and the recommendations of the Parliament, the Commission partially rewrote these provisions in its latest draft. The Directive now permits the unauthorized extraction of insubstantial parts of a database for private or commercial purposes,¹⁰⁵ and defines commercial purposes as "any use which is not (a) private, personal, and (b) for non-profit making purposes."¹⁰⁶ Those who use the information bear the burden of proof that "the extraction and re-utilization of insubstantial parts do not prejudice the exclusive rights of the owner of that database to exploit the database, and that such practices are not carried out any more than is necessary to achieve the desired objective."¹⁰⁷ The U.S. copyright law similarly requires a judge ruling on whether an unauthorized use is "fair" to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," as well as the harm to the potential copyrighted work.¹⁰⁸ However, the Commission did not add percentage levels or other numerical guidelines for the determination of permissible extraction. Thus, despite the Commission's attempt to clarify this language, the new

99. *Id.*

100. *Id.*

101. Perry, *supra* note 81.

102. *Id.*

103. *Id.* (Interview with Barry Mahon, executive director of EUSIDIC).

104. *Id.*

105. Draft Directive, *supra* note 37, at arts. 8(4) - (5).

106. Amended Directive, *supra* note 5, at art. 11(7).

107. *Id.* at art. 8(b).

108. 17 U.S.C. §§ 107(3)-(4) (1988 & Supp. 1992).

provisions have not addressed industry complaints that the Directive lacks objective standards for infringement.¹⁰⁹

2. FAIR USE AND COMPULSORY LICENSES

The Directive further limits its grant of sui generis rights by requiring that database creators allow free use of their databases for noncommercial private, educational, and research purposes.¹¹⁰ The Directive requires that all licensing agreements made by database distributors contain a "clause allowing such fair use":

Whereas distributors of databases should make appropriate provisions in their contracts as regards to the unauthorized re-utilization of the contents of the database by the lawful user where such re-utilization is for strictly private purposes or for the purposes of teaching or research, provided such re-utilization is not carried out for commercial purposes and does not prejudice the exclusive rights of the maker of the database to exploit that database.¹¹¹

Similar provisions are found in the copyright laws of the United States and in the Berne Convention. Section 107 of the 1976 Copyright Act provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."¹¹² The Berne Convention allows signatory countries to decide whether to permit the fair use of protected works for teaching.¹¹³

For data that is difficult to acquire, the Database Directive could require that a compulsory license issue for the information, although the issue is under reconsideration by the Council of Ministers and may be removed from the final draft of the Directive that will be reviewed by the European Parliament under the co-decision procedure.¹¹⁴ Article 11(1) of the version of the Database Directive reviewed by the Council of Ministers requires that if the contents of a database "cannot be independently created, collected or obtained from any other source," a compulsory license must issue on "fair use and non-discriminatory terms."¹¹⁵ To apply for a compulsory license, a database user would submit a declaration "clearly setting out the justification of the commercial purposes pursued and requiring the issue of a license."¹¹⁶ A

109. Perry, *supra* note 81.

110. Amended Directive, *supra* note 5, at Recital 38a.

111. *Id.*

112. 17 U.S.C. § 107 (1988).

113. Berne Convention, *supra* note 8, at art. 10(2).

114. *Council Seeks Accord on Database Directive*, REUTERS EUR. COMMUNITY REP., May 31, 1995; *EU Policy Updates: Data Protection - Database Directive*, BUSINESS EUROPE, June 19, 1995.

115. Amended Directive, *supra* note 5, at art. 11(2).

116. *Id.* at art. 11(1).

compulsory license would not be available simply to save time, effort, or money.¹¹⁷ In such cases, the database user would be required to negotiate a private license with the database owner or to collect the data independently.¹¹⁸

The compulsory licensing requirement does not apply to all databases produced in the European Union. It applies solely to databases available to be "freely" interrogated by the public, and produced either by a public entity, an entity under a duty to provide the information, or a firm with a monopoly on the information acquired through an exclusive governmental concession.¹¹⁹ The concept of "free interrogation" of a database is not defined, rendering "unclear whether either a requirement for payment or a provision limiting the mode or extent of interrogation of a database will mean that the database is not made publicly available, and so is not subject to compulsory licensing."¹²⁰

Members of the information industry reacted strongly against the compulsory licensing provision.¹²¹ Charles Clark, director of the Federation of European Publishers, recommended that the Commission include a five-year "breathing period" before a new database would be susceptible to compulsory licensing.¹²² He argued that this would be an effective incentive for the creation of databases in the public interest, such as collections of medical information. Since these databases often generate lower revenues, they would require longer periods of exclusivity for publishers to recoup their initial investments.¹²³ Despite the benefits to the database industry of Clark's suggestion for a breathing period, the Commission did not include one in the latest version of the Directive. However, from the recent response of the Council of Ministers (the text of which is unavailable at publication),¹²⁴ it appears the lobbyists may yet prevail on this issue.

3. RECIPROCITY

The Directive contains reciprocity provisions that limit the availability of the sui generis rights to certain companies. The Directive

117. *Id.*

118. *Id.*

119. *Id.* at arts. 11(2)(a)-(b).

120. Chalton, *supra* note 90, at 98.

121. Perry, *supra* note 81.

122. *Id.*

123. *Publishers' Rights in the Information Society*, TECHEUROPE, Sept. 6, 1994. European publishers who have voiced their opposition to the compulsory license provision include Federation of European Publishers, European Newspaper Publishers Association, Federation of Associations of Periodical Publishers, and International Group of Scientific, Technical and Medical Publishers. *Id.*

124. IP(95)572 (European Union press release discussing Council of Ministers' decision regarding the Database Directive).

grants national treatment for any copyrights protecting the format and contents of a database, but the *sui generis* protection is much more restricted. *Sui generis* rights extend exclusively to nationals of member countries of the E.U. and to database producers who establish their "habitual residence" in the E.U.¹²⁵ In the case of a work made for hire under Article 3(4) of the Directive,¹²⁶ a database producer must have a "registered office, central administration or principal place of business" in the E.U., or its "registered office . . . must possess an effective and continuous link with the economy of one of the Member States."¹²⁷

Databases produced by companies in non-member countries without E.U. offices will receive *sui generis* protection only if their countries have comparable laws or have formed agreements with the E.U. to allow for such protection by the E.U.¹²⁸ Article 13(3) allows the Council to form such an agreement with a country that fails to meet the reciprocity requirement.¹²⁹ Although one interpretation of this provision is that "the Commission hopes . . . to encourage wider availability of the new *sui generis* right,"¹³⁰ the operation of the reciprocity requirement would probably not have this effect. Instead, the reciprocity provisions are a grave threat on many levels. The provisions could have adverse effects on international trade and the global harmonization of intellectual property protection, as discussed in Parts IV and V.

IV. DATABASE PROTECTION IN THE UNITED STATES

As discussed in Part II.B.3. above, the Database Directive restricts *sui generis* protection to databases made by companies with their "principal place of business" in the European Union or "an effective and continuous link" with the economy of a member state,¹³¹ and to databases produced in countries where the national laws prohibit the unauthorized use of database contents.¹³² This part examines the protection provided to compilations of information in the United States to illustrate that the intellectual property laws in this country do not provide similar protection to uncopyrightable database contents and, therefore, will not meet the reciprocity requirements of the Directive. As a result, database publishers in the country that is the world's largest database supplier will be denied *sui generis* protection for their products within the E.U..

125. Amended Directive, *supra* note 5, at art. 13(1).

126. *Id.* at art. 3(4).

127. *Id.* at art. 13(2).

128. *Id.* at Preamble, § 38.

129. *Id.* at art. 13(3).

130. Chalton, *supra* note 90, at 99 (emphasis omitted).

131. *Id.*

132. *Id.*

A. Protection for Facts After *Feist*¹³³

The sui generis rights in the Database Directive aim to protect databases that are primarily collections of raw facts. Compilations of facts remain unprotected under U.S. copyright laws, as the Supreme Court recently reaffirmed in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹³⁴ In that case, the Supreme Court reiterated the "bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations."¹³⁵ The plaintiff in *Feist* was a public utility that provided telephone service to certain regions in Kansas.¹³⁶ Kansas state law required the Rural Telephone Service Company to issue a directory containing an alphabetical listing of the names, addresses, and telephone numbers of its customers.¹³⁷ Defendant Feist Publications printed a "white pages" type directory that contained the same sort of information, but for a larger geographical area than the plaintiff's directory.¹³⁸ The Plaintiff sued the Defendant for infringement of its copyright in the directory because 1,309 entries in the Defendant's directory were the same as the Plaintiff's directory.

The Supreme Court held that the defendant did not infringe the plaintiff's copyright. Despite the fact that it had copied a substantial amount of plaintiff's telephone directory – 1,309 entries¹³⁹ – the defendant did not copy any protectable elements.¹⁴⁰ The Court found the contents of the directory – names, telephone numbers, and addresses – to be unprotectable facts, leaving only its selection, arrangement, and coordination as potentially protectable elements of the directory. The Court considered the Plaintiff's telephone directory to be "garden-variety" as it was arranged in alphabetical order, a method of organization that evidenced no originality.¹⁴¹ Writing for a unanimous Court, Justice O'Connor stated that the Copyright Act only protects works "possess[ing] at least some minimal degree of creativity."¹⁴² The level of creativity can be "extremely low,"¹⁴³ yet originality must exist in some form.

133. *Feist Publications v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

134. *Id.* at 344-45.

135. *Id.* at 347.

136. *Id.*

137. *Id.*

138. *Id.*; see also Michael Epstein & Kenneth R. Parks, *Law Stresses Originality in Protection of Databases*, N.Y.L.J., Apr. 12, 1991, at S2.

139. *Feist*, 499 U.S. at 349.

140. *Id.*

141. *Id.* at 345.

142. *Id.*

143. *Id.*

In its discussion of the failure of the directory's contents to qualify for copyright protection, the Court restated principles underlying the lack of copyright protection for facts. Under the 1976 Copyright Act, facts and ideas do not qualify as "original works of authorship"; therefore, according to the Court, protecting factual contents would violate the "most fundamental axiom of copyright law."¹⁴⁴ Copyright principles follow "the First Amendment doctrine that free speech encompasses 'public access to discussion, debate and dissemination of information and ideas'."¹⁴⁵

Copyright laws will only protect a collection of facts when the facts are "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."¹⁴⁶ This copyright "extends only to the material contributed by the author of such work" and not to any unprotectable contents.¹⁴⁷ Regardless of the level of creativity evidenced in the compilation of factual elements and the labor expended to create the compilation, as Justice O'Connor wrote in *Feist*, the "facts themselves do not become original through association."¹⁴⁸ Thus, a copyright in a factual compilation is "thin," because the elements—the facts themselves—receive no protection.¹⁴⁹

The *Feist* Court noted that its decision was based largely on the Constitutional "objective of copyright . . . [t]o promote the Progress of Science and useful Arts."¹⁵⁰ The Court interpreted this Constitutional mandate to reward the fruits of the creative process and not the labor involved in the process itself, commonly called "sweat of the brow."¹⁵¹ Before the *Feist* decision, most courts had abandoned a "sweat of the brow" theory, as the Second Circuit did twenty-eight years ago in *Rosemont Enterprises, Inc. v. Random House, Inc.*¹⁵² The *Feist* case completely abrogated the "sweat of the brow" theory as a basis for copyright protection.¹⁵³ Therefore, "a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a

144. *Id.* at 344.

145. *Cable News Network v. Video Monitoring Servs. of Am.*, 940 F.2d 1471, 1479 (11th Cir. 1991) (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982)).

146. 17 U.S.C. §101 (1988).

147. *Id.* at § 103.

148. *Feist*, 499 U.S. at 349.

149. *Id.*; see also *Epstein & Parks*, *supra* note 138.

150. 499 U.S. at 349 (quoting U.S. Const. art. I, § 8, cl. 8).

151. *Id.* at 352-53.

152. 366 F.2d 303, 306-07 (2d Cir. 1966).

153. State law may protect compilations based on a variation of the "sweat of the brow" misappropriation theory; however, preemption issues would exist in application of this state doctrine to protection of this subject matter, which is covered by the Copyright Act.

competing work, so long as the competing work does not feature the same selection and arrangement."¹⁵⁴

The Supreme Court ultimately decided *Feist* using a fact-specific analysis of the copyrightability of a typical "white pages" telephone directory.¹⁵⁵ The Court found that copyright would not protect telephone directories arranged in alphabetical order, as they showed absolutely no evidence of independent creation or a "minimal degree of creativity."¹⁵⁶ In fact, the *Feist* Court's test for "some minimal degree of creativity" was itself "minimal," in that it provided little guidance for courts to decide whether different kinds of compilations should receive copyright protection.¹⁵⁷ The decision merely stated that "the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."¹⁵⁸ This "narrow category" of unprotected works would probably include alphabetical, numerical, and chronological listings.¹⁵⁹ For example, a case decided soon after *Feist* found that "typical yellow pages" telephone directories were uncopyrightable.¹⁶⁰ However, many databases will fall into a gray zone under the *Feist* Court's test.

Courts already offer varied interpretations of the vague standard announced in *Feist*. Most courts uphold copyright protection for compilations that reflect anything beyond entirely routine methods of organization, making the requisite level of creativity seem truly minimal.¹⁶¹ In *Kregos v. Associated Press*,¹⁶² the Second Circuit held that forms used to compile baseball pitching statistics were copyrightable since the plaintiff had selected nine categories from "scores of available statistics about pitching performance."¹⁶³ The *Kregos* court found that the plaintiff's method of selection sufficiently reflected the "personal opinion, taste, or judgment" of the creator to warrant copyright protection.¹⁶⁴

154. *Feist*, 499 U.S. at 349.

155. *Id.*

156. *Id.* at 345.

157. *Id.*

158. *Id.* at 359.

159. COPYRIGHT OFFICE, GUIDELINES FOR REGISTRATION OF FACT-BASED COMPILATIONS 1 (rev. Oct. 11, 1989).

160. *Bellsouth Advert. & Publishing Corp. v. Donnelley Info. Publish.*, 999 F.2d 1436, 1443 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 943 (1994).

161. *See also* Kristin Loeber, *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.: Mopping the Sweat off of the Brow*, 44 BAYLOR L. REV., 409 (1992).

162. 937 F.2d 700 (2d Cir. 1991), remanded as 795 F. Supp. 1325 (S.D.N.Y. 1992), *aff'd*, 3 F.3d 656 (2d Cir. 1993).

163. *Id.*

164. *Id.*

In *Kregos*, the Second Circuit tried to give teeth to the "minimal creativity" standard announced in *Feist* by using evidence of personal opinion, taste, and judgment as a mark of creativity. The Court noted that under *Feist*, the copyright in a factual compilation was thin but "we do not believe it is anorexic."¹⁶⁵ However, selecting categories of information will not always meet the Second Circuit's "personal judgment" test. In the same year as the *Kregos* decision, the Second Circuit denied copyright protection to the maker of a chart used to collect horse racing statistics. The statistics were arranged on "purely functional grids that offer no opportunity for variation."¹⁶⁶ The court found that the selection of categories for the chart involved inadequate personal judgment to meet a minimum degree of creativity.¹⁶⁷

In a case decided the following year, *Corsearch, Inc. v. Thomson & Thomson*,¹⁶⁸ the District Court for the Southern District of New York added their own criteria to the test for original selection, coordination, and arrangement of a database. The District Court held that the formatting "enhancements" of Thomson & Thomson's TrademarksCan database of trademark information evidenced sufficient creativity to uphold its copyright protection.¹⁶⁹ The District Court looked for evidence of "enhancement and programming of the state trademark data, as well as other contributions that establish the originality and requisite creativity."¹⁷⁰ Using this test, the court found infringement of the copyrightable "enhancement[s]" in the database, because the defendant could have selected and rearranged the data in an original format but instead sold reports duplicating the format exactly.¹⁷¹ The significant additions to the test for creativity in this decision illustrate the need for courts to put their own gloss on the Supreme Court's gossamer standards.

Although the actual contents of the database are not copyrightable, the test for copyright infringement of a database requires a court to examine the contents. The general test for copyright infringement is whether an allegedly infringing copy is "substantially similar" to a

165. *Key Publications v. Chinatown Today Publish. Enter., Inc.*, 945 F.2d 509, 514 (2d Cir. 1991); see also *Budish v. Gordon*, 784 F. Supp. 1320, 1333 (N.D. Ohio 1992) (quoting *Key Publications*).

166. *Victor Lalli Enters. v. Big Red Publish.*, 936 F.2d 671 (2d Cir 1991).

167. *Id.* The U.S. Court of Appeals for the Seventh Circuit recently asked the same question in *Mid Atlantic Title Co. v. Kirk*, 991 F.2d 417 (7th Cir. 1993), and remanded the case for reconsideration of whether a compilation of title search information contained sufficient originality for copyright protection.

168. 792 F. Supp. 305 (S.D.N.Y. 1992).

169. *Id.*

170. *Id.* at 322.

171. *Id.* at 305.

copyrighted work.¹⁷² In the context of compilations, courts test whether any of the copyrightable elements of a compilation—arrangement, selection, or coordination—are substantially similar.¹⁷³ Courts compare the arrangement of entries, the method of selection of entries for inclusion in the database, and the coordination of the entries into database form to determine whether the defendant's database is substantially similar to the plaintiff's.

When the database format is uncopyrightable, the percentage of contents copied becomes unimportant. For example, in *Key Publications v. Chinatown Today Publishing Enterprises*, the court found no substantial similarity in the databases, and therefore no infringement, even though 17 percent of the entries were exactly the same.¹⁷⁴ Similarly, in *Bellsouth Advertising and Publishing Corp. v. Donnelly Information Publishing, Inc.*,¹⁷⁵ a typical "yellow pages" directory was held to be uncopyrightable, so the fact that the plaintiff's and defendant's directories shared the same 37 erroneous listings could still not rise to the level of infringement.¹⁷⁶ These cases show that significant duplication of entries may not be adequate grounds for infringement. Major duplication of contents seems to evade a finding of copyright infringement if accompanied by even a minor modification of format. Therefore, aside from cases of exact duplication, the copyright infringement protection for a compilation of facts is fairly meager.

The merger doctrine may present a further barrier to copyright protection for factual compilations.¹⁷⁷ The merger doctrine prevents a copyright from attaching to a work in which the idea and expression "merge," because only one expression of the idea is possible.¹⁷⁸ In the database context, facts gathered in the most practical, user-friendly format will retain no protectable elements. This is a favorable outcome, as scholar Paul Goldstein notes, because "variety" is the last thing that consumers desire in fact works such as directories.¹⁷⁹ The facts from the *Feist* case serve as an example of how the merger doctrine defeats copyright protection in a compilation. Few arrangements are possible for

172. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); GOLDSTEIN, *supra* note 6, at § 7.1.1.

173. GOLDSTEIN, *supra* note 6, at §§ 7.3.1, 8.4, 8.6; 1976 COPYRIGHT ACT §§ 101, 103(b) (definition and scope of copyright protection of compilation and collective work).

174. *Key Publications v. Chinatown Today Publish. Enter., Inc.*, 945 F.2d 509, 516 (2d Cir. 1991).

175. *Bellsouth Advert. & Publishing Corp. v. Donnelley Info. Publish.*, 999 F.2d 1436, 1436-45 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 943 (1994).

176. *Id.*

177. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Baker v. Selden*, 101 U.S. 99, 201, 217 (1880).

178. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Baker v. Selden*, 101 U.S. 99, 201, 217 (1880).

179. GOLDSTEIN, *supra* note 6, at § 2.3.2.

typical "white pages" telephone directories, which list every telephone customer in a defined geographic area. Likewise, the *Kregos* court stated that copyright protection would not be available if few ways existed to organize horse racing or baseball pitching statistics.¹⁸⁰ However, courts differ on how to apply the merger doctrine, and sometimes reach an undesirable outcome, as in the Fourth Circuit case which upheld protection for a database because its format was designed to be "readable" for a lay person.¹⁸¹

The merger doctrine is based on the separation of unprotectable ideas from the protectable expression of such ideas. The fundamental importance of the idea/expression dichotomy in the case of factual works was noted over a century ago, in the Supreme Court's decision in *Baker v. Selden*.¹⁸² The Court denied copyright protection to the methodology contained in a book that explained a new system of double-entry bookkeeping. Selden's valid copyright in his book, the Court stated, could not be used to prevent others from using the factual knowledge the book contained.

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.¹⁸³

The Court's holding in *Baker v. Selden* succinctly summarizes the U.S. policy on the protection of factual information that continues to this day. It is true that "great praise may be due to the plaintiffs for their industry . . . yet the law does not contemplate their being rewarded" with a copyright.¹⁸⁴ The copyright policy of the U.S., as reaffirmed by *Feist* and the cases that have followed, continues to "eliminate the economic waste of a rule that [would require] competitors to reinvent the wheel, incurring the same expense as the first copyright owner to produce an identical product."¹⁸⁵

180. *Kregos v. Associated Press*, 3 F.3d 656, 700 (2d Cir. 1993); see also *Victor Lalli Enters. v. Big Red Apple*, 936 F.2d 671 (2d Cir. 1991) (finding that copyright would not protect "purely functional grids that offer no opportunity for variation").

181. *U.S. Payphone v. Executives Unlimited of Durham*, 18 U.S.P.Q. 2d 2049 (BNA) (4th Cir. 1991).

182. *Baker v. Selden*, 101 U.S. 99 (1880).

183. *Id.* at 103.

184. *Id.* at 105.

185. GOLDSTEIN, *supra* note 6, at § 8.4.1.2.

B. Other Sources of Legal Protection for Database Contents

There are some U.S. laws that protect databases in a way that is comparable to the *sui generis* protection of the Database Directive—state misappropriation laws. The Database Directive itself is described as a misappropriation law in its Preamble, which states that the Directive was enacted “to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment incurred in obtaining and collecting data.”¹⁸⁶ In the United States, state law claims of misappropriation have often served “to fill the interstices of copyright.”¹⁸⁷

However, the question remains whether state misappropriation laws may be preempted by section 301 of the Copyright Act in the context of database contents.¹⁸⁸ Section 301 provides that the Copyright Act preempts

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.¹⁸⁹

Courts mainly focus on the third test when deciding cases regarding factual compilations, namely, whether the work falls within the scope of the subject matter of copyright law.¹⁹⁰ Therefore, a state cause of action will be preempted by federal copyright law “if the subject matter of the state-law right falls within the subject matter of the copyright laws and the state-law right asserted is equivalent to the exclusive rights protected by federal copyright law.”¹⁹¹

The application of Section 301 is inconsistent because of the ambiguity of the phrase “come within the subject matter of copyright.”¹⁹² Although the Copyright Act does not protect raw facts, U.S. courts remain split on whether “facts” lie within or without the subject matter of

186. Amended Directive, *supra* note 5, at Preamble § 28.

187. GOLDSTEIN, *supra* note 6, at § 15.4.2.

188. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (state misappropriation law not preempted).

189. 17 U.S.C. § 301 (1988).

190. GOLDSTEIN, *supra* note 6, at §§ 15.2.3, 15.7; *see also infra* note 191.

191. *Kregos v. Associated Press*, 3 F.3d 656, 666 (2d Cir. 1993) (false designation of ownership claim grounded solely on defendant's copying of plaintiff's protected expression held preempted by copyright law); *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992) (unfair competition and misappropriation claims based on the copying of plaintiff's protected expression preempted); *Walker v. Time-Life Films*, 784 F.2d 44 (2d Cir. 1986) (plaintiff's state law claim that defendant's movie copied his book preempted); *Xerox Corp. v. Apple Computers, Inc.*, 734 F. Supp. 1542 (N.D. Cal. 1990) (preemption of reverse passing off claim in which plaintiff alleged it was constructive author of defendant's product).

192. GOLDSTEIN, *supra* note 6, at § 15.2.3.

the Act. Some courts have upheld state misappropriation claims for improper use of the uncopyrightable material within a copyrightable work.¹⁹³ However, most courts find that "[s]tate law claims do not avoid preemption simply because they are based upon the improper use of uncopyrightable material contained in works properly subject to copyright."¹⁹⁴

In addition, state computer crime laws are a potential source of protection for database contents.¹⁹⁵ Computer crime laws have been enacted by forty-nine states to prohibit the unauthorized access, use, and damage of such computer-stored information when such information has been kept confidential as a trade secret.¹⁹⁶ Despite the differences between such laws and the provision of the Directive—that they require that the information be confidential and provide for criminal liability—these statutes share the goals of the Directive, to prevent the unauthorized extraction and reuse of computer-stored information.¹⁹⁷ However, the E.U. will probably focus on the differences between the Directive and computer crime laws, not the similarities, as they do not seem to desire reciprocity, as discussed in Part V.

V. INTERNATIONAL CRITICISM OF THE DATABASE DIRECTIVE

The Database Directive has not received widespread acceptance in the international database industry. Even within the E.U., opinions are

193. *Bellsouth Advert. & Publish. Corp. v. Donnelley Info. Publish., Inc.*, 933 F.2d 952, 957 n.11 (11th Cir. 1991), *vacated*, 977 F.2d 1435, *aff'd*, 999 F.2d 1436 (11th Cir. 1993) (stating that data "accumulated by the 'sweat of the brow'" may find protection under unfair competition); *Mayer v. Josiah Wedgewood & Sons, Ltd.*, 601 F. Supp. 1523, 1533-34 (S.D.N.Y. 1985) (citing the legislative history of the Copyright Act and its examples of state misappropriation claims not preempted by the Act, including taking of "hot news" and improper invasion of information in a database). Note, *Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality*, 27 G.W. J. INT'L L. & ECON. 457, 500 (1994) (arguing that a state right against misappropriation or unfair extraction would not be preempted under the subject matter test).

194. *Nash v. CBS, Inc.* 704 F. Supp. 823, 832 (N.D. Ill. 1989), *aff'd*, 899 F.2d 1537 (7th Cir. 1990) (state law claim for improper use of uncopyrightable material contained in plaintiff's copyrighted book preempted); see also Paul T. Sheils & Robert Penchina, *What's All the Fuss About Feist? The Sky is Not Falling on the Intellectual Property Rights of Online Database Proprietors*, 17 DAYTON L. REV. 563, 584 (1992). Although section 301 is now the primary means to find preemption of the Copyright Act, the Supremacy Clause of the U.S. Constitution may also operate to preempt state law protection of facts. U.S. Const. art. VI, § 2. The Supremacy Clause will preempt a state law that conflicts with, or hinders the objections of federal law and thus "will so offend the federal balance that it must be invalidated." GOLDSTEIN, *supra* note 6, at § 15.3.3.

195. See, e.g., Cal. Penal Code § 502 (1992); FLORIDA COMPUTER CRIMES ACT, FLA. STAT. ANN. § 815.01-.07 (West 1976 & Supp. 1991).

196. *Id.*

197. Amended Directive, *supra* note 5, at Preamble, no. 7.

mixed as to the relative benefits and shortcomings of the legislation.¹⁹⁸ This part addresses current reactions to the proposal, and potential reactions upon its passage, with particular emphasis on the reactions in the countries that are the world leaders in database protection, the United States and Great Britain.

A. Reactions to the Directive in the United States

The United States is the world's largest producer and distributor of databases.¹⁹⁹ As such, it seems a likely target for the Database Directive's reciprocity provisions, which withholds content protection for databases produced in countries without similar protection. Since U.S. laws do not provide similar protection for database contents, the contents of databases produced in this country will remain unprotected in the E.U.²⁰⁰ Congress would probably need to pass *sui generis* legislation to obtain reciprocity in the E.U. and prevent U.S. database producers from being at a competitive disadvantage in the E.U.

Professor Paul Goldstein notes that while *Feist* held that *copyright* protection is unavailable for database contents, it does not preclude database content protection by some other means.²⁰¹ He writes that "if Congress wishes to [protect factual database contents] . . . it must do so under some constitutional power other than the copyright power."²⁰² Thus, although *Feist* abrogated copyright protection for the products of

198. Henry H. Perritt, Jr., *The International Legal Information Network*, 38 BILL. L. R EV. 555 (1992); J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms, Symposium: Toward a Third Intellectual Property Paradigm*, 94 COLUM. L. REV. 2432, 2496 (1994) (calling the Database directive "a legal monstrosity"); *but cf.* Christian Tyler, *A Modern-Day Caxton*, FINANCIAL TIMES, Dec. 24, 1994, at 3 (quoting publisher of electronic databases who fears that data protection under the EC directives "will be much too weak").

199. See DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1992, at 62-2. The Impact Program identified Japan as another target country of the Database Directive. The Japanese government, through the Ministry of International Trade and Industry (MITI), has instituted several programs to foster the development of information services. Two programs "emphasize the medium- to long-term at which Japan may pose in international markets for electronic information. The first is the designation by MITI and the Ministry of Post and Telecommunications of more than 60 towns and areas outside Tokyo as testing grounds for the use of advanced information technologies In June 1991, MITI announced that it intended to make a large investment (MECU 24) by [sic] a 'Hyper Network' laboratory." 1991 Impact Report, *supra* note 4, at 5. The report may have overstated Japan's true "threat" to the European Union, as this laboratory is actually a joint venture with France Telecom. *Id.*

200. See text in Part IV *supra*.

201. Paul Goldstein, *Copyright and Legislation: The Kastenmeier Years*, 55 LAW & CONTEMP. PROBS. 79 (1992). Cf. Note: *Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality*, 27 G.W. J. INT'L L. & ECON. 457, 500 (1994) (supporting congressional enactment of a scheme of copyright protection for databases exceeding that for the E.U.'s Database Directive, to allow the United States to continue to dominate the world database market).

202. Goldstein, *supra* note 201.

the "sweat of the brow,"²⁰³ such protection could still be provided outside of the domain of copyright. Goldstein notes that the Commerce Clause of the U.S. Constitution would be an appropriate source for federal power over the protection of the factual contents of databases.²⁰⁴

Whether the United States will adopt laws that directly protect database contents is unclear. The Department of Commerce has repeatedly identified intellectual property protection for databases as a major concern.²⁰⁵ In the year the Supreme Court decided *Feist*, a Commerce Department report noted the negative impact the decision could have on the information industry.²⁰⁶ The report feared that "it could cheapen the value of databases and be a disincentive to produce them."²⁰⁷ In a report issued the following year, however, the Commerce Department backed away from this statement, arguing instead that "[t]he broad public interest in promoting the dissemination of information to our citizens must be balanced with the need to ensure the integrity of intellectual property rights and copyrights in information and entertainment products."²⁰⁸ The current Commerce Department position advocates the "globalization of the information services industry" and "places a high priority on removing barriers to cross-border trade and to investment."²⁰⁹ Thus, the Commerce Department's trend toward open borders indicates that, while *sui generis* protection may not be *completely* out of the question, it is exceedingly unlikely.

The issue of database contents protection could become an obstacle to U.S.-E.U. trade. The long-standing U.S. policy has been to support the free dissemination of information, and to condemn such protection elsewhere.²¹⁰ U.S. trade policy has also focused on an international agenda that encourages the globalization of information services.²¹¹ In 1992, the Commerce Department reported that the U.S. government placed a high priority on removing barriers to trade and investment by U.S. information service companies, and has sought to remove such

203. *Feist*, 499 U.S. 340, 352-53.

204. Goldstein, *supra* note 201.

205. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1992, at 26-2.

206. *Id.*; see also Note: *Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality*, 27 G.W. J. INT'L L. & ECON. 457, 500 (1994) (arguing for a reversal of *Feist* to protect the U.S. database industry).

207. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1992, at 26-2.

208. DEPT. OF COMMERCE, Administration Policy Statement on the National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49025, 49030 (1993).

209. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994, at 25-1.

210. President Clinton often states that reciprocity is a two-way street, relating the need for other countries to open their markets to U.S. goods if they want the U.S. market to remain open to theirs. See, e.g., *GATT's Last Hurray a Global Triumph*, HOUS. CHRON., Dec. 19, 1993, at 2 (appealing to Europe to open its market).

211. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1992, at 26-1.

barriers through its discussions and negotiations with members of the General Agreement on Tariffs and Trade as well as in bilateral talks with Mexico, Canada, the European Community (E.C.), and other countries.²¹²

Apart from action by the U.S. government, database producers in the United States might attempt to qualify for protection under the Database Directive by publishing a version of their databases in the E.U. This strategy, however, would be a costly means of circumventing the reciprocity provisions of the Database Directive. Database producers in the United States also are likely to continue using data from European databases, as permitted by *Feist*.²¹³ Lacking database protection in the United States, European companies may attempt to stop the transfer of data to the United States and forego the entire U.S. information market.

B. Responses in Great Britain

Great Britain is the main supplier of information services in the E. U.²¹⁴ To preserve its position as the market leader in database production in Europe, Britain already grants databases a generous fifty years of copyright protection through provisions in Britain's Copyright Designs and Patent Act.²¹⁵ The Act protects a database as a literary work if its creator shows she used "mere skill, judgment and labor," a standard much lower than the "originality" requirement of U.S. copyright law.²¹⁶

If the European Council of Ministers passes the Database Directive, each of the E.U. member states will be required to enact its provisions into law within two years. As an E.U. directive, the new provisions would preempt the database contents protection in the Copyright Designs and Patent Act.²¹⁷ To comply with the E.U. regulation, Britain would have to shorten the duration of protection it provides to database contents. Thus, the threat to Britain stands opposite to the threat faced by the U.S., with regard to data protection, as the Directive would "undermine Britain's position of having arguably the best protection for databases among EC states."²¹⁸

Information industry members fear they will suffer an enormous setback if Britain has to lower its term of protection from fifty to fifteen

212. *Id.*

213. *Feist Publications v. Rural Tel. Serv.*, 499 U.S. 340, 352 (1991).

214. See text accompanying *supra* note 16.

215. Copyright Designs and Patent Act of 1988, §§ 3(1)(a)-(b). The Act defines "literary work" as "any work, other than a dramatic or musical work, which is written, spoken, or sung, and accordingly includes (a) a table or compilation, and (b) a computer program."

216. *Id.*; see also J.H. Reichman, *Electronic Information Tools—The Outer Edge of World Intellectual Property Law*, 17 DAYTON L. REV. 797, 804 (1992); 17 U.S.C. § 102(a) (1988).

217. See text accompanying *supra* notes 16-17.

218. David Owen, *Copyright Fears for Address Database*, FINANCIAL TIMES, Aug. 10, 1992, at 6.

years.²¹⁹ Many British information services trade associations have accused the European Commission of legislating at Great Britain's expense. The President of the Automobile Association, owner of one of Britain's largest databases, stated, "There is a feeling that the directive is drafted more according to the political concerns of the Commission rather than the problems of the real world."²²⁰ One industry representative noted that "the 'unfair extraction' right is a very poor exchange for the very well understood copyright, which has worked well in the UK."²²¹ Britain's Information Technology Marketing Council has called the Directive unworkable and a threat to the industry.²²²

The Database Directive would affect the intellectual property of a wide range of industries. The Royal Mail expresses concern about protection for its Postal Address File, a copyrighted list of British postal codes which generates millions of pounds of revenue for the Mail each year.²²³ The Automobile Association worries about the potential effects of the Directive on its computerized cartography and road reports operations.²²⁴ Many banks, including Barclays and the Royal Bank of Scotland, repeatedly complain about the Directive's threat to the transborder flow of financial data for market transactions, and have been lobbying actively against the Directive.²²⁵

British trade associations have mobilized to fight the Directive. The Direct Marketing Association (DMA) exhibited a special group to lobby the European Commission and European Parliament to allow Britain to retain the fifty years of protection for database contents currently available under its copyright laws.²²⁶ Colin Fricker, legal affairs director of the DMA, considers the Directive "ridiculous."²²⁷ He insists that the Directive would not even appease most European database producers, since "[t]he thing that unites all direct marketers, whatever their national laws at the moment, is they want better database protection than they

219. See *infra* notes 225-28.

220. Robin Cobb, *The Database Fightback: Database Producers Oppose Elimination of Copyright Protection*, *MARKETING*, Feb. 18, 1993, at 30.

221. *Id.*

222. *Pressure Group Claims Database Directive Spells Trouble*, *COMPUTER WKLY.*, Jan. 21, 1993, at 4.

223. Owen, *supra* note 218, at 6.

224. Cobb, *supra* note 220, at 30.

225. *Europe 1993: The Effects of E.C. IT Legislation*, *COMPUTER WKLY.*, Jan. 7, 1993, at 22 (statement by Victor Hume of the Irish Bankers Federation, at a 1992 meeting of the Council of European Computer Users Association).

226. Other opposition groups include FEDIM, which also lobbied against the directive for the protection of personal data; the Periodical Publishers Association (PPA), which opposes the compulsory license provision; and the Confederation of British Industry (CBI).

227. Cobb, *supra* note 220, at 30.

have. They want a protection equivalent to what we have in the UK and Ireland."²²⁸ With the Database Directive in its final stage of the approval process, it is unlikely these groups will convince the European Commission to increase the term of protection in the current proposal from fifteen to fifty years.

VI. CRITICAL FAILINGS OF THE DATABASE DIRECTIVE

A. Harmonization at the Expense of Globalization

The European Union maintains a vision of an internal market without barriers—a region where goods, services, capital, and people move freely.²²⁹ The European Council of Ministers aims to achieve a strong internal market through the directives it enacts. The directives are also intended to harmonize the laws of member countries²³⁰ and increase the international market for E.U. goods.

The Database Directive contains provisions consistent with these goals. The first goal of the drafters of the Database Directive was to harmonize the varying approaches member states have taken toward new technology.²³¹ However, the Berne Convention, the primary international copyright agreement, already protects the original elements of databases.²³² All of the E.U.'s member states are signatories of the Berne Convention, making new harmonizing legislation superfluous. Moreover, the *sui generis* proposal of the Directive contradicts the terms of the Berne Convention, which explicitly upholds the free dissemination of information by precluding protection of facts and news.

The preferable course of action for the E.U. would be to follow advice given by the World Intellectual Property Organization and submit a proposal to amend Berne.²³³ Following Berne instead of creating new *sui generis* legislation unique to the European Union would avert the inequity of the reciprocity provisions in the Directive. The "High-Level

228. *Id.*

229. See *supra* notes 22-24 and accompanying text.

230. EEC Treaty, *supra* note 24 (mandating the goal to streamline procedures and remove the administrative burdens that arise from having to work with different jurisdictions and conflicting laws).

231. For further discussion of technology-oriented legislation in the European Union, see *supra* notes 10-15 and accompanying text.

232. Berne Convention, *supra* note 8, at art. 2(5); see also *supra* notes 60-63, and accompanying text.

233. *Proposed Directive Would Harmonize Community Protection for Data Banks*, 6 WORLD INTEL. PROP. REP. 63, 64 (1992). The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations established in 1967 to administer UN Unions, including the Berne Convention. All of the Member States of the European Union are members of WIPO, but the European Union itself is not yet a member.

Group on the Information Society," a task force dedicated to reporting on the information market-related issues to the Council of Ministers, also recommended this course of action. Its recent report noted that "the global nature of the services [related to the information industry] . . . means that the Union will have to be a party to international action to protect intellectual property."²³⁴

The European Commission seems to have drafted the Directive to keep their database protection out of Berne's reach, since as long as countries outside the European Union do not reciprocate with similar protection, their products would not be protected within the European Union.²³⁵ Denying protection to U.S. databases and shortening the length of Britain's protection would enable the E.U. to meet a high priority goal—to foster its cottage. Commentators predict that the reciprocity provisions will place U.S. firms without European subsidiaries at a competitive disadvantage to European firms (or European subsidiaries of U.S. firms). European firms will be able to extract data from databases produced by such U.S. firms, but the U.S. will be prohibited from extracting data from databases produced by the European firms.²³⁶

The E.U. seems poised to permit the piracy of U.S. databases and to condemn such piracy by non-reciprocating countries. Software piracy is a global problem of astronomical proportions, resulting in losses of about \$3.4 billion worldwide in 1993.²³⁷ It is interesting to note that the E.U. is on the Priority Watch List for intellectual property rights practices compiled by the U.S. Trade Representative Office.²³⁸ The fourth and fifth largest software pirates in the world are E.U. member states—Italy and Spain—where revenues lost to U.S. publishers in 1993 were approximately \$257 million and \$199 million respectively.²³⁹

Another goal the European Commission hopes the Directive will achieve is to foster the E.U.'s database industry. The Directive will grant limited monopolies over to database producers over data they collect.²⁴⁰ The latest draft of the Directive disclaims such goals by referencing

234. Sharp & Pavitt, *supra* note 27, at 143; *see also* text accompanying *infra* note.

235. Amended Directive, *supra* note 5, at art. 13(1) (2); *see also supra* notes 128-33 and accompanying text.

236. Jonathan Band & Laura F.H. McDonald, *The Proposed E.C. Database Directive: The 'Reversal' of Feist v. Rural Telephone*, 6 *COMPUTER LAW J.* 19 (1992).

237. DATA ANALYSIS GROUP INDUSTRY FORECASTS: SECOND QUARTER, at 103 (compiling information from *The Numbers Sheet*, *COMPUTER RESELLER NEWS*, Mar. 7, 1994, at 14). Meanwhile, revenue losses from piracy in the United States have decreased from \$2 billion in 1990 to \$1 billion in 1992. *Id.* at 102.

238. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994, at 27-6.

239. DATA ANALYSIS GROUP, *COMPUTER INDUSTRY FORECASTS: SECOND QUARTER*, at 103 (compiling information from *The Numbers Sheet*, *COMPUTER RESELLER NEWS*, Mar. 7, 1994, at 14).

240. Amended Directive, *supra* note 5, at Preamble, nos. 11 and 12.

Articles 85 and 86 of the EEC Treaty²⁴¹—the antitrust provisions of the Treaty—and establishing a Commission review process to occur in three years, whereby the Directive could be amended to mandate licensing if the competition rules fail to avert monopolistic behavior among database producers. Nonetheless, the Commission's underlying goal may be to create mini-monopolies that would provide database creators with incentives for investment and risk-taking in database production.²⁴² This plan seems destined for failure when the mini-monopolies over information reduce incentive for innovation, since stimulus for creation primarily arises from competition.²⁴³

The DG-XIII, the European Commission's division on electronics, telecommunications, and technology, has high expectations for the European Union's information services industry. DG-XIII has reported expectations of 700,000 new jobs in the industry before the year 2000.²⁴⁴ The European Union's information services industry would probably require governmental assistance to meet that goal, since the industry currently employs only about 32,000 persons, and E.U.'s market for electronic information is shrinking steadily.²⁴⁵ By comparison, the U.S. information services industry employs over one million people in more than 25,000 firms.²⁴⁶

Europe's information industry also bears the burden of high production costs. Unlike the mainly English-speaking market of the United States, European companies must cope with a highly fragmented market, divided by varying "technical, legal, tariff, language, and other barriers which are all obstacles to the free movement of information."²⁴⁷ European database producers must translate their products to accommodate the different languages of the European countries. Additional burdens arise from the high costs of marketing expenses, office space, taxes, and the mandatory benefits and salaries imposed by labor laws.²⁴⁸ Protecting information in electronic databases could give

241. EEC TREATY, *supra* note 24, at arts 85-6.

242. High-level Group on the Information Society, Europe and the Global Information Society: Recommendations to the European Council 17 (1994) [hereinafter High-level Group on the Information Society].

243. MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990); Sharp & Pavitt, *supra* note 27, at 143.

244. Information and Communications Technologies in Europe, Commission of the European Communities, Directorate-General XIII on Telecommunications, Information Industries and Innovation 66-8 (1991).

245. The 1991 Impact Report reported a growth rate of about 12.5 percent in 1990, with continued slow growth in 1991. 1991 Impact Report, *supra* note 4, at iii.

246. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994, at 25-1.

247. Information and Communications Technologies in Europe, Commission of the European Communities, Directorate-General XIII on Telecommunications, Information Industries and Innovation 66-8 (1991); 1991 Impact Report, *supra* note 4, at 45.

248. Collada, *supra* note 19, at 4.

the European Union a competitive advantage it desperately needs to foster this industry. Interestingly, the Directorate-General for Economic and Financial Affairs predicted a five percent increase in European Union exports of goods and services by the end of 1993.²⁴⁹ This prediction may have hinged on protectionist trade measures like the Database Directive.

B. Economic Policy, Trade Regulation, Labor Law, or All of the Above?

1. GROWING REGIONAL DISPARITY

Europe is currently experiencing many internal economic problems. A 1993 study by the European Parliament reported that Europe was facing a severe economic downturn, creating skyrocketing unemployment and growing regional economic disparity. The study, designed to assess the impact of E.U. legislation on the less developed regions in the European Union, noted that the relative strengths of regional economies were increasingly divergent, jeopardizing the stability of the European Union.²⁵⁰ The E.U. legislative bodies and the individual member countries have done little to improve the divergence. Instead, "[g]overnments in Western Europe have responded to the recession by putting up tough new barriers to exports from Eastern Europe."²⁵¹

European Union leaders have done little to improve the unemployment problems in the less-developed countries, and in the European Union in general. The average unemployment rate for the twelve member countries over the last two years was about 11 percent, and "is expected to rise significantly in all member countries" in the

As one reporter noted

Western European governments have also begun to try to reduce or remove some of the social benefits that make production so costly, and have met with loud protests from organized labor. In Germany, for instance, the law requires employers to give nearly all industrial workers 30 paid vacation days a year—six weeks—and to add a 13th month's salary at Christmas. Government-mandated health insurance, pension and unemployment contributions add 19.4 percent of each employee's pay to company payroll costs.

Craig R. Whitney, *Western Europe's Dreams Turn Into Recession and Refugees*, N.Y. TIMES, Aug. 8, 1993, at A1, A8.

249. Commission of the European Communities, Directorate-General for Economic and Financial Affairs, Supplement A: Recent Economic Trends, Jan.-Feb. 1993, at 8 [hereinafter Directorate-General Report].

250. European Parliament Directorate-General for Research, *The Impact of 1992 and Associated Legislation on the Less Favoured Regions of the European Community 7* (IFO INSTITUTE FOR ECONOMIC DEVELOPMENT, C.W. Name & J. Reuters eds., 1991) [hereinafter Report on Less Favoured Regions].

251. Whitney, *supra* note 248, at A8.

coming years.²⁵² European Commission representatives admit that "the Europe '92 project is not, and never has been, motivated primarily by regional policy objectives, but by the wish to enhance the competitiveness of the Community of Twelve in the global context."²⁵³ Therefore, they do not apologize for the fact that it "will have a less marked effect on employment and do little to relieve the labour market in the regions in question."²⁵⁴

Regional disparity is highly visible in the information industry.²⁵⁵ Britain, France, and Germany dominate the industry, while many countries virtually ignore it.²⁵⁶ The Database Directive is geared toward improving that situation. The Preamble of the Directive notes the problems associated with the "great imbalance in the level of investment in database creation both as between the Member States themselves, and between the Community and the world's largest database producing countries."²⁵⁷ The Database Directive might have a positive short-term effect on unemployment in the less developed regions, as it would probably increase the number of low-skill data entry jobs.²⁵⁸ Recent political changes in Eastern Europe have created a large pool of unskilled, low-cost labor, well-suited for "labour-intensive industries"²⁵⁹ like data collection.

Nonetheless, the Database Directive will fail to improve the European Union's economic condition if European databases become prohibitively expensive under its provisions. Monopolists typically charge large premiums for their goods. Royalty rates for licensing information in databases created in the European Union would probably include premiums calculated to include the value attributed to the facts and the labor involved in collecting the information, as well as the risks associated with licensing databases in countries without data protection.

The Information Society Group has already rejected the monopoly formula, recommending instead that the European Council of Ministers

252. Directorate-General Report, *supra* note 249, at 8..

253. Report on Less Favoured Regions, *supra* note 250, at 7.

254. *Id.*

255. 1991 Impact Report, *supra* note 4.

256. See 1991 Impact Report, *supra* note 4, at 11-13; Paul Tate, *Divided We Stand—How IS Managers Confront the Economic Disunity of Europe*, INFORMATION WK., Mar. 15, 1993, at 34.

257. Amended Directive, *supra* note 5, at Preamble, no. 11.

258. Low-skilled jobs involving database production, including data entry and manual scanning, are also low-paying. For example, in the New York metropolitan area in the late 1980s, average weekly earnings of key entry operators ranged from about \$235 to \$334, while over 50 percent of highly-skilled systems analysts earned over \$1200. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, INDUSTRY WAGE SURVEY: COMPUTER AND DATA PROCESSING SERVICES (1987). These figures indicate that even if the database directive created many such jobs, similar wages in the E.U. would not likely boost standards of living of the less favored regions in the long term.

259. Report on Less Favoured Regions, *supra* note 250, at 24, 32, fig. 2.

create "a new regulatory environment allowing full competition" as a "prerequisite for mobilizing the private capital necessary for innovation, growth, and development."²⁶⁰ Joint ventures between U.S. and European companies could provide such capital and thus accelerate the growth of Europe's information industry. Commentators encourage the European Union to adopt liberal trade and foreign investment policies to stimulate competition on an E.U.-wide basis and achieve a European market without regional divergence.²⁶¹ The agenda of the European Commission's DG-IV committee on competition includes deregulation of the telecommunications industry. Unfortunately, the interventionist policies of the DG-XIII committee on technology, such as this proposed Directive, do not follow the *laissez-faire* approach of DG-IV.

Joint ventures will most benefit a host country when production is performed on a local level. "Screwdriver factories bring minimal skills; minimum local content requirements bring the higher value, skilled jobs including jobs in management, design and R&D."²⁶² Local content clauses are not intended "to maximize the value of assets under national (or European) ownership, but to maximize the value of the productive activities of local people."²⁶³ A study of European joint ventures showed how local content requirements "channeled inward investment towards higher value added activities, which brought skilled jobs and better training opportunities (rather than screwdriver plants) to Europe."²⁶⁴

Without a strict local content requirement, most joint database production would probably be completed in the United States, where many costs are lower. Unfortunately, the Database Directive does not contain any local production requirements. Instead, the Directive requires that foreign companies maintain an "effective and continuous link with the economy of one of the Member States."²⁶⁵ This standard is too subjective to enable European companies to benefit fully from joint ventures with U.S. companies.

C. The Directive as Destructive Long-Term Social Policy

Over the long term, *sui generis* provisions of the Database Directive would ultimately fail to provide Europe with social welfare gains. The most destructive aspect of the Directive is that it would allow a limited group of database creators to control the dissemination of information. The resulting restrictions on the transfer of knowledge would be

260. High-level Group on the Information Society, *supra* note 242, at 12.

261. Sharp & Pavitt, *supra* note 27, at 143.

262. *Id.* at 145.

263. *Id.*

264. *Id.* at 137.

265. Initial Proposal, *supra* note 37, at art. 11(2).

extremely detrimental to society, as information lies at the core of social advancement. Furthermore, the sui generis provisions lack the focus on promoting creativity and originality present in copyright laws, and reward industry with monopoly. The Directive's provisions "emphasize output and supply, and ignor[e] the value of skills and organizations and the degree to which competition and rivalry provide a spur to innovation."²⁶⁶ On balance, the negative long-term effects of the Directive would outweigh the short-term economic boost that the European Union seeks.

The most valuable policies that the European Union could adopt during its current economic downturn would contribute to the general welfare of its people. Robert Reich addressed this goal in *The Work of Nations*:

What is the role of a nation within the emerging global economy, in which borders are ceasing to exist? Rather than increase the profitability of corporations flying the flag, or enlarge the worldwide holdings of its citizens, a nation's economic role is to improve its citizens' standard of living by enhancing the value of what they contribute to the world economy. The concern over national competitiveness is often misplaced. It is not what we own that counts; it is what we do.²⁶⁷

Regulations such as patent and copyright laws foster industries that promote economic and social advancement. By contrast, regulations that encourage wasteful, repetitious data collection by low-skilled labor do not provide lasting benefits to society.²⁶⁸ The information industry has the capacity to "unleash[] unlimited potential for acquiring knowledge, innovation, and creativity,"²⁶⁹ if encouraged by well-planned legal and economic incentives.

In 1994, the Information Society Group reported to the Council of Ministers that the information revolution presents a great risk of the "creation of a two-tier society of have and have-nots, in which only a part of the population has access to the new technology, is comfortable using it, and can fully enjoy its benefits."²⁷⁰ Unfortunately, the leaders of the European Union have chosen to take this risk, through misconceived policies that would ultimately obstruct the free flow of information vital to the long-term growth of society. The preferable course both for the information industry and for European society as a whole would be to

266. Sharp & Pavitt, *supra* note 27, at 145.

267. ROBERT REICH, *THE WORK OF NATIONS* 301 (1991).

268. *Id.*; see also Reichman, *supra* note 216, at 2497-98 ("The front-end gains to publishers under the extraction right may thus conceal the long-term social costs in diminished research and development capabilities at public and semipublic institution, many of which are already indirectly subsidizing so-called private research and development.").

269. HIGH-LEVEL GROUP ON THE INFORMATION SOCIETY, *supra* note 242, at 6.

270. *Id.*

follow the advice of the Information Society Group, "establish safeguards and to ensure the cohesion of the new society. Fair access to the infrastructure will have to be guaranteed to all, as will provision of universal service."²⁷¹

D. The Ideal of Global Harmonization

International trade and the technological innovation would benefit enormously from the global harmonization of technology-related laws. The concept of "common rules of the game"²⁷² is the primary U.S. policy in international negotiations regarding intellectual property protection.²⁷³ Recently, the United States sought and achieved common rules for database protection in the North American Free Trade Agreement (NAFTA) negotiations. The Commerce Department's 1994 report notes that "information service companies are expected to benefit from the implementation of" the agreement,²⁷⁴ which requires Canada and Mexico to protect databases as compilations in provisions that mirror U.S. copyright laws.²⁷⁵ By contrast, the Database Directive creates "system friction" through direct contradiction and defiance of the General Agreement on Tariffs and Trade (GATT), the Berne Convention, and domestic laws worldwide. The Directive's reciprocity provision would cement this adversarial relationship.

The main objectives of the intellectual property arm of GATT, the GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),²⁷⁶ are to protect and enforce intellectual property rights that "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."²⁷⁷ A recent round of GATT negotiations expanded the Agreement to cover services, and accomplished further harmonization of international intellectual property protection. The GATT position on data

271. Reichman, *supra* note 216.

272. See SYLVIA OSTRY, *BEYOND THE BORDER: THE NEW INTERNATIONAL POLICY ARENA, IN STRATEGIC INDUSTRIES IN A GLOBAL ECONOMY: POLICY ISSUES FOR THE 1990s* (OECD ed. 1991).

273. Private trade associations could potentially have a positive effect in the negotiation of globally harmonized information industry policies. The U.S. information industry associations lobby with international counterparts to keep this market open, including the Information Industry Association, which has allied with trade associations in thirteen countries, the Information Technology Association (formerly ADAPSO), and the Electronic Data Interchange Association.

274. DEPT. OF COMMERCE, *U.S. Information Outlook 1994*, at 25-1.

275. North American Free Trade Agreement, 32 I.L.M. 605 (1993).

276. Doc. MTN/FA of Dec. 15, 1993, Annex 1C, 33 I.L.M. 81 (1994).

277. *Id.* at pt. 1, art. 7.

protection is that "[c]ompilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection . . . shall not extend to the data or material itself."²⁷⁸ The TRIPS text promotes copyright protection for "expressions" and not "ideas, procedures, methods of operation or mathematical concepts as such."²⁷⁹

Discussions following this round of GATT negotiations note the positive harmonizing effect of the TRIPS agreement. In Congressional hearings on the impact of the Uruguay Round on U.S. industries, Jacques Gorlin, consulting economist to the Intellectual Property Committee (IPC), testified that the agreement "limits many of the exceptions and derogations from the standards of protection that had been a concern for the IPC."²⁸⁰ He commended the limitation on the scope of copyrights in databases to the levels of the Berne Convention:

The TRIPS text goes a long way in providing the type of international intellectual property protection that the IPC, three successive Administrations and the U.S. Congress sought together over the last seven years through the GATT. On balance, the text contains high standards of protection and enforcement, [and] has a multilateral dispute resolution mechanism. . . Among the critical improvements in the worldwide protection of intellectual property are . . . in copyright . . . [M]embers are required to grant protection to databases and computer programs as literary works under Berne.²⁸¹

Global harmonization is receiving worldwide support from the information technology industry itself. In early 1994, several information technology groups from the European Union, Japan and the United States issued a joint public policy agenda naming global harmonization through multilateral negotiations as the foundation for their recommendation.²⁸² The joint statement, entitled the White Paper on Global Information Infrastructure, confirmed that "The existing international property law regime, confirmed by the GATT TRIPS Agreement, can well serve the

278. *Id.* at pt. 2, sec. 1, art. 10(2).

279. *Id.* at pt. 2, sec. 1, art. 9.

280. GATT: *Impact on American Industries and Markup of France's Embargo of U.S Exports of Seafood: Hearing Before the House Subcommittee on Economic Policy, Trade and Environment of the House Committee on Foreign Affairs*, 103d Cong., 2d Sess. (1994) (testimony of Jacques J. Gorlin, Consulting Economist to the Intellectual Property Committee).

281. *Id.*

282. *Info Tech Industries Reach Accord on IPR, Other Policies*, 9 WORLD INTELL. PROP. R EP. 79-80 (1995); Excerpts from the White Paper on Global Information Infrastructure, 9 WORLD INTELL. PROP. R EP. 85-86 (1995) (prepared by the U.S. Information Technology Industry Council (ITI), the European Association of Business Machines and Information Technology Industry Council (EUROBIT), and the Japan Electronic Industry Development Association (JEIDA)).

needs of the GII [Global Information Infrastructure]."²⁸³ The statement emphasized that the globalization of the information industry necessitates global harmonization of legal rules in order for the industry to reach its full potential,²⁸⁴ and argued for the "harmonization of the framework of intellectual property rights protection under the international treaties at an international level."²⁸⁵ The joint statement also encouraged individual governments to pursue harmonization to help resolve the remaining intellectual property issues faced by the information technology industry,²⁸⁶ a message the European Union should heed.

VII. CONCLUSION

The Counsel of Ministers is unlikely to suggest further revisions of the Database Directive at this point in the European Commission's legislative process.²⁸⁷ If the European Council of Ministers enacts the Database Directive in its current form, the U.S. response will probably not be positive. The U.S. trade representatives may argue in negotiations with the European Union that state unfair competition and computer crime laws already fulfill the reciprocity requirement. It remains doubtful that these state laws will qualify for reciprocity.²⁸⁸ It is also doubtful that the U.S. Congress would pass a similar *sui generis* law. As the Supreme Court noted in *Feist*,²⁸⁹ a federal *sui generis* statute would be necessary to protect database contents, as the addition of a similar provision in the copyright law would blatantly contradict its underlying policy to reward originality. Furthermore, Congress is unlikely to compromise the long-standing policy to maintain the free flow of information. Regardless, the myriad divergent interests of U.S. industries would make *sui generis* legislation in the area of technology difficult to enact.

As a result of the enactment of the Directive, companies may be forced to incur the high costs to establish an E.U. presence. Alternatively, they may rely exclusively on private contracts, or simply retain the status quo of nonprotection in the European Union. Strategic alliances between U.S. and E.U. companies could help foster the E.U. information industry. Such joint ventures would facilitate the globalization of information services. The European Union should openly encourage foreign

283. *Id.* at 86.

284. *Id.*

285. *Id.*

286. *Id.*

287. See *supra* notes 21-22.

288. See *supra* notes 190-95.

289. 499 U.S. 340, 354 (1991).

investment, simultaneously protecting local economic development with strong local content requirements.

With many international organizations—including several European groups—working successfully to integrate the world's intellectual property protection, the European Union has little justification or need to pass the Database Directive. Despite several rounds of amendments, the Directive remains fatally flawed as intellectual property law, international trade measure, and internal economic regulation. The most dangerous aspect of the Directive is its potential to stifle access to information, thereby allowing a few to control the knowledge of the many. The long-standing U.S. policy to encourage the free flow of information has not prevented the United States from dominating the worldwide information industry. Europe should focus on policies and regulations that will simultaneously encourage economic growth and safeguard the democracy of ideas. In the words of Europe's own task force on information policy, the Information Society Group, "the information society has the potential to improve the quality of life of Europe's citizens, the efficiency of our social and economic organisation and to reinforce cohesion."²⁹⁰ This will only be possible if the European Council of Ministers votes to preserve the free flow of information.

290. High-level Group on the Information Society, *supra* note 242.