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**Theory and Practice in the Analysis of Information Policy in the  
Digital Age: A Casestudy on the Formulation of the European  
Directive on the Legal Protection of Databases.**

**Paul Turner  
Information Policy Unit  
Department of Information Science  
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**Volume One**

*Submitted in partial fulfilment of the requirements for the degree of  
Doctor of Philosophy (Information Science).*

**July 1999**



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## **Declaration**

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Finally, it is hereby acknowledged that the legislative material reproduced in the appendices is copyright of the European Union.

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3. Proposal rapporteur European Commission DGXV/E/4
4. Representative from European Commission DGIII/F/4
5. Representative from European Commission DGXIII/B/1
6. Legal Counsel from European Commission DGXIII/B/1 & DGXIII/E/1
7. Representative from European Commission DGXIII/E/1
8. Representative from European Commission DGXIII/E/1
9. Principal Administrator Council Secretariat
10. Representative from Council Legal Service
11. Rapporteur Economic and Social Committee (ECOSOC)
12. Legal Counsel for ECOSOC rapporteur
13. Member of Legal Affairs Committee European Parliament
14. Shadow rapporteur Legal Affairs Committee European Parliament
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16. UK Representative in Council Working Group  
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20. Chief Executive UK Publishers Association (PA)
21. Member of Federation of European Publishers (FEP) Representation
22. Legal Counsel for the European Publishers Council (EPC)
23. Representative for Reuters
24. Executive Director of European Association of Information Services (EUSIDIC)
25. Representative from Dun & Bradstreet and EC Committee of the American Chamber of Commerce (AMCHAM)
26. Representative for Reed-Elsevier and rapporteur Confederation of British Industry (CBI)

27. President of the European Information Industry Association (EIIA)
28. Vice-President of the Information Industry Association (USA)
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## **Abbreviations**

|          |   |
|----------|---|
| AIDAA    | Association Internationale des Auteurs de l'Audiovisuel                               |
| AIPPI    | Association Internationale pour la Protection de la Propriete Industrielle            |
| ALAI     | Association Littéraire et Artistique Internationale                                   |
| AMCHAM   | EU Committee of the American Chamber of Commerce                                      |
| BEUC     | European Bureau of Consumers' Associations  |
| BIC      | Book Industry Communication   |
| CBI      | Confederation of British Industry   |
| CEC      | Commission of the European Communities  |
| CFSP     | Common Foreign and Security Policy  |
| CISAC    | Confederation Internationale des Societes d'Auteurs et Compositeurs                   |
| CITED    | Copyright in Transmitted Electronic Documents   |
| COPEARMS | Coordinating Project for Electronic Authors Right Management Systems                  |
| COREPER  | Committee of Permanent Representatives  |
| CRID     | Centre de Recherches Informatique et Droit  |
| DG       | Directorate-General in the European Commission  |
| DMA      | Direct Marketing Association  |
| DTI      | Department of Trade and Industry (UK)   |
| EAPA     | European Alliance of Press Agencies   |
| EBLIDA   | European Bureau of Library, Information and Documentation Associations                |
| ECHR     | European Convention on Human Rights   |
| ECJ      | European Court of Justice   |
| ECIS     | European Committee for Interoperable Systems  |
| ECOSOC   | Economic and Social Committee   |
| ECSC     | European Coal and Steel Community   |
| EEA      | European Economic Area  |
| EFTA     | European Free Trade Association   |
| EIIA     | European Information Industry Association   |
| EMF      | European Multimedia Forum   |
| EPC      | European Publishers Council   |
| EPP(PPE) | Group of the European Peoples Party   |
| ESA      | European Space Agency   |
| EURATOM  | European Atomic Energy Community  |
| EUROBIT  | European Association of Manufacturers of Business Machines and Information Technology |
| EUSIDIC  | European Association of Information Services  |
| FAEP     | Federation of European Magazine Publishers  |
| FEDMA    | Federation of European Direct Marketing Associations                                  |
| FEP      | Federation of European Publishers   |
| FID      | International Federation for Information and Documentation                            |
| GATT     | General Agreement on Tariffs and Trade  |
| GESAC    | Groupement Européen des Sociétés d'Auteurs et Compositeurs                            |
| ICT      | Information and Communications Technology   |
| IEE      | Institute of Electrical Engineers   |
| IIA      | Information Industry Association (USA)  |
| IFJ      | International Federation of Journalists   |
| IFLA     | International Federation of Library Associations                                      |
| IFPI     | International Federation of the Phonographic Industry                                 |

|            |   |
|------------|---|
| IFRRO      | International Federation of Reproduction Rights Organisations                         |
| IMPRIMATUR | Intellectual Multimedia Property Rights Model and Terminology for Universal Reference |
| IP         | Information Policy  |
| IPR        | Intellectual Property Right   |
| IPS        | Information Policy Studies  |
| IS         | Information Science   |
| ISI        | Institute for Scientific Information  |
| MEI        | Media and Entertainment International   |
| MEP        | Member of the European Parliament   |
| NATO       | North Atlantic Treaty Organisation  |
| NFAIS      | National Federation of Abstracting & Information Services (USA)                       |
| NAFTA      | North American Free trade Agreement   |
| OECD       | Organisation for Economic Cooperation and Development                                 |
| OJ         | Official Journal of the European Communities  |
| PA         | Publishers Association  |
| PES (PSE)  | Group of the Party of European Socialists   |
| QMV        | Qualified Majority Voting   |
| RBC        | Revised Berne Convention  |
| SEA        | Single European Act   |
| STM        | International Association of Scientific, Technical and Medical Publishers             |
| TEU        | Treaty on the European Union (Maastricht)   |
| TRIPS      | Trade Related aspects of Intellectual Property  |
| UNESCO     | United Nations Educational, Scientific and Cultural Organisation                      |
| UNICE      | Union of Industrial and Employers' Confederations of Europe                           |
| WIPO       | World Intellectual Property Organisation  |
| WTO        | World trade Organisation  |

## **Abstract**

This thesis is concerned with the academic study of information policy and aims to improve theoretical and methodological approaches for the analysis of complex information policy environments. In conducting a casestudy on the formulation of the European directive on the legal protection of databases, up to its adoption in March 1996, the research aims to explore the ways in which copyright and information issues were framed, and solutions shaped by the process of formulating policy responses to them at the European level.

At the substantive level the research examines the legal issues arising in the protection of databases in Europe and describes and explains the role of human, organisational and contextual factors in shaping the content of the directive as finally adopted. At the methodological level the research examines the utility of a re-interpreted process model of policy-making for providing a coherent framework within which to conduct analysis of this complex information policy issue. At the theoretical level the research aims to use the casestudy findings to generate insights for the academic study of complex (European) information policy environments.

The literature review begins by examining the development of information policy and considers the main problems that have inhibited the development of a coherent approach to information policy studies from within the information science tradition. It examines the re-interpreted process model of policy-making and presents it as a heuristic device with which to conduct the casestudy. The literature review also examines in detail the development of copyright policy at the European level and identifies the expansion of protection that has taken place. In particular, the impact of digital information and communication technologies on copyright regimes is considered. The literature review also outlines the emergence of the European Union(EU), and considers how the EU has shaped the characteristics of, and interactions between policy actors operating in the European policy-making environment.

The casestudy analysis is conducted in two parts consisting of a detailed analysis of documentary evidence and forty in-depth semi-structured interviews with policy actors directly involved in the formulation of the directive. In deploying the re-interpreted process model the analysis is divided into two overlapping phases linked by the publication of the Commission's formal directive proposal in 1992. To ensure that the casestudy findings can be used in a more generalisable manner the analysis addresses the links between the formulation of the database directive and the wider context of European copyright and information policy-making in the digital age. Following the documentary and interview analysis the research findings are discussed and interpreted.

The thesis concludes that at a substantive level the formulation of European copyright policy is problematic and tends towards a strengthening of protection in favour of rightsholders. In the digital environment the implications of this for other areas of information policy are also shown to be of concern. At the methodological level the re-interpreted process model is highlighted as useful in sensitising analysis to sources of complexity in the formulation process and for providing a coherent framework within which to study them. At the theoretical level the thesis enhances understanding of (European) information policy processes and provides some useful insights for academic information policy studies.

## Chapter 1. General introduction

“Spectacles magnify one set of factors rather than another and thus not only lead analysts to produce different explanations of problems that appear, in their summary questions to be the same, but also influence the character of the analyst’s puzzle, the evidence he assumes to be relevant, the concepts he uses in examining that evidence, and what he takes to be an explanation. . . different conceptual lenses lead analysts to different judgements about what is relevant and important” (Allison:1971:251).

### 1. 1. Background and rationale for the casestudy

This thesis is concerned with the academic study of complex information policy environments and forms part of a growing body of work within the information science (IS) tradition aimed at improving theoretical and methodological frameworks for its analysis (Rowlands:1996, Turner:1997, Browne:1997a, 1997b). This thesis engages directly with information policy complexity through a casestudy on the formulation of the European directive on the legal protection of databases. The background and rationale for this casestudy can be summarised as follows:

- Information policy (IP) has in recent years become a focus for political and economic discussions at regional, national and supra-national levels. These discussions have been stimulated primarily by two factors. Firstly, a need to respond to the challenges posed by digital information and communication technologies (ICTs) and secondly, a widely held assumption that information policies can have a direct and beneficial influence on economic and socio-cultural developments (CEC:1994, NII:1993). More specifically, ICTs have provided the technical capability to convert all types of information (i.e. textual, graphical and audio-visual) into a single digital bit stream that can be stored, manipulated and transmitted at high speeds across global electronic networks. This has led to the production, distribution and consumption of new electronic goods and services that are not inhibited by national frontiers and directly challenge nationally based legal and regulatory regimes (e.g. copyright). However, despite the increased profile of these IP discussions, a range of factors (including the unique properties of information and existing policy-making structures) have ensured that policy responses have tended to remain fragmented and piecemeal (Sillince:1994). In the digital context this lack of policy coordination has begun to raise concerns, not least because of evidence that suggests a narrow focus on a single IP issue (e.g. copyright) leads to a failure to consider the broader social implications of the solutions developed on the emerging information society (Bently & Burrell:1997, Eisenschitz & Turner:1997).
- At an academic level, while IP has also generated considerable interest, it is evident that there remains little consensus on how best to define and study it. Previous examinations of the information science literature (IS) have highlighted the limited frameworks and research tools currently available to support information policy studies (IPS). They have also revealed a range of conceptual problems that have inhibited the development of strong theoretical and methodological foundations for the study of IP environments (Rowlands:1996, Turner:1997, Browne:1997a, 1997b). This situation clearly presents problems for the serious academic researcher. At a practical level this lack of a common approach is at least partly due to the difficulties faced in studying the dynamic complex of inter-related issues, actors and events that characterise large scale information policy problems. Drawing on ideas from the policy sciences it is argued that these difficulties can be overcome by adopting a process model and opening it to a variety of re-interpretations (rational-actor, bureaucratic imperative and garbage can) to develop a heuristic device with which to approach the analysis of information policy environments



(Rowlands & Turner:1997). It is this re-interpreted process model that is deployed in the information policy casestudy conducted in this thesis.

- At the European level one of the most dynamic areas of IP development has been in the field of intellectual property rights (IPRs) and more particularly copyright. While the European Union's (EU) work in this field has always been part of a wider policy agenda aimed at harmonising legal regimes to aid in the completion of the internal market, a key driver in its copyright initiatives has been the emergence of digital ICTs. Apart from accentuating differences between different Member States copyright regimes, by extending the ability for easy multiple copying (without any degradation in quality) these technologies have problematised the traditional balance of rights in copyright between authors, users and rights holders. In response to these challenges the EU has been very active. However, recently a number of writers have criticised the EU's approach to copyright in digital environments arguing that copyright is being over-extended and the balance of rights tipped in favour of rights holders in these new environments. Further it has been argued that because of the inter-relatedness of information issues this approach will have a negative impact on other aspects of the developing information society including on information access, privacy and free speech (Bently & Burrell:1997, Fujita:1996, Hugenholtz:1996b, Laddie:1996, Mason:1997). At the broadest level this raises questions about European policy-making on such complex issues e.g. What factors shape the policy solutions as finally adopted ? How are the different positions of Member States mediated ? What roles do the different European institutions play in the policy process ? How influential is lobbying on the policy outcome ? Is a satisfactory balance of rights being maintained or are there obvious winners and losers ?

It is in this context, that the casestudy on the formulation of the European directive on the legal protection of databases<sup>1</sup> is conducted. This directive is the fifth 'copyright' directive adopted in the EU since May 1991 and the first to directly address the protection of information contents held in electronic form. It is particularly noteworthy because as well as introducing copyright protection for 'original' databases it also introduced a *sui generis* ('one of a kind') protection for databases based solely on the investment made in their creation. Aside from the protection it offers databases and their contents, it has set a precedent that has influenced subsequent European Commission copyright proposals for the digital environment. The directive exemplifies a complex information policy problem and it neatly highlights the difficulties of using copyright for protecting information products in digital environments. Significantly since its adoption the database directive has also been strongly criticised by a number of eminent copyright and information law experts who have expressed concerns over the lack of clarity in the text and the negative effects on competition, the advancement of scientific research and the public domain they fear will be the *long-term* result of its introduction (Reichman & Samuelson:1997, Kuomantos:1997, Garrigues:1997).

In deploying the re-interpreted process model in the context of this casestudy, the thesis is designed to make a number of contributions to a new approach in information science to the study of information policy environments by:

- Adding to the limited stock of information policy casestudies;
- Enhancing techniques for the study of these complex policy environments;
- Promoting an approach to information policy studies grounded in and prioritising observable practice over idealised statements about how policy-making is supposed to occur (Glaser & Strauss:1967).

---

<sup>1</sup> Directive 96/9/EC of March 11th 1996 for the Legal Protection of Databases (Official Journal, No. L77 27/03/96).

- Drawing attention to the implications of treating information solely as an economic good in policy debates and highlighting the importance of information meaning and context in analysis.

## **1. 2. Aims of the research**

The thesis is centred around three sets of interests;

1. **At the substantive level:** to examine the legal issues surrounding the European protection of databases; to analyse the development of the European Commission's directive proposal; and, to describe and explain the role of human, organisational and contextual factors in shaping the formulation of the directive as finally adopted.
2. **At the methodological level:** to examine the utility of the re-interpreted process model for sensitising analysis to sources of complexity in the policy formulation process and for providing a coherent framework within which to systematically study policy issues, policy actors and the policy context.
3. **At the theoretical level:** to ensure that the casestudy findings can be used in a generalisable manner to provide insights to enhance academic understanding of information policy and improve analysis of complex (European) information policy environments.

As a consequence of these interests the casestudy is addressed through a series of research questions that can broadly be organised under the following three headings:

- **Information Policy Issues**

What legal protection was available to databases prior to the European directive ? What factors led to databases becoming a focus for a European public policy discussions ? Why did the European Commission opt for a dual system of (copyright/sui generis) protection in its proposal ? Which provisions of the directive proved the most controversial during its negotiation ? How were the complex problems raised by extending copyright into electronic environments handled, understood and resolved or not ? To what extent was a satisfactory balance of rights reached ? What threats and opportunities arise from the extension of copyright type concepts into the digital environment ? In digital environments what relationships are there between copyright and other information policy issues ?

- **Information Policy Processes**

What role did the European institutions play both formally and informally in formulating the database directive ? What role did lobby groups play in shaping the directive ? How were the different positions adopted by policy actors on particular issues mediated at the European level ? Who were the most powerful policy actors in the formulation process ? When and how was influence exerted in the formulation process ? What alliances were formed during the passage of the directive ? How typical of copyright policy formulation in general were the processes surrounding the database directive ? How well do European policy processes handle interrelationships between information policy issues ? What other factors affect the manner in which copyright issues are framed and discussed at the European level ?

- **Information Policy Context**

How significant is the database directive for current and future European copyright policy formulation ? Did any international policy developments impact on the outcome of the directive ? How do these specific policy issues and processes relate to broader issues over information and its transfer in the developing information society ? As the Information society develops what role will copyright harmonisation play ? What role do the broader

processes of European integration play in shaping specific pieces of copyright legislation ? How could European policy formulation be improved ? Are there any democratic concerns arising from European policy-making processes ?

### **1. 3. The research strategy**

The thesis is structured in three parts:

1. **Part One: Literature Review.**
2. **Part Two: Casestudy.**
3. **Part Three: Conclusions.**

The contents of the individual chapters in each part can be summarised as follows:

#### **Part One: Literature Review**

##### **Chapter 2. Information policy and information policy studies: a model for research**

This chapter examines information policy and its study from within the information science tradition. The first section examines the emergence of discussions on information policy, considers some of the main characteristics that make information policy complex and identifies a number of core values central to all policy discussions concerned with information and its transfer. The second section examines the development of information policy studies from within the information science tradition. It reviews a range of conceptual and methodological problems that have inhibited the development of a coherent theoretical framework for the analysis of complex information policy environments. The final section examines a model developed for conducting research in complex information policy environments. It is argued that this 're-interpreted process model' offers a useful heuristic device within which to systematically analyse the complex interaction of human, organisational and contextual factors in the development of information policies. This model is deployed in the context of the casestudy.

##### **Chapter 3. European copyright and the expansion of protection**

This chapter examines the development and expansion of copyright law at the European level and describes the copyright policy context within which the European protection of databases was formulated. The first section provides a brief overview of the historical development of copyright, considers the two main legal traditions (*droit d'auteur* & copyright) and outlines the international structure of copyright protection. The second section examines the development of European copyright law and its legal basis within the EC treaty, analyses the European Commission's initial response to the challenges posed by digital technologies and highlights the importance of copyright exceptions for maintaining a balance of rights between copyright owners, authors and users. The final section examines the harmonisation and expansion of copyright protection at the European level and the links between these policy developments and wider European and international discussions on the information society.

##### **Chapter 4. Policy-making in the European Union: actors, institutions and procedures**

This chapter examines the European integration process, considers how this has shaped the European policy-making environment and provides an overview of the main European institutions and decision-making procedures which structure the interactions of policy actors operating at the European level. The first section examines the development of the European

Union (EU) and highlights how the integration process has increased the power and policy competence of the European institutions. The second section reviews a range of academic theories that have been developed to account for this process and for the emergence of the EU as a supra-national policy-making system. The final section provides a topography of the current European policy-making environment and identifies the structural characteristics of the main policy actors and the formal policy procedures utilised at the European level.

## **Part Two: Casestudy**

### **Chapter 5. Research strategy**

This chapter presents the research strategy employed in conducting the casestudy on the formulation of the European directive on the legal protection of databases. The casestudy examines the legal issues surrounding the protection of databases and analyses the development of the European directive. Most significantly the casestudy describes and explains the role of human, organisational and contextual factors in shaping the directive as adopted. The re-interpreted process model is deployed to provide a coherent framework within which to study the complex interaction of these factors. The first section introduces the casestudy and highlights the need for analysis to examine policy issues, their representation in policy documents and the role of key policy actors in the policy process. The second section provides an overview of the research design and examines the data collection and analysis through documents and semi-structured interviews conducted in chapters 6 and 7. It also considers the problems of using verbal data and how the research design addresses the issue of ensuring that the casestudy findings can be used in a generalisable manner. The final section briefly examines the discussion and interpretation of the research findings conducted in chapter 8.

### **Chapter 6. Documentary Analysis**

This chapter provides a documentary analysis of the formulation of the European database directive up to its adoption compiled from a range of documentary sources and complemented by 50 telephone interviews. Deploying the re-interpreted process model the chapter is divided into two parts reflecting the two phases of the formulation process. Part one: examines the emergence of database protection as a European policy issue prior to the publication of the 1988 copyright Green Paper and considers the origins of the dual copyright/sui generis approach. It reviews the results of the April 1990 public hearing and highlights the subsequent emergence of significant database case law in Europe and the USA. This section ends by examining the internal Commission discussions and the events leading up to the release of the formal database proposal. Part two: begins with an examination of the formal database proposal and proceeds by following the formal policy-making process detailed by the co-decision procedure. It examines the opinion of the Economic and Social Committee; the amended proposal text following its first reading in the European Parliament; the discussions in Council; the Council's common position; and, the Parliament's second reading up to the directive's formal adoption. The documentary analysis enables: the identification of the origins of the directive within European copyright policy; highlights the directive's innovative dual copyright/sui generis approach; provides a timetable for the main changes to the directive text; and, indicates the key policy actors involved in the formulation process from the three broad categories identified.

## **Chapter 7. Interview analysis**

This chapter provides a detailed analysis of the interview transcripts presented in Volume 2 of the thesis. These transcripts were compiled from semi-structured interviews conducted with forty policy actors directly involved in the formulation of the database directive. Following an introduction, this chapter is divided into four main sections reflecting the structure of the interview question frame. The first section examines the structural characteristics of the interviewees and specifically in relation to the interested parties summarises their formal lobbying positions on the directive (compiled from policy submissions made by these groups during the formulation process). The second section analyses interviewee responses to eight questions on the database directive and the role of policy actors during its formulation. The third section analyses interviewee responses to three questions on European copyright policy and its links with the formulation of the database directive. The fourth section analyses interviewee responses to four questions on the relationship between copyright policy and other information policies in the digital age.

## **Chapter 8. Discussion and interpretation**

This chapter discusses and interprets the casestudy research findings and considers how at a more general level they can be used to improve analysis of complex (European) information policy environments and enhance academic information policy studies. The first section examines how the interview analysis relates to the documentary evidence. The second section deploys the two phase model of the formulation process and examines how the interview analysis adds to our understanding of the range of human, organisational and contextual factors that shaped the formulation of the database directive. This section also examines the broader links between casestudy and European copyright and information policy-making in the digital age. The final section examines the insights that the casestudy provides for improving academic understanding of information policy and for the analysis of European information policies.

## **Part Three: Conclusions**

### **Chapter 9. Conclusions**

This chapter considers the casestudy findings in terms of the research aims set out in chapter one. It indicates the limits of the study and highlights a number of areas worthy of future research.

## **Chapter 2. Information policy and information policy studies: a model for research**

“Information science is interdisciplinary in nature; however the relations with other disciplines are changing ....[it] is inexorably connected to information technology ....[it] is an active and deliberate participant in the evolution of the information society” (Saracevic:1992:6)

### **2. 1. Introduction**

This chapter examines information policy (IP) and its study from within the information science (IS) tradition. The first section examines the emergence of discussions on information policy, considers some of the main characteristics that make information policy complex and identifies a number of core values central to all policy discussions concerned with information and its transfer. The second section examines the development of information policy studies (IPS) from within the information science tradition. It reviews a range of conceptual and methodological problems that have inhibited the development of a coherent theoretical framework for the analysis of complex information policy environments. The final section examines a model developed for conducting research in complex information policy environments. It is argued that this ‘re-interpreted process model’ offers a useful heuristic device within which to systematically analyse the complex interaction of human, organisational and contextual factors that occur in the development of information policies. This model is deployed in the context of the casestudy.

#### **2. 1. 1. Information policy and the information society**

“Information policy is the set of all public laws, regulations, and policies that encourage, discourage, or regulate the creation, use, storage, and communication of information” (Weingarten:1989).

“Information policy is about getting the right information to the right people at the right time” (Scott:1996)<sup>1</sup>.

“ I have found some difficulty in identifying a unified set of topics which might be the subject of something called ‘information policy’ ... [a] stranger might readily conclude that the only element unifying information technology policy, intellectual property, information disclosure, confidentiality and privacy...is that they are all of concern to librarians and information scientists” (Aldhouse:1997:115)

Information policy (IP) invites a range of often contradictory opinion and lacks a common, generally accepted definition. An historical perspective highlights that control over, and access to, different types of information has always been a source of power in society (Eisenschitz:1993:9-21). The emergence of some of the first formal government information policies (e.g. intellectual property) can be linked to the development of the printing press. This technology facilitated the emergence of a trade in information products that governments quickly became eager to regulate (Eisenstein:1982). This perspective usefully draws our attention to the pervasive nature of information in most economic and socio-political relationships and to the

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<sup>1</sup> Comments made by Elspeth Scott(GlaxoWellcome) during a ‘workshop on understanding information policy’ held at Cumberland Lodge, Windsor Great Park, 22-24 July 1996, organised by the Information Policy Unit, Department of Information Science, City University.

connections between technological developments and policies on information transfer. Its wide scope however, makes it difficult to generate anything but a very broad and all inclusive definition of information policies (Hernon & Relyea:1968).

A more conventional approach, (but one also emphasising the link with technology), views IP as the set of public policy actions that were developed from the 1950's and early 1960's onwards in response to the perceived need for better flows of scientific and technical information in the context of the 'Cold War' and the accompanying 'Space Race' and 'Arms Race'. Burger (1993) and others (Browne:1997a, Rowlands:1998) cite the US Weinberg Report of 1963 (on the need for government action to optimise the flow of scientific and technical information), as evidence of the emergence of information as a specific focus for public policy attention. In Europe during this same period, similar trends were evident as discussions on the need for policies on information were stimulated both by developments in EURATOM and by on-going discussions of information issues in international organisations such as the OECD and UNESCO<sup>2</sup> (Mahon:1989).

Alongside these policy developments, governments in the post World War II period had also become aware of a need to formalise rights and protections for information in other policy areas including; freedom of expression, privacy and access to government information. As a result, particularly in Europe, national laws and international conventions were signed providing for a range of other information rights and protections<sup>3</sup>. Although all these information laws and policies share common core values (Overman & Cahill:1990) a range of factors including the pervasiveness of information in society and the structure of governmental policy-making ensured that the overall public policy response to information remained fragmented over a range of agencies at regional, national and international levels.

By the late 1970's authors writing from a range of perspectives were linking the rapid diffusion of digital information and communication technologies (ICTs) and the growing economic importance of the information sector, with notions of a transition in, or transformation of, economic and socio-political structures. Some writers forecast that the trade in information goods and services would quickly exceed the trade in manufactured goods and primary products (Bell:1973, Porat:1977), and highlighted the socio-economic benefits to be gained from the proper regulation and management of this developing information economy (Masuda:1980, Bushkin & Yurow:1981). Other writers provided more pessimistic views of the disbenefits for socio-economic and political structures from these rapid changes (Toffler: 1970, 1980, Sklair:1973, Ackroyd et al:1977).

By the 1980's these 'discourses of transformation'<sup>4</sup>(Turner:1995) combined with the ever-increasing importance of ICTs had stimulated governments around the world to commission

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<sup>2</sup> For more recent studies, See, OECD (1981, 1990) & UNESCO(1981).

<sup>3</sup> See, for example provisions within the European Convention for the Protection of Human Rights and Fundamental Freedoms(1953) and the Universal Declaration of Human Rights(1948).

<sup>4</sup> While there is little agreement on the terms used there is a huge literature discussing the notion of a transition in or transformation of cultural, political and economic structures linked to the development of ICTs: See, for example, Industrial to Post-industrial Society (Bell:1973, Toffler:1980), Modernity to Post-modernity (Baudrillard: 1975, 1990, Lyotard:1984, Crook:1992), Capitalism to Late Capitalism (Jameson:1984, Featherstone:1990), Modernity to Late Modernity (Giddens:1990, Habermas:1989), Fordism to Post-Fordism (Aglietta:1989), Organised to Disorganised Capitalism (Lash & Urry:1987).

reports on IP issues and to review their policy options<sup>5</sup>. These reports generally confirmed the increased investment, productivity and profitability being gained from information goods as measured in bits, bytes and speeds of transmission. They also encouraged optimistic political rhetoric on the benefits of the developing information economy and contributed directly to the shape of policy interventions adopted. As a consequence, initially much public IP concentrated on encouraging the development of digital *infrastructures* and the promotion of the use of ICTs (Murphy:1986, Schiller:1986). Subsequently however, it became apparent that many of the anticipated benefits were proving slow to appear and that the deployment of ICTs had also generated real social problems including higher unemployment and a de-skilling of the workforce (Winston:1986, Mosco:1988, 1989). The limited success of many of these government information policies was partly because their basic assumptions had been shaped by problematic quantitative measures of the role of information in the economy (Williams:1988, Miles:1990, Stoetzer:1992). Importantly, these quantitative measures exhibited a technological bias that had marginalised questions about the significance of information content and meaning in their analyses (Turner:1994).

The issue of 'information meaning' was first identified by Machlup (1962) who attempted to analyse the structure and shape of information in the US economy. Machlup highlighted the inadequacy of traditional economic concepts for accommodating information as an object or commodity<sup>6</sup>. These problems were later ignored by other writers, notably by Porat (1977) for whom information was an object/commodity that could unproblematically be measured, its meaning being bypassed by the assumption that demand for it axiomatically indicated its utility. However, in approaching IP from within the information science (IS) tradition it is clear that ignoring the meaning of information in analysis is problematic "information cannot be said to exist at all unless it has meaning, and meaning is established only in social relationships with cultural reference and value.. [This] loss of meaning in the analysis means we can never be sure whether the packages that are counted by a criterion that is non-meaningfully related to their content indicate the correct or even relevant boundaries" (Marvin:1987:51).

By the early 1990's recognition of the importance of information *content* had become a key focus for political and economic discussions of the information society within European and international forums (Moore:1997). While the basic assumption that information policies could impact positively on the economy remained (CEC:1994, NII:1993) the need to respond to the challenges posed by digital ICTs to existing legal and regulatory regimes had become the central task of policy actions (Garnham:1994). As the scope and range of IP issues expanded so did the numbers of policy actors and policy debates. At the European level this contributed to a continued fragmentation<sup>7</sup> in the policy response and to expressions of concern over the disproportionate influence of lobby groups in the policy process (Mazey & Richardson:1993a).

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<sup>5</sup>See for example; in France the Nora & Minc Report for the President on the 'computerisation of society (1981)', in the UK the Cabinet Office Information Technology Advisory Panel (ITAP) Report on 'making a business of Information: a survey of new opportunities(1983)', in the USA the Congress Office of Technology Assessment(OTA) 'intellectual property rights in an age of electronics and information (1986)', in the EU - Commission of the European Communities(CEC) 'the establishment at community level of a policy and a plan of priority actions for the development of an information services market COM(87) 360 final (1986)'. For Japan, H. Engelbrecht (1986) *The Japanese Information Economy: Its quantification and analysis in a macro-economic framework*, Information Economics and Policy 2 pp.277-306.

<sup>6</sup> Machlup (1962) identifies a wide range of problems with incorporating information into economic theory including its non-exclusivity and inexhaustibility.

<sup>7</sup> For example, at the European level, Sillince (1994) identifies eight separate directorate-generals within the European Commission involved with generating information policies.



At the broadest level, as increasing numbers of policy decisions are taken at the supra-national level questions arise as to how democratic policy-making processes are ? and whether given the rhetoric on the information society the problem of information policy fragmentation has been recognised and/or is being addressed by policy-makers dealing with information policy issues at the European level ?.

In the context of the casestudy this generates the following question<sup>8</sup>:

***In what ways might policy formulation at a European Level be improved ? Do you have any concerns over the issues of democratic participation and accountability ?***

### **2. 1. 2. Defining characteristics of information policy**

“ ...policy development regarding the ‘information age’ has been a piecemeal effort, generally reactive to situations that have come to our attention<sup>9</sup>. The practical policy problem, then, is that information policy appears to be a ‘fuzzy set’, or a dissociated and more often than not dissonant collection of laws, regulations, and public policies” (Overman & Cahill:1990:803)

IP is a growth industry. Industrial convergences along with the clash of existing legal and regulatory systems have combined with rhetoric on new ICTs and cliché’s about the developing ‘knowledge industry’ to fuel arguments for policy interventions at national and supra-national levels to manage, regulate and control information. IP issues are clearly complex and present real definitional difficulties. Even defining the basic boundaries of an IP issue can be problematic. Pragmatists, for example, may argue that IP is a goal-driven, problem-solving activity in which boundaries are defined by the issues at hand. This approach however, fails to recognise that different actors involved in the policy process perceive different boundaries; that differences will exist in the scale and scope of views on a particular IP problem; and, that different attitudes, motivations and values will underpin the stances of the different policy actors involved. To ignore these issues, means to ignore the range of human, organisational and socio-political forces that shape (and in turn are shaped by) the information policy-making process (Turner: 1995b).

Information policies have developed in a variety of contexts, mostly in response to advances in technology and have employed a range of methods in addressing issues concerned with information and its transfer. This raises the question as to whether such a diverse range of policies share any common characteristics ? One common approach to answering this question has been to develop comprehensive classifications of policies that address information issues. A typical example of this approach is Chartrand’s (1986, 1989) nine categories of information policy;

- Intellectual property
- Information disclosure, confidentiality and the right of privacy
- Telecommunications, broadcasting and satellite transmissions
- Information technology for education, innovation and competitiveness

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<sup>8</sup> See, appendix 2 - interview question frame: section D - question 15.

<sup>9</sup> The first part of this quote cited in Overman & Cahill (1990) comes from the US Senate (1986) *Information Age Commission Acts* (99 - 505) Government Printing Office, Washington, D.C.

- Information resources management
- Library and archives policy
- Computer security, computer crime and computer regulation
- International communications policy
- Government information systems and information dissemination policy

A variety of similar classification based approaches have also been developed by other authors (Rowlands & Vogel:1991, Hill:1994). This type of approach although enhancing understanding of the scope of information policies, does little to identify any shared characteristics. Indeed by treating these policies as discrete entities it de-sensitises us to the interrelationships between them. An alternative framework is offered by Moore (1993) who developed a comprehensive information policy matrix within which to map the goals of different information policies. The framework examines information policy goals at three levels (organisational, industrial and societal) in relation to a range of dynamic forces including (legislation & regulation, information technology and human resources). The advantage of this framework is that it highlights the range of policy objectives covered by information policies. But by spreading its net so wide the matrix ends up by making it difficult to differentiate information policies from other industrial and competition policies.

More recently, Braman (1990)<sup>10</sup> has argued that there are five characteristics that differentiate information policy from other areas of public policy:

- (1) IP is a relatively new area of policy concern;
- (2) IP involves an unusually large number of diverse groups of players;
- (3) Policy decisions about information can have an enormous impact on events and policies in other areas - the reverse being true to a much lesser extent;
- (4) Information does not fit into the traditional categories employed by policy analysts;
- (5) Information policies made at very different levels of the political and social structure, from the local to the global, show a remarkable degree of interdependence.

As a consequence, IP can be characterised as a particularly complex area of public policy that defies easy description and analysis. In an initial attempt to identify some of the sources of this complexity Braman highlighted four sets of problems:

- *Conceptual Problems:* The rapid pace of technological change creates difficulties for both information policy practitioners and researchers because the assessment and comprehension of problems, agreement on policy aims, and the generation and implementation of effective policy solutions, are all problematic in dynamic IP environments (e.g., Hawkins:1992 )
- *Informational Problems:* Information fulfills a variety of functions in the policy-making process variously informing, legitimating and/or controlling policy actions. Frequently the information available is inadequate, it is biased or policy-makers are not able to fully comprehend it. All of these factors are problematic for 'good' policy-making (e.g., Robins:1992, Strachan:1997).
- *Structural Problems:* The size and volume of issues, actors and policy objectives almost inevitably leads to problems in policy coordination. Conflicts occur due to the practical

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<sup>10</sup> For a more detailed summary of Braman's argument See, Rowlands (1997a).

difficulties of trying to ensure coherence between heterogeneous policy initiatives (e.g., Michael:1986, Bates:1990)

- *Orientation Problems*: Information policies are approached from a variety of different perspectives (scientific, professional, political). These different perspectives clearly affect the overall aims that information policies are set (Turner:1996).

This approach is useful in identifying some of the main sources of complexity in IP but it does little to provide any obvious solutions to overcoming these difficulties. At best, it draws our attention to the fact that information policies involve *value judgements* about what information is and how best it should be deployed in the current dynamic economic and socio-political context. Information policies clearly involve “a fundamental enduring conflict among or between [different] objectives, goals, customs, plans, activities or stakeholders which [are] not likely to be resolved completely in favour of any polar position in that conflict”(Galvin:1994). As the numbers of European policy initiatives on information issues increase questions arise as to how well the conflicts and tensions between these different policies are understood and how adequate existing policy structures and processes are for handling them ?

In the context of the casestudy this generates the following question<sup>11</sup>

***How adequately do European Information policy processes handle the interrelationships between information policies ?***

### **2. 1. 3. Information policy values: a normative structure**

“Values comprise the normative propositions that affirm what our social policy ought to be, and the normative and moral assumptions that underlie present practice” (Rein:1976:38).

A major contribution to the study of IP values was made by Overman and Cahill (1990)(Table 2.1.) who provide a ‘systematic, critical and explicit’ method for examining the interplay between the seven core IP values they identified. The approach illustrates a range of inherent tensions that may exist within particular information policies between restrictive and distributive goals (for example, the tension in copyright between the needs of authors and rights holders for protection and the needs of users for information access). While their categorisation of information policy values may appear somewhat arbitrary, their assertion that ‘conflict and convergence’ surrounding these values establish the normative structure of most information policy debates is justified “Complex policy problems in general, and information policy in particular, reflect a level of ‘policy impossibility’ in which group and individual values and preferences can never be consensually ordered to provide a unique policy preference for society as a whole” (Overman & Cahill:1990:817)

In considering the important link between information policies and ICTs Goodyear (1993) adapted Overman & Cahill’s approach to create a framework specifically examining IP values in the ‘electronic age’. Goodyear’s framework identifies three values; access, privacy and ownership, as central to IP debates in the emerging information society. This framework also emphasises how the digital environment has the potential to magnify the interrelationships

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<sup>11</sup> See, appendix 2 - interview question frame: section D - question 14

between these three IP values, even though formal policy responses have remained fragmented by administrative and socio-cultural conventions.

**Table 2. 1. Information policy values**

| CORE VALUES                                     | UNDERLYING ASSUMPTIONS   |
|---|--|
| Access & Freedom<br>(Distributive)              | <i>The assumption of democracy: For democracy to work citizens need to be well informed. Freedom of, access to, and use of information are key elements in scientific progress and in ensuring democratic government. Governments and organisations often try to restrict freedom and access on grounds of national security or the need for competitive advantage.</i>  |
| Privacy<br>(Restrictive) and,<br>(Distributive) | <i>The preservation of personal rights: Privacy within democratic societies is an important value linked to notions of an individual's autonomy, independence and sovereignty. Tensions exist in determining the boundaries of privacy between the needs of Governments for information on its citizens, or organisations on their customers, with the individual's moral supremacy in the private sphere.</i>   |
| Openness<br>(Distributive)                      | <i>The public's right to know: Open Government assumes the right of the public to know about how government is conducted. Openness is associated with the linked notions of participation, trust and accountability.</i>   |
| Usefulness<br>(Restrictive)                     | <i>The pragmatist's creed: The basis for Governments to collect and maintain public records must be the use to which that information is put. The key policy issue revolves around who decides and controls what information is considered useful and therefore collected by Government.</i>   |
| Cost & Benefit<br>(Restrictive)                 | <i>The bureaucratic necessity: Information has economic value. The production, storage and dissemination of information by Governments has costs and benefits that have to be evaluated in terms of what is in the 'public interest' (free at the point of use) and what is 'commercial purpose' (for which a fee is payable).</i>   |
| Secrecy & Security<br>(Restrictive)             | <i>The authoritative cloak: Certain types of information may need to be kept secret by governments for a variety of reasons including national security. The key issue again revolves around who is able to decide what should or should not be kept secret. The ability to make these decisions is a genuine source of political power.</i>   |
| Ownership<br>(Restrictive)                      | <i>The notion of intellectual property: Here ownership is concerned with the protection of the form or expression of ideas traditionally through Patents and Copyright and with the exclusive right to economically exploit creative works. In giving these rights Governments anticipate benefits to society at large from the increased circulation of ideas. This balance has come under increasing strain, particularly in copyright, from the impact of information and communication technologies.</i> |

(Adapted from Overman & Cahill:1990)

As an example, consider copyright on the internet. Due to the dangers of piracy in electronic environments rights holders have for some time been arguing for an extension in the scope of copyright protection to include the display of digital works held in the RAM memory of a user's computer. If such an extension in protection occurred it would in effect bring the 'act of reading' within the scope of copyright's exclusive rights. Within the copyright regime itself this would fundamentally change the balance of rights amongst rights holders, authors and users by shifting from the existing 'de facto right to read' in analogue environments to a system of digital pay-per-view. It could also be argued that such an extension would, by default bring the underlying ideas contained within these copyright works within the scope of copyright's exclusive rights, (something that has always been outside the scope of copyright). Clearly one cannot take possession of an idea without being able to gain access to an embodiment of that idea<sup>12</sup>.

<sup>12</sup>Litman, J. (1994) The Exclusive Right to Read, *Cardozo Arts and Entertainment Law Review* 13.

However in the digital environment, by extending copyright in this manner there would also be implications for the other two core information values identified by Goodyear (access and privacy); The possibility to charge for every byte of information in digital environments would quickly reduce information access to a question of one's ability to pay rather than relying on a notion of a 'public interest' in ensuring access to information. This in turn would create increasing pressure on the research community<sup>13</sup> and on information access more generally with accompanying implications for democracy as a whole (Schiller & Schiller:1988). Digital environments also provide rights holders with the ability to collect and collate information on citizens who use their works on-line. Technical systems for copyright management could be utilised to further track information use with the obvious implications for users privacy. Indeed, in many instances this information monitoring is already happening on-line, often without the permission or knowledge of users and with little regard for data protection principles (Goldman:1997).

At a practical level this raises questions about whether or not the actors directly involved in shaping European copyright policies for digital environments are aware of the tensions with other areas of information policy, and if so how they deal with them within the confines of the policy-making process ?.

In the context of the casestudy this generates the following question<sup>14</sup>

***How would you characterise the relationships in digital environments between copyright policy and other areas of information policy such as Privacy ?***

Clearly IP as an area of public policy is problematic to define. It is complex and multifaceted and operates in dynamic environments involving a diverse range of policy actors. While it is possible to identify a set of common core values, conflict and convergence amongst their differing aims and objectives has contributed to fragmentation in IP responses. Taken together information policies now form a jig-saw of partly overlapping, often contradictory laws, regulations and controls. In this context, it is not surprising that questions over how to move towards a more critical scientific approach to the study of IP environments and how to generate useful insights for those engaged in real-world policy design and implementation have remained problematic. "The absence of a single, authoritative policy-maker, the elusiveness of decisions, and the twists and turns of the policy process have one important repercussion; they leave no obvious point of entry for research" (Booth:1988)

## **2. 2. Information policy studies**

"At a time when the significance of 'information' is being emphasised in contemporary debates, it is ironic that so little has been written about the study of information policy itself; to date, relatively scant attention has been paid to the theoretical foundations of the subject. Indeed, the

<sup>13</sup> See, for example Loughlan(1996) Of Patents and Professors: Intellectual Property, Research Workers and Universities, *European Intellectual Property Review(EIPR)* 6(345-51). Loughlan argues that in the context of publicly funded Universities 'private sector monopoly rights are an inappropriate research-reward mechanism and that their increasing introduction into the university environment is destroying the existing research culture and peer review process'.

<sup>14</sup> See, appendix 2 - interview question frame: section D - question 13

lack of commonly accepted frameworks, tools and methodologies for information policy analysis is a source of difficulty and frustration for the serious academic researcher”(Rowlands:1996:13).

The study of information policy is new both within and beyond the information science (IS)community. Although IP has attracted interest from a range of disciplines including public policy, economics, sociology and legal studies (Braman:1989, Burger:1993), it has been argued persuasively by Rowlands (1997a) that the ‘roots of information policy studies are planted firmly in the library and information science tradition’. This section examines the development of information policy studies(IPS) from within the IS tradition and reviews a range of conceptual and methodological problems that have inhibited the development of a coherent theoretical framework for the analysis complex IP environments

### 2. 2. 1. Development within information science<sup>15</sup>

Amongst information policy professionals and academics there is a wide range of opinion on what information policy *is* or *should be* and on how best it can be studied, analysed and evaluated. Perspectives can be differentiated:

- By scale with accounts of policy-making at international (Mahon:1989, Sillince:1994), national (Weingarten:1989, Gray, J:1988) and organisational (Orna:1990, Pye:1997) levels;
- By the motivations underpinning the research with examples of scientific, professional and political policy-making and analysis (Karni:1983, Aldhouse:1997, Jacobsen:1989);
- By the mode of inquiry with analysis *for* policy-making and *of* policy-making providing detailed *descriptions* and/or articulating clear *prescriptions* (Bates: 1990, Braman: 1988, Haines:1997, Kajberg & Kristiansson:1996, Martyn et al:1990).

Despite this variety of approaches, it is only recently that the lack of a coherent framework for the study of information policies has received much attention (J. Gray:1989, R.Gray:1993, Kristiansson:1996). As Rowlands has argued there has been a general failure to acknowledge that ‘while information policies have been *technology-driven*, information policy research has been *discipline-bounded* ’(Rowlands:1996:17). In this context a number of writers from within the IS tradition have identified a range of conceptual and methodological problems that have inhibited the development of a strong theoretical and methodological basis for the academic study of IP environments (Braman:1989, 1990, Browne:1997a, 1997b, Bawden:1997, Kajberg & Kristiansson:1996, Rowlands:1996, Turner:1997). These problems can be divided into three categories;

- Problems relating to the definition of basic terms and concepts i.e. ‘information’ and ‘policy’, (Braman:1989, Bawden:1997).
- Problems relating to the use of appropriate models, methodologies and frameworks for information policy research (Kajberg & Kristiansson:1996, Rowlands:1996).
- Problems relating to the underlying paradigms that inform approaches from within the IS tradition (Browne:1997b, Turner:1997).

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<sup>15</sup>A shortened version of this section was originally published as ‘Information Policy Concepts: An Overview’ pp.19-26 In I. Rowlands (ed)(1997) *Understanding Information Policy*, Bowker-Saur, London.

### 2. 2. 2. Definitional dilemmas

“A detailed examination of the published record of information policy reveals a variety of definitive and analytical approaches to the concept of information policy. There is an evident lack of consensus on what constitutes the core of information policy. An array of classificatory approaches in the field are offered but what is missing is a coherent theoretical framework” (Kajberg & Kristiansson:1996:5).

The basic concepts underlying information policy studies i.e. ‘information’ and ‘policy’, exhibit a high degree of theoretical pluralism. Even a casual glance at the IS literature on ‘information’ reveals a wide range of stances and interpretations (Belkin:1977, Farradane:1979, Machlup & Mansfield: 1983, Roszak:1986, Stonier:1986, Liebenau & Backhouse:1990, Buckland:1991, Hayward & Broady:1994). While definitions differ broadly speaking two main approaches can be identified that define information; *either* (as an object, a commodity, a thing) *or* (as a subjective process involving the generation of meaning in the human mind reliant on social relationships and context) (Eisenschitz:1993:10-13). While some researchers accommodate and even welcome this definitional diversity (e.g. Braman:1989), others view it as a source of confusion and express unease about information policy studies apparent inability to define its core concepts (Browne:1997a).

The ambiguities associated with the term ‘policy’ hardly help matters. Hogwood & Gunn (1984), for example identify ten distinct meanings for the term, nearly all of them in common usage and instantly recognisable to the non-specialist. To make matters worse, this definitional problem is apparently compounded when the two terms are brought together, as Rowlands (1996) puts it ‘There are at least as many definitions of information policy as there are writers on the subject’, or perhaps more accurately, there would be if writers on information policy were more explicit about the definitions they used. Clearly the limited vocabulary available and the inconsistent use and definition of terms is a real problem for the serious academic IP researcher (Allen & Wilson:1997).

Problems of definition are not however purely of academic interest. They are important in the ‘real world’ of the policy-maker where, implicitly, information has tended to be discussed and approached in a very narrow way, as an object/commodity, something that can be measured in bits, bytes or dollars. With policy generally taken to imply purposeful action directed towards a set of identifiable goals; and policy research as the analysis of these actions by objective scientific criteria. In these highly pragmatic working definitions objectivity is emphasized and subjectivity, value judgements and power relations downplayed. In these contexts it becomes clear how questions about the influence of individual values and judgement can be ignored (Turner, 1994). However, as Strachan & Rowlands (1997) review of published research on how policy-makers use information illustrates, information systems designed ‘rationally’ to support the policy-making process often fail because the design does not take into account the highly ‘irrational’ ways in which research information is actually used. Research may be used as a weapon to neutralise the opposition, to present an image of careful decision-making, to legitimise rather than influence and sometimes further research is commissioned simply as a spoiling tactic to postpone a final decision. Clearly the different ways IP is defined, discussed, in what circumstances and for what purposes has received too little attention. What IP is, is still hotly contested. However, despite the range of opinion, it is apparent that most writers assume

information policy is something that can be distinguished from other types of policy. However, from an academic perspective even this assumption needs to be questioned<sup>16</sup>.

In attempting to identify the kind of information being dealt with in information policies Bawden (1997) suggests two approaches. Firstly, the traditional knowledge pyramid which distinguishes between data, information, knowledge and wisdom and which highlights that moving from data through to wisdom involves value-adding processes: 'evaluation, comparison, compilation and classification'. This Bawden argues illustrates a close link between information policy formulation and knowledge management because 'policies, if they are anything, are about context, meaning and action'. Secondly, building on the work of Liebenau and Backhouse (1990) and Brier (1996) Bawden identifies the semiotic viewpoint as an alternative approach. From this viewpoint information must be described completely through four levels: the empiric (physical transmission of information), the syntactic (languages, codes, grammars of information), the semantic (meaning and context of information), the pragmatic (significance and purpose of information transfer). Bawden argues that both approaches highlight that information policy formulation is:

- inherently and intrinsically complex;
- not directly or primarily concerned with technical solutions;
- dependent upon an appreciation of the meaning and significance of knowledge in its context.

This implies that to cope with these characteristics, research of information policies must be 'holistic and integrated over all its levels' (Bawden:1997:78).

An even more useful approach to defining information in IP environments has been developed by Braman (1989). This hierarchical approach illustrates the plurality of definitions surrounding information and categorises them into four broad groups: information as a resource; information as a commodity, information as perception of pattern; information as constitutive force in society (Table 2.2.). The hierarchy is based on differences in the scope of the social phenomena incorporated, the complexity of the social organisation addressed and the 'amount of power granted to information and its creation, flows and use'.

In the context of information policies Braman argues that the choice of definition type is ultimately political and is determined by three factors:

- The perspective on an IP issue i.e. individual, organisational or state;
- The utility of a definition for a particular situation;
- The relationship between a definition and the notions of power with which it is associated.

For Braman policy-makers should always start with the broadest definition of information as a constitutive force in society because they should always be concerned with the overall shape of society. Similarly information policy researchers should always use 'the definitions that provide the deepest levels of analysis' because 'this definition provides the context, and ultimate analytical standard, of any decision made using other definitions of information' (Braman:1989:242).

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<sup>16</sup> This assumption is tested in Ian Rowlands (1998) *Mapping the knowledge base of information policy: clusters of documents, people and ideas*, PhD thesis, Information Policy Unit, City University.



**Table 2. 2. Braman's information definitions hierarchy**

| Information definition type        | Characteristics of definition type  |
|------------------------------------|---|
| As a resource                      | <i>Information, its creators, processors and users are viewed as discrete and isolated entities. Information comes in pieces unrelated to bodies of knowledge or information flows into which it may be organised. Social structure is simple: information have and have-nots. This definition's scope is relatively limited with information ascribed no intrinsic power of its own. In essence: information as a resource encompasses any information content represented in any way, embodied in any format and handled by any physical processor.</i> |
| As a commodity                     | <i>Despite problems with applying traditional economic concepts to information as something that can be exchanged this definition has in recent years increased in scope, penetration and domination. This definition incorporates the information production chain along which information passes and gains increased economic value. The economic power attributed to information here may well destroy other types of value inherent in social, cultural, religious and aesthetic information.</i>   |
| As perception of pattern           | <i>Higher in the hierarchy context is added so that information has a past &amp; future, is affected by motive and other factors and has effects of its own. It can reduce uncertainty and is seen as inseparable from its context. But reliance on context mean definitions of this type vary between individuals. Here knowledge is power applicable in a highly articulated social structure.</i>  |
| As a constitutive force in society | <i>At the broadest level information is not just affected by and part of social structure but is also an active agent in social change. This definition applies to the entire range of phenomena and processes in which information is involved. It can be applied to social structure of any complexity and, attributes to information, its flows and uses an enormous power in constructing our physical and social reality. It is also open to abuse as a tool of ideological manipulation.</i>  |

(Adapted from Braman:1989)

The term policy also exhibits definitional ambiguity. Rein & Schon (1994) have developed a useful 6 point hierarchy to encapsulate these different definitions starting from the material through to the abstract. As Browne (1997a) has argued a major advantage of this encompassing framework of the scope of policy activities is that it highlights the need in policy research to look at the context of policy-making - the actors, institutions and socio-political context. Starting from the narrowest definition, policy in this framework can be defined as:

- Policy practices, for example regulation.
- Policy as sets of rules and laws.
- Policy as a process involving bargain and debate between rival positions
- Policy as the different positions and arguments put forward
- Policy as the systems of beliefs, values and opinions shared by particular groups involved
- Policy as the general beliefs and values shared among members of the same culture.

Clearly definitional dilemmas are here to stay. However, by examining the assumptions underpinning these different definitions it becomes easier to accommodate different ways of understanding and representing IP. These may complement, compete and sometimes cancel one another out. But in adopting this stance it is important not to ignore the differentials in power that exist and contribute to the legitimacy of one definition over another.

### **2. 2. 3. Models and methodologies in information policy studies**

“Descriptions are never independent of standards, and the choice of such standards rests on attitudes which because they can be neither logically deduced nor empirically proved are in need of critical evaluation” (Habermas:1972).

The second set of problems in the academic study of IP environments relates to the models and methodologies used by researchers. Just as there are a range of definitions, so too there are a range of models, methodologies and frameworks for conceptualising IP. While the purpose of these frameworks varies: ideal type, descriptive, prescriptive, the basic task they fulfil is the same. They enable researchers to simplify reality. Models achieve this by being highly selective about the aspects of reality they project and emphasize and those aspects they play down or ignore. Each policy model encapsulates a particular way of seeing the world and makes a set of assumptions that are rarely if ever made explicit. Models are representations of reality. But as representations they can do more than simply aid comprehension and may actually construct or even displace the reality researchers perceive by attributing relationships between aspects of the model that may be only partially reflected in the real world. Analysts have to be aware of the capacity for models to enable us to see what we want to see (Parsons, 1995). We must be critical about the models we use and the claims we make for them.

In an examination of the main frameworks and methodologies that have been applied to the creation of knowledge in IPS Rowlands (1996) has identified five broad approaches (Table 2.3.). These approaches while certainly not mutually exclusive, provide a useful illustration of the range of approaches evident in the IS literature. Importantly, as well as noting the lack of good casestudy material on IP, Rowlands concluded that the methodological approaches to the analysis of IP environments available within the IS community remain limited due to a lack of concepts, frameworks and research tools.

These issues point up the need to approach policy making and policy studies as a set of social practices in their own right. This emphasizes the need not only to be critical and self-reflective about the definitions, models and frameworks used by ourselves and others, but also to reflect on paradigms which support the assumptions upon which these different approaches are based. More critically for information scientists it implies being explicit about the influence and impact of the positivist paradigm that has underpinned most of the work conducted so far (Vakkari & Cronin:1992).

**Table 2. 3. Tools and methodologies for information policy research**

| Research Tool                  | Methodological strengths  | Methodological weaknesses  |
|--------------------------------|---|--|
| Classification-based           | <ul style="list-style-type: none"> <li>• <i>Useful tools for exploring patterns in complex data.</i></li> <li>• <i>Demonstrates breadth of issues embraced by information policy.</i></li> <li>• <i>Facilitates access to primary research materials</i></li> </ul> | <ul style="list-style-type: none"> <li>• <i>Limited theoretical underpinnings.</i></li> <li>• <i>Obscures the political, social and institutional contexts within which policy operates.</i></li> <li>• <i>Allocation of policies into mutually exclusive taxa risks losing a sense of their interconnections</i></li> </ul> |
| Issue identification & options | <ul style="list-style-type: none"> <li>• <i>Primary value as a data collection tool.</i></li> <li>• <i>Useful for mapping and scoping complex policy problems</i></li> </ul>  | <ul style="list-style-type: none"> <li>• <i>Fails to provide an explicit framework for evaluating policy options.</i></li> <li>• <i>Typically generates highly value-laden results.</i></li> </ul>   |
| Reductionism                   | <ul style="list-style-type: none"> <li>• <i>Reduces complexity and ambiguity to manageable proportions.</i></li> <li>• <i>Restricting analysis to a particular discipline (e.g. economics) allows underlying assumptions to be made more explicit.</i></li> </ul>   | <ul style="list-style-type: none"> <li>• <i>May succeed in providing a cogent but partial explanation which is not useful in the real world.</i></li> <li>• <i>In extremis it becomes difficult to relate the parts to the whole.</i></li> </ul>   |
| Scenarios & forecasts          | <ul style="list-style-type: none"> <li>• <i>Generation of alternative visions is a useful input to decision-making.</i></li> <li>• <i>Reduces and constrains uncertainty.</i></li> </ul>  | <ul style="list-style-type: none"> <li>• <i>Difficult to capture sufficient data to make valid extrapolations.</i></li> <li>• <i>Underlying models often too deterministic.</i></li> </ul>   |
| Process based & casestudies    | <ul style="list-style-type: none"> <li>• <i>Highly integrative technique yeilding 'context rich pictures'.</i></li> <li>• <i>Useful for testing hypotheses and developing new theories.</i></li> </ul>  | <ul style="list-style-type: none"> <li>• <i>Highly expensive of time and other resources.</i></li> <li>• <i>Difficult issues relating to access and confidentiality.</i></li> <li>• <i>Generalisation is problematic</i></li> </ul>  |

(Adapted from Rowlands 1998)

#### 2. 2. 4. Re-locating positivism: paradigms in research

“Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system....Conversely, by the same token, no statement is immune to revision” (Quine:1964:43).

Leaving aside problems of definition and the pitfalls often associated with our inadequate attempts to model reality, a further set of problems that need to be considered are the paradigms that underpin the definitions and methodologies used. The positivist paradigm is dominant within the IS tradition (Saracevic:1992). Existing approaches within IS have continued to rely on a substantialist view of information and the subject/object divide (Hoel:1992). This tradition has

clearly had an influence on the approaches adopted in IPS, especially as many senior writers in the field are scientists by training. Why this is an issue of concern for IPS links directly to criticisms of positivism that arose from investigations into the theory and practice of science that highlighted how far from scientific, science often is.

Popper, (1957) argued that facts exist in the context of theories, values, beliefs, not independently of them. The implication being that scientists do not engage merely in passively describing pre-existing facts about the world, but actively formulate and construct the nature of that world in their studies (Woolgar:1996:15). Kuhn (1962), whilst agreeing that science was often a constructed discourse, rejected Popper's claim that science proceeded by falsifying its theories and argued instead that it proceeded by a cycle of 'normal science' followed by revolution. In this sense, then, it was not only the theories but also the methodologies employed which participated in the construction of and re-enforcement of the normal science view of the world. As a result of these criticisms it became problematic to assume that *social* reality could be explained solely in terms of cause and effect, or that inquiry could be neutral, objective and value free. The result of these criticisms was to reposition positivism.

In this context, it is useful to consider what other paradigms developed on the nature of reality and knowledge. In approaching these newer paradigms it is helpful to be able to be able to navigate between. A useful, if rather personal, overview of the range of paradigms that have emerged since the critiques of positivism, has been provided by Egon Guba(1990). Guba proposes that the current state of social science can be understood in terms of four paradigms which are differentiated by contrasting their approaches to ontology (the nature of reality), epistemology (the relationship between knowledge and the knower) and methodology (how knowledge should be established) (Table 2.4.) The critics of positivism argued that there was not one correct way to comprehend reality but rather a number of versions of reality.

Of course in problematising our notions of reality there is the danger of going so far as to lose a sense of our ability to analyse or explain anything. But this would be to forget that, while different paradigms can be characterised as providing multiple versions of reality, they have differential access to power to enforce or support the view articulated. However, if it is accepted that often knowledge is contextual, mediated and rarely value free, it is necessary to recognise that so is our analysis of it. Indeed there are many different ways of looking at an IP issue: from seeing it as a purely technical problem at one end, to a reality constructed in the minds of the participants at the other. Therefore there is a need for a sophistication in IPS to acknowledge that there are radically different theories over the nature and construction of knowledge and over what knowledge means in specific contexts. IPS must accept a broad church of opinion from quantifying cost-benefit analysis at one end, to discourse analysis and critical theory at the other. In the context of these problems the next section examines a model developed for conducting IP research.

**Table 2. 4. Guba’s comparison of paradigms**

| <b>Paradigm</b> | <b>Ontology</b>   | <b>Epistemology</b>   | <b>Methodology</b>   |
|-----------------|---|---|--|
| Positivism      | <i>Reality exists, it works according to the laws of cause and effect, these laws can be revealed</i>         | <i>Inquiry can be value-free, objectivity can be achieved.</i>  | <i>Hypotheses can be empirically tested.</i>   |
| Post-Positivism | <i>Reality exists, it cannot be fully understood or explained, there are multiple causes and effects.</i>     | <i>Objectivity is an ideal, it requires a critical community, subjectivity is acknowledged.</i>                     | <i>It is critical of experimentalism, it emphasises qualitative approaches, theory and discovery.</i>        |
| Critical Theory | <i>Reality exists, it cannot be fully understood or explained, there are multiple causes and effects.</i>     | <i>Values mediate the inquiry, Requires the selection of a value system.</i>  | <i>Proposes the elimination of false consciousness and facilitates and participates in transformation.</i>   |
| Constructivism  | <i>There are multiple realities, they exist as mental constructs and are relative to those who hold them.</i> | <i>Knowledge and the knower are part of the same subjective entity, findings are the result of the interaction.</i> | <i>Identifies, compares and describes the various constructions that exist hermeneutical and dialectical</i> |

(Adapted from Parsons:1995)

### **2. 3. Developing a model for information policy research<sup>17</sup>**

As the preceding discussions have highlighted information policy has generated considerable interest across the public, corporate and academic sectors. While there is little in the way of formal definition of what the notion actually means, there does at least seem to be a broad consensus that information policy is highly complex and presents serious difficulties in terms of scoping meaningful studies.

This section argues that the related problems of complexity and scope limitation in IPS can best be addressed by conceptualizing IP as a process (a verb), rather than as an object (or noun). Drawing on ideas from the policy sciences, a process model of IP is presented. This process view draws attention to the temporal and dynamic aspects of information policy-making. This basic process model is opened up to a number of re-interpretations ( ‘rational actor’, ‘bureaucratic imperative’, and ‘garbage can’ ). It is argued that this ‘re-interpreted process model’ is highly applicable in the context of IPS and offers a useful triangulation tool with which to begin to isolate some of the main sources of complexity surrounding IP. As a *meso-* or middle-level theoretical category this tool also opens up the possibility of enabling researchers to identify and deploy other theoretical categories at other (macro and/or micro) levels of analysis.

#### **2. 3. 1. Complexity in information policy research**

As previously noted (section 2.2.3.) Rowlands (1996) has argued that the concepts, frameworks and research tools available to support IPS are limited. This conclusion arose out of a realisation that researchers from within the IS tradition often acknowledge the complexity of IP, but then

<sup>17</sup> A version of this section was originally published with Ian Rowlands as ‘Models and Frameworks for Information Policy Research’ pp.46-60. In I. Rowlands (ed)(1997) *Understanding Information Policy*, Bowker-Saur, London.

proceed to use that as a justification for ignoring its analysis. IP issues are clearly very complex and multi-faceted. However, this complexity, needs to be taken seriously by the academic IS community and incorporated into research design. There is a need for a new research approach to deal with the contradictory, interrelated and unpredictable (*the incidental and the accidental*) factors that characterize information policy making in the real world.

The fact that information policies are problematic to study does not justify the temptation to conveniently push this complexity to one side or to retreat into often sterile arguments over definitions. If this complexity is not addressed in research design it means accepting wider social, political and cultural forces as somehow a series of 'givens'. This is problematic because it homogenizes the wider context for IP in a manner that denies it as a contested and dynamic environment. It removes the researcher's own assumptions and opinions from the field of analysis. Tacit agreement to accept that things are 'complex' neatly avoids more difficult issues such as analysing how and why they are complex and what differences and disputes may exist between analysts. There is also a real danger that the notion of 'complexity' will be used by policymakers as a rhetorical smokescreen to disguise the real policy agenda<sup>18</sup>. Rather than ignoring complexity, changing the subject matter, or trying to explain it away, this section argues that an attempt can be made to study complex IP environments in a systematic way.

### **2. 3. 2. Scope limitation in information policy research**

Closely related to issue complexity in IP analysis is the problem of scope limitation. What are the boundaries of an IP problem? Public policy generally is difficult to draw lines around, but the issue of scoping research needs to be taken seriously. Otherwise there is the danger that research will fail because it addresses the wrong problem. It is better therefore to adopt methods that yield 'an approximate answer to the right question, which is often vague, rather than an exact answer to the wrong question, which can always be made more precise' (Rose:1976). This is not easy, especially within the limitations of the existing IS research toolbag. For example, at the national level in Britain IP is highly decentralized and fragmented. The motivation for policy development and change comes from many areas and, as a consequence, there is only notionally a 'national information policy' made up of a mix of statutory and common law, social norms, administrative practices, market forces and international treaties and agreements. A similar lack of a coherent IP has been noted by a number of writers at the European level (Mahon:1989, 1997, Sillince:1994).

As discussed above (section 2.2.3.) there has also been a general failure in the IPS to identify the models and assumptions being deployed. All policy researchers distinguish between the aims and results of their research, but only rarely do they identify the specific limitations of the tools they employ in relation to the conclusions they draw. This raises a series of questions, including: the role we attribute to the analyst (as an impartial observer, biased agent or ideologist?); the type of analysis being undertaken (whether describing what a policy *is* or telling us what it *should be*?); and the stage of policy development being considered (policy formulation, implementation or evaluation?). While these fine distinctions are most frequently more of a problem for academic researchers than for 'real-world' policy practitioners, this observation does reveal a worrying deficit between policy formulation and the information and research feeds into policy design.

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<sup>18</sup>A corollary of this is that policy-makers often deploy vagueness and ambiguity as a method of coping with situations where negotiation and compromise between conflicting positions is required. This strategy leaves policies open-ended, allows for a variety of interpretations and provides flexibility in dealing with unforeseen problems as the policy evolves (Rein:1976).

The role of a scientific approach to IP must be to unravel these assumptions and make them explicit. Ideally, a conceptual framework is needed that can account for specific problems yet allow for more generally applicable hypotheses to be formulated and tested. The next sub-section examines a widely accepted model of the policy process and shows how that model can be developed to deal with these issues.

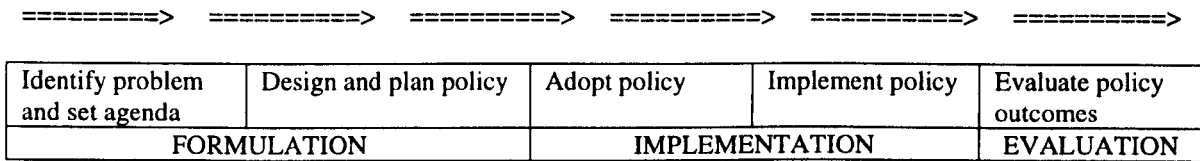
### 2. 3. 3. Modeling the dynamics of information policy

The problems of complexity and scope limitation have been identified as two key issues in information policy research. While they are clearly difficult to address this sub-section argues that having acknowledged them we can and must try to systematically address them in our research design. As Turner (1994) argued, IP is too often conceptualised simply as a 'thing', as an object. This notion is particularly evident in the IS literature and there is a real lack of good casestudy material in the IPS literature, and little illumination of the human, organisational and socio-political aspects of policy-making.

The wider public policy sciences literature does offer a choice of research frameworks for trying to understand the dynamics of policy-making. Some writers view policy-making as a series of choices: choices of scope, of policy instrument, of distribution, of restraints and innovation (Jenkins:1978). Some view policy-making as the reaction of a political system to external stimuli (Easton:1979). Others view policy-making as the result of bargains struck between policy actors or flowing from existing organisational processes and procedures (Dye:1972, Burns & Stalker:1961).

A review of all the frameworks potentially available for use in the context of information policy studies is beyond the remit of this thesis. But an immediately useful and productive way of trying to understand IP is to employ a systems approach. This recognises that policy-making comprises a series of inputs (people, ideology, expediency, information, research, investment) and outputs (wealth creation, better health care, access to democracy). By conceiving of information policy-making as an *Input-Process-Output* (I-P-O) model it is possible to the view IP as governing a *process* (such as the storage and transmission of information) rather than as a *thing* (such as a technology). IP is therefore better thought of as a verb rather than as a noun. Just as the I-P-O model can be used to describe how data are transformed into information and then knowledge, so it can also offer insights into policy-making. Thus, rather than addressing policy issues relating to a specific advance in software or data communications (i.e. technology-driven), it is possible to focus attention on the underlying functional aims and objectives of policy (Trauth:1986).

Conceptualising policy as a *process*, rather than as a specific outcome or event, is very useful. It helps us to understand how policy develops over time and how policy is shaped by (and, in turn shapes) human, organisational and socio-political factors. Policy is not an abstract ideal, it takes place in an imperfect and sometimes confusing world. A typical representation of the policy-making process is the 'functional staged model' (Lasswell:1970). A simplified version (not incorporating feedback loops) is illustrated below (Figure 2.1.)

**Figure 2. 1. Staged model of the policy-making process**

Moving from left to right, a problem is first identified and defined and placed on the agenda of the decision-makers. Alternative solutions are developed, presented and rejected in favour of the option which offers the maximum net benefit (or is most convenient, expedient or inexpensive). This is then officially adopted. Implementation begins and evaluation or monitoring procedures are usually invoked so that any undesirable outcomes can be identified and dealt with. In many cases, the results of that evaluation will require adjustments to be made earlier in the chain, perhaps resulting in a complete re-design of the policy.

To a large extent, once a policy-making process gets underway, it tends to be continuous. It has been said that policy-making has 'no beginning and no end' (Lindblom:1959). This overstates the case, as it is possible to define reasonable starting and termination points in a pragmatic way. Within those boundaries, however, the process can be regarded as continuous. The power of this staged model is that it offers a way of grouping a wide range of apparently disconnected decisions, phenomena, observations and data into meaningful units, and it also has a certain intuitive appeal. It also clearly has limitations. Many critics would immediately point out that real life, with its rough-and-tumble of politics and 'horse-trading', is never as neat and tidy as the model suggests. Nonetheless this is how policy-making is most often presented in the media, and many policy-makers often justify and defend their actions, however apparently irrational at the time, in terms of this ideal framework.

One aim of this sub-section is simply to extend the current vocabulary of IPS. The social sciences are already heavily pre-occupied with debates on the nature and the definition of models, and it is not the intention here to enter into the realms of philosophy. It is however, contended that the process model can be of real value in facilitating a deeper understanding of IP problems. In this context, Lasswell's basic model can be re-interpreted in a number of ways. In the next sub-section three re-interpretations are examined in detail: 'the rational actor', 'the bureaucratic imperative', and 'the garbage can'. These re-interpretations are not proposed as exclusive, alternative methods for analysis. Rather they are considered to be a single overall framework or heuristic device for generating value- and paradigm-critical research strategies that in the context of an analysis of a specific policy process enable sensitivity on the part of the researcher.

#### **2. 3. 4. Re-interpreting the process model: the 'rational actor'**

A 'rational actor' interpretation is the one which most closely fits Lasswell's original process model. This interpretation presents policy-making as the result of a series of wholly rational decisions unencumbered by external events. Under this interpretation, policy design takes place in the context of explicitly stated goals which are pursued relentlessly and consistently and brought to an intellectually '*satisficing*' (Simon:1957) conclusion. The choice of which policy option to adopt from the many considered is determined by a cold assessment of costs and benefits based on analytical criteria. The rational actor view of policy-making draws heavily on notions of objectivity, impartiality and equity.



This interpretation treats policy as a planning activity. Here *ends* (policy goals) dictate the choice of *means* (tools and methods). The most prominent writers to develop an ideal type interpretation of this kind are Simon (1957, 1983) and Lindblom (1959, 1979) who differ in respect of the importance that they attach to this means-ends schema. While Lindblom's incrementalist approach stresses the importance of specifying policy objectives in advance and then searching for options, Simon argues that by specifying policy objectives at the outset there is a danger of foreclosing too quickly on possible alternative courses of action. This may seem a relatively small point, but it does suggest that there are strains and tensions even within the classical artifice of the rational actor interpretation<sup>19</sup>.

It is difficult, if not impossible, to find real world examples of the rational actor approach in its purest expression. Yet the interpretation remains powerful and the assumptions that underpin it can still be seen in many press and media accounts of policy events. It is clearly useful, even if only in the negative sense of drawing our attention to deviations from the ideal in the real world. We may never be able to approach or even approximate to the rational actor model in real life, but the conceptual framework it provides does allow us to isolate some of the sources of complexity in information policy.

This can be done by challenging some of the assumptions that underpin the rational actor interpretation. For instance, the assumption that policy-making is somehow synonymous with planning. In real-world situations it is usually very difficult or even impossible to reach agreement on policy goals and objectives. There are likely to be many conflicting views, values and assumptions held by the various stakeholders, such that too rigid an approach to 'planning' from the start may simply lead to open conflict. This raises the important issue of who, precisely, are the policy-makers? Just those with the legal authority to engage in the formulation of policy? Research organisations? The media? Consumer interest groups? Industry lobbyists? The rational actor interpretation of policy-making is particularly interesting from an IPS viewpoint. If policy-making is totally rational, then it must take place in information-rich environments where there is unimpeded access to comprehensive, reliable, timely and objective sources of research<sup>20</sup>.

This ideal is unattainable, not least because of the limits placed on policy-making by time and the availability of finite resources. But what happens when critical information is unavailable? Does the policy-making process *really* stop in its tracks? There is always a balance to be struck between the potential benefits of having comprehensive information available versus the potential costs in terms of time and money in seeking the missing information (See, for example, Walsh & Simonet:1995). Given that the equation will not always tilt in favour of seeking the missing information, policy will sometimes proceed on inadequate information or research which 'satisfices'.

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<sup>19</sup> For an analysis of variations in the degree of prescription and/or description articulated by writings from within the rational actor interpretation of the policy process, See, G. Smith & D. May (1980) The Artificial debate between Rationalist and Incrementalist models of decision-making, *Policy and Politics*, 8 pp.147-161.

<sup>20</sup> In practice the assumption that more information aids better policy-making has also been shown to be problematic as policy-makers have often rejected analysis where it intensifies uncertainty, threatens their entrenched views or runs counter to the current political wisdom.(Booth:1988:221). This also highlights that for example research information in policy-making is more than data-collection and can be used to legitimate decisions arrived at by other routes. Research can also be used as a tool of control and of symbolic value (academic gloss) (See, for example, Knorr:1977, Robertson:1988).

There are perhaps other more fundamental issues in relation to the quality of the information feeds to policy-makers. Are the information systems and services that they use attuned and sensitive to their needs? How do you constantly update a 'perfect' knowledge base? To what extent can (usually generalist) policy-makers be expected to understand and interpret complex scientific information? Do we have useful metrics for evaluating the effects of particular policy choices? Consider for example, the problem of justifying corporate investments in information technology. Many recent studies have failed to show a direct correlation between IT investment in companies and measurable benefits (Baily:1989, Rule & Attewell:1991). Is this because there are no benefits, that there are disbenefits, or that we are simply unable to find the right metrics? (Turner:1994) These are pertinent questions in the context of a view of policy-making based on a rationalist interpretation.

Even the assumption that careful planning makes good policy may be challenged, since even the most carefully planned policy will meet with unforeseen snags or give rise to unintended consequences. This is inevitably always a possibility given the complexity of social and organisational environments. Careful planning and analysis are doomed to be only partially adequate as a means of selecting between policy alternatives. There is no way of fully knowing what the practical effects will be, other than through pilot projects and experiment. Policies may generate knock-on second order effects which may be desirable or undesirable and which may assist or inhibit the realisation of the original aims and objectives. Ignoring these effects is itself dangerous, risky and irrational, yet responding to them is costly and may rely on *ad hoc* improvisation - the antithesis of a wholly rational approach.

Before examining two other re-interpretations of the process model, it is important to be aware of the distinction between rational decisions, as defined by the ideal type model described above, and the decisions taken by policy actors in given policy contexts (Hill:1993). Since rarely can it be argued that actors take decisions that are for them at the time *irrational*, even though for the (often distant) analyst this may appear to be the case.

### **2. 3. 5. Re-interpreting the process model: the 'bureaucratic imperative'**

In the real world, a wholly rational approach to policy-making is impracticable and probably misguided. The limits to rationality in policy-making are obvious, the notion of 'perfect knowledge' being possibly the most difficult aspect to accept. The rational actor interpretation does not embrace the fact that values and beliefs (whether personal, organisational, professional or ideological) have a major bearing on the priority which human beings attach to particular choices of action. It requires an enormous act of faith to believe that policy-makers are always able to act independently of their values and beliefs.

In this context a 'bureaucratic imperative' interpretation of the policy-making process is possible. This assumes that, despite their best intentions and endeavours to behave in a 'rational' manner, powerful organisational/institutional factors come into play which sometimes make this impossible. Even if the individual could overcome his own personal limitations as a policy-maker, he would still face obstacles that were in his way because of the fact that he has to work as part of an organisation/institution. For instance, in the name of efficiency, modern organisations/institutions tend to involve a high degree of division of labour and specialisation, but this often gets in the way of being able to see the big picture. Instead, the individual tends to perceive problems through narrower departmental 'spectacles'. A truly rational policy would be based on the widest possible field of vision. It would avoid the kind of sub-optimal policy-

making that confuses a sub-system (such as a particular directorate within the European Commission) with a larger system (European government).

Institutional settings are a significant source of values, norms, procedures and accepted wisdom that may influence or override 'rationality'. "People within the system make decisions on the basis of clearly established rules and modes of conduct. Any policy that is to be implemented by a bureaucracy, must be transformed in such a way that whatever the intent of the policy-makers about the implementation of the policy, the bureaucratic rules of the implementing organisation will be more powerful" (Burger:1993:19).

The bureaucratic interpretation conceptualises policy-makers as most often simply reacting to immediate short-term problems rather than planning for the future. It assumes that even though agreement on policy objectives or values may be almost impossible, pragmatic agreement on what can be done to solve a problem is nevertheless within reach. For many people, policy-making *is* a problem-solving activity. A 'good' policy is one that forges agreement between people with different values and interests. The bureaucratic interpretation accepts that reality is too complex ever to be understood completely and that there are too many variables to control. Policy-makers therefore get by as best they can in circumstances of uncertainty and ignorance. They operate on the basis of experience, trial and error, adopting flexible but cautious approaches to the complexity of the social, organisational and political environment. Their behaviour is characterised by an incremental, step-by-step approach.

The bureaucratic interpretation shifts the focus on the policy process away from planning to the business of doing something now rather than looking to the future. Policies are evaluated quickly in terms of the marginal benefits they offer in improving the *status quo*. This highly pragmatic approach can be summed up as 'the art of the possible'. *Consensus* rather than rational exposition of the problem and possible remedies become the key determinant of policy choice. This tends to favour gradual or piecemeal change. This approach admits no strategy, it simply 'muddles through'. It prioritises experience, intuition and feeling and plays down the role of analysis. Here *ends* become subservient to the *means* available (Jenkins:1978).

Clearly this model also has its limitations. For example, the assumption that consensus is the mark of a 'good' policy implies a view of society as highly pluralist; where people are free to pursue and protect their interests; where all interest groups are equally articulate at expressing their views; and, where government is open, sensitive, impartial, unbiased and even-handed. Yet society is far from this ideal: differences in power, skills, financial and other resources exist. Consensus, if reached at all, tends merely to be compromise and is often skewed towards the needs and desires of the powerful. Another problem is the tendency for consensus to promote forces of conservatism, inertia and caution and to discourage innovation or risk-taking.

Ironically, the concept of bureaucracy is one that tries to make administrations more rational and more neutral. Max Weber's ideal construct of bureaucracy is of an impersonal, hierarchical system of authority where rules, procedures and regulations form the basis for actions. While these formal characteristics are supposed to lead to efficiency, objectivity, consistency and predictability, they also deeply affect the way that the members of a bureaucracy behave (Weber:1947).

The hierarchical structure and authoritarian character of bureaucracies are essential to control the activities of their members and coordinate efforts towards a common goal. There is, however, a tendency to institutionalise conformity. This is reinforced by such factors as socialisation into the

bureaucratic culture, the desire to belong, peer pressure and self-interest (anxieties over job security or the desire for career enhancement, for instance). This in turn leads to situations where people clearly define their sphere of responsibility and stick to it, become unwilling to use personal initiative, search for approval before doing anything and generally 'pass the buck'. These are significant points for a consideration of how policy is designed, implemented and evaluated. Rules and regulations have a tendency to become more important than the goals themselves (goal displacement), because abiding by the rules and regulations becomes the primary goal. At its most extreme, the protection and survival of the bureaucracy and its members override its original goals and becomes a 'bureaucratic pathology'<sup>21</sup>.

The bureaucratic interpretation may appear to be a good description of the way organisations/institutions make policy decisions, but it is not necessarily a good model for *how* they should make decisions. The bureaucratic interpretation contrasts strongly with the rational actor approach outlined above. Its value lies in drawing attention to the specific organisational/institutional factors that shape and constrain policy-making. It is important because analysts and commentators have certain assumptions about how policy is made in government or in commercial enterprises. These assumptions are often not explicit but they certainly affect the conclusions that are drawn.

### 2. 3. 6. Re-interpreting the process model: the 'garbage can'

Despite their differences of emphasis, the rational actor and bureaucratic interpretations share one thing in common: an assumption that policy-making is essentially orderly, continuous and linear. Both proceed from gaining an initial understanding of a problem to the application and evaluation of measures designed to bring about a resolution. The question of how that problem is recognised by policy-makers in the first place is often given little attention. Instead, problems are taken as 'givens' and analysis moves forward from that point. But why are some problems acted upon while others are ignored ?

The definition of problems is often a *political* activity. At any given time, many problems and issues will be competing for the attention of the policy-maker. Only a relatively small number will have any reasonable chance of being seriously considered, and only a very few will gain more than short-lived support within the policy environment. This is a particularly difficult aspect in many areas of IP where the ultimate policy goals are themselves often unclear and ambiguous (for example, the European Union's information society initiatives)<sup>22</sup>.

Following Kingdon (1984) a major limitation of both rational and bureaucratic interpretations of the policy-making process is that they are too clear-cut. In neither interpretation do such anarchic

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<sup>21</sup> At the European level the picture is further complicated not only by the variety of bureaucrats working for the European institutions but also because of bureaucratic interpenetration (*engrenage*) i.e. the interaction between European bureaucrats and civil servants from the Member States bureaucracies (Lodge:1993:14-15).

<sup>22</sup> It is also important to realise that lack of a visible policy does not always mean that no policy exists 'it is absurd to deny that by studied inaction in certain situations governments are expressing something that is a policy'(Jenkins:1978). A linked perspective is, that even where there is a visible policy its purpose may be to prevent policy action (*virtual policy*) - for an analysis of this perspective in the context of UK and European policy moves to commercialise public sector information, See, D. R. Worlock (1997) Real Policy or 'Virtual Policy' ? A Casestudy of Tradeable Information Policy.

(but instantly recognisable) concepts of disorder, chance happenings and sheer bloody-mindedness sit very comfortably. In developing his own interpretation, Kingdon (1984:104) depicts policy-making as "...a garbage can into which policy goals, organisational rules and constraints, the 'right climate', and other often unexpected variables are thrown together. The resulting policy outcome is often unpredictable and because of the ambiguous nature of the policy goals themselves, often unrecognisable".

The policy-making environment is most often made up of a constantly shifting network of interested parties and strategic alliances (industry lobbies, executive and legislative branches of government, the media, consumer groups, etc.) In the nature of things, these different groups pursue their own objectives in their own time and at their own pace. The policy consensus which finally emerges from this process can be seen as the output of a network of 'organised anarchies'. Why anarchies? Kingdon identifies three sets of characteristics that are common to all organised bodies and decision-makers and argues that these constitute powerful reasons why we should regard aspects of the policy-making process as being essentially chaotic and non linear (Table 2.5.)

**Table 2. 5. Sources of non-linearity in policy-making processes**

|                                 |  |
|---------------------------------|--|
| <b>Problematic Preferences:</b> | <i>In the early stages of the policy-making process it may be very difficult for the individual participants to grasp what their preferences really are: these may have to be 'discovered' as the process rolls out and more information becomes available.</i>  |
| <b>Unclear Technology:</b>      | <i>Individual participants in the policy-making process may not necessarily fully understand the needs or the goals of the organisation they 'represent' nor appreciate some of the finer points of protocol. They may instead operate largely on the basis of personal initiative, of trial and error, of doing what seems right at the time.</i> |
| <b>Fluid Participation:</b>     | <i>The composition of the participants in any large-scale decision-making process may change over time. Sometimes capriciously, as they lose heart or move onto other things, or by design, as their power and influence are neutralised. On the other hand, previously 'dormant' participants may suddenly become active.</i>                     |

(Adapted from Kingdon:1984)

It would be unreasonable to characterise policy-making processes as being inherently chaotic all the time. But the garbage can interpretation is useful in that it suggests that at some points, especially perhaps in the early stages of policy formulation policy-making may occur in a disorderly manner. From this third perspective inside the garbage can, policy-making can be seen as the result of political bargaining or 'horse-trading' rather than as the result of carefully considered analysis. This interpretation draws our attention to the actors involved rather than the issues at stake: powerful elites may emerge and act strategically as 'policy entrepreneurs', taking advantage of temporary 'windows of opportunity'.

Under the bureaucratic interpretation, organisations/institutions are seen as mechanisms that coordinate the deployment of resources and technology in pursuit of clearly defined goals. But if the policy goals are hazy, the participation fluid and decision-making disorderly, then the basic assumptions behind the bureaucratic interpretation soon become redundant.

The 'garbage can organisation' has been characterised by (Cohen, March & Olsen:1972) as comprising a set of:

- Choices looking for problems;

- Issues and feelings looking for decision situations in which they might be aired;
- Solutions looking for issues to which they might be the answer; and,
- Decision-makers looking for work.

The garbage can interpretation admits spontaneity and chance into the study of policy-making processes. Fundamentally, it argues that policy-making is first and foremost about *politics and power* structures, not rational discussion. Ultimately, the garbage can interpretation is difficult to deploy in providing fully satisfactory explanations of what happens in policy-making. It does, however, provide a distinctive perspective (especially from the rational actor interpretation) to suggest that triangulation of the three perspectives together might provide a useful heuristic device with which to approach analysis of information policy in the real world.

## 2. 4. Deploying the re-interpreted process model: A casestudy

“The fact that alternative frames of reference produce quite different explanations should encourage the analyst’s self consciousness about the net he employs” (Allison:1971).

From the above discussion it is evident that in conducting IP analysis researchers need to be sensitive to a range of perspectives and adopt methods that are contingent on the circumstances that they find and not as they have theorised (Wildavsky:1979). It has been argued that academic IPS needs to take greater account of the process dynamics of policy-making and address the complexity of policy processes in research design. By developing a simple process model and opening that model up to three different (but overlapping) interpretations, it has been argued that this provides a tool for beginning to isolate and understand some of the main sources of ‘complexity’ surrounding information policy.

**Table 2. 6. Comparison of three interpretations of the policy process**

| Interpretation          | Type of analysis  | Primary Policy Drivers   | Primary Focus of Analysis   |
|-------------------------|---|--|---|
| Rational Actor          | <i>Prescriptive - says how policy-making should take place in an ideal world.</i>   | <i>Policy-making is driven by rational choice based on perfect information towards well-defined goals - strong affinity with planning activities</i>   | <i>As the policy process is entirely rational, analysis focuses on policy content and policy goals: through policy documents, records and statements</i>  |
| Bureaucratic Imperative | <i>Descriptive - shows how organisational structures, goals and values can influence the policy-making process.</i>                                 | <i>Policy-making is driven by bureaucratic rules and procedures based on the need to achieve consensus subject to the constraints imposed by the organisational setting</i>  | <i>Analysis focuses on formal policy-making procedures and the characteristics, influence and aims of bureaucratic institutions and their officials in shaping policy processes</i>   |
| Garbage Can             | <i>Descriptive - highlights the range of dynamic socio-political, contextual and random variables that can influence the policy-making process.</i> | <i>Policy-making is driven by politics and power. Policy emerges as a result of competition and consensus between different policy actors with different aims, objectives and strategies in dynamic environments</i> | <i>Analysis focuses on the range of other actors involved in the policy process, their aims, interests, strategies and ability to influence the policy process in a variety of arenas in an ever-changing policy context.</i> |

Each of the interpretations focuses attention on different aspects of the policy-making process and may be more useful for some purposes or some situations than others (Table 2.6.). Generally, it is problematic to be bound too rigidly or dogmatically to a particular model. Indeed it is contended here that a deep analysis of IP can only be achieved by linking a number of different perspectives. ‘Crucially it [must be] acknowledged that all models are partial in that each highlights a part of the whole. A whole that includes these diverse representations themselves....each may have differential claims to legitimacy and accuracy and so may actively shape the aspects that it is supposed to be merely illuminating” (Frances et al: 1991).

This chapter has illustrated IP is complex and difficult to study. It has highlighted that within the IS tradition there are a range of definitional, methodological and theoretical problems inhibiting the development of a coherent approach to the study of IP environments. In response to these challenges it is anticipated that the re-interpreted process model will prove useful in analysing complex IP environments. In this context, the development of copyright policy at the European level best exemplifies a complex IP environment. This is not just because of the large numbers of issues, actors and institutions involved, but also because of the manner in which the rapid deployment of digital ICTs has upset the balance of rights between rights holders, authors and users.

The re-interpreted process model is deployed in the context of a specific IP casestudy on the formulation of the European directive on the legal protection of databases. The casestudy is restricted to the formulation of the directive up to its adoption on March 11, 1996. The next chapter gives a background to the development of copyright policy in the European context.

## Chapter 3. European copyright and the expansion of protection

“...a number of basic dimensions of the nature and function of copyright may be distinguished. In an overall, cultural perspective, the stated purpose of copyright is to encourage intellectual creation by serving as the main means of recompensing the intellectual worker and to protect his moral rights. In an economic sense, copyright can be seen as a method for the regulation of trade and commerce. Copyright thus serves as a mechanism by which the law brings the world of science, art, and culture into relationship with the world of commerce. In a social sense, copyright is an instrument for the cultural, scientific and technological organisation of society. Copyright is thus used as a means *to channel and control flows of information in society*” (Plowman & Hamilton:1980:25 *emphasis added*).

### 3. 1. Introduction

This chapter examines the development and expansion of copyright law at the European level and describes the copyright policy context within which the European protection of databases was formulated. The first section provides a brief overview of the historical development of copyright, considers the two main legal traditions (*droit d’auteur* & copyright) and outlines the international structure of copyright protection. The second section examines the development of European copyright law and its legal basis within the EC treaty, analyses the European Commission’s initial response to the challenges posed by digital technologies and highlights the importance of copyright exceptions for maintaining a balance of rights between copyright owners, authors and users. The final section examines the harmonisation and expansion of copyright protection at the European level and the links between these policy developments and wider European and international discussions on the information society.

#### 3. 1. 1. Copyright: a brief history<sup>1</sup>

All intellectual property rights, as formal legal rights first developed in Europe as a result of a number of specific technological, socio-economic and political circumstances. These included: the expansion in the role of government in the economy; the growth in commercial markets for technical, literary and artistic creations, and for copyright, most importantly the invention of the printing press. By enabling the rapid production of large numbers of copies of a work at relatively low cost, a profitable trade in printing, publishing and selling of works quickly developed. More significantly, these activities led to the increased circulation of information throughout society that resulted in the social benefit of greater literacy and education amongst the general population (Eisenstein:1982). However, this ‘new technology’, as well as bringing social and economic benefits also posed threats. Publishers faced unfair competition from those

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<sup>1</sup> This is not intended to be a definitive history. Indeed writing such a history is fraught with problems. “The history of copyright has been written from the perspective of lawyers, printers, authors, literary theorists, Marxist theorists, post-modern writers and post-industrial critics. All these perspectives have contributed to our understanding of copyright; however, .... In reading about copyright’s history it soon becomes apparent that various writers are so engrossed in their own experiences that they can only meaningfully engage with others who come to the subject from a similar point of view. Writers from different disciplines are ignored, discounted, ‘corrected’ or ridiculed” K. Bowrey (1996) *Who’s Writing Copyright’s History ? EIPR* 6 pp.322-329. Two recent histories of copyright that overcome some of the problems identified by Bowrey are; Woodmansee, M. & Jaszi, P.(eds)(1994) *The Construction of Authorship: Textual Appropriation in Law and Literature*, Duke University Press, London, and, Sherman, B. & Strowel, A.(eds)(1994) *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press, Oxford.



engaged in the production of pirated copies of the works they produced while governments saw the political dangers of works being circulated containing views antithetical to their own. Initially therefore, at least in England, copyright was developed as a means of both regulating publishing and enforcing censorship.

As a result throughout the 16th and 17th centuries copyright consisted of a monopoly right granted to publishers<sup>2</sup> to print, publish and sell works in return for their agreement to censor particular works identified by the State. This basic form of copyright continued for approximately 150 years until the government allowed the Licensing Act (1662) to expire in 1694. By this time, the government had become less concerned with censorship and more worried about the Stationers Company printing monopoly that had led to a lack of competition and artificially high prices for books. In response, Parliament introduced the copyright Statute of Anne in 1709 that established what has since become the basis for copyright laws in all Anglophone countries. Fundamentally, this statute removed the publishers' monopoly by allowing authors and others named in the Act to acquire copyright protection by placing the names of works on the Stationers Company register. The statute also limited the term of protection to fourteen years, after which works entered the public domain. Crucially the statute removed the link with censorship and allowed copyright to become a right granted by the government that was available to all (Whale & Phillips:1983:10).

In the two hundred years after the Statute of Anne copyright was expanded both in terms of scope and the term of protection. In the United Kingdom (UK) all of this legislation was replaced by the 1911 Copyright Act, which codified the UK's statutory copyright law. This has subsequently been followed by the Copyright Act of 1956 and the Copyright, Designs and Patents Act of 1988. The statute of Anne also formed the basis for the development of copyright law in the United States (US), where from the beginning there was a strong desire to ensure the dissemination of ideas amongst the public. In 1787 the constitutional convention adopted a clause to empower Congress "To promote the progress of sciences and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"(OTA:1986:37-39). The first federal copyright Act followed shortly afterwards in 1790 entitled 'An act for the encouragement of learning by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned'. Like the Statute of Anne this Act approached copyright as a system of statutory rights granted to right holders by the government.

By the beginning of this century Anglo-American copyright had become a system of statutory economic monopoly rights granted to information producers justified on the basis of the benefits which society at large gained from the increased investment in and production of information works (Eisenschitz & Turner:1997:209-223). These economic rights were granted as a fair remuneration or reward for creativity and as a necessary incentive to ensure the generation of further works. In safeguarding the social dimension of copyright this system had also developed a range of measures to restrict copyright where it was deemed to be detrimental to the public interest or likely to lead to market failures. Thus, governments had become increasingly involved in a balancing act between the rights of copyright owners and copyright users. But just as there are differences in the scope and type of rights granted between countries, so too there are different approaches adopted in the provision of these exceptions to copyright. However, the development of international copyright conventions and more recently pressure to harmonise

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<sup>2</sup> The stationers guild (printers and publishers) became the Stationers Company as a result of a Royal Charter granted by Henry VIII under the Star Chamber decree of 1556.

European copyright regimes, has resulted in most European copyright Acts containing (some of) the following exceptions as permitted under the terms of the Berne Convention: copying for personal use; copying for scientific, educational or other private use; archival copying; library privileges; (other) reprographic reproduction. (Hugenholtz & Visser:1995)

As this brief history illustrates copyright has always been intimately linked with controlling information transfer of creative works and, responding to the challenges posed by new technologies. The relationship between copyright and these two concerns has continued right up to the present. Indeed, it is in part because of the increased importance of both information and technology in the economy that copyright has emerged from being a rather esoteric area of the law to become a subject of major importance on national, European and international policy-making agendas. Significantly, this history also draws attention to the fact that copyright has consistently been expanded and strengthened following industry lobbying.

### **3. 1. 2. Continental copyright: the development of *droit d'auteur***

In other European countries up until the end of the 18th century a similar history in the development of the authors rights (*droit d'auteur*) tradition is evident. Initially in both France and Germany it was the Crown in the shape of the King (in France) and regional Princes (in Germany) that granted rights to publish as part of a system of censorship. However with the French revolution in 1789 all crown rights in France including those granted to authors and publishers were abolished. From this period on, as expressed in the French decrees of the Constituent Assembly in 1791 and 1793 authors rights were deemed to be the natural rights of authors as a reward for their creativity. As a result, an author (and his heirs) acquired the exclusive right to reproduce a work throughout his lifetime and for 10 years after his death. Thus, unlike the rights granted under the statute of Anne, rights did not depend on formalities such as registration or publication and were available throughout the author's lifetime and beyond. However, at this time the rights offered by both systems (copyright and *droit d'auteur*) remained predominantly economic rights ensuring copyright owners the right to exploit the value of the protected work for a defined period (WIPO:1988:24).

Gradually however the authors rights system also formalised an additional type of protection that extended to the author's personality. This protection of an author's moral rights led to the development of the dual system so characteristic of continental *droit d'auteur* systems today. Although the balance between the two types of rights does vary between different *droit d'auteur* countries. For example, in France the system evolved to treat the moral right as more fundamental than the economic right, while in Germany the two rights are treated more equally. A consequence of the close relationship between the author and his rights, has been that the level of originality required in a work before it qualifies for protection under the *droit d'auteur* system has always been much higher than that required under the copyright system<sup>3</sup>. It is also important to note that at this time, the notion of a balance of rights or the desire to promote the public interest were not central features of the developing *droit d'auteur* system (Desbois:1978).

Notwithstanding the addition of some limited moral rights to the UK's Copyright Designs and Patents Act of 1988 which were required to enable the UK to ratify the 1971 revision of the Berne Convention, moral rights remain the main difference between Anglophone copyright and

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<sup>3</sup> The differing levels of originality required under the two systems; copyright and *droit d'auteur*, will be shown to have had major influence on the development of the dual copyright/*sui generis* approach adopted in the database directive.

continental *droit d'auteur* systems. This is best illustrated by the manner in which the existing limited moral rights have been incorporated into UK law. These rights that are considered an author's inalienable right under the *droit d'auteur* system can in the UK be signed away to a publisher by an author and thus treated as yet another quasi-economic right (Eisenschitz:1993:58-59).

The two traditions are overtly quite different; the copyright tradition based on the notion of a balance between economic rights and public interest benefits and the continental *droit d'auteur* tradition based on a concern with authors fundamental natural rights alongside economic rights. Indeed it is these differences that have in the context of the European Community been viewed as obstacles to the creation of the 'internal market'. However, it cannot be denied that aside from European efforts to harmonise the two traditions, international agreements on copyright have led to the notional acceptance within copyright countries of moral rights and to the development within *droit d'auteur* countries of some exceptions similar to public interest considerations in the copyright tradition. It is this international aspect of copyright protection that is examined in the next sub-section.

### 3. 1. 3. Copyright in the International Dimension

By the 19th century an expanding international trade in intellectual products had made the development of international agreements to protect these works in a uniform manner a priority. In 1886 the Berne Copyright Union was founded and in the same year it established the 'Convention for the protection of literary and artistic works'. Subsequently the text of this Convention has been revised several times, with the most significant recent revisions being the Stockholm Act of 1967<sup>4</sup> and the Paris Act of 1971. There are now more than 100 countries that are signatories of the revised Berne convention (RBC) although not all are signatories to the same revised texts (Burke:1995:477-480).

The RBC is built on three main principles:

- *National Treatment* - this requires signatories to apply their national copyright laws to works from other member countries in the same way as they do to works originating from within their own country.
- *No formalities* - this requires signatories to provide national treatment automatically with no dependence on formal notice registration or deposit.
- *No reciprocity* - this requires signatories to provide national treatment with no formalities independent of the existing protection or term of protection offered in the country of origin of the work.<sup>5</sup>

In acknowledgment of the necessary balance between the rights of copyright owners and copyright users, the RBC provides for copyright exceptions including Article 9(2) 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal

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<sup>4</sup> At the 1967 Stockholm Convention Conference the World Intellectual Property Organisation(WIPO) or (OMPI in French) was established. WIPO whose headquarters are in Geneva, Switzerland is a United Nations agency responsible for a number of International Intellectual Property Conventions including the RBC. It regularly holds meetings on the need for developments in intellectual property rights.

<sup>5</sup> WIPO acknowledges a few exceptions to this rule 'the main being that if a country provides for a longer term than the minimum prescribed by the Convention and a work ceases to be protected in its country of origin, protection may be denied'(WIPO:1988:67).

exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’.

Despite its most recent revisions aimed at better accommodating the needs of developing countries, the RBC can be characterised as an international agreement that has tended to favor the interests of powerful producer nations eager to profit from the export of their creative works (Eisenschitz:1993:60). In this context a large number of countries did not become signatories to the RBC either simply because their copyright laws did not comply with its standards or because they disagreed with the imbalance in the RBC favoring powerful producer countries. However, as international trade in copyright protected works continued to grow increasing pressure mounted both to harmonize agreements that were being made between RBC members and non-members, and to create a unified basis from which to promote the interest of these non-member countries. These circumstances led, under the sponsorship of UNESCO to the establishment of the Universal Copyright Convention(UCC) in 1952.

The UCC, although similar to the RBC in requiring its members to provide national treatment, only provides protection for 25 years after the death of the author or in certain cases from a work’s first publication. The UCC also allows members to derogate from certain types of protection on the basis of reciprocity. Its most significant contribution to international copyright protection is the provision that (where the symbol ©, plus the date of first publication and name of the copyright owner are printed in copies of a work) then countries which require formalities such as registration are to take these conditions as satisfied in regard to that work. The UCC has however remained less prominent than the RBC particularly since the USA joined the RBC in 1989. It would however be inappropriate not to acknowledge the influence of the UCC on the RBC particularly where later revisions of the two conventions have grown in similarity in a manner beneficial to developing countries. Although tensions between powerful producer countries and developing countries over copyright issues remain.

Since the end of World War II a large number of other international and regional agreements concerning copyright and neighbouring rights have been completed. Most of these have, like the revisions of the RBC, been in response to technological changes and the continued expansion of global trade in intellectual products. These agreements, many of which have been initiated in Europe, provide various protections, including for performers, record producers, broadcasters and satellite signals<sup>6</sup> and have involved a diverse range of international organisations including WIPO, WTO, UNESCO and the Council of Europe (Nimmer & Geller:1993, Stewart:1989).

Finally another trend that has recently emerged in international copyright protection has been the formal inclusion of copyright regulations within trade treaties. The two best examples of this are: the TRIPS (Trade Related aspects of Intellectual Property) agreement which formed part of the Uruguay round of the General Agreement on Tariffs and Trade (GATT)<sup>7</sup> and the regional

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<sup>6</sup> See for example, the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations (26 October 1961) administered by WIPO, UNESCO and International Labour Organisation (ILO); Geneva Convention for the protection of producers of phonograms against unauthorised duplication of their phonograms (29 October 1971) administered by WIPO; Brussels Convention relating to the distribution of programme-carrying signals transmitted by satellite (21 May 1974) administered by the European Broadcasting Union(EBU).

<sup>7</sup> The GATT was first negotiated in 1947 and aimed to reduce obstacles to the development of international trade. The Uruguay round, the most recent GATT negotiations included for the first time trade-related aspects of intellectual property (TRIPS). See, Ross, J.C. & Wasserman, J.A.(1993) Trade-related Aspects of

NAFTA (North American Free Trade Agreement). Both TRIPS and NAFTA highlight not only the continuing importance of copyright issues per se but in both cases include these as part of multi-lateral agreements aimed at the liberalization of trade.

During the Uruguay round of GATT, a degree of consensus was reached over the need for further international protection of intellectual property, including copyright. The TRIPS agreement that grew out of this consensus has among other achievements introduced minimum standards of copyright protection in the 117 signatory countries. The TRIPS agreement also provides for a rental right, similar in many respects to the EC directive on rental rights<sup>8</sup> and protection for computer programs in object or source code Article 10(1) and databases Article 10(2) which states:

‘Compilations of data or other material, whether in machine readable or other form, which by reason of their selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.’

Significantly, this Article extended protection to both electronic and non-electronic databases at a time when the EC directive on databases was being negotiated and was still proposing protection for only electronic databases<sup>9</sup>. The influence of the TRIPS agreement on the development of the EC directive will be considered later in the casestudy. However despite the extension to non-electronic databases, the TRIPS agreement did not clarify what level of originality would be required of databases for them to receive protection i.e. whether following the higher level of originality of droit d’auteur countries or the lower level of copyright countries.

Article 13 of TRIPS addresses copyright exceptions and allows for signatories to provide for exceptions that ‘do not conflict with a normal exploitation of the work and do not unreasonably prejudice the interests of the right holder.’ However, as with a similar provision in the RBC what ‘normal exploitation’ or ‘unreasonable prejudice’ mean in practice has continued to be a cause of considerable debate (Worthy:1994:195).

Some of the impetus for the inclusion of intellectual property into the GATT came from an earlier regional trade agreement that had been forged between Canada and the US in 1987. This regional agreement was later developed and extended to include Mexico to become the NAFTA that came into force on 1 January 1994. Its intellectual property provisions focus mainly on ensuring conformity within the region to other international agreements including the RBC. Significantly Article 1705 includes provisions for the protection of computer programs and databases along with other issues including exceptions to copyright.

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Intellectual Property Rights In T.P. Stewart(ed)(1993) *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law & Taxation Publishers, Deventer. For a review of the TRIPS agreement concluded on 15 December 1993, See, European Intellectual Property Review Supplement (1994) on the GATT Agreement on Trade-Related Aspects of Intellectual Property Rights, Vol.16 11 November. ESC/Sweet & Maxwell.

<sup>8</sup>Council of the European Communities(1992) Directive on Rental and Lending Right and on certain Rights related to Copyright in the Field of Intellectual Property. ( 92/100/EEC) O.J. L346/61, 19/11/92.

<sup>9</sup> Amended proposal for a Directive on the legal protection of Databases COM(93)0464, 04/10/93 O.J. C308 15/11/93 001

In the context of these international copyright agreements it is important to note how the different socio-economic and political contexts within the EU and North America have given rise to wholly different approaches to copyright harmonisation. “In each trade area, the copyright harmonisation process is [*predominantly*] the result of indigenous forces. Not only are the political contexts in which these schemes are integrated different in nature, but the texts that form the very bases of the harmonisation activities are themselves the unmistakable by-products of these political environments” (Gendreau:1995:488-89)(emphasis added). While the continuing work of these international agreements has reduced the differences between copyright and *droit d’auteur* systems, it is undeniable that in recent years it is within the Europe Union that the most strenuous efforts have made to harmonise copyright protection across the Member States.

### **3. 2. Copyright and the European Union<sup>10</sup>**

In the post World War II period countries both within and beyond Europe became convinced of the need to promote cooperation in political, socio-economic and cultural fields. At the international level this led to the establishment of organisations like the United Nations in 1944 and the North Atlantic Treaty Organisation (NATO) in 1949. While in Europe it led to the development of organisations such as the Organisation for European Economic Cooperation(OEEC) in 1948<sup>11</sup>, and the Council of Europe in 1949. In the context of these developments by the 1950’s the importance of copyright and intellectual property rights had been acknowledged both in the European Convention on Human Rights(ECHR) and internationally in the Universal Declaration of Human Rights<sup>12</sup>. In both instances these conventions linked rights over information to the basic rights necessary for free, democratic societies to flourish. Thus whilst international treaties such as the Berne Convention provided much of the impetus for copyright harmonisation, at a far broader level copyright had been recognised as a fundamental part of the framework necessary for democracy to flourish both in Europe and internationally<sup>13</sup>.

#### **3. 2. 1. The Treaty of Rome<sup>14</sup> and Community competence in Copyright<sup>15</sup>**

The Treaties establishing the three European Communities (ECSC, Euratom and EEC) clearly started Europe on the path to integration. Indeed, the core constitutional segments of the treaty

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<sup>10</sup> The development of the European Union (EU) and current European institutional arrangements are discussed in greater detail in chapter 4.

<sup>11</sup> This organisation later opened its membership to non-European countries to become the Organisation for Economic Cooperation and Development (OECD) in 1960.

<sup>12</sup> See, European Convention for the protection of Human Rights and Fundamental Freedoms (1953) Article 10(1) and 10(2); and, Universal Declaration of Human Rights (1948), Article 27(1) and 27(2).

<sup>13</sup>In both cases the basic ideas in the Conventions built on approaches first outlined in the Constitution of the United States in 1787 and in the French Constitutions of 1791 & 1793.

<sup>14</sup> This refers to the treaty establishing the European Economic Community (EEC). In fact two treaties were signed in Rome in March 1957; one establishing the EEC and the other the European Atomic Energy Community (Euratom).

<sup>15</sup> For Commission justification of Community competence in copyright, See, Green Paper on Copyright and the Challenge of Technology COM(88) 172 final - Section 1.5. ‘The EEC Treaty and the Community’s powers in relation to copyright goods and services pp.8-15.

establishing the EEC, the most important of the communities, are still, in amended form, evident in the Treaty on the European Union (TEU)<sup>16</sup>.

The EEC treaty does not specifically address, or provide specific powers over copyright<sup>17</sup>. However, by establishing a free trade area built on the principles of free competition and the free movement of goods, services, capital and labour, the treaty had the potential to affect the use of national copyright laws, their harmonisation and inclusion in standards. This resulted from the inherent tension between nationally based copyright laws and the principles promoting free movement of goods and services across the Member States. Although disputes involving copyright issues are dealt with by interpretation of different provisions of the treaty, prior to any European harmonisation initiatives, it quickly became apparent that the Commission and European Court of Justice (ECJ), in trying to ensure a common market throughout the Community had limited powers over national copyright laws. The most important treaty Articles of relevance to policy actions in the copyright field are summarised below:

- Article 100A - Following the entry into force of the Single European Act in 1987, Article 100A became available for measures aimed at 'the establishment and functioning of the internal market'. This Article subsequently became the most significant justification used by the Commission for its actions in the copyright field i.e. because differences between Member States copyright regimes were adversely affecting the functioning and completion of the internal market.
- Articles 85 and 86 - These Articles are central to European competition law. Article 85 prohibits any agreements or practices that restrict or distort competition across the community, while Article 86 prohibits the abuse of a dominant market position in any manner that affects trade between Member States. Although neither Articles were established with copyright in mind, it had become apparent from case law by the 1970's that the exercise of copyright<sup>18</sup> was within the scope of European competition law, particularly in relation to collecting societies and copyright licenses<sup>19</sup>. Freedom of competition also has relevance for the inclusion of intellectual property rights (IPRs) in standards where a tension has always existed between open access to specifications and IPRs that provide monopoly control. Whilst conventional discussion of standards revolves around patents, it is clear from the

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<sup>16</sup> The TEU or Treaty of Maastricht came in to force on 1 November 1993, at this time the three European Communities were incorporated into the broader European Union and the EEC was renamed the European Community (EC) - See chapter 4.

<sup>17</sup> Dietz (1978) in his comprehensive study of copyright law in the European Community highlighted that the list of invisible transactions set out in Annex 3 to the EEC Treaty, relating to Article 106, (3) 'is the only place where copyright is directly mentioned within the EEC Treaty'.

<sup>18</sup> 'Since its early judgements on this matter, the Court's case law has traditionally distinguished between the existence and the exercise of an intellectual property right, both in competition and free movement of goods cases' Friden, G. (1989) Recent developments in EEC Intellectual Property Law: The distinction between existence and exercise revisited, *Common Market Law Review*, 26 (pp.193-212).

<sup>19</sup> See, ECJ decision 2 June, 1971 'Gema' case (IV/26760) OJ L134 p.15, here collecting societies were judged to be subject to community competition law, also ECJ decision January 20, 1981 Gema (joined cases 55/80 and 57/80) ECR 147. Also, in the 'Old man of the sea' case (1977) the European Commission objected to a clause in Penguin Books copyright license contract for the paperback edition of Hemingway's book that excluded the UK and Ireland.

recent Magill decision<sup>20</sup> that refusal to license an IPR can constitute an abuse of a dominant position under Article 86 (Good:1991:398-403).

- Articles 30 and 36 - These Articles address the free movement of goods within Europe. Whilst Article 30 prohibits between Member States 'quantitative restrictions' and 'all measures having equivalent effect' on goods, Article 36 allows some restrictions, including on the grounds of national copyright laws. However in practice, these restrictions have to be justified in each case and cannot be deployed as a 'means of arbitrary discrimination or a disguised restriction on trade between Member States'. These restrictions have been further changed by the doctrine of European exhaustion of rights first developed by the ECJ in the 1971 Deutsche Grammophon decision<sup>21</sup>. This decision has been followed by numerous other ECJ judgements interpreting Article 36 and the exhaustion of rights doctrine, which has since been extended to patents and trademarks. In the Coditel case<sup>22</sup>, the ECJ ruled that the exhaustion doctrine did not apply to services involved in communication to the public, which went against the original proposal from the European Commission. In this decision the ECJ allowed for copyright to restrict the broadcasting of services across Member States boundaries, on the grounds that exhaustion applies only to material products and not to performing rights where exploitation relies on repeat performance. This clearly marked a significant re-interpretation of Articles 59-66 of the Treaty which prohibit restrictions on the freedom to provide services throughout the Community and Article 56 which allows for restrictions on the grounds of public health, security or public policy. Thus copyright became a further justifiable restriction on the freedom to provide services. Article 57 paragraph 2 however provides for the freedom of establishment across the Member States and as a consequence has also been used in circumstances where services subject to copyright are provided<sup>23</sup>.
- Finally, although in a European context there are differences of opinion over the extent to which copyright is dependent on the right to property, it is clear that copyright forms part of 'the rules governing the system of property ownership in Member States' as defined in Article 222. However despite the fact that these rules should not be prejudiced by the Treaty, "it does not appear to be warrantable, on the basis of Article 222 of the EEC treaty, to remove copyright as a whole from the field of application of the EEC Treaty" (Dietz:1978:13).

By the 1980's the frequency of cases and obvious limits on Community competence had in part contributed to an increased awareness of the need for some form of harmonisation of national intellectual property laws. However, although the Community was proving competent and successful in developing harmonised solutions in the field of industrial property (in particular in

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<sup>20</sup> 'Magill' refers to a decision by the ECJ affirming that European Union competition law overrides national copyright laws Cases C-241/91P and C242/91P, *Radio Televis Eireann and Independent Television Publications Ltd v. Commission*, Judgement of the Court, 6 April, 1995.

<sup>21</sup> See, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkte GmbH*, June 8, 1971 (case No. 78/70) ECR 487. Here the ECJ decided that once a right holder sells copies of a work within the European community, these copies are then free to circulate throughout the community Thus a right holder cannot thereafter restrict the circulation of those copies on the grounds of his/her copyright. The distribution right in regard to those copies having thus been exhausted within the community.

<sup>22</sup> ECJ decision *Coditel v. Cine-vog films*, 18 March 1980 (case No.62/79) ECR 881.

<sup>23</sup> See, Proposal for a Council Directive on the Legal Protection of Databases COM(92) SYN 393 OJ. No. C156 June 23, 1992 pp.4-10.



patent and trademark law)<sup>24</sup>, it had become evident that the harmonisation of copyright law was proving more complex. Part of the explanation for this lack of harmonisation lies in the very case by case approach of the ECJ. This approach had tended to focus primarily on the economic aspects of copyright, with little attention given to its socio-cultural policy dimensions. Concerns were expressed (Dietz:1985) that this ad hoc approach prevented the development of a coherent approach to European copyright regulation. However, the accession of the UK and Ireland to the Community combined with a growing awareness of problems posed to copyright regimes by new technologies and the increasing economic importance of information products and services, gave a new impetus to harmonisation initiatives within the Community<sup>25</sup>.

### 3. 2. 2. Copyright harmonisation up to 1988: Cultural policy or Internal market criteria?

In examining the early development of European copyright harmonisation initiatives it is possible to identify pressure coming from Member State governments<sup>26</sup> and from lobby groups both of whom were by the 1980's already grappling with the implications of new ICTs for their nationally based copyright regimes. However, specifically at the European level it is possible to identify three distinct sources for the development of copyright harmonisation initiatives. These initiatives are linked with a number of Directorates-Generals(DGs) within the Commission<sup>27</sup>.

Firstly, the issue of copyright harmonisation was formally brought to the attention of the European Commission(DGXII) by the unanimous resolution of the European Parliament (EP) on May 13, 1974<sup>28</sup> which included a request to the Commission to produce proposals for the harmonisation of Member States laws concerned with the protection of cultural objects, copyright and neighbouring rights (Dietz: 1985:380-81). In response, the Commission's DG XII for research, science and education formed a division called 'problems of the cultural sector' which commissioned a number of copyright studies including Dietz's seminal study of copyright law in the European Community (Dietz:1978). Later this division was placed under the direct control of the office of the President of the Commission within the General Secretariat of the Commission, from where it prepared some proposals for initiatives in the cultural sector including copyright which were presented to the Council<sup>29</sup>.

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<sup>24</sup> Convention on the granting of European Patents (European Patent Convention - EPC) came into force on 7 October, 1977; Council Directive (89/104/EEC) to Approximate the Laws of the Member States Relating to Trademarks of 21 December, 1988 OJ 1989 L 40/1; Council Directive (87/54/EEC) on the Legal Protection of topographies of semi-conductor products of 16 December, 1986 OJ 1987 L 24/87.

<sup>25</sup>The UK, Ireland and Denmark joined the Community in January 1973 - bringing the total number of members to 9 countries. The accession of the UK and Ireland increased the pressure for copyright harmonisation because of the strong differences between the copyright systems of (the UK and Ireland) and the *Droit d'auteur* systems predominating amongst most of the Community members.

<sup>26</sup> For example, preparations for the reform of national copyright regimes were occurring in Germany, France and the UK. In the UK, the British government had established a Committee in 1974 to consider the need to reform the law of copyright and designs. This committee produced the 'Whitford Report' in 1977 which was followed by the UK government's consultative Green Paper 'Reform of the law relating to Copyright, Designs and Performers' Protection in 1981. Both documents contributed to the preparation of the UK's 1988 Copyright Designs and Patents Act.

<sup>27</sup>The role of the Commission's DGIV(competition)directorate is examined in section 3. 3. 1. on Software.

<sup>28</sup> OJ No. C 62 May 30, 1974.

<sup>29</sup> 'A proposal for Community action in the cultural sector (1977)'; 'A proposal for stronger Community action in the cultural sector (1982)', Bulletin of the European Communities, supplement 6/77 & 6/82 respectively. Actions on private audio recording, reprography, cable & satellite TV and piracy were proposed.

A related development was the beginning in late 1983 of informal council meetings between ministers of culture from the Member States. These meetings gave rise to informal agreement on the desirability of among other things strengthening protection for cultural products and adapting copyright laws to meet the challenge of new technologies. However, due to a variety of factors including under-staffing and insufficient support from Member states the further development of these initiatives was inhibited (Dietz:1985:382-83), despite the approval of both proposals by the European Parliament<sup>30</sup>. This stated, in the first formal meeting of the Ministers of Culture in June 1984 a resolution was prepared on measures to combat audio-visual piracy<sup>31</sup>.

Secondly, initiatives came from DGX (audio-visual, information, communication and culture) and from DGIII(internal market and industrial affairs). DGIII in particular approached copyright harmonisation on the basis of internal market criteria and the issues arising from the conflict between Member States copyright laws and the Treaty. The Coditel decision of the ECJ, (which allowed right holders of copyright in broadcast services in one Member State to prevent the distribution of these services to another Member State), provoked DGX into action because it was an obstacle that the Commission wanted to remove so as to enable the development of a single European broadcasting market. In this regard, DGX published the 'Television without Frontiers' Green Paper in 1984<sup>32</sup>. Curiously, this Green Paper only covered copyright in a limited way, its main proposal being the introduction of a compulsory (non-voluntary) license to facilitate free movement of broadcast services across the Community. This compulsory license proposal was strongly criticised and progressively diluted until, in the directive that resulted from the Green Paper it had at a practical level disappeared (Collins:1994)<sup>33</sup>.

Despite highlighting the importance of copyright in the Television without Frontiers Green Paper, it was apparent from the adopted directive (89/552/EEC) that the Commission had not fully addressed the copyright issues that had arisen and that further actions would be required. However due to the different approaches to copyright evident across the Member States, how to proceed with harmonisation proved to be a particularly difficult problem. Indeed to the outside world the lack of apparent action for over three years after the TV without Frontiers Green Paper, led many to actively demand for information on the Commission's proposals on these issues<sup>34</sup>. The Commission's response culminated in the publication by DGIII of its Green Paper on Copyright in 1988<sup>35</sup>. Whilst this Green Paper articulated a fundamentally economic approach to copyright, DGIII were careful to pay lip-service to cultural considerations. Indeed paragraphs 1.4.1 to 1.4.10 of the Green Paper are devoted to a consideration of these very issues<sup>36</sup>. Previous

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<sup>30</sup> OJ No. C 39 12 February, 1979; and, OJ No. C342 19 December, 1983.

<sup>31</sup> Resolution of 24 July, 1984, (OJ No. C204/1 3 August, 1984).

<sup>32</sup> Commission of the European Communities (1984) Green Paper on the establishment of the Common Market for broadcasting, especially by satellite and cable COM (84)300 final.

<sup>33</sup> Council of the European Communities(1989) Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities 89/552/EEC, OJ L 298, October 17 pp.23-30.

<sup>34</sup> The European Parliament submitted questions to the Commission about its position on copyright. See for example; (question no.1977/86, OJ. C124 pp.26 - 11/05/87) and (question no.656/87, OJ. C315 pp.3, 26/11/87).

<sup>35</sup>CEC (1988) Green Paper on Copyright and the Challenge of Technology COM(88) 172 final June 7, 1988.

<sup>36</sup> For example, paragraph 1.4.4. states: '...Intellectual and artistic creativity is a precious asset, the source of Europe's cultural identity and of that of each individual State. It is a vital source of economic wealth and

evidence of the dominance of this economic approach comes from the approach in the Commission's 1985 Internal market White Paper<sup>37</sup>.

Thirdly initiatives developed out of DGXIII efforts to assist the European information industry<sup>38</sup>. These efforts were themselves motivated by an awareness of the growing significance of information in the economy and the dynamic role of information and communication technologies in these developments. By the early 1980's there had been considerable growth in on-line information markets and this combined with encouragement for the different parts of the information sector (including libraries and the commercialisation of government held data ) at national and European levels had confirmed information as a well established, if fragmented area of evolving policy. In its commitment to establishing the European information market the Commission quickly became aware of the challenges being posed by electronic information to existing legal regimes including copyright. As a response DGXIII established the Legal Advisory Board (LAB) in 1985. The LAB composed of invited legal experts, academics and professionals from all Member States was established to 'increase awareness of these legal challenges and to submit ideas and recommendations to the Commission on eliminating disparities and aligning national legal provisions'<sup>39</sup>.

In May 1986 the LAB and officials from the Commission held a preliminary discussion on the challenges posed by electronic information systems to copyright regimes in Europe. Later in the same year the LAB was invited to contribute advice to DGIII in its preparation of the Copyright Green Paper (COM(88)172 final). As part of this process, Mr. Posner, who was the DGIII official responsible for drafting the Green Paper, prepared and distributed to the LAB a 'questionnaire relating to provisions of national copyright laws of specific importance for the operations of computerised information systems' (Appendix 1). Following consideration of this questionnaire, DGXIII/B/1 organised a meeting in Luxembourg on 28 January 1987 to prepare its contribution to the sections of the Green Paper concerned with 'computerised information systems' e.g. *databases*. During the introduction to this meeting DGIII representatives commented that in view of the limited time, lack of detailed research on the issues and advice from numerous experts no immediate action was required, and that therefore it was not likely that the Commission would include a chapter on databases. However, as it transpired a chapter on databases was included in the Green Paper following input from, most significantly, DGXIII and

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of European influence throughout the world. This creativity needs to be created; it needs to be given a higher status and it needs to be stimulated' COM(88) 172 final pp.6

<sup>37</sup> CEC(1985) White Paper on Completing the Internal Market COM(85) 310 final June 1985: Intellectual property is only mentioned briefly in paragraphs 145-149. 'Differences in intellectual property laws have a direct and negative impact on intra-Community trade and on the ability of enterprises to treat the Common Market as a single environment for their economic activities'(para.145). Specific mention of copyright relates only to the future need for legal protection of software in the Community.

<sup>38</sup> The EEC's interest in the information market was stimulated by developments in Euratom in the 1950's & 1960's and by discussions in the OECD and UNESCO. In 1971 the Council passed a resolution (OJ C122 December 10 1971) establishing the EEC Committee for Information and Documentation in Science and Technology(CIDST) to discuss these issues within DGXIII of the European Commission. Initially CIDST focused on infrastructure and developed the Euronet network. Later CIDST began to promote the information market through the development of information services, software and databases (DIANE). In 1986 the Commission published 'The establishment at Community level of a policy and a plan of Priority Actions for the Development of an information services market COM(87) 360 final', Mahon (1989).

<sup>39</sup> See, Legal Advisory Board website ( <http://www.echo.lu/legal/en/labhome.html> ). Note; the LAB was originally called the Legal Observatory for the European Information Market.

the LAB. Indeed, it was here that one of the first Commission discussions on the possible need for a *sui generis* right approach took place.

Although a range of approaches based on previous Commission experience with patents and trademarks had been considered for the harmonisation of copyright, by the mid-1980s it was apparent that DGIII's piecemeal approach (i.e. one proposal at a time) based on Articles 100 and 189(c) of the Treaty had come to dominate<sup>40</sup>. By this time, European level action on copyright was based firmly on the need to promote the internal market, to encourage the growth of the information and communication sector and to respond to the challenges posed by technology. This economic and technological focus quickly squeezed out consideration of many of the cultural and social aspects of copyright<sup>41</sup>.

### 3. 2. 3. The Copyright Green Paper and the Challenge of Technology

The 1988 Copyright Green Paper addressed the following issues 'piracy; home copying of sound and audio-visual materials; distribution and rental rights for certain classes of work(in particular, sound and video recordings); the protection available to computer programs and databases; and finally, the limitations on the protection available to Community right holders in non-Member States'(Green Paper:1988:15). The selection and prioritisation of these issues (and the absence of others such as; duration of copyright protection, reprography and copyright contracts) can be, at least partly explained by two factors. Firstly, the time pressure exerted on the Commission to ensure the completion of the internal market<sup>42</sup> by January 1, 1993. Secondly, the four goals identified by the Commission as the basis for Community action on copyright:

- To ensure the proper functioning of the internal market through the elimination of obstacles and legal differences that disrupt competition and obstruct cross-frontier trade in goods and services;
- To ensure the proper functioning of the internal market by improving the competitiveness of the Community's economy , particularly in areas of potential growth such as the media and information;
- To ensure that intellectual property derived from creativity or investment within the Community is not misappropriated by others outside its external frontiers;
- To ensure that the restrictive effects of copyright protection on legitimate competition do not become excessive and in practice become a genuine monopoly, unduly broad in scope and duration.(Green Paper:1988:3-5).

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<sup>40</sup> The Commission had not however, given up entirely on the idea of some form of unified European copyright legislation as is indicated by DGIII's later (failed) introduction of a proposal for a Council decision requiring Member States to ratify the Berne and Rome Conventions (1990 - OJ C24/91). There was also continued support for a unified approach from eminent copyright experts, Adolf Dietz for example argued '...if a well formulated draft for a modern European system of copyright protection were available, even if only in the form of a uniform law, such a document would produce a much more dynamic effect than could individual national reform legislation, even if some feathers would fly in the conflict of interests' (Dietz:1985:401-2).

<sup>41</sup> The 1988 Green Paper states 'Differences in national approaches to authors' *moral rights*, for example, do not in general produce situations that need to be addressed by Community Legislation. For this reason, the matter can for the most part be left to be regulated by national laws within the framework of Article 6bis of the Berne Convention'(para.1.4.9. pp.7) - COM(88) 172 final.

<sup>42</sup> The Single European Act (SEA) signed in February 1986, which came into force in 1987, set the timetable for the completion of the internal market by January 1, 1993.

Particularly noticeable, was the absence of authors. This lack of consideration given to moral rights reduced the Commission approach to copyright, to one based fundamentally on economics. An approach that promoted protection for European publishers<sup>43</sup> in the interests of completing the internal market. Of course, this is not to suggest that from this economic approach authors themselves would not gain benefit in the form of greater remuneration for their creative endeavours. But this approach did ignore the tension that exists between authors and publishers over moral rights<sup>44</sup>.

As a result copyright was not addressed as a balance of the complete range of authors, publishers and users interests. "The centre of the Green Paper is not the author but the producer. The author's work is not so much an intellectual creation but a merchandise. It is not the author's rights which have to be protected in the first instance but the producer's investments, and the free circulation of those within a common market has also to be secured" (Moller:1989:11). This bias is more significant given the dominance of publishing organisations actively involved in promoting their interests to the Commission, Parliament and Council. In this context the under-representation of authors and users in Commission consultations on these issues has continued to be of concern. "the LAB regrets that the parties invited to express their views at the 'superhighways' hearing did not include (proportional) representation of major information users, such as libraries, intermediaries, universities, and end users" (LAB:1995:3).

Alongside these economic and internal market considerations the Green Paper was also a real attempt by the Commission to address some of the challenges posed by technology (in particular digital ICTs) to copyright. Building on this consultation directly, the Commission released proposals for directives providing legal protection to computer programs and databases, and has since continued to make proposals addressing the challenges posed by digital technologies<sup>45</sup>.

While detailed analysis of the 1988 Green Paper is available elsewhere (Schricker:1989, Francon:1989), it is important to consider the fundamental challenges posed by new ICTs to copyright. Developments in copyright law have always been related to technological advances. From the printing press (Eisenstein:1979), records and perforated rolls of music<sup>46</sup>, and films<sup>47</sup> to video-recorders<sup>48</sup> and double audio-cassette players<sup>49</sup>, (as a few examples), copyright has proved

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<sup>43</sup>Publishers is used here as a collective term to describe all those industries that distribute to consumers the creative works of authors, artists & performers i.e. book publishers, software producers, TV & Film producers and sound recording companies.

<sup>44</sup>For example, from a Commission public hearing on moral rights held in Brussels (Nov 30 - Dec 1, 1992) the Commission stated: "The hearing clearly showed the sensitive character of the question of moral rights...The representatives of authors and performers generally wanted strong moral rights, while the representatives of publishers and the press, producers, broadcasters and employers were hostile"(Copyright and Related Rights in the Information Society Green Paper COM(95) 382 final pp.66).

<sup>45</sup>For example, Commission of the European Communities(1995) *Green Paper on Copyright and Related Rights in the Information Society* COM(95) 382 final 19/07/95.

<sup>46</sup>See, for example Section 19 of the UK Copyright Act of 1911

<sup>47</sup>See, for example Section 13 of the UK Copyright Act of 1956

<sup>48</sup>See, US Supreme Court case (1984) *Sony Corporation v. Universal City studios*, 464 US. 417, 104 S.Ct 774 An attempt was made to prevent the sale of Betamax video-recorders on the grounds that the equipment would lead to copyright infringement through home recording of TV programs. The Supreme Court found in favour of Betamax on the grounds that the recorders could be used for non-infringement of copyright including 'time shifting' for convenience of viewing.

<sup>49</sup>See, UK House of Lords decision(1986) *Amstrad Consumer electronics plc v. British Phonograph Industry(BPI) Ltd.* The BPI tried to prevent the sale by Amstrad of its double audio-cassette players on the

itself adaptable to advances in technology. Prior to digital technologies however, copyright had always been adapted to the specific characteristics of each new analogue format. For example, in UK copyright law, whilst recording of TV programs on video for time shifting purposes is permissible, home taping on audio-cassette is disallowed. In this way, governments and the courts maintained the balance between the rights of authors, publishers and users.

Aside from the global nature of digital ICTs problematising differences between national copyright regimes they also enable all types of information (i.e. text, graphics and audio-visual), to be transformed into a single digital bit stream that can be stored, manipulated and transmitted via computer (Hugenholtz:1996b, Dellebeke:1997). This has contributed to the dissolution of barriers between previously distinct sectors of the information, telecommunications and audio-visual industries that historically had evolved with their own market structures, customer/supplier relationships, economies of scope and scale and regulatory mechanisms. These convergences have led to a clash of existing legal and regulatory systems, most aptly illustrated in the development of multimedia products and services. Therefore it is important to note that digitalisation poses challenges to, and has implications for, not just intellectual property rights but a range of other legal and technical regimes that effect the transfer of information.

This 'electronic sieve' not only blurs the distinction between works that exist in themselves (books, paintings) and works that exist through their performance (music, dance, drama)(Dommering:1996), but also at a practical level the distinction between the original and its copy as works are distributed on-line. Such has been the challenge posed by the development of the information super-highway and interactive multimedia that there has been a range of opinion on the role, and suitability of, copyright for the digital environment.

At one end of the spectrum, some have argued that copyright is finished, that intellectual property rights are inappropriate for the digital environment (Barlow:1994), whilst at the other, there are those who have argued that no significant changes to copyright need to be made as a result of digitalisation (Henry:1995). In between these two points, the majority view is that copyright does need to be adapted to the digital realm. However even within this majority view there are significant differences over the extent to which copyright requires change. Some writers see the need for fundamental change (Olswang:1995, Christie:1995) whilst others including the European Commission have tended to promote a more incremental approach to change. Alongside these debates has developed discussions on the role of technical systems for copyright right management and protection. Indeed, these technical systems have acquired greater significance as right holders have identified the potential for protecting their interests without direct recourse to copyright (Vinje:1996).

In the context of the casestudy this generates the following question<sup>50</sup>

***What threats and opportunities would you identify from the extension of copyright concepts into the digital realm ?***

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grounds that the equipment was an incitement to infringe copyright. The House of Lords found in favour of Amstrad.

<sup>50</sup> See, appendix 2 - interview question frame: section D - question 12

### 3. 2. 4. Exceptions to Copyright: Finding a Balance

Despite the debates over the extent to which copyright needs to be adapted, there is a considerable degree of agreement that copyright is both applicable to the digital realm and that its existing strengths make it unlikely that it will be entirely replaced in these new contexts. Copyright has three main strengths as a legal regime;

- There is a high degree of national and international experience and expertise in the use of copyright-type rights;
- There is an existing network of international treaties and frameworks; and,
- As a legal regime it has proven very flexible in the face of technological innovation.

A central concern to all those involved in the debates including governments, authors, publishers and users is the issue of the balance of rights and permissible exceptions to copyright in digital environments. Before considering these issues it is helpful to briefly examine the basis and nature of traditional copyright exceptions.

Copyright, while providing right holders with certain exclusive rights over a work, has never extended to all uses of a work. Quite apart from copyright never having protected ideas per se, but rather, only their expression, users have always been allowed access to, and use of works in certain non-commercial ways. Copyright has evolved into a balance between on one side the exclusive rights granted as a fair remuneration for creativity and as an incentive to ensure the generation of further works and on the other the social benefit of ensuring the provision of public access to the original information. Though as has been indicated above (section 3.1.2.) this balance is maintained in different ways in different countries and provides for different types of protection depending on the medium<sup>51</sup> (Hugenholtz & Visser:1995).

In examining the range of exceptions to copyright, it is important to identify the different motivations and purposes governments have had for enacting them. Following Guibault (1997) it is possible to identify three key motivations for copyright exceptions:

- To safeguard users constitutional rights and freedoms.
- To promote information use for learning , education and research.
- To prevent market failures.

Under the first type of exceptions governments are concerned to guarantee democracy by ensuring the free flow of information and safeguarding on the one hand freedom of speech and on the other the right to privacy<sup>52</sup>. In both droit d'auteur and copyright systems these type of exceptions allow users to copy parts of works without the right holder's consent for certain purposes including study, research and reporting. The second type of exceptions, which are also based on concern for the public interest, are designed to promote the use of information by providing certain types of users greater access to and use of copyright works. These users include libraries, museums, archives and educational institutions. These type of exceptions are predominantly, though not exclusively, found in Anglophone countries e.g. in the UK libraries can provide to members of the public for the purposes of research or study a single copy of an

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<sup>51</sup> See, for comparison: in France the 'code de la propriete intellectuelle' and in the UK the 'copyright, designs and patents Act'. While the French system identifies only very limited circumstances for restrictions on the authors right, in the UK a highly detailed and enumerated list of exceptions is identified.

<sup>52</sup> See, European Convention for the Protection of Human rights and Fundamental freedoms; *Article 10* on freedom of expression; and, *Article 8(1)* on privacy - Universal Declaration of Human Rights; *Article 12* on privacy; *Article 19* on freedom of expression.

article from a journal or a single copy of an extract of other types of works. In some countries, (including the UK, Ireland and the US), many of the exceptions in these first two categories are embodied within the concepts of 'fair dealing' or 'fair use'. Although not easily defined, this fair dealing category provides a justification on the grounds of equity. The third type of exceptions are designed to rectify instances of market failure where right holders can no longer effectively control the uses made of their works. These type of exceptions are normally introduced via non-voluntary (compulsory) licenses e.g. levies on blank cassettes. (Guibault:1997:12-17).

With the development of digital networks, networks in which copying is fundamental to all operations, how to maintain a balance of rights and adapt exceptions to these new environments has become a major issue. Central to these debates is the issue of whether transient copies of a work in a computer's RAM memory or browsing on-line should be within the scope of the reproduction right<sup>53</sup>. On one side right holders have argued that this extension of copyright is necessary to encourage investment in digital environments, to protect against the ability for further abuses of copyright and to rectify potential market failures (Clarke:1996, BCC:1996). On the other, many academics and users representatives have argued that such a move would constitute an over-extension of copyright to a point where ideas themselves and not just their expression were being protected, a situation in contravention of the very basis of copyright regimes that would have a detrimental impact on the basic human rights and freedoms mentioned above (Mason:1997, Eisenschitz & Turner:1997).

Clearly copyright exceptions are not the only ways in which the boundaries of copyright continue to be defined. Increasingly right holders are using contracts to protect their works on-line and are deploying technical systems to enforce them. These practices raise concerns for copyright exceptions because it remains unclear the extent to which exceptions that are not explicitly binding<sup>54</sup> are permissible above and beyond any contractual agreements<sup>55</sup>.

Competition law has also played a significant part in defining the boundaries of copyright in Europe, as is illustrated in the Magill case. The case involved the rejection by three broadcasters to grant the Irish publisher 'Magill TV Guide Ltd' licenses to include their programme information in its planned weekly programme guide. Finally after six years the European Court of Justice(ECJ) on April 6, 1995 found in favour of Magill on the grounds that the broadcasters were abusing their dominant positions under Article 86 of the EC Treaty. As a remedy to this violation of Article 86 the ECJ imposed a compulsory license (Vinje:1995b:374-76). "Even after *Magill*, refusal to license intellectual property rights will in the vast majority of cases remain immune from attack under Article 86. Fortunately, however, the ECJ has preserved the flexibility to apply Article 86 to special circumstances, such as those sometimes found in information technology, where refusal to license should be deemed abusive and compulsory licensing should

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<sup>53</sup> See WIPO diplomatic conference on certain copyright and neighbouring rights questions, Geneva, December 2-20, 1996; US White paper on intellectual property and the national information infrastructure; report of the working group on intellectual property rights,(1995)Washington DC; and , in Japan, the Report on discussions by the working group of the Subcommittee on Multimedia Copyright Council; Study of Institutional Issues regarding Multimedia, Agency for Cultural Affairs, Tokyo.

<sup>54</sup> An example of a binding exception that cannot be over-turned by contract is Article 5(2) of the Software Directive: " The making of a back-up copy by a person having a right to use the computer program *may not be prevented by contract* insofar as it is necessary for that use"(emphasis added) OJ No. L122/42 17/05/91.

<sup>55</sup> Some experts have argued that "exemptions may not be restricted by contract. It is not possible to forbid private copying in the case of a statutory license" (Hoeren:1995:512) Whilst some US case law suggests otherwise: *ProCD v. Zeidenberg* (1996) The court judged that ProCD could protect non-copyright material (telephone listings) & restrict their use under a shrink-wrap license (Court of Appeals, 7th Circuit, 1447).



be available as a remedy to facilitate legitimate competition. This flexibility is especially important in areas where copyright,...is applied to industrial contexts such as software”(Vinje:1995a:303).

### 3. 3. Copyright, Technology and the European Response

Although in late 1980's, debates on the internet, interactive multimedia and the information society had yet to emerge as high profile public policy issues, it is clear that technological and internal market pressures were paramount in the minds of the officials who drafted the Commission's first copyright Green Paper. It is also clear that the document's focus was the promotion of the economic interests of publishers and other right holder industries rather than those of authors and users. To some extent this focus has remained in all subsequent Commission initiatives on copyright, where author and user concerns have often tended to be secondary to the economic concerns of publishers, e.g. despite a public hearing on moral rights in 1992 it was not until the publication of the Commission's second Green Paper (COM (95)382 final) that moral rights were mentioned as area in need of Commission action. "With the arrival of the information society the question of moral rights is becoming more urgent than it was. Digital technology is making it easier to modify works. The Commission believes there is a need for an examination of the question whether the present lack of harmonisation will continue to be acceptable in the new digital environment”(CEC:1995b:67) (COM(95) 382 final).

Perhaps the economic orientation of European legislation on copyright is to be expected, given that one of the main goals of the Community is the removal of barriers to trade across the Member States, however the over representation of powerful and articulate right holder industries at all stages in the policy process has, especially in the context of the developing digital environment, become of serious concern. As those familiar with European consultation procedures on copyright will be aware, the majority who hear about and attend even the 'public' consultations, are representatives of right holder organisations. Although these lobbyists clearly have a legitimate right to express their views, there is a growing perception that there is a strong link between the size of lobbying operations and one's ability to exert influence. This suggests that there maybe a widening democratic deficit as policy is generated by a 'policy elite' made up of government and right holder industry representatives. " One of the most spectacular developments since the mid-1980's has been the explosion of professional lobbyists, financial consultants, and law firms locating in Brussels...in the absence of any official register of EC lobbyists it is impossible to calculate just how many paid consultants of one form or another are based in Brussels. However, one estimate put the figure for 1990 at 3000, three times that of two or three years ago”(Mazey & Richardson:1993:198).

This raises the point that apart from the legal issues themselves a range of other human and organisational/institutional factors can influence copyright policy-making. It is important therefore to ask actors involved in European copyright policy processes to identify these factors and to indicate their degree of importance.

In the context of the casestudy this generates the following question<sup>56</sup>

***Which other factors, if any, would you identify as being significant in affecting how copyright issues are framed and discussed at the European level ?***

<sup>56</sup> See, appendix 2 - interview question frame: section C - question 11

In this context, before conducting a detailed examination of the policy issues and processes that led up to the adoption of the database directive, it is useful to review the European copyright initiatives that followed on from the 1988 Green Paper. Not only did these initiatives provide some of the context for the developing database directive but also, particularly in the case of the software directive<sup>57</sup>, they defined some of the legal concepts that were deployed by it e.g. the originality criterion. Indeed it was the software directive, the first European exercise in copyright harmonisation, that most clearly highlighted the Community's firm intention to expand and strengthen copyright protection in response to the challenge of technology.

### 3. 3. 1. Computer programs and their protection

As early as the 1970's questions had already emerged over how best to protect computer programs. In 1974 the US Congress established a Commission on New Technological Uses of Copyrighted Works ( 'CONTU' ) on whose advice Congress had concluded that computer programs could be protected as 'literary works' under the terms of the 1976 US Copyright Act<sup>58</sup> (CONTU:1978). In 1980 Congress followed this up by passing the Computer Software Copyright Act<sup>59</sup> which affirmed conclusively software's eligibility for copyright protection in the US. At the same time in Europe many Member States were struggling with the issue of the legal protection available to software. In the UK for example, these issues had been addressed in the 1977 Whitford Report and again in the UK's Green Paper on copyright reform in 1981 both of which had concluded that computer programs, or at least aspects of them, were eligible for copyright protection.

In other areas too the legal protection of computer programs was becoming an issue. In 1980 the European Commission citing Article 86 of the EC Treaty acted against IBM on the grounds that it was abusing its dominant market position by deploying its proprietary systems architecture to prevent the interoperability of products from other companies, with its own computers. The dispute was finally resolved in 1984<sup>60</sup> when IBM agreed to supply other software producers with the information they needed to make their products compatible with IBM's computers and so facilitate competition (Good:1991). Although settlement of this dispute did not involve a formal decision by the Commission or ECJ, it has since become significant as an early example of the Commission's (DGIV) commitment to the precedence of competition law over intellectual property rights<sup>61</sup>.

By the mid-1980's not only was there a considerable amount of case law supporting the protection of software by copyright<sup>62</sup> but four Member States; Germany, France, the UK and Spain had enacted copyright legislation specifically protecting computer programs<sup>63</sup>, whilst in a

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<sup>57</sup> Council Directive 91/250/EEC of May 14, 1991 on the Legal Protection of Computer Programs, OJ 1991 L122/42 May 17, 1991 ( 'Software Directive' ).

<sup>58</sup> US Copyright Act of October 19, 1976 Pub. L. No. 94-553 Stat.2541. See, section 102.

<sup>59</sup> US Computer Software Copyright Act of December 12, 1980 Pub.L. No.96-517 Stat.3028

<sup>60</sup> See, Commission press release IP(84)290 August 2, 1984 IBM settlement, 14th Report on Competition policy pp.77 and Bulletin of the European Communities(1984) 10 pp. 96-98 ( IBM ).

<sup>61</sup> An indication of the significance of this settlement is that despite the dispute not going to court, it still appeared in the Common Market Law Reports(CMLR) - IBM, 3 CMLR 635, 1981 & IBM, 3 CMLR 147, 1984.

<sup>62</sup> See, for Example UK Court of Appeal (1982) *Sega Enterprises Ltd. v. Alca Electronics*.

<sup>63</sup> See, *Germany: Law Amending Legal Provisions in the Field of Copyright of June 24, 1985, France: Law on the Rights of Authors, Performers, Record and Videogram Producers and Communication Enterprises of July 3, 1985 (No. 85-660), UK: Copyright (Computer Software) Amendment Act 1985 of*

number of other Member States draft legislation was already being debated (CEC:1988:178). At the international level legal protection for software had also been debated extensively from the late 1970's onwards by organisations such as WIPO<sup>64</sup> and UNESCO. However, at this level there was a noticeable lack of consensus over using copyright to protect software. Indeed at the time Japan had amended its copyright act to specifically exclude 'algorithms, programming languages and rules' (CEC:1988:203).

It was in this context that the Commission in its 1985 White Paper ( COM(85)310 final ) briefly mentioned its intention to bring forward legislation to protect 'semi-conductor products, bio-technological inventions and computer programs'. In paragraph 149 of the White Paper, the Commission announced its intention to release a consultation on problems relating to copyright later that year and a proposal for a directive on the legal protection of computer programs by the end of 1987. In the event, the consultation Green Paper was released in June 1988 ( COM(88) 172 final) and the proposal on software in January 1989<sup>65</sup>. In the Green Paper, Chapter 5 focused on computer programs and ended with ten questions upon which the Commission requested interested parties to comment (Green Paper:1988:200-201). In the following months the Commission services (particularly DGIII, DGIV and DGXIII) engaged in discussions with interested parties and in October 1988 organised a two-day hearing on computer programs prior to its preparation of the proposal for a directive. After this, based on the comments from interested parties and further internal discussion amongst the various DG's the Commission quickly prepared its proposal and adopted it. In January 1989 in a mood of 'cautious optimism' (Verstryngne:1992: 6)<sup>66</sup> the proposal ( COM(88) 816 ) was released as an internal market draft directive under the co-operation procedure according to Article 100A of the EC treaty.

As events unfolded, this optimism was quickly shown to have been misplaced, as the software directive became the most heavily lobbied internal market directive the European Institutions have experienced to date. On hindsight, that this optimism was not shared even amongst the other Commission directorates, was perhaps an indication of the troubles ahead. DGIV in particular, in the light of their experience with IBM, were aware of the dangers to competition of over strong intellectual property rights and insisted that the proposal in the Official Journal(OJ) carry an appendix clarifying these Article 86 concerns (OJ C91/89, 12/04/89 Appendix pp.16). The directive itself, was intended to remove the legal uncertainty over the protection available to software by harmonising across Member States the laws on copyright protecting computer programs. Following its release from the Commission the proposal moved along the procedural pathway and was discussed in ECOSOC, the Parliament and Council being finally adopted after much heated debate in May 1991<sup>67</sup> with an implementation date within the Member States set for

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July 16, 1985, *Spain*: Articles 91-100 of Ley de Propiedad Intelectual of November 11, 1987 (No. 22/87) - (Green Paper:1988:202).

<sup>64</sup> Initially the difficulty of incorporating computer programs into intellectual property categories led WIPO to suggest a form of *Sui Generis* protection. Events in the US and Europe superseded this approach and led to it being dropped.

<sup>65</sup> Proposal for a Council Directive on the Legal Protection of Computer Programs COM (88) 816 final - SYN 183 OJ No. C91 April 12, 1989 pp.4

<sup>66</sup>The two Commission officials most closely associated with the Software Directive came from the Commission copyright division (F/4) within DGIII. They were Jean-francois Verstryngne and Bridget Czarnota. Mr.Verstryngne moved from the Cabinet of President Jacques Delor, becoming the head of division F/4 in DGIII. Bridget Czarnota, who is English, later went on to draft the proposal for the Database Directive. Both officials were interviewed as part of this study.

<sup>67</sup> Council Directive of 14 May 1991 on the Legal protection of Computer Programs (91/250/EEC) 'Software Directive' OJ 1991 L122/42 17/05/91 pp.42.

January 1, 1993, the nominal completion date for the Single Market. Although a large number of issues proved controversial during the policy debates that led up to the adoption of the Directive only three will be mentioned here: the scope of protection, decompilation and the originality criteria (Wacker:1994).

In terms of the scope of protection, the most fierce lobbying concerned questions over access to interface information. Given that copyright does not protect ideas per se but only their expression, the ideas and principles underlying a computer program including those of its interfaces were not copyrightable. However, the nature of computer programs meant that access to these ideas and principles was, at least in the original proposal, blocked subject to authorisation by the right holder. After intense lobbying and based on amendments introduced by the European Parliament, the adopted directive clarified the text of Article 1(2) on the scope of protection and introduced in Article 5(3) the right of the lawful user to engage in reverse analysis without the authorisation of the right holder<sup>68</sup>(Drier:1991). Aligned to this debate and perhaps even more controversial was the issue of decompilation of computer programs. Once access to interface information was to be allowed, the question arose as to what extent this information could be reproduced or used to achieve interoperability with other computer systems<sup>69</sup>. Mindful of Article 85 and 86 of the Treaty i.e. the Community's competition rules, the compromise achieved in Article 6 allowed for decompilation where 'the reproduction of the code and translation of its form...are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs' under strict conditions.

The level of originality required of a computer program before it would receive protection under the directive also provoked considerable discussion. Much of this however, was within the Council working group and so the issue whilst important was less high profile than the issues considered above. Part of the difficulty arose because of the different levels of originality required of literary works across the Member States and because of the lack of definition of the terms 'original' or 'work' in the Berne Convention. More fundamentally however, the issue was controversial because, if computer programs were deemed not to meet the originality criteria, the rest of the directive would be meaningless. A major hurdle in this regard, was the *Inkasso*<sup>70</sup> judgement in Germany. This judgement had established 'an unusually strict requirement of originality for copyright protection of computer programs') and was later overturned in Germany during the implementation of the software directive (Vinje:1995:364-65).

The adopted text Article 1(3) states 'A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection'. This relatively low level of originality was later applied in the case of legal protection available to databases. Perhaps it is also useful to note that the Software directive allows for very few exceptions, although users did acquire a right to make a

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<sup>68</sup> Article 5(3) 'The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the right holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.'

<sup>69</sup> Decompilation is the translation of a computer's object code (machine readable) into source code (user readable - program language). To achieve interoperability this source code or parts of it must be written for the system to be connected.

<sup>70</sup> See, German Federal Supreme Court, *Inkasso KG v. Bappert and Burker Computer GmbH*, May 9, 1985.

back-up copy of the software - Article 5(2) (Czarnota & Hart:1991). The adoption of the software directive marked both the completion of Europe's first copyright harmonisation legislation and laid out the Community's starting point for addressing the challenges posed to the law by advances in technology. However, by adopting a step-by-step approach European policy-makers put themselves at a disadvantage in being able to assess the broader social and cultural dimensions of the challenges they identified. This is especially the case in the realm of digital communications, which show little respect for national territorial boundaries or distinctions between substantive legal categories.

Apart from the problems of maintaining a consistency in approach between policy initiatives, the directive based approach has rarely proved conducive to a rapid response, due in part to the political and administrative forces at play in the European policy making process. Of course, at one level the European supra-national response does address the challenge posed to nationally based legal rules but at another this response is weakened by the principles of subsidiarity<sup>71</sup> on one side and on the other the global nature of digital communications which resist boundaries imposed even at the European level. More fundamentally an approach which is restricted to a single substantive legal category e.g. copyright, may obscure the blurring of legal categories<sup>72</sup> and informational forms<sup>73</sup> that has occurred in the digital environment. As a consequence, this approach forecloses on deploying these characteristics to develop innovative policy responses and to a consideration of the impact of extensions in copyright on other aspects of the developing information society e.g. privacy, commercialisation of public sector information, security, access to information and freedom of expression. "Digitalisation and the information infrastructure enable the objectives of one distinct body of law such as privacy to be achieved by the application of the rules of another field of law such as intellectual property. Secondary use of personal data, for example, is a core issue for information privacy law, but in the multimedia context, copyright law can also regulate the manipulation of data relating to individuals. In essence, functional activity is more relevant than sectoral legal boundaries" (Reidenberg:1996:3)

### 3. 3. 2. Harmonisation and the Spread of European Copyright protection

Following the publication of the copyright Green Paper ( COM(88)172 ) and alongside the initiatives on computer software, the Commission pushed forward with a number of other proposals for copyright harmonisation. In January 1991 the Commission published its follow-up communication to the Green Paper (CEC:1991: COM(90) 584 final). This publication, which had been preceded by consultations and public hearings<sup>74</sup>, outlined the Commission's working

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<sup>71</sup> The Treaty on the European Union (TEU) ('Maastricht Treaty') which came into force in November 1, 1993 introduced the principle of subsidiarity into the treaty establishing the European Community i.e. when and wherever possible policy decisions should be taken at the national rather than European level (See, Section 4. 1. 2.).

<sup>72</sup> Traditionally there have been clear delineations between substantive areas of law with their own sets of rules and regulations e.g. copyright, privacy, telecommunications and broadcasting. The digital environment has not only blurred the boundaries within these categories e.g. In copyright; the difficulty of defining a copy or authorship in interactive environments but also the legal rights applicable e.g. is an on-line information service provider to be treated as a common carrier, a broadcaster or publisher.

<sup>73</sup> e.g. For digital environments copyright traditionalists continue to draw on an analogy with book publishing. How useful such an analogy is in an environment where the distinction between reproduction and representation in copyright works is blurred and new interactive informational forms are being developed e.g. info-mercials, should be questioned (Dommering:1996).

<sup>74</sup> The Commission held four public hearings on copyright issues: on the legal protection of computer programs (6-7 October 1988), on audio-visual home copying (1-2 December 1988), on rental rights and

programme in the field of copyright and neighbouring rights for the period up to December 31, 1992. Indeed in the weeks leading up to its release the Commission adopted its second proposal for a directive<sup>75</sup> and a proposal for Council decision requiring all Member States to accede to the Rome and Berne (Paris Revision 1971) conventions by December 31, 1992<sup>76</sup>.

This latter move was a clear attempt by the Commission to introduce a common minimum standard of copyright protection in all Member States from which to promote further harmonisation. The proposal however was rejected by the Council in December 1991 on the grounds that the Commission was not empowered to force Member States to ratify these international conventions. In response the Commission softened its proposal into a resolution requesting Member States to comply with the provisions of these conventions and to incorporate them into their national laws by January 1, 1995. This political (rather than legally binding) solution was duly adopted by the Council in 1992<sup>77</sup>.

The rental right directive that was adopted by the Council at the end of 1992<sup>78</sup> also generated some strong lobbying. The Directive established an exclusive right for authors, performers, phonogram producers and film directors to authorise the rental and lending of their works following their distribution and sale. It also secured remuneration to authors even in cases where they had waived or transferred their rental rights. The directive also regulates certain neighbouring rights by providing for exclusive rights of fixation, reproduction and distribution to performers, producers of phonograms, producers of the first fixation of films and broadcasters. Member States were required to implement the directive by July 1, 1994.

A third directive proposal was released by the Commission concerning the 'co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission'(Cable and Satellite Directive) on July 17, 1991. This directive which was adopted in 1993<sup>79</sup> provided the 'missing chapter' on copyright issues from the broadcasting directive (89/552/EEC) that emerged from Commission's 1984 'Television without Frontiers' Green Paper (Collins:1994). As a result of the directive broadcasters have only to negotiate copyright royalty payments in the country of origin of the broadcast, as opposed to in every Member State which receives that broadcast(Vinje:1995b:370). The directive also differentiates between cable and satellite operations. For satellite communications to the public of copyright protected works authorisation is required in, and subject to, only the laws of the country from which the signal originates. For cable operators however, 'Article 9 of the directive lays down that the right to grant or refuse authorisation for cable retransmission may be

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certain aspects of piracy (18-19 September 1989), and on the legal protection of databases (26-27 April 1990).

<sup>75</sup> Proposal for a Council Directive on the rental right and lending right and on certain rights related to Copyright in the field of Intellectual Property, December 5, 1990 ( 'Rental Right Directive' ) OJ No. C53 1991.

<sup>76</sup> Proposal for a Council Decision on the Accession of Member States to the Rome and Berne Conventions, December 1990 OJ No. C24 1991.

<sup>77</sup> Council Resolution on the Accession of Member States to the Rome and Berne Conventions, May 14, 1992 OJ No. C138/1 1992.

<sup>78</sup> Council Directive 92/100/EEC 19 November, 1992 on the rental right and lending right and on certain rights related to copyright in the field of intellectual property ( 'Rental Right Directive' ), OJ No. L346/61 1992.

<sup>79</sup> Council Directive 93/83/EEC of September 27, 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ( 'Cable and satellite Directive' ), OJ No. L248/15 1993.

exercised only through a collecting society'(CEC:1995b:31) Member States were required to implement the directive by January 1 1995.

The fourth directive proposal, released by the Commission on February 6, 1992 (OJ No.C92) was to harmonise the term of protection for copyright and related rights across Member States. When it was adopted in 1993<sup>80</sup> the directive had increased the period of protection offered in most Member States to life of the author plus 70 years (as was already the case in Germany). The Directive also harmonised the related rights protection offered to performers and others to 50 years after publication. For film and audio-visual works the main author is deemed to be the principal director, with the 70 year duration of protection beginning after the death of the last principal director, author of the screenplay, author of the dialogues and composer of music specifically created for the production. Member States were required to implement the directive by July 1, 1995. The fifth directive proposal on protection for databases forms the basis of the casestudy conducted in this thesis.

The follow-up to the Green Paper (COM(90)584 final) also outlined a number of other actions to be proposed by the Commission including a proposal for a directive on home copying of sound and audio-visual recordings<sup>81</sup> and initiatives on moral rights<sup>82</sup>, reprography<sup>83</sup>, resale rights<sup>84</sup> and the collective management of copyright and neighbouring rights and the functioning of collecting societies<sup>85</sup>. There was also recognition in the follow-up document of the need to use the Community's external relations to ensure better protection of Member States intellectual property outside the EU. In the agreement signed in May 1992 between the EC and EFTA forming the EEA, Member countries of both agreed to accede to the Berne Convention (Paris Act ) and the Rome Convention by January 1, 1995. The EEA agreement that came into force in January 1994, also required EFTA Member countries to adopt parts of the EU's 'acquis communautaire' on intellectual property issues. Similar, though less binding agreements were reached with Poland, Hungary and the then Czechoslovakia. These agreements which came into

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<sup>80</sup> Council Directive 93/98/EEC of October 29, 1993 harmonising the term of protection of copyright and certain related rights ( 'Duration Directive' ), OJ No.L290/9 1993, November 24.

<sup>81</sup> In late 1992 informal Commission proposals for a directive introducing a system of levies on blank tapes and recording equipment met with opposition in Council from Member States without levies, including the UK and Eire. The proposal has since gone a little cold, although a directive proposal may eventually emerge as the issue was mentioned in the Commission's Communication 'Europe's way to the Information Society: An Action Plan' (COM(94)347 final) and more recently in the Copyright Green Paper (CEC:1995b:49-52).

<sup>82</sup> The Commission released a questionnaire on moral rights in August 1992 and followed this up with a formal hearing in Brussels (Nov 30 - Dec 1) 1992. The idea of a directive on this issue also proved highly controversial only re-emerging in the Copyright Green Paper (CEC:1995b:65-68).

<sup>83</sup> The Commission held a formal hearing on reprography in June 1991 but like private copying it proved to be a highly controversial issue. See, (EC:1995b:49-52)

<sup>84</sup> The artist resale right or droit de suite embodied in Article 14(3) of the Berne Convention provides the author/artist with a right to remuneration from any sale of a work after its initial transfer. The Commission released a questionnaire in July 1991 followed by a public hearing in November 1991. Since the ECJ ruling in the Phil Collins case (joined cases C-92/92 and C-326/92) of October 20, 1993 which prohibited any discrimination on the grounds of nationality, and removed reciprocity of droit de suite from the EU, the Commission has made a formal proposal for a directive which is currently near completion (CEC:1995:65-68).

<sup>85</sup> Little has developed in this regard other than the requirement under the Cable and Satellite Directive 93/83/EEC to use collecting societies when negotiating licensing for cable retransmission. More recently they were mentioned as a possible solution to the acquisition and management of rights in the information society (CEC:1995b:69-78)

force in January 1, 1993 provided a five year timetable to enable these countries to attain a level of protection similar to that existing in the EU and to accede to a number of international conventions (Vinje:1995b:374). At the international level too, by January 1, 1993 discussions at WIPO and GATT on further extensions in, and harmonisation of copyright, including on databases were already well advanced.

### 3. 3. 3. Superhighways and the Information Society

By the early 1990's governments, particularly in Europe, North America and Japan had begun to make explicit policy statements about the importance of information and information infrastructures for socio-economic development. In the US in the run-up to the 1992 election Bill Clinton and his vice-president Al Gore (who coined the phrase 'the information superhighway'), both prioritised the role of new information and communication technologies (ICTs) in the creation of economic and social benefits. Shortly after the election the US government in February 1993 established an information infrastructure task force (IITF) who quickly produced the National Information Infrastructure(NII)<sup>86</sup> agenda placing information policy at the centre of US industrial policy. Similarly in Canada, the government committed itself to the development and implementation of an information infrastructure strategy<sup>87</sup>. While in Japan the importance of computing and telecommunication infrastructures<sup>88</sup> had also been recognised.

In Europe while most countries had well developed research and development policies for new ICTs, few had placed these at the centre of their strategies for long-term socio-economic growth. In this context the international developments above, especially those in the US, acted as a catalyst for European level action on the information society, a term adopted by the Commission and used in December 1993 in its initial policy statement referred to as the 'Delors White Paper'<sup>89</sup>. This paper was approved by the European Council and quickly gave rise to the 'Bangemann Report'<sup>90</sup> and its follow-up action plan<sup>91</sup>.

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<sup>86</sup> National Information Infrastructure: Agenda for Action (September 1993) IITF, National Telecoms and Information Administration, Washington DC. The IITF was organised into 3 Committees on: Applications & Technology; Telecommunications; Information Policy. The information policy committee working groups included one devoted to intellectual property rights. At the same time the US government promoted the use of ICT's in the provision of public services through its programme for re-inventing government - Report of the National Performance Review(1993) US Government Printing Office.

<sup>87</sup> In April 1994 the Canadian Industry minister established the Information Highway Advisory Council. This council produced a final report in September 1995 with nearly 300 policy recommendations, See Final report of the Information Highway Advisory Council "Connection, Community, Content: The Challenge of the Information Highway" available at ( <http://info.ic.gc.ca/ic-data/info-highway/ih-e.html/> ).

<sup>88</sup> See, Social Infrastructure of the Information Society (1993) Recommendations of the Industrial Structure Council, Ministry of International Trade and Industry (MITI); Program for the Advanced Information Infrastructure(1994) Final report of the Information Industry Committee, MITI; Predicted problems and possible solutions for administering Intellectual Property Rights in a Multimedia Society, Institute for Intellectual Property, Multimedia Committee, IIP Tokyo, June 1995.

<sup>89</sup> European Commission (1994) White Paper on Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century, Office of Official Publications of the EEC, Luxembourg.

<sup>90</sup> After the December 1993 meeting of the European Council, Commissioner Bangemann formed a task force comprised of eminent business professionals and academics to prepare a report on these issues. The report entitled Europe and the Global Information Society - Recommendations of the high-level Group on the Information Society, was presented to the European Council at Corfu on May 26 1994.

<sup>91</sup> The Corfu European Council invited the Commission to prepare an Action Plan to implement the recommendations in its initial report. This document is entitled Europe's Way to the Information Society:



The Commission action plan produced by DGIII and DGXIII detailed a range of actions and pending measures designed to achieve a European Information Society (EIS)<sup>92</sup>. These objectives were it argued, to be achieved by governments adopting a 'laissez-faire' approach and leaving the development of the information society to the market<sup>93</sup>, perhaps best illustrated by the European approach to the liberalisation and deregulation of telecommunications markets and services. These objectives were given a global focus with the G-7 meeting on the Global Information Society held in Brussels in February 1995 where the action plan initiatives were echoed in a call for the building of the information infrastructure through: interoperability and interconnectivity; the global development of markets for networks, services and applications; research and development into new applications and services; the protection of privacy and provision of data security; and, the protection of intellectual property rights.

### 3. 3. 4. Copyright in the Developing information Society

In parallel with the release of the 'Bangemann Report' and its action plan, DGXV of the Commission began its own consultations on actions needed in the field of intellectual property rights in the context of the developing information society. In early 1994 DGXV conducted a number of informal consultations with interested parties 'in order to evaluate the significance of any changes to the current application of copyright and related rights which might occur as a result of the development of superhighways'. These meetings led to the distribution of a questionnaire<sup>94</sup> around which the Commission organised a public hearing in Brussels on 'copyright and neighbouring rights in the information society' (July 7-8, 1994). This consultation process revealed that the majority of interested parties, whilst aware of the need for some adaptation of existing copyright regimes, were not in favour of major European level reform.

On the basis of these responses and further consultations DGXV published its second Green Paper on copyright (CEC:1995b) in July 1995 (Hoeren:1995:511-14). This Green Paper addressed the extent to which copyright needed to be harmonised in the context of digitalisation. Its economic approach built on the internal market principles that had shaped the four adopted copyright directives and which were influencing the on-going negotiations on the database directive. The Green Paper had two chapters. The first chapter explained the reasons for the Green Paper, covering the range of issues at stake and summarising the existing legal framework. The second chapter addressed the substantive copyright issues and posed a large number of

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an Action Plan COM(94) 347 final, Brussels July 19, 1994. Since these initial plans the Commission has followed these with several 'rolling action plans' with an increasing focus on the international dimension.

<sup>92</sup> The action plan is divided into four sections: Regulatory and legal framework; networks, basic services, applications and content; social, societal and cultural aspects; promotion of the information society.

<sup>93</sup> Curiously, the traditionally more laissez-faire US the government initially took a more active role in shaping the NII than the EU. However, despite the initial market zeal of the Bangemann report, there has been an increasing recognition of the need for state involvement to ensure the successful development of the Information Society. See, Dutton, W. et al (1994) *The Information Superhighway: Britain's Response (PICT)*, Policy research Paper No.29 December., ESRC. Preston, P. & Lorente, S. (1995) *Competing Visions of the Information Superhighways in Europe: Implications for Users*, PICT Conference, Westminster, London May 10-12. ESRC.

<sup>94</sup> DGXV/E/4 Questionnaire on Copyright and Related Rights in the Information Society, June 2, 1994. The questionnaire was divided into 6 sections: Evolution of the superhighways; Scope of the information infrastructure; Identification and clearance of rights; Choice of legal regime; Review of existing regimes; Other relevant issues (CEC:1995:477-479).

questions to interested parties on the need for further harmonisation<sup>95</sup>. As with the first copyright Green Paper (CEC:1988), the document exhibited a slant in favour of the economic concerns of right holders with less consideration given to the balance of rights for authors and end-users of information (Eisenschitz & Turner:1997:216, LAB:1995). Following its publication the Commission received over 350 written responses from interested parties and began work towards its follow-up communication in the field of copyright. As part of its on-going consultations the Commission held a public hearing on the exploitation of rights on January 8-9 1996 and finally ended the consultation process with a conference in Florence in June 1996 (CEC:1996b).

While the information society has clearly given impetus to these new copyright initiatives, the Commission's justification for copyright policy proposals has remained the removal of barriers to the internal market within the broader goal of achieving 'an ever closer union'. However, given that the full impact of digitisation remains unclear so too does the impact of these copyright initiatives on the internal market. In this situation of uncertainty it is appropriate to ask policy actors how they view the future role of copyright harmonisation within this broader picture.

In the context of the casestudy this generates the following question<sup>96</sup>

***As the global Information Society develops what role will copyright harmonisation play in the process of European integration ?***

In the US, slightly ahead of the developments in Europe, the information policy committee of the IITF had in 1993 established a working group on intellectual property rights chaired by the US commissioner of patents and trademarks, Bruce Lehman. This group, which focused on copyright and its 'application and effectiveness' in the context of digitalisation engaged in consultation during 1993, before producing a Green Paper for further comment in July 1994<sup>97</sup>. Following further consultation the group produced its White Paper final report on September 5, 1995<sup>98</sup>. Whilst the report claimed that it was clarifying US copyright law rather than calling for major changes to it, others argued strongly that the report's recommendations would constitute a radical transformation of copyright law providing right holders with much stronger rights in digital environment than they have in the analogue world (Litman: 1994, Samuelson: 1996). Without waiting for a reaction to the White Paper the US government pushed forward with legislative proposals. In September 1995 the National Information Infrastructure Copyright Protection Act, which practically identical to the White Paper, was introduced into the Senate (S.1284) and the House of Representatives (H.R.2441). However, since a series of public hearings were held on the Act by both Houses serious opposition to aspects of the Act have come

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<sup>95</sup> Chapter two is divided into three parts; (1) General questions - applicable law, exhaustion of rights and parallel imports; (2) Specific Rights - Reproduction right, communication to the public, Digital dissemination or transmission right, digital broadcasting right and moral rights; (3) Questions on the Exploitation of Rights - Acquisition and management of rights, and Technical systems of identification and protection.

<sup>96</sup> See, appendix 2 - interview question frame: section C - question 10.

<sup>97</sup> Green Paper on Intellectual Property and the National Information Infrastructure: a preliminary draft of the report of the working group on intellectual property rights, IITF, July 1994.

<sup>98</sup> White Paper on Intellectual Property and the National Information Infrastructure: A final report of the working group on intellectual property rights, IITF, September 1995(<http://www.uspto.gov/web/offices/com/doc/ipnii> ).

to light including the issues of transient copies, the scope of the distribution right and liability for copyright infringement of information service providers (Jordan:1996) .

In Europe prior to the release of the follow-up communication, some Commission officials close to the document had already given an indication of its contents including: the need to harmonise the reproduction right with clear definitions over its scope and limitations in digital environments; consensus that there was no need for a new right (e.g. digital transmission right); consideration of an exclusive broadcasting right for specific categories of neighbouring right holders in relation to some broadcasting activities (digital multi-channel broadcasting); the need for legal protection of technical systems for the protection and identification of copyright; and, the need for an examination of the issue of service providers and network operators liability for copyright infringement. (Gaster:1996:9-10).

In November 1996 the Commission adopted its follow-up communication on copyright (CEC:1996) outlining four priority areas for legislative action by the Commission aimed at removing obstacles to competition and trade in copyright goods and services in the information society. The four priority areas identified for harmonisation were: the reproduction right; the distribution right; the communication to the public right for 'on-demand' services; the legal protection of anti-copying systems. The Communication also identified a number of areas requiring further investigation: the broadcasting right; applicable law and law enforcement; the management of rights and moral rights. Since the follow-up communication the Commission has adopted a proposal for a directive on copyright and related rights in the information society addressing these priority areas as well as implementing the main obligations of the new WIPO treaties on the protection of authors and the protection of performers and phonogram producers<sup>99</sup>. This directive proposal has now begun its procedural passage through the EU institutions under the co-decision procedure and has just recently reached the amended proposal stage<sup>100</sup>

During this same period in the 1990's the World Intellectual Property Organisation (WIPO) had started to take on a more significant role in discussions of how best to adapt copyright regimes to the challenges posed by digital information and communication technologies<sup>101</sup>. In October 1989 WIPO had already taken the decision to begin work on a protocol to the Berne Convention which would adapt the RBC to technological advances that had taken place since its last revision in the Paris Act of 1971 and later on began work on a new instrument for the protection of performers and producers of phonograms. These moves were given greater impetus by both Europe and the US following the G-7 meeting on the global information society in February 1995 and the Ministerial declaration on the Global Information network in Bonn in July 1996. As a result by the time the Commission released its follow-up communication on copyright, considerable attention was being directed to the WIPO Diplomatic Conference on certain copyright and neighbouring rights questions held in Geneva between 2-20 December 1996.

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<sup>99</sup>Proposal for a Directive on copyright and related rights in the information society, IP/97/1100 December 10, 1997 COM(97) 628 final.

<sup>100</sup> Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society COM(99)250 final, 21 May 99

<sup>101</sup> WIPO Worldwide Symposiums: on the Intellectual Property Aspects of Artificial Intelligence, March 1991; on the Impact of Digital technology on Copyright and Neighbouring Rights, Harvard University, April 1993; on the future of Copyright and Neighbouring Rights, Paris, June 1994. For an examination of WIPO's digital agenda , See, Ficsor, M.(1996) Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument -pp.111-138 in P.B. Hugenholtz (ed) The Future of Copyright in a Digital Environment, Kluwer Law International.

At this conference delegates considered draft treaties on literary and artistic works (Copyright Treaty), on the rights of performers and phonogram producers (New Instrument) and on databases<sup>102</sup>. In all of these draft treaties there was a strong 'digital agenda' being pushed particularly by WIPO officials, the US and EU (Samuelson:1997). In the event, only the Copyright Treaty and the New Instrument were adopted<sup>103</sup>. Both were revised during the conference e.g. following strong lobbying from among others the ad hoc Alliance for a Digital Future (comprised of telecommunications companies, on-line service providers and users) the Copyright Treaty had Article 7 concerning temporary copies deleted and Article 8 concerning communications to the public (including digital transmissions) dramatically reworded (Mason:1997).

This chapter has provided an examination of the history and development of copyright and analysed the emergence of, and basis for Commission actions aimed at harmonising copyright regimes at the European level. The chapter has also considered the challenges posed to copyright by digital ICTs and examined the policy responses developed in the information society. Before turning to the detail of the casestudy the next chapter examines the development of the EU and its institutional structure which sets the frame within which these issues have been discussed and within which the database directive was formulated.

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<sup>102</sup> Provisional documents (August 30, 1996) which set out the basic proposals for the WIPO conference promoted a strong protectionist agenda in favour of right holders. The late release date of these drafts also limited the time available for consultation and debate, with among others user groups. The provisional documents were as follows: Substantive provisions on the protection of Literary and Artistic Works - this was to be the new protocol to the Berne Convention (Doc. CRNR/DC/4 ); Substantive provisions on the protection of the Rights of Performers and Producers of Phonograms - this was to be the new instrument (Doc. CRNR/DC/5 ); Substantive provisions on Databases (Doc. CRNR/DC/6 ).

<sup>103</sup>The Database proposal was dropped but is set to remain on WIPO's agenda for future actions.

## Chapter 4. Policy-making in the European Union: actors, institutions and procedures

“...European level public policy emerges, despite the need to accommodate the diverse interests of fifteen Member States, the degree of competition between European Union institutions and the EU’s democratic deficit. Above all, the EU policy process is a series of multi-level games fought between an increasingly large number of policy actors - both public and private - who exploit the many opportunities presented by different policy arenas” (Richardson:1997).

### 4. 1. Introduction

This chapter examines the European integration process, considers how this has shaped the European policy-making environment and provides an overview of the main European institutions and decision-making procedures which structure the interactions of policy actors operating at the European level. The first section examines the development of the European Union (EU) and highlights how the integration process has increased the power and policy competence of the European institutions. The second section reviews a range of academic theories that have been developed to account for this process and for the emergence of the EU as a supra-national policy-making system. The final section provides a topography of the current European policy-making environment and identifies the structural characteristics of the main policy actors and the formal policy procedures utilised at the European level.

#### 4. 1. 1. The European Community and the single market

In the period after the Second World War, both in Europe and internationally numerous efforts were made to develop cooperation between nations (See, section 3.2.). In Europe some of these efforts led to agreement among certain European countries to take cooperation a stage further and to move towards integration. The first definite moves in this direction were the signing by the three Benelux countries (Belgium, Luxembourg and Netherlands), France, West Germany and Italy, of the Paris Treaty in 1951 to form the European Coal and Steel Community (ECSC) and in 1957 of the two Treaties of Rome to form the Euratom (European Atomic Energy Community) and most significantly, the European Economic Community (EEC). Although there were a range of motivations and aspirations amongst the six original Member States in signing these treaties, each country was prepared to sacrifice a degree of its national sovereignty in return for the benefits that it anticipated would accrue from moves towards integration. These Treaties marked the beginning of what has since developed into the most successful and important supra-national political and economic system in the world - the European Union (EU) (Fontaine:1997).

Since 1957 the process of European integration has not been particularly smooth or uniform, indeed it has often been both uncertain and unpredictable. However, the basic approach to policy-making set out in the Treaty of Rome; with policy initiatives *proposed* by the Commission, *consulted* on with the Parliament and *decided* upon by the Council, (with the European Court available to interpret laws made) has remained. Unsurprisingly after more than 40 years of integration this basic approach has experienced some change. Change that has been brought about both by factors from within and external to the European Economic Community (EEC). Apart from the increased number of Member States that now constitute the community, the relationships between the European institutions themselves have changed as each has extended its interests. The policy-making procedures have become more numerous and more complex as the EU has expanded its policy competencies. There has also been a dramatic

increase in the numbers of actors participating in the policy-making process that are not from either the European institutions or Member State governments. A large number of external factors have also effected the integration process. Most notably, the collapse of communism in Eastern block countries in the late 1980's and early 1990's, which has subsequently led to a dramatic shift in the agenda of the EU as a whole (Nugent:1994).

Prior to the signing of the Treaty on the European Union<sup>1</sup> the most significant amendment to the Treaty of Rome was the Single European Act (SEA)<sup>2</sup>. The SEA, which had been preceded by a Commission White Paper on the subject<sup>3</sup>, set out a timetable for single market completion and introduced a new legislative procedure - (the cooperation procedure) to facilitate more efficient decision-making by extending the use of qualified majority voting (QMV) in the Council. The cooperation procedure introduced a system of two readings in the European Parliament and the Council, as well as a rigid timetable for the final stages of the negotiation of legislative proposals considered under this procedure. Most significantly under a new Article introduced into the Treaty (Article 100A) the cooperation procedure was to be used for all legislative proposals concerned with the completion of the internal market. Other major changes introduced by the SEA included; the establishment of the Court of First Instance to assist the European Court of Justice (ECJ); and, an increase in the powers of the European Parliament both under the cooperation procedure and another new procedure - (the assent procedure) for use with issues concerning Community enlargement.

A significant factor in this '1992 initiative' was the dynamic role played by the European Commission and in particular its President, Jacques Delors. Delors appointment as Commission President in 1985 marked the beginning of a period of dramatic activity and dynamism on the part of the Commission. This continued throughout his Presidency but was most evident up until the Maastricht summit and the signing of the Treaty on the European Union (TEU). Delors leadership, personality and vision of a united Europe transformed the Commission into an effective and efficient agent shaping Community policy agendas and more generally the whole of the integration process. However this *politicization* of the Commission left it open to the criticisms that it was engaged in empire building and that it was not democratically accountable. As the TEU later highlighted "one of the many ironies of the subsequent ratification crisis was that, by default, Delors defended a treaty that benefited the Commission little but that the public perceived as having greatly enhanced the Commission's power" (Dinan:1994:181). Indeed, as Michelle Cini has pointed out Delors and his *mafia* (within the Commission) " by taking an overtly maximalist line on political union in the run up to Maastricht played into the hands of the Member States' anti-EC and anti-Commission domestic constituencies" (Cini:1996:91).

#### 4. 1. 2. Maastricht and the formation of the European Union

Although the SEA extended the role and power of the main European institutions, many policy actors within them and within Member State governments (particularly in France and Germany)

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<sup>1</sup> Signed in Maastricht, Holland on 7 February, 1992 - the TEU came into force on 1 November 1993.

<sup>2</sup> The Single European Act was signed on 17 February 1986 but due to ratification problems did not come into force until the middle of 1987. Most importantly the SEA set 1 January 1993 as the completion date for the internal market (often referred to as the '1992 programme' or '1992 initiative' ).

<sup>3</sup> Commission of the European Communities (CEC) (1985) White paper on completing the Internal Market, COM(85) 310 final.

were eager to push for closer integration<sup>4</sup>. This was viewed as necessary for the community to receive the full benefits of a European single market. As a result there was a raising in the profile of European discussions on a number of topics including:

- Economic and Monetary Union (EMU);
- The introduction of a social dimension into the single market;
- A common foreign and security policy, and;
- A need to improve democratic accountability within the European institutions.

As pressure for reform mounted the Council held several meetings that finally led to agreement on the need to hold intergovernmental conferences (IGC's) on both political union and EMU. These IGC's were held throughout 1991; with Member States Finance Ministers meeting in the IGC on EMU, and Foreign Ministers in the IGC on political union. Significantly, the Commission also participated in these IGC's, and at all levels of the negotiations (Archer:1994).

Despite different positions amongst the Member States (from the highly integrationist Belgium and Luxembourg at one end, to the reluctant UK at the other), by December 1991 both IGC's were able to present their conclusions to the European Council<sup>5</sup> at Maastricht in preparation for a new European treaty. There were however, a number of issues that remained unresolved, two of the most important being:

- The continued opposition of the UK government to both the social chapter<sup>6</sup> and to making a firm commitment to joining the single currency (Euro).

After further negotiation these issues were also resolved and the treaty (TEU) signed. It was anticipated that the treaty would come into force on 1 January 1993 but as a result of difficulties in its ratification in Denmark, France, Germany and the UK, it was only finally implemented on 1 November 1993. Most significantly, the Danish referendum on the TEU was lost (50.7% to 49.3%) only later being approved in a second referendum in May 1993 (56.8% to 43.2%). This shock to the integration process had, as was mentioned above, knock-on effects on the Commission, as well as in pushing the principle of subsidiarity<sup>7</sup> into centre stage in EU policy-making (Nugent:1994:57-64, Cini:1996:72-95).

The TEU transformed the integration process by creating the European Union (EU). The EU stands on three pillars:

- The Community pillar;
- The Common Foreign and Security Policy pillar (CFSP);
- The Cooperation on Justice and Home affairs pillar (JHF).

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<sup>4</sup>In contrast, the UK Conservative Government during this period continued its *long standing opposition* to any integration beyond a basic common market. See, for example S. George (1990) *An awkward partner: Britain in the European Community*, Oxford University Press, Oxford.

<sup>5</sup>The European Council is distinct from the Council of Ministers - and is a gathering of the heads of all the Member State governments. It convenes usually at summits that are held at least twice every year.

<sup>6</sup>The UK government negotiated an 'opt-out' from signing the social chapter in the TEU.

<sup>7</sup>The principle of subsidiarity was formally introduced into the treaty establishing the European Community (first pillar of the EU) i.e. when and wherever possible policy decisions should be taken at the national rather than European level; Article 3b of the EC treaty states "...the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States..."

Only the Community pillar is examined here and more particularly, its provisions establishing the European Community (EC). The Community pillar concerns most of the EU's policies and governs the institutional and operational procedures of the Commission, Parliament, Council and Court of Justice. Although the Community pillar revised and reinforced the treaties on the ECSC and Euratom, it is most significant for its revisions to the treaty on the EEC. This pillar apart from renaming the EEC the European Community (EC)<sup>8</sup> and establishing the principles of subsidiarity and EU citizenship, introduced a number of other changes to the treaty on the EEC. The most important of these was the establishment of a new legislative procedure - (the co-decision procedure) in Article 189b of the EC treaty.

The co-decision procedure (described in greater detail below) extended the use of QMV and the powers of the European Parliament by giving it a right of veto over proposals negotiated under it. In essence, the co-decision procedure extended the cooperation procedure (Article 189c of the EC treaty), and introduced the possibility of a conciliation committee and a third reading for controversial legislative proposals (Nugent:1994:68-75). Significantly, as a result of the introduction of the co-decision procedure a range of policy areas including legislative proposals concerned with 'harmonisation for the purpose of completing the internal market' (Article 100A of EC treaty) were transferred to this new procedure. This included *the directive on the legal protection of databases* (See, CEC:1993:77).

While in general the difficulties faced in the ratification of the Maastricht treaty had made the European Commission adopt a more cautious and low profile policy approach, one area continued to be a key focus. This policy exception was in the area of European competitiveness. This generated the 'Delors White Paper'(CEC:1993b)<sup>9</sup> and enabled the President to leave office 'with a flourish' (Cini:1996). Subsequently this led onto the Commission's Information Society initiatives within which copyright policy has been an important constituent (See, Section 3.3.3.).

#### **4. 1. 3. The Amsterdam Treaty and the expansion of the EU**

Although Maastricht marked new depths in the level of European integration, it in no way signified the end of efforts to develop 'an ever closer union' or to disputes about what future direction such integration should take. Indeed it is evident that the TEU 'highlights and confirms long established characteristics and features of the integration process' (Nugent:1994:77). A process that continues to develop and evolve today.

On 17 June 1997 the integration process took another step forward with agreement among the Member States on a new Treaty for Europe - the Treaty of Amsterdam. This new treaty which has still to be ratified in the Member States has four main objectives (CEC:1997):

- To place employment and citizens' rights at the heart of the EU;
- To remove the remaining obstacles to the freedom of movement and to strengthen security;
- To ensure Europe plays a more active role in world affairs;
- To improve the structure and functioning of European institutions to facilitate future EU enlargement.

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<sup>8</sup> The terms European Union, European Communities and European Community often tend to be used as synonyms for one another, but in certain circumstances it is important to be aware of the distinctions between them.

<sup>9</sup>Commission of the European Communities (CEC)(1993b) White Paper on Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century, COM(93) 700 final 5 December, Office of Official Publications of the EEC, Luxembourg.



In essence, the new treaty aims to consolidate the three pillars of the TEU and in terms of institutional reform will make the co-decision procedure the norm, increase the use of QMV and allow for a degree of 'multi-track' or 'multi-speed' integration amongst the Member States in the future<sup>10</sup>. The treaty is at base part of preparations by the EU and its existing Member States for the accession of new EU Members from central and eastern Europe. It comes into force on 1 May 1999.

## 4. 2. EU policy-making and integration theories<sup>11</sup>

"...continuing flux in terms of membership, policy competence, policy style and evolution have characterised the EC system since its inception. Different sets of actors or factors have become dominant during different phases in the EC's development "(Lodge:1993).

Since the early days of European integration political scientists, economists and others have provided a range of macro-level conceptual frameworks to try to explain the processes driving the development of the European supra-national system. In the last 40 years as Europe has evolved from a free trade area, through a common market and into the present integrated union, different theories have emerged to explain these integration processes.

Prior to the signing of the SEA the dominant theoretical approaches to integration were:

- Functionalism (Mitrany:1966) and Neo-Functionalism (Haas:1958)
- Intergovernmentalism (Hoffman:1966) and Domestic Politics (Wallace, Wallace & Webb:1983)

Although there are significant differences between these approaches, the key unit of analysis that they all use is the *nation-state*. The main areas of conflict between these approaches being the importance attributed to notions such as 'national sovereignty' and 'national interest' and the different perspectives on 'the adaptiveness of the political machinery of the state to the demands imposed by intensive and extensive international cooperation' (Webb:1983:13).

By the 1980's as the integration process began to move into a new phase, the increased capacity for decision-making by the European institutions themselves began to generate theoretical approaches concentrating on the development of shared European policy-making styles and common patterns of behaviour amongst policy actors at the European level. In particular there was a re-emergence of a federalist theoretical approach to integration. This approach argued that these type of developments indicated that Europe was heading towards a supra-national system of governance 'a United States of Europe' that would eventually replace the nation-state. The importance of this approach however waned as political opposition to the idea of a 'federal' Europe emerged in the run up to the SEA. This opposition being most clearly espoused by the UK's eurosceptics.

Following the SEA and the signing of the Maastricht treaty, other theoretical approaches developed to account for the new deeper levels of integration prevailing after the formation of the EU. Initially many of these were directed towards trying to account for and understand the

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<sup>10</sup> This will extend processes already begun under the TEU, for example, the ability of the UK government to opt-out of joining the single currency on 1 January 1999.

<sup>11</sup> For a detailed discussion of theories of European integration See, chapter one, in L. Cram (1997) *Policy-making in the EU: conceptual lenses and the integration process*, Routledge, London

new constitutional arrangements. These approaches tended to combine elements of previous approaches, for example, neo-functionalism and domestic politics (Sandholtz & Zysman:1989; Keohane & Hoffman:1991), and tried to overcome the polarisation of previous debates between national (state-centric) and supra-national (institutional) approaches (Cram:1997).

Most importantly by the early 1990's a new theoretical approach to European integration had developed. This *policy based* approach acknowledged the EU as an established political and institutional system of supra-national policy-making within which power and politics acted as drivers for the integration process. Significantly this approach attempted to bridge the gap between previous macro-level theories on integration (using the nation-state as the primary unit of analysis) with the every-day policy-making processes carried out by actors from both within, and external to the European institutions.

Following Cram (1997:22-27) it can be argued that this policy based approach emerged as a result of an increasing number of studies highlighting the importance of different policy actors at the European level including;

- Bureaucratic politics and the Commission as agenda-setter (Peters:1992, 1994; Pollack:1995)
- The European Parliament as conditional agenda-setter (Tsebelis:1994)
- Interest groups (Greenwood, Grote & Ronit:1992; Andersen & Eliassen:1993; Mazey & Richardson: 1993a)

These studies also highlighted that it was problematic to treat any of these European level policy actors (e.g. the European Commission), as single entities because this ignored the considerable degree of variation in policy behaviour and competition between actors from different parts of the same institution or organisation (Cini:1996; Turner:1997b).

Significantly, in the context of the casestudy, these policy based approaches exhibit some methodological similarities with the re-interpreted process model developed in chapter two. While the aims of these approaches are different, both recognise the need for analysis to consider both the role of individual policy actors and the influence of the broader context (as well as the links between them) in developing their explanations. Furthermore both approaches are critical of previous macro-level explanations of European policy-making processes and argue that the role of Member States, European institutions or interested parties can never be fully explained without reference to actions of individuals who in specific circumstances represent them. "...The 'European policy game' continues to be played at the detailed policy level and continues to attract the attention and efforts of a plethora of interest groups and others....EU policies are not simply the outcome of interstate bargaining even if the policy process appears to culminate in this way. It is a complex process involving different types of actors involved in what Tsebelis (1990) terms nested games" (Richardson:1996).

In this context, these policy-based approaches reinforce the argument outlined by the re-interpreted process model i.e. contrasting theoretical approaches must be used together to enhance understanding of both specific policy processes and the wider policy context within which they develop.

### 4. 3. European formal policy-making processes

“The strengthening of transnational decision-making has not eliminated cross-national competition and conflict. However, the increased importance of the central EC institutions has mobilised a wide variety of interests which are seeking to influence the decision-making process through direct contacts. This, in turn has further strengthened the role of central EC institutions in relation to Member countries, and stimulated the growth of complex game playing centred around the policy-making process”(Andersen & Eliassen:1993).

Despite the increased importance of EC institutions and lobbying, at a formal level Member State governments represented in the Council remain the most powerful participants in European policy-making. Indeed, subject to the rules of QMV(qualified majority voting) they retain formal executive control over almost all decision-making at the European level.

In this context, while it is important to acknowledge that particular Member State positions on policy issues often mask a lack of national level consensus, it is the differences between Member States that are often most significant in the policy-making process. In this regard, following Lodge (1993:3-4) it is possible to identify a number of structural differences that impact on the ability of different Member States to influence change both within specific policy areas and in the integration process more generally. These differences include:

- Size                                      Big versus Small Member States(MS)
- Integration                                Pro versus Anti-supranationalism MS
- Point of Entry                            Founding versus New MS
- Wealth                                      Rich versus Poor MS
- Form of Government                    Unitary versus Decentralised/Federal MS.

In the context of the casestudy another difference i.e. copyright tradition (Droit d’auteur versus Copyright Member States) may also prove relevant. These differences are also significant because of the way in which other participants in the policy process (e.g. the Commission, other Member States, lobby groups), have been able to exploit them to shape particular Member State preferences on certain issues. This is particularly the case where a Member State lacks a strongly defined position on a policy issue and/or lacks adequate information or interest to form one. “The Commission has often capitalised upon this fact [*a lack of information*] by packaging particular issues in such a way as to maximize the likelihood of their acceptance by national governments....while enhancing the degree of room for manoeuvre enjoyed by the CEU [*Commission of the European Union*] at the level of the day-to-day policy process” (Cram:1997:175-76).

Clearly whatever the role of the European institutions and lobby groups in any particular European policy process, a range of treaty-based and procedural factors place important constraints on their behaviour. To enhance understanding of the casestudy the next section provides an overview of the main European institutions and decision-making procedures that structure the policy-making environment within which policy actors operate.

#### 4. 3. 1. European institutional actors and the co-decision procedure

“ What is distinctive about the EU is the sheer range and complexity of its processes: a host of actors, operating within the context of numerous EU and national-level institutions, interact with

one another on the basis of an array of different decision-making rules and procedures ” (Nugent:1994:299).

EU policy processes are complex and multi-faceted. However, in making European legislation this complexity is constrained by the structures imposed by the main European formal policy-making procedures: consultation procedure, assent procedure, cooperation procedure and co-decision procedure. While under the terms of the EC treaty each procedure is employed for different policy spheres, all provide a formal structure for the involvement of the main European institutions in the policy process. Before examining the co-decision procedure<sup>12</sup> more closely, the formal role of the main European institutions in legislative process are briefly examined:

- *The European Commission*

The European Commission is at the centre of the EU. Although Article 155 of the EC treaty remains vague about its precise role, it is involved in the passage of legislation at all levels and at all stages of the policy process and has the crucial role as the initiator and proposer of European legislation.

The Commission is headed by 20 Commissioners<sup>13</sup> who are political appointees of the Member States<sup>14</sup> (and subject to the approval of the European Parliament) but from whom, under the terms of the EC treaty, they are independent (Article 157 EC treaty). Each Commissioner is in charge of a specific policy portfolio and is supported by a small personal cabinet. Below this college of Commissioners, is the bureaucracy proper of the Commission<sup>15</sup>. This is currently divided into 24 directorates-general (DG), 5 horizontal services<sup>16</sup> and a range of other less permanent working groups and committees. Each DG is responsible for a particular policy area or administrative function and is internally sub-divided into a number of directorates themselves further divided into a number of units<sup>17</sup>. It is from within these units that middle or lower ranking officials draft proposals that may or may not be adopted by the Commission hierarchy to enter the formal EU policy-making process. If a proposal is adopted by the Commission, then usually

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<sup>12</sup> Only the co-decision procedure is examined in detail because this was the procedure under which the database directive was adopted. It is acknowledged that initially the database directive began its formal passage under the cooperation procedure but the procedure was changed as a result of the coming into force of the TEU. The key difference between the two procedures being that under the co-decision procedure the European Parliament acquired the power to veto proposals (Article 189b EC treaty).

<sup>13</sup> Since the TEU the term of office is 5 years with one of the Commissioners appointed as President. Following the recent mass resignation of the Commissioners due to fraud allegations, Romano Prodi was appointed as the new Commission President. By the end of July 1999 the other new Commissioners will be in place.

<sup>14</sup> Larger Member States (i.e. Germany, UK, France, Spain & Italy) have 2 Commissioners other Member States 1.

<sup>15</sup> The Commission is relatively small in size with just over 16,000 staff. This has implications for the work of officials preparing proposals and their reliance on interest groups and other policy actors for information and other resources.

<sup>16</sup> The secretariat-general, legal service, spokesman's service, statistical office and joint interpreting and conference service. The secretariat-general is the most important of these as it coordinates the work of the Commission and its relations with the other European institutions.

<sup>17</sup> For example, DGXV/E/4 refers to: directorate-general XV (for financial services and the internal market) directorate E (for intellectual and industrial property, freedom of establishment and the provision of services and professional regulation) and Unit 4 (for copyright, neighbouring rights and international aspects).

it is this official who becomes its 'rapporteur' i.e. the official with the responsibility to present the proposal to the other European institutions in the formal policy-making process and liaise with interested parties (Cini:1996).

Although policy proposals are instigated as a result of ideas generated both from inside and outside the Commission, it is clear that as the initiator of legislative action the Commission is in a very strong position to set the agenda and parameters of particular policy discussions. Increasingly, the Commission has tended to outline its broad policy agenda in specific fields e.g. copyright, through the use of Green Papers. These consultation documents outline the Commission's general assessment of the field, its policy goals and the policy actions that it intends to undertake. Usually it is within this frame that particular legislative proposals are prepared by individual officials. While the degree of autonomy that Commission officials have in preparing a proposal varies all engage in communication and consultation with a wide range of external policy actors including lobby groups and representatives from the Member States.

Communication and consultation within the Commission is coordinated by the Commission's secretariat and involves two processes. The proposal is passed vertically up the internal hierarchy of a particular DG and is also passed horizontally across to other DGs that have relevant expertise or an interest in it. Following this consultation the draft legislative proposal is discussed by the cabinets of the Commissioners who will, subject to agreement, pass the proposal to the college of Commissioners for adoption. At the weekly meeting of the college the Commissioner with responsibility for the draft proposal will present it to the college. At these meetings the college can adopt the proposal, reject it, defer a decision or send it back to the DG for re-drafting. However, the decision by the college on a proposal is taken under a voting system where a simple majority is sufficient to ensure its adoption. Following the formal adoption of a legislative proposal by the Commission the second phase of the policy-making process begins involving the other European institutions. In this second phase the Commission rapporteur presents and justifies the proposal to the Parliament, Council and where appropriate the Economic and Social Committee.

Before examining the formal role of these other institutions it is important to acknowledge that at the broadest level the Commission is simultaneously a political actor and a civil servant in the EU policy process with considerable power to set policy agendas, shape the manner in which legislative proposals are presented and extend its own future policy competence (Cram:1997).

- *European Parliament*

In the formal legislative process the powers of the European Parliament (EP) have gradually been increased<sup>18</sup> and it continues to push for equal executive power with the Council in EU policy-making. However, despite these improvements in its legislative role its limited executive power remains at the heart of what has been described as the EU's 'democratic deficit' i.e. specifically the inadequate influence of the EP over the Commission<sup>19</sup> and Council (Lodge:1993).

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<sup>18</sup> Most recently the Treaty of Amsterdam strengthened the European Parliament's powers by extending the co-decision procedure to a number of new policy areas including transport, social policy and the environment. The procedure has also extended the Parliament's right of veto by removing the requirement for an absolute majority for rejection of a policy proposal.

<sup>19</sup> The EP's recent censure motion against the Commission that led to the mass resignation of the college of Commissioners, and since the TEU the EP's increased role in the appointment of new Commissioners is an example of how this situation is changing.

Despite these factors, the EP remains the only directly elected supra-national parliament in the world and after the most recent elections (June 1999) has 626 Members from the 15 Member States. These Members of the European Parliament (MEPs) are divided within the EP amongst nine political groups. These groups are central to the running of the EP and are especially important in coordinating voting in plenary sessions on legislative proposals. In the context of the casestudy the two largest groups are: The EPP(PPE) Group of the European People's Party and the PES (PSE) Group of the Party of European Socialists.

At the operational level the management of the EP is the responsibility of the bureau which consists of the President, 14 Vice-Presidents and 5 quaestors<sup>20</sup> and is supported by the Parliament's secretariat. The Members of the bureau are all elected for two and half years. The bureau deals with the administrative aspects of running the Parliament. In parallel with the bureau is the Conference of Presidents which consists of the President of the Parliament and the chairman of the political groups. The conference is responsible for 'issues of a political character or pertaining to the external representation of the EP' (Corbett et al:1995:103). Below this structure most of the detailed policy work that is voted on in the EP's plenary sessions is conducted in one of the 20 standing committees each specialising in a particular policy field e.g. Committee on legal affairs and citizens rights. The EP also has a number of less permanent sub-committees.

In the legislative process a Commission proposal enters the Parliament and is referred by the bureau to one or more standing committees<sup>21</sup> within which a parliamentary rapporteur prepares a report on the legislative proposal. This report and the proposal are then discussed and amended at a series of subsequent meetings of the committee. The Commission rapporteur usually attends these meetings and discusses proposed amendments with the committee and in particular with its rapporteur. The committee finally adopts its amended text of the Commission proposal and recommends its adoption by the EP at a plenary session. The committee rapporteur presents the amended text to the EP plenary session and has an important role in recommending what the reaction of the EP should be to the Commission's response to accept or reject the EP's amendments to its proposal. The EP's plenary sessions occur eleven times per year but are often poorly attended further empowering the committee stage in the legislative process. If the EP is involved in a second reading of a legislative proposal, the proposal (by now a Council common position) is referred to the same committees as in the first reading. Where possible the committee rapporteur is the same individual and again the committee considers the text and makes its amendments<sup>22</sup> (Corbett et al:1995).

Above all, the EP's limited legislative powers and influence in the policy process over the Commission and Council place it in a difficult position. Even with the veto provided by the co-decision procedure there has been a general reluctance to invoke it except on extremely controversial issues. At a practical level this has meant that many EP amendments continue to be ignored in the EU policy process by the Commission and Council.

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<sup>20</sup> Responsible for financial and administrative matters of direct concern to MEPs.

<sup>21</sup> A proposal can be referred to up to 3 standing committees, although only one is designated the principle committee responsible for reporting to the EP's plenary session.

<sup>22</sup> Under the co-decision procedure the EP can do a number of things including reject the Council's common position. This invokes a conciliation committee between the Council and EP. The EP representatives usually involve some the members of the original standing committees involved.

- *Council of Ministers,*

The Council of Ministers (or Council) is the key formal executive decision-making body in the EU. It has as its chief function the adoption of legislative proposals generated by the Commission. Crucially it is the institution in which the Member States governments meet to express and protect their national interests.

The Council has a hierarchical structure: at the top are the Member State's Ministers<sup>23</sup> who attend meetings in their respective policy fields (e.g. Transport Ministers attend meetings of the transport Council). The timetable and number of meetings in each policy field per year varies and depends largely on the amount of legislation there is to be adopted. Below the Ministerial level is the Committee of Permanent representatives (COREPER)<sup>24</sup>. This committee is made up of officials from the Member States permanent delegations in Brussels and usually meets once per week to prepare the work for the Council. At the bottom of the Council are a large number of committees and working groups that generate information for the Council. In the legislative process the working groups tend to have the specific task of analysing the detail of legislative proposals presented by the Commission. The working groups are comprised of Member State civil servants and experts from the national ministries with the responsibility for the issues under discussion as well as the Commission representatives (including the proposal rapporteur) and representatives from the Council secretariat. These working groups meet regularly when there is a specific proposal under discussion subject to the timetable laid out by the Council Presidency. The working groups endeavour to negotiate the proposal towards a common position that has the support of the Member States. The working groups report to the COREPER and highlight controversial issues in a proposal that require political resolution. Most of these political decisions are resolved by the COREPER who prepare the proposal for the next Council meeting where they advise their ministers on the position that their Member State should adopt and how to vote: accept, reject or abstain.

At an operational level the work of the Council is coordinated by the Council Presidency working in association with the Council secretariat. The Presidency is held by each Member State in rotation for a period of six months and confers on the Member State holding the post the ability to set timetables and agendas and to exert throughout the Council hierarchy power over the policy priorities it sets itself.

In the legislative process a Commission proposal is presented to the Council under one of the formal policy procedures and initially is directed to a relevant working group. This group subject to the agenda of the Presidency and other factors<sup>25</sup> will then begin to examine the text and attempt to prepare a common position<sup>26</sup>. Controversial issues that cannot be resolved by the working group are presented to the COREPER which takes decisions on these issues and

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<sup>23</sup> Meetings of the Member States Prime Ministers are referred to as the European Council which meets at least once every six months.

<sup>24</sup>There are in fact two COREPERs - COREPER 1 is represented by middle and lower ranking officials from the Member States permanent representations - it deals with a range of policy areas including the internal market and COREPER 2 which is represented by the most senior staff from Member States permanent representations - it deals with politically sensitive issues including foreign affairs and economic and financial affairs.

<sup>25</sup>For example, how controversial the proposal is or the existing work-load of the working group.

<sup>26</sup>The meetings of the working group on a particular policy proposal often take place over a number of Council Presidencies and often are more active after the Commission has presented the amended proposal text following the first reading in the European Parliament.

prepares the text for formal adoption by the Council's ministers. In the Council meetings ministers usually consider issues grouped under two headings: A points and B points. A points are proposals recommended by the COREPER for adoption without discussion while B points involve some ministerial level discussion.

Increasingly the voting system used by the Council in making its decisions involves a system referred to as QMV (qualified majority voting). Under QMV Member States are allocated a number of votes relative to their size:

|   |          |
|---|----------|
| Germany, France, Italy & the UK         | 10 votes |
| Spain                                   | 8 votes  |
| Belgium, Netherlands, Portugal & Greece | 5 votes  |
| Austria & Sweden                        | 4 votes  |
| Ireland, Denmark & Finland              | 3 votes  |
| Luxembourg                              | 2 votes  |
|   | -----    |
| Total                                   | 87 Votes |

In adopting a Commission proposal under QMV a minimum of 62 votes is required. The result of QMV is that the five biggest Member States are not able to push proposals through against the wishes of the smaller Member States. The Council does however try to ensure that legislation adopted has more support amongst the Member States than the minimum required under QMV.

- *Court of Justice*

The European Court of Justice (ECJ) based in Luxembourg has two key areas of responsibility; interpreting the application of EU law in the Member States and making judgements on the basis of EU law in specific cases brought to it by the Member States, the other European institutions, organizations or individuals. The ECJ ensures that EU law is uniformly applied across the Member States and most importantly has had a major role in safeguarding the operation of the single market.

The ECJ is comprised of 15 judges and 9 advocates-general appointed by the Member States for a renewable term of 6 years. These judges elect a President for a 3-year term who is responsible for coordinating and directing the work of the Court. The advocates-general assist the ECJ in its work by presenting cases to it in an independent and impartial manner (Article 166 of the EC treaty). Since November 1989 the Court of Justice has been assisted by the Court of First Instance. This Court was established primarily to speed up the European legal process and mainly handles actions brought by individuals and organisations.

Crucially the ECJ upholds and enforces the supremacy of European law within the EU.

- *Economic and Social Committee*

The Economic and Social Committee (ECOSOC) is a consultative body comprised of 222 representatives of economic and social interests from across the Member States. These interests are divided into three groups: Group 1: Employers, Group 2: Workers and Group 3: Various Interests and are appointed by the Council for a renewable term of 4 years.



At the operational level the work of the ECOSOC is coordinated by a bureau under the direction of a chairman (both elected by the ECOSOC's members for a period of two years) and supported by the ECOSOC secretariat. The main activity of the ECOSOC is the preparation of opinions on proposed EU legislation and in a number of policy spheres including internal market issues the ECOSOC under the EC treaty must be consulted by the Commission and Council.

In the legislative process a Commission proposal enters the ECOSOC and is directed by the bureau to one of nine sections e.g. the section for industry, commerce, crafts and services where a rapporteur prepares a draft opinion which is then discussed by members of the section. Once agreement has been reached on the ECOSOC opinion it is placed on the agenda of the next ECOSOC plenary session where a vote is taken to adopt it. Given that the ECOSOC is only a consultative committee its power in the legislative process is extremely limited and at a practical level its opinions are often ignored by the Commission and Council who are under no legal obligation to modify a proposal in response to them.

- *The Co-decision procedure*

One of the consequences of the signing of the TEU was a new procedure for the making of European legislation under a new Article 189b introduced into the EC treaty i.e. the co-decision procedure. Most significantly, this new procedure provided the European Parliament for the first time with the right to veto proposals negotiated under it. The procedure is increasingly being used in a wider range of policy spheres<sup>27</sup> as detailed in the EC treaty and more specifically in the context of the casestudy includes proposals concerned with 'harmonisation for the purpose of completing the internal market (Article 100a)'. The procedure employs QMV for Council decisions except on cultural matters and those dealing with research and development framework programmes where unanimity is required.

The co-decision procedure provides the formal framework and in its latter stages a timetable within which legislation must be processed by the Council and EP. The database directive was formulated using this procedure which is described in greater detail below<sup>28</sup>:

Following the adoption by the Commission of a formal proposal under the co-decision procedure this proposal is presented to the Council, to the EP for its first reading and to the ECOSOC for an opinion. After the first reading in the EP amendments recommended by the Parliament are accepted or rejected by the Commission in preparing an amended text. This amended text is then presented to the Council where the working group set about preparing a common position text which is voted on in the Council under the rules of QMV.

Following the adoption of a common position by the Council and its presentation to the EP a strict timetable under the co-decision procedure comes into operation. The EP has during its second reading three months in which to respond.

It can do this in a number of ways:

1. *Approve the common position or take no action* - This results in the proposal being adopted by the Council as law within three months.

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<sup>27</sup> The policy spheres subject to the co-decision procedure have been extended by the Amsterdam treaty.

<sup>28</sup> This provides the key features of the co-decision procedure which has been further modified by the Amsterdam treaty.

2. *Propose amendments to the common position* - This can produce a number of results;
  - a) The Council can approve the amendments, change the common position accordingly and adopt the law by QMV (if the Commission agrees the amendments) or by unanimity (if the Commission does not agree with the amendments) within three months.
  - b) The Council can reject the Parliament's amendments. This results in the President of the Council in agreement with the President of the EP convening the conciliation committee which then has six weeks within which to try and approve a joint text. (i) If this proves successful the proposal returns for a third reading to the Council and Parliament for voting under QMV and absolute majority respectively. If these voting requirements are met the proposal has to be adopted within six weeks, if not and either institution does not reach agreement the proposal is not adopted. (ii) If conciliation fails the Council can within six weeks confirm the common position under QMV possibly with EP's amendments. In this case the law is adopted unless within a further six weeks the EP rejects the text.
3. *Indicate that it intends to reject the proposal*. This results in the convening of the conciliation committee and the same procedural possibilities as described above.

Ultimately it is the introduction of a right of veto for the EP that is the most significant impact of the co-decision procedure.

#### 4. 3. 2. Interest groups and the EU policy process

"...the art of EC lobbying is not so dissimilar to national lobbying - informal discussions, telephone briefings, lunches, good documentation, etc. are just as important in Brussels as in London...The crucial difference which makes EC lobbying such a complex activity is the policy-making environment...In particular, the absence of any single decision-making centre and the fact that [fifteen] Member States and sets of interests have an input into the EC policy process creates uncertainty and competitive agenda-setting" (Mazey & Richardson:1993b).

Apart from European and Member State actors who formally participate through the European institutions in EU policy-making, there are a large number of other actors involved in the EU policy process. Indeed as the integration process has transferred increasing spheres of policy competence to the European level so the numbers of interest groups lobbying the European institutions has grown<sup>29</sup>. While clearly the diversity of interested parties involved in any particular policy sphere will vary enormously, at the broadest level they can usefully be categorised<sup>30</sup> as follows:

- *European level associations and groups*: These groups vary enormously in size, membership and resources. Some groups are very large, lobbying on a range of cross-sectoral issues e.g. UNICE (Union of Industrial and Employers' Confederations of Europe) while others representing specific sectoral interests may consist of little more than one or two individuals aided by some secretarial support e.g. EUSIDIC (European Association of Information Services). Many of these organisations actively encourage their national members to lobby their Member State governments.

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<sup>29</sup> The most dramatic increase in lobby groups operating at the European level occurred after the SEA and has continued to grow as the EU has enlarged and its policy competence expanded.

<sup>30</sup> In the casestudy interested parties are categorised slightly differently to draw attention to their specific orientations in relation to the policy issues in the database directive.

- *Regional and local governments:* Recently many regional and local governments/authorities have identified the need for direct representation at the European level e.g. Germany's Länder.
- *Non-European and international groups:* Many established international groups and associations have within them sections addressing European policy issues e.g. IFJ (International Federation of Journalists). There is also strong representation from countries with business interests in Europe especially from the US e.g. AMCHAM (EU Committee of the American Chamber of Commerce).
- *Individual firms:* This applies particularly to multi-national firms who may originate from inside or outside Europe but who because of their size and available resources can lobby both on their own and from inside European trade associations e.g. Reuters, Bertelsmann, Dun & Bradstreet.
- *Others (Professional lobbying consultants, law firms, academic research centres, national groups):* There are also increasingly a large number of other interests which although not having a permanent representation at the European level at different times participate in European level policy processes by being represented through a variety of channels including professional lobbying groups, law firms, academics etc.

In participating in the EU policy process these different interested parties are faced with a complex institutional framework against which they have to allocate their resources for both staying informed about policy developments and actively trying to participate in their formulation. In response these groups have tended to concentrate their efforts on the Commission. Although subject to their resources lobbying also takes place in the European Parliament, the ECOSOC and at the national level with Member State officials who participate in the Council negotiations (Nugent:1994).

While the influence that different interest groups have on any particular policy will vary considerably it is clear that lobbying works. The golden rule being to get in as early as possible and to stay as close as possible to the Commission rapporteur (Mazey & Richardson:1993c). Of course the manner in which particular interest group arguments, information and views are received by Commission officials, MEPs or Member State representatives largely depends on the individual roles, agendas and perspectives of these policy actors on the policy proposal under discussion. Interest groups can however maximise their potential to influence by, for example, providing Commission officials with accurate information and well articulated arguments as well as by highlighting wide support amongst other interest groups for their views. But given the extent to which proposals may change during negotiations in the other European institutions there is in reality, a need to continue lobbying throughout the policy process, which again raises the issue of the resources available to different interest groups.

Clearly large differentials do exist between different interest groups in their ability to influence and participate which suggests that "...while the Commission claims to be impartial and objective, it is in fact [often] acting as a voice for sectional interests. It is certainly clear that some outside actors have developed close relationships with their counterparts in the Commission. As such, there tends to be something of a gap between those interests with preferential insider-type access, and those largely excluded from the formulation process" (Cini:1996:150). In this context, it is also important to point out that when particular lobby groups are successful in influencing the

policy process they are usually very reluctant to admit it “when victory is achieved it is important not to give too much publicity to one’s success, as this can embarrass officials and prejudice further influence” (Mazey & Richardson:1993c:45)

This chapter has examined the integration process and provided an outline of the European policy-making environment. It has also examined key European actors, institutions and formal procedures that interact in the European policy-making environment. In the context of this chapter (and chapters 2 and 3) the thesis now turns to analyse the formulation of the European directive on the legal protection of databases.

## Chapter 5. Research strategy

“Human Sciences can be sciences in exactly the same sense, though not in exactly the same way as the natural ones. Not in the same way, because there is a difference from the natural sciences over what is to be explained (*meanings* as well as external regularities) and over the procedures to be used to establish explanations (*interpretation* as well as causal analysis). None the less, the principles governing the production of these explanations are substantially the same” (Silverman:1985: *emphasis added*).

### 5. 1. Introduction

This chapter presents the research strategy employed in conducting the casestudy on the formulation of the European directive on the legal protection of databases. The casestudy examines the legal issues surrounding the protection of databases and analyses the development of the European directive. Most significantly the casestudy describes and explains the role of human, organisational and contextual factors in shaping the directive as adopted. The re-interpreted process model is deployed to provide a coherent framework within which to study the complex interaction of these factors. The first section introduces the casestudy and highlights the need for analysis to examine policy issues, their representation in policy documents and the role of key policy actors in the policy process. The second section provides an overview of the research design and examines the data collection and analysis through documents and semi-structured interviews conducted in chapters 6 and 7. It also considers the problems of using oral data and how the research design addresses the issue of ensuring that the casestudy findings can be used in a generalisable manner. The final section briefly examines the discussion and interpretation of the research findings conducted in chapter 8.

#### 5. 1. 1. Casestudy introduction

The literature review identified information policy (IP) as a dynamic, complex and fragmented group of public policies developing in response to the challenges posed by ICTs. Within the IS tradition, the academic study of IP was highlighted as lacking consensus on how best to approach these policy environments. More specifically a range of problems were identified as inhibiting the development of a coherent framework within which to analyse the diversity of issues, actors and events that characterise large scale IP problems. In an attempt to overcome these difficulties a process model of policy-making was opened up to three re-interpretations (rational actor, bureaucratic imperative and garbage can) to develop a triangulation tool for the systematic analysis of these IP environments. This re-interpreted process model is deployed in the context of the casestudy on the formulation of the European database directive up to its adoption under the co-decision procedure on March 11, 1996.

More explicitly, the re-interpreted process model is tested as a research tool that provides:

- A systematic means of studying complexity in the policy process derived from the interaction of a range of human, organisational and contextual factors (Section 2.3.1.);
- A coherent framework within which to meaningfully scope the casestudy (i.e. limited to the formulation process) (Section 2.3.2.);
- An approach for addressing the problem of the lack of generalisability common to casestudies (Section 2.3.3. and Section 5.1.2.);

- A meso- or middle-level theoretical category that opens up the possibility for future research to identify and deploy other theoretical categories at (macro and/or micro) levels of analysis (Section 2.3.).

Despite criticisms that a process model adopts an over-simplistic 'black box' view of the policy-making system (Sabatier & Jenkins-Smith:1993) it is argued that the model as re-interpreted (section 2.3.) does provide a coherent framework within which to conduct this IP casestudy. Apart from its intuitive appeal, the process model is often employed by policy actors themselves when explaining their actions. More importantly in terms of improving information policy studies (IPS), this model sensitises analysis to the relationship between policy-making on particular issues and the wider context within which policy-making takes place. This wider environment *both shapes (and is shaped by)* policy-making and therefore also needs to be addressed within analysis.

The casestudy is informed by the observation that whilst *much* continues to be written on copyright issues themselves, *little* attention has been given to the important ways in which these issues have been framed and solutions shaped by the process of formulating policy responses to them at the European level. More specifically, the database directive<sup>1</sup> was selected because it is the first European copyright directive to address the protection of information contents held in digital form and at a European level directly highlights the problems of using copyright for protecting digital information products. It is particularly noteworthy for having introduced an additional form of protection, a *sui generis* (one of a kind) right to protect databases that lack sufficient originality to qualify for protection under copyright.

Since its adoption the database directive text has been strongly criticised and concerns have been raised over the negative socio-economic consequences that are anticipated will be the *long-term* result of its introduction (Reichman & Samuelson:1997, Kuomantos:1997, Garrigues:1997). These criticisms are indicative of more general concerns being expressed about the strengthening of copyright, particularly in response to the challenges posed by ICTs. Indeed, recently many copyright and information law experts have begun to argue that copyright has become over-extended and that too little consideration has been given to the negative impacts of this over-protection on broader social and cultural goals in the emerging information society (Laddie:1996, Hugenholtz:1996b, Mason:1997, Fujita:1996).

Explicit within many of these criticisms is the notion that a range of human, organisational and contextual factors have combined to shape copyright policy in ways that have little to do with the merits of legal arguments. At the European level this raises questions about copyright policy-making e.g. What factors shape the policy solutions as finally adopted ? How are the different positions of Member States mediated ? What roles do the different European institutions play in the policy process ? How influential is lobbying on the policy outcome ? Is a satisfactory balance of rights being maintained or are there obvious winners and losers ? It is in this context that the casestudy analyses the formulation of the database directive.

### **5. 1. 2. The casestudy and the re-interpreted process model**

In conducting this analysis the re-interpreted process model usefully sub-divides policy formulation into two phases; the identification of problems and the design of policies (figure

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<sup>1</sup> Directive 96/9/EC of the European Parliament and of the Council of March 11th 1996 on the legal protection of databases (Official Journal, No. L77 27/03/96).

2.1.). Within this framework the 'rational actor' interpretation focuses attention on the issues and the policy documents, while the 'bureaucratic imperative' and 'garbage can', draw attention to the role of civil servants, policy-makers and lobbyists in the policy process and to the wider policy context (Table 2.6.). Analysis proceeds by examining; the policy issues, their representation in policy documents, and the role of key policy actors in the policy process through semi-structured interviews.

Analysis of the documentary evidence provides details of the origins of European discussions on databases, reveals the legal issues and highlights the main policy events during the directive's formulation. From the publication of the Commission proposal through to the directive's adoption formal policy documents also provide a coherent timetable within which to identify where and when significant changes were made to the directive text. It is also possible, following the structure of the European co-decision procedure (section 4.3.1.) to examine the formal role of the European institutions in the directive's formulation.

This documentary evidence however, does little to enhance understanding of *why* particular decisions were made and fails to elaborate on the role of individuals in the policy process. At a theoretical level, this raises questions over how adequate an explanation of the formulation of the database directive can be provided solely from an examination of documentary evidence? Formal policy documents tend to produce neat linear versions of events that obscure the politics and power play so characteristic of public policy-making. These accounts also ascribe particular roles, values and intentions to policy actors in the formulation process that require corroboration.

In this context, the formulation of the database directive was analysed further through interviews with European policy actors<sup>2</sup>. In particular 40 in-depth semi-structured interviews were conducted with European level: civil servants, policy-makers and lobbyists who were directly involved in the directive's formulation. These semi-structured interviews complement the documentary analysis and enhance understanding of the formulation process. They reveal the role and influence of policy actors in the formulation process and the links these actors make with these processes and the broader context of European copyright and information policy-making in the digital age.

However, in-depth interviews also highlight a general problem with the casestudy approach: *direct engagement with policy complexity tends to make generalisation very difficult* (Smart:1991). This problem has to be addressed in the research design to ensure that research findings can be used in a generalisable manner to improve academic understanding of complex information policy environments. More generally, drawing out the links between individuals actions in the policy process and the wider policy context enables a more comprehensive analysis "While research data are often mainly gathered at either a structural or at an interactional level, sound analysis and intelligent conceptualisation requires that both levels (and their relations) should be addressed" (Silverman:1985:70)

At a theoretical level, the need to consider individuals actions, the wider policy context and the links between them can be summarized following Bhaskar (1979) in three propositions:

- Individuals actions and beliefs are central to the reproduction of social structures
- Social structures are real, acting as both constraints and enabling forces for actions

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<sup>2</sup> 50 preliminary investigative telephone interviews and 40 in-depth semi-structured interviews with key policy actors were conducted as part of the casestudy

- Social structures are the condition for individuals actions and beliefs and are, (whether consciously or not) reproduced and changed by these actions and beliefs.

At a methodological level a concern to establish the connections between the role of policy actors in the formulation of the directive and the wider European policy context<sup>3</sup> leads on to questions about how this can be achieved in research design. From the policy studies literature it is clear that a common response to this issue has been to impose from the outset a structural level theory (e.g. Marxism) on case-study findings (Dryzek:1987, Parsons:1995). This type of approach however often leaves gaps in analysis that are filled by general assumptions being made about the role of policy actors based on their structural characteristics (e.g. profession, gender, nationality) that are rarely empirically tested. Therefore, in conducting this casestudy it is argued that connections made between the role and beliefs of policy actors involved in the database directive and the wider policy context should be grounded in empirical data collected from these actors. In explaining the role of Member States, the European institutions or lobbying organisations in shaping the database directive reference must be made to the actions and beliefs of individuals who represented those States, institutions and organisations during the formulation process (Ham & Hill:1984).

In this context the 40 in-depth semi-structured interviews were designed to serve two purposes:

- To complement the documentary analysis by collecting detailed data on the role and influence of policy actors during the formulation process.
- To ask broader questions about how individual policy actors understand the links between the formulation process on the database directive and the wider context of European copyright and information policy-making in the digital age.

## **5. 2. Research design overview**

In conducting the casestudy data are collected in two principle ways: Through an examination of the documentary evidence (complemented by 50 telephone interviews); and through 40 in-depth semi-structured interviews with key civil servants, policy-makers and lobbyists involved in the directive's formulation.

### **5. 2. 1. The documentary evidence and telephone interviews**

Following the re-interpreted process model the formulation of the database directive can be divided into two overlapping phases:

- From the period just prior to the release of the 1988 copyright green paper up to the formal publication of the database proposal;
- From the formal publication of the database proposal through to its formal adoption as the European directive on the legal protection of databases directive in March 1996.

Within this framework the 'rational actor' interpretation focuses analysis on policy documents, records and statements. This approach has much in common with two previous documentary guides to other European copyright directives; on the software directive (Czarnota & Hart:1991)

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<sup>3</sup> This context was examined in detail in the literature review in particular in chapters 3 and 4.



and on the rental and lending right directive (Reinbothe & Von Lewinski:1993). The documentary analysis presented is compiled from:

- Public documents and press releases from the European institutions;
- Documents and briefing notes collected from the UK's Patent Office;
- Written submissions made by various lobbying groups;
- Legal opinions from a range of published academic articles;
- Extensive access gained to internal European Commission files on the directive<sup>4</sup>.

Complementing these documentary sources, 50 preliminary investigative telephone interviews were conducted with a wide range of policy actors who were involved at different times during the formulation of the directive (**Appendix 1**)<sup>5</sup>. These telephone interviews proved useful in a number of ways including: facilitating the collection of additional documentary data on the formulation process; clarifying details of the internal procedures for processing draft legislation within the European institutions; providing an overview of the range of opinion on the directive and the key issues that arose during its formulation. The telephone interviews also directly assisted in the identification and selection of the 40 policy actors formally interviewed. This documentary analysis is conducted in chapter 6.

### **5. 2. 2. In-depth semi-structured interviews**

Following the re-interpreted process model the 'bureaucratic imperative' and 'garbage can' interpretations draw attention to a range of human, organisational and contextual factors that can influence the policy-making process. In the context of the database directive the influence of these factors during the formulation process are further investigated through 40 in-depth semi-structured interviews.

The policy actors interviewed were identified and selected on the basis of the documentary evidence and the 50 investigative telephone interviews. Significantly most of these actors had previously participated in policy-making on other European copyright directives and many continue to be actively involved in on-going European copyright discussions. At the broadest level all of them can be identified as coming from one of the following three groups:

1. European civil servants working for the institutions of the European Community i.e. Commission officials, Council officials;
2. European policy-makers working within the institutions of the European Community i.e. ECOSOC representatives, members of the European Parliament (MEPs), members of the Council working group on copyright;
3. Representatives of interested parties i.e. lobbyists from individual companies, trade associations, user groups as well as academics and independent consultants.

These semi-structured interviews allow access to information on the actions, motivations and beliefs of policy actors directly involved in the formulation process. They aim to add another layer of analysis to the explanation of the issues and events constructed from the documentary evidence and to reveal the range and role of 'bureaucratic' and 'garbage can' factors in the

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<sup>4</sup> Access to these files resulted from good personal contacts with particular officials and was allowed on the strict understanding that the information collected would only be used in the context of my research.

<sup>5</sup> These telephone interviews are divided into the same three categories used in the semi-structured interviews i.e. European level civil servants, European level policy-makers and representatives of interested parties (lobbyists).

formulation process. More specifically by examining the links that interviewees make between the database directive and broader context of European copyright and information policy it is possible to identify the basis on which these actors justified their actions. This interview analysis is conducted in chapter 7.

In the context of the discussion of difficulties currently facing information policy studies (Section 2.2.) it is important to acknowledge that the use of verbal data from semi-structured interviews raises a number of theoretical and methodological problems. These problems need to be addressed at every stage of the investigation; from question frame design, through the collection and transcription of data, into the data analysis and conclusions drawn. At the most general level these problems all relate to ensuring the reliability, validity and comparability of the answers received.

### **5. 2. 3. Problems with verbal data**

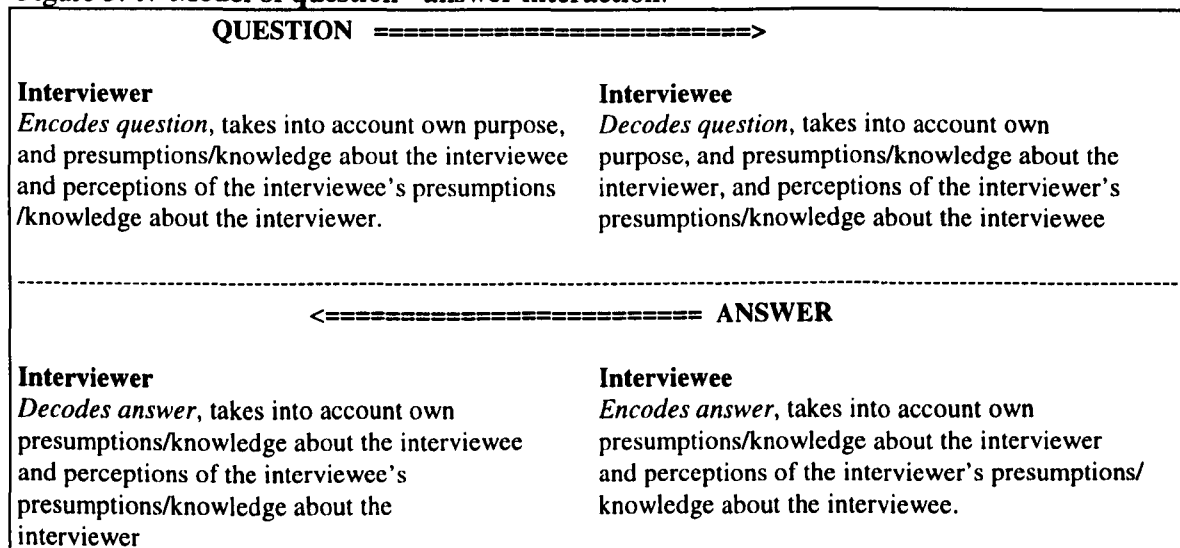
In approaching the collection and analysis of verbal data two broad orientations can be identified. The first is a positivist orientation (Section 2.2.4.) within which interviewers assume the data collected simply describes objective facts and events in the world. Comparison is based on an assumption of a single, unitary relationship between questions and answers. Answers that are usually pre-figured by the highly structured format of the questionnaires used to collect this data. The second more interpretivist orientation groups a variety of more qualitative approaches. Here researchers are interested in actors meanings and experiences. These approaches assume that to understand individuals behaviour in any situation it is necessary to understand how individuals define that situation. Explanation and interpretation is developed in terms of the concepts used by these individuals. Most frequently this data is collected through unstructured interviews and participant observation. However, by introducing subjectivity into their analyses researchers make the replication of research findings difficult and comparison problematic (Pawson: 1989).

Despite criticisms of both of these orientations, e.g. the positivists for the problematic validity of their results and the interpretivists for the subjectivity of their interpretations (Brenner, Brown & Canter:1985) both highlight that the interview situation (and within that question-answer interaction) is a complex and dynamic process of definition and interpretation over which neither the interviewer or interviewee ever has total control. The manner in which interviewees respond to questions always depends on their comprehension of the question, its purpose, their perception of the interviewer, (and their perception of the interviewer's view of them) as well as the interview situation (Figure 5.1.). Variability in responses also arises because questions can be answered at different levels of generality (personal, organisational, national, European) with different frames of reference (descriptive, explanatory, evaluative) and with different motivations (ideological, professional, scientific). From this perspective interviewee's must be treated as active agents engaged in interpreting interviewer's questions and in trying to exert control over the interview situation.

At a theoretical level these concerns highlight that regardless of the orientation adopted sound collection and analysis of interview data relies on researchers being self-reflexive about the impact of their own subjectivity on the interview process. At a methodological level this implies paying attention to defining as clearly and as simply as possible the questions asked, ensuring that interviewee's can answer them and making sure that interviewee's know the perspective to use in responding. "...the assumption that answers given by different respondents to the same question are comparable will only hold true if each respondent has oriented to each of the sources of variability in the same way...More generally it is difficult to reject the view that,

unless all respondents focus upon the same topic and respond to it in terms of the same dimensions, the answers that they give cannot be meaningfully compared with one another” (Foddy:1996).

Figure 5. 1. Model of question - answer interaction.



(Adapted from Foddy:1996)

#### 5. 2. 4. Interviewee selection, question frame design and data collection

The choice to conduct semi-structured interviews was made as the best method of maintaining flexibility in gaining access to policy actors roles, motivations and meanings while simultaneously ensuring the comparability of the responses collected. At a practical level this produced an approach similar to the ‘double interview technique’ developed by Belson (1986) such that interviewees were asked a number of set questions in the same order, complemented by a series of probes which were employed after the initial response to each question.

Compiling a short list of key policy actors to interview proved relatively straightforward. However, because the entire formulation process occurred over a period of more than eight years and took place at the European level, three practical difficulties<sup>6</sup> imposed constraints on the final choice of interviewees:

- A large number of the policy actors involved in the directive had either retired or had changed employment making them very difficult to locate<sup>7</sup>;
- Financial constraints limited the amount of European travel that could be undertaken to conduct these interviews<sup>8</sup>.
- Many of these policy actors were unwilling<sup>9</sup> or unable to spare the time for an interview on the database directive.

<sup>6</sup> Many of these difficulties were alleviated by being based at the Centre de Recherches Informatique et Droit (CRID), University of Namur as this provided direct access to Brussels based policy actors who formed the majority of actors interviewed.

<sup>7</sup> For example, at a practical level it proved impossible to contact Mr.Dobelle (formerly chairman of the Council working group meetings during the French Presidency).

<sup>8</sup> For example, financial constraints prevented travel to Geneva, Switzerland to interview Mr.Kemper (formerly chairman of the Council working group meetings during the German Presidency) now working at WIPO

As a result, from the three broad categories of policy actors identified the 40 semi-structured interviews were divided as follows: 10 interviews with European level civil servants (Figure 5.2.); 8 interviews with European level policy-makers (Figure 5.3.) and 22 interviews with representatives of interested parties (Figure 5.4.). Given that many of the interviewees continue to work in the field of European copyright policy to encourage candor in their responses the interview transcripts were *anonymised*.

Figure 5.2. Interviews with European level civil servants

| • 10 interviews with European level civil servants    |                          |
|---|--------------------------|
| <i>Institution/ Organisation</i>                      | <i>Transcript Number</i> |
| European Commission (formerly DGIII/F/4 and DGXV/E/4) | 1.                       |
| European Commission (formerly DGIII/F/4)              | 2.                       |
| European Commission DGXV/E/4                          | 3.                       |
| European Commission (formerly DGIII/F/4)              | 4.                       |
| European Commission (formerly DGXIII/B/I)             | 5.                       |
| European Commission DGXIII/E/4                        | 6.                       |
| European Commission (formerly DGXIII/E/4)             | 7.                       |
| European Commission DGXIII/E/4                        | 8.                       |
| Council Secretariat                                   | 9.                       |
| Council Legal Service                                 | 10.                      |

From this group of European civil servants, interviews were conducted with officials from the Commission and the Council. In the Commission civil servants from DGIII (later DGXV) and DGXIII(the associated service on the directive) were interviewed. These interviews include the draughtsman of the original Commission proposal and cover the involvement of staff from these Commission directorates during the entire formulation process from the 1988 green paper through to the directive's adoption. The two Council staff interviewed, attended the meetings of the Council working group and assisted successive Council Presidencies in coordinating the revisions of the directive text. Following telephone contacts with civil servants in the European Parliament it became evident that additional semi-structured interviews would not provide additional information on the formulation process because these policy actors had relatively poor recollections of the database directive (see Appendix 1: telephone interviews:10, 11, 12, & 13).

Figure 5.3. Interviews with European level policy-makers

| • 8 interviews with European level policy-makers                             |                          |
|--|--------------------------|
| <i>Institution/ Organisation</i>   | <i>Transcript Number</i> |
| ECOSOC (Economic and Social Committee)                                       | 11.                      |
| ECOSOC (Economic and Social Committee)(Legal Adviser)                        | 12.                      |
| MEP (Member of the European Parliament - UK)(PES)                            | 13.                      |
| MEP (Member of the European Parliament - Spain)(PES)                         | 14.                      |
| Council Working Group (UK)(Patent Office - Department of Trade and Industry) | 15.                      |
| Council Working Group (UK)(Patent Office - Department of Trade and Industry) | 16.                      |
| Council Working Group(Belgium) (Ministry of Justice)                         | 17.                      |
| Council Working Group(France) (Ministry of Culture)                          | 18.                      |

From this group of European level policy-makers, interviews were conducted with representatives from all the major institutions directly involved in the formulation process. In the

<sup>9</sup>For example, John Stevens & Catherine Stewart as representatives of Reuters and Ann Joseph from Reed Elsevier refused to be interviewed as part of this study.

ECOSOC interviews were only conducted with the rapporteur of the ECOSOC opinion and his legal adviser who helped in preparing the text of the ECOSOC opinion. Telephone interviews were conducted with other members of the ECOSOC committee involved but they had little recollection of the database directive or its formulation. In the Parliament, strenuous efforts were made to conduct interviews with the rapporteurs on the directive. However, Mr. Garcia-Amigos (Spanish - EPP) (First Reading)<sup>10</sup> refused to be interviewed and Mrs. Palacio-Vallelersundi (Spanish - EPP) (Second Reading) whilst having agreed to be interviewed remained consistently unavailable<sup>11</sup>. As a consequence two interviews were conducted with other MEPs who attended the Legal Affairs Committee meetings during both readings. One of whom was the shadow rapporteur on the directive during its second reading. In the Council interviews were conducted with representatives from the UK, France and Belgium who attended the Council working group meetings on the directive<sup>12</sup>. Interviews were to have been conducted with COREPER representatives from the Member States but following telephone contact it became clear that either they were unwilling to participate or had little recollection of the directive's negotiation (See Appendix 1: telephone interviews:22, 23, 24, 25).

Figure 5.4. Interviews with representatives of interested parties

| • 22 interviews with representatives of interested parties                      |                          |
|---|--------------------------|
| <i>Institution/ Organisation</i>  | <i>Transcript Number</i> |
| FEP/Publishers Association(UK)  | 19.                      |
| Publishers Association(UK)  | 20.                      |
| FEP (Federation of European Publishers)   | 21.                      |
| EPC (European Publishers Council)   | 22.                      |
| Reuters (formerly)  | 23.                      |
| EUSIDIC (European Association of Information Services)                          | 24.                      |
| Dun & Bradstreet & AMCHAM(EU Committee of the American Chamber of Commerce)     | 25.                      |
| Reed-Elsevier   | 26.                      |
| EIIA ( European Information Industry Association)                               | 27.                      |
| IIA (Information Industry Association - USA)                                    | 28.                      |
| B/W Partners (professional EU lobbying consultants)                             | 29.                      |
| UNICE (Union of Industrial and Employers' Confederations of Europe)             | 30.                      |
| Bertelsmann   | 31.                      |
| IFPI(International Federation of the Phonographic Industry)                     | 32.                      |
| IFJ (International Federation of Journalists)                                   | 33.                      |
| AIDAA (Association Internationale des Auteurs de l'Audiovisuel)                 | 34.                      |
| EAPA (European Alliance of Press Agencies)                                      | 35.                      |
| FEDMA (Federation of European Direct Marketing Associations)                    | 36.                      |
| EBLIDA (European Bureau of Library, Information and Documentation Associations) | 37.                      |
| IFLA (International Federation of Library Associations)                         | 38.                      |
| CRID (Centre de Recherches Informatique et Droit)                               | 39.                      |
| Norall, Forester & Sutton (Brussels based Law Firm and professional lobbyists)  | 40.                      |

From this group interviews were conducted with representatives of all the major interest groups involved in lobbying on the directive. While there are problems categorising some individuals

<sup>10</sup> See, Appendix 8.

<sup>11</sup> On three separate occasions appointments were made but on arrival at the European Parliament Mrs. Palacio-Vallelersundi proved to be unavailable.

<sup>12</sup> In the Council working group, efforts were made to contact and interview Mr. Dobbelle (chair of the Council working group during the French Presidency) Mr. Kurt Kemper (chair of the Council working group during the German Presidency and Mr. Norup Nielssen (Representative for Denmark in the Council working group) but at a practical level it was not possible to interview these policy actors.

who represented more than one organisation during the passage of the directive, the approach adopted was to categorise interviewees on the basis of their main employment during the formulation process. The overwhelming dominance of the UK database industry in the European market-place and the nature of the copyright protection available to databases in the UK prior to the directive, led to a high proportion of interviewees from UK based interested parties. The final list of interviewees was compiled after extensive telephone interviews with representatives of interested parties (Appendix 1: telephone interviews 27-50). These interest groups can be subdivided into a number of broad categories as follows:

**1. Individual Information and Database companies:**

Dun & Bradstreet  
Reuters  
Reed-Elsevier  
Bertelsmann

**2. Trade Associations:**

**a) Horizontal associations: representing cross-sectoral business interests**

UNICE (Union of Industrial and Employers' Confederations of Europe)  
AMCHAM (EU Committee of the American Chamber of Commerce intellectual property subcommittee)

**b) Vertical Associations: representing specific sectoral interests**

**Information Industry and Information services:**

EIIA (European Information Industry Association)  
IIA (Information Industry Association - USA),  
EUSIDIC (European Association of Information Services)  
FEDMA (Federation of European Direct Marketing Associations)  
EAPA (European Alliance of Press Agencies)

**Publishers:**

FEP (Federation of European Publishers)  
EPC (European Publishers Council)  
PA (Publishers Association - UK)  
IFPI (International Federation of the Phonographic Industry)

**Authors:**

AIDAA (Association Internationale des Auteurs de l'Audiovisuel)  
IFJ (International Federation of Journalists)

**3. Users and Legal Experts:**

EBLIDA (European Bureau of Library, Information and Documentation Associations)  
IFLA/LA (International Federation of Library Associations/ Library Association - UK)  
CRID (Centre de Recherches Informatique et Droit)  
B/W Partners (professional EU lobbying consultants)  
Norall, Forrester & Sutton (Brussels Law Firm)

The semi-structured interviews were arranged by making an initial telephone contact with each prospective interviewee. Following agreement on an interview date, a copy of the question frame was faxed or emailed to them (**Appendix 2**). This question frame was designed and structured around four sections:

- **Section A: information on the interviewee and organisation:** This requested interviewees to prepare background information on themselves and their organisation/ institution *prior to* the interview.

The remaining three sections consisted of a total of 15 questions that formed the core of the question frame:

- **Section B: policy formulation for the database directive - the issues and processes:** This section consisted of 8 questions specifically on the formulation of the database directive. These questions were generated in the context of the documentary analysis in chapter 6.
- **Section C: European policy for copyright:** This section consisted of 3 questions concerned with European copyright policy-making more generally. These questions were mainly generated from the literature review on European copyright in chapter 3.
- **Section D: information policy-making and copyright in the digital age:** This section consisted of 4 questions concerned with the even broader issues of information policy and copyright in the digital age. These questions were mainly generated from the literature review on information policy in chapter 2.

At an operational level, all interviews were conducted at the offices of the interviewees during a 12-month period in 1997/98. During each interview, a brief introduction on the background to, and aims of the research was provided, as were details on how the interview was to be conducted. In this regard, in establishing the relevance of each question to the interviewee and his/her ability to answer, interviewees were instructed to say if they:

- Found any questions problematic to answer;
- Did not understand the purpose of any question;
- Did not know or had simply forgotten the answer to any question;
- Were unsure of the frames of reference they should use in answering i.e. professional or personal.

With all 15 questions, but particularly those concerned with the broader issues addressed in Sections C and D of the question frame, a number of probes were used following the interviewee's initial response. These probes provided flexibility in the interview process and enabled the collection of more detailed information on the concepts interviewees used to orient themselves in the wider policy environment. These probes aimed to draw out explanations and opinions in the interviewees own terms. The probes used can be summarised as follows:

- An expectant glance (to prompt a fuller response)
- Yes, followed by an expectant silence (to prompt a fuller response)
- Have you anything further to add ?
- Were there any other factors ?
- Could you explain more explicitly what you mean ?
- Why do you feel like that ?
- What is your personal opinion ?
- I am interested in all your reasons

It is important to note the extent to which the use of these probes was constrained in two respects. Firstly, practical limits were imposed by the time available for conducting the interview, which on average took 1 hour and 30 minutes. Secondly, where interviewees responded tersely or in a vague manner there were limits on the extent to which pressure could be exerted on them by the interviewer to provide a more comprehensive answer. This was because the research relied heavily on gaining the cooperation of these experienced policy actors,

who were as a result in a powerful position vis-a-vis the interviewer. The interviewees could clearly terminate the interview at any point if they objected to these probing techniques. Indeed, this problem of 'interviewing up' (i.e. interviewing powerful and experienced policy actors) proved very real during data collection.

During the interviews (all of which were conducted in English) interviewee responses were transcribed in detailed note form complemented by verbatim quotes. To aid in transcript accuracy interviewee responses were regularly summarised during the interview and these summaries then confirmed with the interviewee. Complete interview transcripts were prepared within 36 hours of each interview, again, to ensure transcript accuracy. These complete interview transcripts are presented in Volume 2 of this thesis.

### 5. 2. 5. Interview analysis

Analysis of the interviews is conducted in chapter 7 and is structured around the four sections of the interview question frame:

Section A of the question frame requested interviewees to prepare *prior to the interview*<sup>13</sup> background information on themselves and their organisation including copies of any policy documents/submissions made during the passage of the database directive and any other documents relevant to their involvement in on-going European copyright discussions. There were two main reasons for attempting to collect this information. Firstly to establish the extent of the interviewees involvement in the formulation of the database directive and to confirm their suitability as policy informants. Secondly, and specifically in relation to interviewees from the category of interested parties, to collect documents and policy submissions made by these groups during the formulation of the directive. As a result section A provides structural data on the interviewees and a summary of the formal lobbying positions of interested parties on the database directive compiled from the information collected.

As the interview transcripts presented in Volume 2 illustrate, sections B, C and D of the question frame generated a huge amount of qualitative data from the forty semi-structured interviews conducted. This data is analysed by comparing and summarising the responses generated from the interviewees. At a practical level this is achieved by examining each of the 15 questions in turn and referring to particular transcript extracts by their interview number, page number and line numbers. For example, where the analysis summarises a point made by interview 21 on page 5 of that transcript, lines 20-25 this is referenced as follows [21:5:20-25]. Given the volume of data and to enhance comprehension of it, the analysis also groups interviewee responses to each question in terms of the three categories of policy actor identified i.e. civil servants, policy makers, representatives of interested parties.

Section B of the question frame focuses on the formulation of the database directive and reveals how different policy actors participated in the formulation of the directive. This section adds considerable detail to the casestudy and at the broadest level corroborates the documentary

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<sup>13</sup> At a practical level this request for the preparation of information prior to the interview proved relatively unsuccessful as a data collection technique. In more than half of the interviews no information had been prepared and valuable interview time had to be spent collecting this structural background data. The main reason for this difficulty appears to relate back to the problem of 'interviewing up' (section 5.2.4.) i.e. because of the seniority of the policy actors involved most of them only directed their attention to the issues to be discussed when the interview began.



evidence. At base, the questions in this section focus on the: who ?, what ?, where ? and when ? of the formulation process.

Sections C and D of the question frame were designed to ask questions about the connections that the interviewees made between their actions during the database directive and broader policy context. More specifically these questions aimed to elaborate policy actors views on the wider development of European copyright policy and, given the concerns expressed about the extension of copyright into digital environments (Section 3.2.4.) about how actors viewed the links between copyright and other areas of information policy. By broadening the interview to ask for actors views on this wider context it became possible to reveal the perspectives they used to explain and justify their own actions. At base, the questions in sections C and D focus on the: how ? and why? of the formulation process.

At a theoretical level, it is evident that the perspectives of the interviewees on this wider policy environment are not the only legitimate ones. However, given that these perspectives influenced interviewees actions during the formulation of database directive they are deemed to have relevance for the ways in which analysis should evaluate the role of contextual factors in the policy process. This reinforces the importance of the methodological point made above 'reference to all-embracing theories about power or the role of the state must refer back to the views of the individuals who, in specific contexts, comprise the state or exercise the power'(Haimes:1993:168). Underpinning the analysis of the interview data therefore is an awareness of a range of approaches in the wider policy studies literature that argue power in policy-making operates not just at the surface level of overt decision-making but also at the deeper levels of agenda-control, participation exclusion and ideology (Lukes:1974, Ham & Hill:1984, Fischer & Forester:1993). In this context it is assumed that much of the knowledge generated from the interviews is value-laden (Rein:1976, 1983, Rein and Schon:1993) that requires interpretation on the part of the researcher. This generates the insight that any sophisticated approach to information policy studies must acknowledge that neither structural nor interpretative analysis is sufficient alone "The social world is no more reducible to member's meanings than it is reducible to purely objective structures" (Moerman:1974).

### **5. 3. Discussion and interpretation of research findings**

Discussion and interpretation of the research findings is conducted in chapter 8. This chapter highlights the key human, organisational and contextual factors that emerge from the data analysis (in chapters 6 and 7) as having influenced the formulation of the database directive. It examines the relationship between the documentary evidence and interview analysis and considers how, in particular, the interview analysis enhances understanding of the formulation process. The chapter also draws attention to the varying degrees of involvement, influence and power that different policy actors had during the directive's formulation.

Significantly, this chapter also considers a question raised at the beginning of the thesis concerning how the casestudy findings can be used in a generalisable manner to provide insights to enhance academic understanding of IP and improve analysis of complex (European) information policy environments.

## Chapter 6. Documentary analysis

“Unrestricted access to, as well as an unrestricted flow of, information and ideas are essential to the well-being of democratic government, the welfare of society, trade, industry, culture and education. Copyright is not just a law for the protection of creators and copyright owners. Copyright is designed to encourage the creation and production of new works and to serve the public interest by disseminating ideas and information” (Mason:1997: 637).

### 6. 1. Introduction

This chapter provides a documentary analysis of the formulation of the European database directive up to its adoption compiled from a range of documentary sources and complemented by 50 telephone interviews. Deploying the re-interpreted process model the chapter is divided into two parts reflecting the two phases of the formulation process. Part one: examines the emergence of database protection as a European policy issue prior to the publication of the 1988 copyright Green Paper and considers the origins of the dual copyright/*sui generis* approach. It reviews the results of the April 1990 public hearing and highlights the subsequent emergence of significant database case law in Europe and the USA. This section ends by examining the internal Commission discussions and the events leading up to the release of the formal database proposal. Part two: begins with an examination of the formal database proposal and proceeds by following the formal policy-making process detailed by the co-decision procedure. It examines the opinion of the Economic and Social Committee; the amended proposal text following its first reading in the European Parliament; the discussions in Council; the Council’s common position; and, the Parliament’s second reading up to the directive’s formal adoption. The documentary analysis enables: the identification of the origins of the directive within European copyright policy; highlights the directive’s innovative dual copyright/*sui generis* approach; provides a timetable for the main changes to the directive text; and, indicates the key policy actors involved in the formulation process from the three broad categories identified.

#### 6. 1. 1. Copyright protection of information and compilations

“The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress” (Laddie:1996:259).

In making copyright legislation governments have always been conscious of the need to balance the rights granted (section 3.2.4.). But at a more fundamental level copyright has always been restricted to original expressions of ideas<sup>1</sup>. This distinction between the underlying idea or piece of information and its protected original expression has become a central tenet of copyright law<sup>2</sup>. However while this distinction has prevented monopolies on ideas and facts it has often proved problematic to define. Especially in situations of functional utility where the expression of a work is almost completely synonymous with the

<sup>1</sup> ‘Copyright law protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours, shapes and so on. Copyright law protects the owner of rights in artistic works against those who ‘copy’, those who take and use the form in which the original work was expressed by the author’ (WIPO:1988:209).

<sup>2</sup> e.g. the idea/expression dichotomy is expressed in Section 102(b) of the 1976 US Copyright Act as follows: “ In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such a work”.

idea or information it embodies e.g. instruction manual. Traditionally several tests have been used by the courts to differentiate between an idea and its expression. The most important being the 'abstractions test' which is used where there is similarity between different authors expressions of the same idea<sup>3</sup>. At one end of the spectrum there are two completely original works, and at the other, one of the works may simply be a plagiarised copy of the other. Using these tests it has been possible for the courts to differentiate in a work between what is, and what is not covered by copyright e.g. whilst a functional work such as an instruction manual may receive copyright protection, the functional procedures it describes are not protected. This leaves open the opportunity for another author to produce another manual on the same subject using the same functional procedures but described in a different manner (OTA:1986).

In this context, it is important to consider the copyright protection that has been made available in different countries to compilations of both original and non-original works. Article 2(5) of the Berne Convention (Paris Act ) states "Collections of literary or artistic works such as encyclopaedias 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." The Convention promotes the fulfilment of both criteria (i.e. that they are collections of literary and artistic works, and that they are intellectual creations in their selection and arrangement).

However, traditionally few European Member States have ever imposed such high requirements before offering protection to compilations. While some Member States have offered protection to almost all information compilations (for example the UK and Ireland), the majority have required only that compilations exhibit intellectual creativity in their selection and arrangement. Treating compilations as intellectual creations eligible for copyright protection raises the issue of the extent to which the protection given ends up protecting individual contents that might not ordinarily be eligible for copyright protection (Porter:1993). This is especially the case with compilations of factual information where a compilation's commercial value relies primarily on its comprehensiveness and not on how its information has been selected or arranged. Indeed, in these types of comprehensive compilations standard alphabetic or numerical arrangements, which have no originality are common. This introduces another important copyright concept into the discussion of copyright protection of compilations i.e. the level of originality required in a work for it to be eligible for protection.

As highlighted in chapter 3 (section 3.3.1.) the originality issue proved controversial in the negotiation of the software directive because of the fact that different Member States apply different levels of originality in assessing whether a particular work is eligible for protection. The approach finally adopted in the software directive was that originality was to be based solely on whether or not a computer program was the 'author's own intellectual creation'. That no qualitative or aesthetic judgement was applied highlights that originality at its minimum requires only that the work has not been copied and that the work exhibits a minimal degree of creativity or judgement by its author. As a result, apart from facts per se almost any and every intellectual creation however banal is eligible for copyright protection when this criterion is used alone<sup>4</sup>.

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<sup>3</sup> "If copyright protects only the literal expression adopted by an author, it allows others to escape claims of infringement by changing the original in only trivial or insignificant ways. The courts have avoided this result by treating idea and expression as a continuum of similarity"(OTA:1986:63).

<sup>4</sup> International copyright agreements, (like most national copyright laws) lack explicit definitions of originality e.g. the Berne Convention. These agreements also provide no definition of what constitutes a work either in terms of quantity or quality. For example with a computer program it remains unclear

Thus, while at the level of copyright theory it would appear that comprehensive compilations of factual information should not be eligible for copyright protection, in a number of countries including several Member States, copyright protection has been available for non-original compilations of factual information e.g. TV program listings, telephone directories. The next sub-section briefly examines the nature and justification for this kind of protection in some European Member States.

### 6. 1. 2. Sweat of brow, catalogue rules and unfair competition

Of all the Member States, the UK and Ireland with their common law copyright traditions, provided the widest scope of protection for literary works, defined in Article 3(1) of the UK's 1988 Copyright Designs and Patents Act (CDPA)<sup>5</sup> as 'any work, other than a dramatic or musical work, which is written, spoken or sung' specifically including computer programs, tables and compilations. Even prior to the enactment of the CDPA UK case law had already developed what is referred to as the 'sweat of brow' defence for extending copyright protection to non-original compilations of factual information<sup>6</sup>. This defence allowed that copyright protection was available to any compilation whose production involved labour or judgement. Significantly although fair use exceptions were deemed to apply, as a consequence of judgments deploying the 'sweat of brow' defence it became, "virtually impossible in English law to distinguish between the information contained in a *pseudo-literary work*<sup>7</sup> and the form in which it is expressed" (Porter:1993:17). One of the few distinctions available being based on whether the information was 'publicly available' in which case others were free to produce their own compilations.

As the US case *Toskvig v. Bruce Publishing Co.*(1950)<sup>8</sup> illustrated the essence of the 'sweat of brow' defence was to prevent competitors from unfairly profiting from the work of the original compiler (in this case the author) of factual information. However, as was later illustrated in the European Court of Justice's (ECJ) judgement in the *Magill* case ( Section 3.2.4) the flipside to this type of unfair competition defence is the charge of abusing a dominant position. This being especially the case in circumstances where information cannot be independently compiled from any other source.

Before the emergence of the EU directive on databases, other Member States had also developed a variety of forms of protection for compilations (CEC:1992), although in some countries this protection of pseudo-literary works was not always provided for within the

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how many lines of code constitute a program. See, the discussion of the software directive (Czarnota & Hart:1991:43-45).

<sup>5</sup> The CDPA also provides a protection against unauthorised reproduction of typographical arrangements of published editions of works. This neighbouring right protection was applicable even to works that were themselves no longer in copyright. This protection was available for 25 years from publication of the edition

<sup>6</sup> In the 1959 case of the *Football League v. Littlewoods Pools Ltd.* concerning the use by a pools promoter of the football fixtures list, the Judge concluded that because the Football League through its employees had expended 'skill, labour, time, judgment and ingenuity' in preparing the fixture list, it was entitled to copyright protection (Porter:1993:16-17).

<sup>7</sup> Porter defines the term 'pseudo-literary works' to describe compilations or collections that do not fulfil the two Berne Convention criteria of Article 2(5) (Porter:1993:3).

<sup>8</sup> *Toskvig v. Bruce Publishing Co.*(1950) 7th Circuit - Court of Appeal judged that biographical information compiled in a book was protected from copying subject to other authors engaging in independent research.

'...the test is whether the one charged with infringement has made an independent production, or made a substantial and unfair use of the complainant's work' cited in (OTA: 1986:75).

context of a copyright/droit d'auteur regime. A number of examples illustrate the variety of protection available prior to the directive.

- In Denmark, and other Scandinavian countries, while collections of literary and artistic works were eligible for copyright protection, the Danish Copyright Act also allowed for protection of 'catalogues, tables and similar works which compile information' (CEC:1988:213). This catalogue right prevented reproduction of these works for a period of 10 years from their publication.
- In the Netherlands a special regime called 'geschriftenbescherming' (protection of writings) in the Dutch Copyright Act provided an extensive list of protected works including 'all other writings' which (following a number of cases concerning the protection of radio and television program listings), were deemed to include published pseudo-literary works (Hugenholtz:1987:7). This copyright protection however specifically did not provide a monopoly on the information held in the compilation although it remained unclear if this special regime for 'writings' extended to pseudo-literary works stored in computers. Interestingly because of the lack of originality in many of the compilations protected under this regime, compilers often resorted to including erroneous information within these works to catch out any would be infringers by providing proof of copying. (Hugenholtz:1997:493).
- In France prior to the directive the protection offered to published collections under the French Copyright Act was based on a surprising 'copyright type' approach which allowed for the right to protection to be held by a company and not as in other parts of the Act exclusively by a named author. Further evidence of this copyright type approach comes from the *Le Monde v. Microfor* case (1988) concerning publication of a French newspaper index. In this case the Court clearly adopted an approach that responded directly to the needs of the developing information industry. "The Court's stance was clearly based on the modernisation of doctrinal theory to accommodate the emerging industrial potential of the new information industries....the solution adopted, very much in line with anglo-saxon legal practice, was to allow 'fair use' of the documents summarised" (Porter:1993:11).
- Finally in Germany, apart from the disputed protection offered by *Kleine Munze* (small change) to certain works of very limited creativity e.g. simple maps (Von Lewinski:1997), compilations were taken to be eligible for copyright protection only where they exhibited sufficient intellectual creativity in their selection and arrangement. "The standard of a clearly above-average creative process is appropriate to distinguish protected works from results that are not eligible for protection in cases where the average effort is merely everyday, mechanical or routine"(Katzenberger:1990:326). Information compilers of pseudo-literary works were not however, left completely unprotected as many Member States including Germany also deployed rules on unfair competition which deemed as misappropriation whole scale copying of any compiled work regardless of its originality. Information compilers also tended to protect themselves through detailed contracts.

Given the differences that exist between copyright and authors rights (droit d'auteur) systems the range of legal protections available to compilations of literary and pseudo-literary works across the Member States is perhaps not surprising. However by the mid 1980's, despite growing legal debate over the extent to which the copyright protection available to literary and pseudo-literary compilations was applicable to, and afforded protection of electronic databases (McDonald: 1983, Lewis:1987, Denis, Pouillet & Thunis:1988, Thorne:1991) no Member State had specifically addressed the protection of electronic databases.

As the economic significance of these markets in information services increased, the European Community through the Commission began to initiate policies and programs to encourage their development (CEC:1986). The European Commission also began to consider ways of removing obstacles to the development of a European information services market (CEC:1988:207). Amongst these obstacles were the variety of legal regimes potentially available for the protection of electronic databases in the Member States. "In view of the uncertainty and possible divergence of interpretation which surround the protection of databases at present, there is clearly a need to establish at least a basic harmonised framework. If this is not done quickly, there is a risk that Member States may legislate expressly in widely differing ways, or that Community databases fall victim to misappropriation because of an absence of enforceable protection. Investment in the sector cannot be sustained as the database industry comes to maturity unless Community databases are at least as well protected as those of its major trading partners"(CEC:1992b:16).

In the context of the casestudy this generates the following question<sup>9</sup>

***When was your first contact with European discussions on Databases ? What factors led to Databases becoming a focus for European public policy discussions ?***

## **6. 2. Part One: Electronic databases and the copyright green paper**

By the 1980's the growing economic importance of the database industry<sup>10</sup> both in its own right and also as a source of competitive advantage for other business sectors had become widely recognised in the industrialised world. In Europe, despite a fragmented information market, database operators had managed to increase their share of the global market in on-line information services. This acknowledged, the European Commission remained concerned over the fragmented nature of this information market. A fragmentation that was due in part to a divergence in Member States policies aimed at promoting this sector as well as linguistic, technical and legal barriers between them. In the face of strong competition from predominantly US companies the main European database operators had tended to focus on national markets or, as in the case of a number of UK operators, on transatlantic agreements with US based companies. The Commission saw these factors as potential inhibitors to investment in the development of databases required to meet the growing demand for new information services. Demand that could easily be met by non-European operators to the detriment of the European information services market.

In this context, whilst database operators across Europe acquired protection for their products through a variety of legal regimes including contracts, confidentiality and unfair competition rules the Commission began to consider copyright as a possible way to harmonise the legal protection available to electronic databases as part of its efforts to promote a European information services market. This copyright focus, developed at least in part out of on-going discussions on the legal protection of computer programs (Section: 3. 3. 1.) and early recognition at an international level of the need to examine the applicability of copyright

<sup>9</sup> See, appendix 2 - interview question frame: section B - question 1.

<sup>10</sup> In 1992 25% of the world's on-line databases were of European origin and the European market for on-line information services was valued at \$2.4 billion. The CD-ROM market was in comparison small with a world market for drives and disks at \$420 million. See, CEC:1992b: explanatory memorandum:2).

principles to the use of computers in accessing literary works<sup>11</sup>. By 1986 the Commission (DGXIII & DGIII) had begun to consider copyright questions related to electronic databases (CEC:1986b) whilst at the international level joint discussions between WIPO and UNESCO experts had also begun to consider similar issues<sup>12</sup> and Japan had amended its Copyright Act to specifically include electronic databases<sup>13</sup>.

This Commission investigation (CEC:1986b) confirmed that legal opinion in all Member States assumed placing copyright works into a 'computerised information system' (database) constituted a reproduction and presupposed that such acts had the consent of the author/(rightholder). However, legal opinion on the extent to which existing Member State copyright laws on compilations extended protection to electronic databases remained divided. A range of different opinions were expressed on the copyright protection available to electronic databases as a whole and divergent opinions were expressed over the extent to which the resulting protection covered the contents of those databases. It was this problem that led the Commission to pursue its dual approach (copyright/*sui generis*) in its database proposal.

This lack of clarity over the protection available to electronic databases was partly due to the complexity of the issues at stake. Indeed at least initially, the Commission itself appeared confused over the nature of the protection available and whether it adhered to the structure (selection and arrangement as discussed above) or contents of the database "The protection accorded to databases relates under existing national legislation and international conventions to the characteristics of the works stored therein, rather than to the database itself as a collection of information" (CEC:1988:211)(Triaille:1991).

Partly as a consequence of these sorts of confusions chapter 6 of the Commission's copyright green paper (CEC:1988) on database protection was inconclusive on the copyright protection available to electronic databases and on any policy actions required at a European level. After its release a lack of industry interest and Commission eagerness to move forward with the software directive proposal, combined to push databases lower down the list of priorities for legislative action. Indeed, having originally requested interested parties to submit their comments on chapter 6 by January 1, 1989 it was not until April 1990 that the Commission held its public hearing on databases.

Prior to this public hearing the Commission sent out a questionnaire (**Appendix 3**) to interested parties containing 15 questions on the legal protection of databases (Gibbons:1990). From a series of telephone interviews it is evident that many of these interested parties became involved in the database discussions as a direct roll-over from their lobbying activities on the software directive and that few of them remained actively involved in the subsequent policy formulation process surrounding the database directive. Overall the April 1990 public hearing produced a high degree of basic agreement in the responses from the interested parties who attended. As a consequence within a month of the hearing the

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<sup>11</sup> See, Recommendations of the 2nd Committee of government experts on copyright problems arising from the use of computers for access to or the creation of works UNESCO/WIPO/CEGO/11/7 August 13, 1982.

<sup>12</sup> See, Comité d'experts gouvernementaux sur les oeuvres imprimées - observations particulières concernant les bases de données pp.69-72 (paragraphes:231-346) UNESCO/OMPI/CGE/PW/3-11 Septembre 14, 1987.

<sup>13</sup> See, Japanese copyright amendment Act May 23, 1986 - 'databases which by reason of the selection or systematic construction of information contained therein, constitute intellectual creations shall be protected and treated as independent works' Article 12 bis, paragraph 1.

Commission was ready to publish its conclusions<sup>14</sup> (**Appendix 4**) and move forward with its preparations for a directive harmonising copyright protection for databases.

Perhaps it is not surprising given the high proportion of rightholders and copyright organisations represented at the public hearing (**Appendix 5**) that whilst there was strong support for a copyright solution to the protection of databases few supported any form of<sup>15</sup> sui generis approach. As the Commission's follow-up to the Green Paper (COM(90)584) stated "The hearing confirmed that there was overwhelming support from rightholders for protection of databases by means of copyright. No support was expressed for a 'sui generis' protection." (CEC:1991:18). Interestingly in this follow-up document the Commission confirmed its intention to produce a copyright directive proposal for databases but at the time made no reference at all to any form of additional sui generis protection. In this context, how and why it is that the sui generis approach<sup>16</sup> survived to become a key feature of the adopted database directive requires further investigation. As part of this, it is first necessary to consider why the majority of interested parties were initially not in favour of the introduction of a sui generis form of protection.

One explanation for the strict copyright stance of the interested parties is that they misunderstood the Commission's focus on the implications of specifically electronic compilations of data; "As a result, the first comments on behalf of the interested circles have, in some cases, simply missed the question (which only relates to the mode of compilation), wrongly confusing it with the issue of the protection of existing copyright works which are incorporated into a database" (Metaxas:1990 :227)<sup>17</sup>. An alternative perspective is that the sui generis regime was unpopular because it would not have been internationally recognised leading to problems of database protection with non-Member States. As the US information industry argued in its submission to the 1990 hearing; "To forsake copyright protection for sui generis protection, in whole or in part, would seriously jeopardise the relationships of EC Member States with other countries in the international copyright community and impair the interests of EC database authors" (Metalitz & Bremner:1990:5). Perhaps however, the major reason for the lack of support for the sui generis approach was that most of the interested parties viewed existing copyright legislation on compilations as applicable to electronic databases which combined with other legal protections e.g. contracts, was deemed to be adequate. Therefore they were resistant to a new approach that would alter the balance of protection available and potentially cause uncertainty. This was particularly the case in the UK, the largest European database market<sup>18</sup> where the sweat of brow defence extended copyright protection to pseudo-literary works and was considered to be applicable to electronic databases.

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<sup>14</sup> See, Commission press release IPO(90)419 'La Commission publie les conclusion de l'audition concernant l'harmonisation communautaire de la protection des bases de donnees par le droit d'auteur'. May 29, 1990.

<sup>15</sup> By this time some copyright groups had begun to realise the limitations of copyright for protecting all databases and had start to examine alternatives; "pour assurer egalement une protection aux banques qui ne remplissent pas les conditions generales du droit d'auteur, d'autres voies s'offrent, notamment la reconnaissance d'un droit voisin ou les regles concernant la concurrence deloyable" Blais, Y. (ed)(1990) l'informatique et le droit d'auteur - Banques de donnees, Actes du 57, Congres de l'ALAI.

<sup>16</sup> In the Commission's original proposal this was referred to as an 'unfair extraction' right

<sup>17</sup> Mr. Metaxas attended the April 1990 hearing as a representative of the UK's General Council of the Bar (GCB). In telephone conversation he recalled that at the public hearing the DGIII Commission representatives Mr. Verstrygne & Mrs Czarnota were strongly in favour of a dual copyright/sui generis approach for the protection of electronic databases.

<sup>18</sup> The dominance of the UK in the European database industry was the result of a range of historical, political and economic factors, undoubtedly however the English language and links with the lucrative US market were, and continue to be very significant factors.



In the context of the casestudy this generates the following question<sup>19</sup>

***What was your involvement in the Database discussions both formally and informally ? Which factors would you identify as the most important in leading to the Directive's adoption ?***

### **6. 2. 1. Origins of the copyright/sui generis dual approach**

“One can only hope that, eventually, the inevitability of a sui generis solution for databases will gradually be appreciated after all and the tide will be reversed. We may then come to terms with the unpalatable but inevitable truth: copyright provisions cannot be stretched infinitely in order to reach the parts other intellectual property rights cannot reach” (Metaxas:1990:234).

Despite a tide of opinion from interested parties flowing against any form of sui generis protection, a number of factors convinced the Commission that a copyright solution on its own would be inadequate for the harmonisation of copyright protection for electronic databases at a European level. The goal of ensuring adequate European wide protection for electronic databases was primarily motivated by growing political recognition of the economic importance of the information and communications sectors and by a desire to counter the continuing dominance of US companies in the provision of electronic information services in European markets.

In its efforts to encourage the development of a European information market (CEC:1986) the Commission set up an information market observatory (IMO) and initiated programs<sup>20</sup> and studies on a range of issues including commercialisation of public sector data (CEC:1989, CEC:1996c), information security (CEC:1996d), data protection (CEC:1990, Council:1995) and intellectual property<sup>21</sup>. However, a range of factors including administrative divisions within and between the European institutions and the influence of lobbying inhibited the coherence of these information policy initiatives (Collier:1991, Mahon:1997). “The causes of policy fragmentation are the lack of a theory of information, its multi-dimensional nature, bureaucratic empire building, and multiple policy paradigms. This would merely be of academic interest if the sums of money misdirected at discredited programmes and companies were not so large” (Sillince:1994:234).

Even in a context where it was assumed by most interested parties that copyright protection was applicable to protect electronic databases, the Commission remained aware that the significant differences in the protection offered under different Member States copyright laws would result in uneven protection across Europe. “...the legislation of the Member States probably serves to protect collections or compilations of works or other material by copyright either as works under Article 2(1) or as collections under Article 2(5) of the Berne

<sup>19</sup> See, appendix 2 - interview question frame: section B - question 2.

<sup>20</sup> The Commission (DGXIII/B) initiated the Information Market Policy Actions (IMPACT) program in 1988 to promote the use of new ICTs and remove barriers to the information market (Council Decision 88/524 - OJ. No.L288 21/10/88 pp.39). This program gave rise to IMPACT 2 for the period 1991-1995 (OJ. No.L377 31/12/92 pp.41) which in turn contributed to the development of the current INFO2000 program concerned with stimulating European multimedia products, (<http://www2.echo.lu/info2000/infhome.html>).

<sup>21</sup> Following DGXIII/B's contribution to the copyright green paper (CEC:1988) it initiated the PROPINTELL study completed by Prof. Michel Vivant in April 1990 on national laws in the Member States concerning information, new technologies and intellectual property including databases. DGIV also commissioned a study on information and intellectual property in the early 1990's (CEC:1992).

Convention but it is unclear whether in all cases such protection extends to 'databases' and to electronic databases in particular....it is certainly the case that different results will be obtained in practice by the application of the legislation of the Member States to a given database" (CEC:1992b:15).

Unsurprisingly these differences in Member States copyright laws (for example with regard to the originality criterion used, the term of protection and permissible exceptions) were most pronounced between common law (copyright) and civil law (*droit d'auteur*) countries. In this context given the dominance of *droit d'auteur* countries in Europe the Commission was aware that it could not harmonise the protection available to databases across Europe by proposing the common law 'sweat of brow' approach as this would not meet the originality criterion of *droit d'auteur* countries<sup>22</sup>. As a result the Commission was eager to find an approach which would better accommodate the interests of both copyright and *droit d'auteur* traditions. The need to find such an accommodation was especially clear in the minds of the Commission officials<sup>23</sup> involved in drafting the database proposal, as they were the same individuals who had experienced first-hand the difficulties of negotiating the originality criteria for the software Directive.

The significant qualitative and quantitative differences between electronic databases and analogue compilations also had implications for the Commission's efforts to harmonise the protection available. Indeed, despite the variety of types of databases<sup>24</sup> and range of distribution formats<sup>25</sup> two main characteristics differentiate them from analogue compilations:

- Electronic databases are capable of storing all types of data including text, graphics and audio-visual together in binary code. These capabilities overcome the previous physical limitations on the volume of data that can be collected, collated and retrieved economically. They also facilitated the development of new types of information products and services (Lea:1993:68).
- Electronic databases allow for the easy manipulation of stored data, such that qualitative and quantitative changes can be achieved with just a few keystrokes. Where in an analogue compilation the author's creativity in its selection and arrangement tends to be obvious, in the digital environment 'the order in which works are arranged in a database is to some extent dictated by the logic of the software which underlies the data and which allows its retrieval by the user. Thus, some similarity may occur in the arrangement of materials in databases which are created using the same database management software'(CEC:1992b:20). As a consequence in electronic databases increasingly the criteria for selection rests with the user deploying the search software rather than with the author of the database.

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<sup>22</sup> See, Judgement of the French Court - Cour de Cassation May 2, 1989 in *L'Expansion industrielle v. Coprosa*. Here the court ruled that information, (in this case the organigram of a company) could not be protected by copyright - *Computer and Telecoms Law Review* 1990 No.2 pp.38-44.

<sup>23</sup> In particular, Mr. Jean-Francois Verstryngue (head of division DGIII/F/4) and Bridget Czarnota (member of DGIII/F/4 and the individual draughtsman of both the Software and Database directive proposals).

<sup>24</sup> Electronic database services include: dynamic financial information, credit reference and consumer preference information, archival information, bibliographic information, full-text information and electronic directories.

<sup>25</sup> These databases can be delivered through a variety of channels. the main distinction being between whether delivery is on-line e.g. via Internet access or off-line e.g. via CD-ROM.

Clearly harmonising the copyright protection available to electronic databases at a European level posed a number of complex problems for the European Commission. To summarise these problems in more detail it is helpful to distinguish between:

- A database's structure (how it is selected and arranged) and a database's contents
- The level of originality required for either the structure or contents to be eligible for copyright protection.

**Table 6.1. Eligibility of databases for copyright protection**

| Originality Criterion |                     | Availability of Copyright Protection |                         |
|-----------------------|---------------------|--------------------------------------|-------------------------|
| Database Structure    | Database Contents   | Protection for Structure             | Protection for Contents |
| <i>original</i>       | <i>original</i>     | <i>Yes</i>                           | <i>Yes</i>              |
| <i>non-original</i>   | <i>original</i>     | <i>No Protection</i>                 | <i>Yes</i>              |
| <i>original</i>       | <i>non-original</i> | <i>Yes</i>                           | <i>No Protection</i>    |
| <i>non-original</i>   | <i>non-original</i> | <i>No protection</i>                 | <i>No protection</i>    |

Table 3.1. summarises these distinctions and assumes databases to be eligible for copyright protection under the same terms and conditions as apply to literary works, and compilations of literary works under the Berne Convention. From the table it can be seen that:

- Where both the structure (selection and arrangement) and contents of a database are original then following Article 2(5) of the Berne Convention copyright protection would be available for the database as a compilation and for the individual contents as literary works.
- Where the structure is non-original but the contents are original then under the Berne Convention the database would be ineligible for copyright protection per se while the individual contents would be protected by copyright as literary works.
- Where the structure is original but the contents are non-original then under the Berne Convention the database would be ineligible for protection. However as the preceding discussion has highlighted in most Member States the database would be eligible for some degree of copyright protection as a compilation, while the individual contents would not be protected by copyright.
- Where the structure and the contents are non-original then under the Berne Convention and following the civil law tradition of most Member States neither contents nor structure would be eligible copyright protection. However, as was previously mentioned, copyright practice most notably in the UK, did protect these pseudo-literary works by stretching the originality criterion. "provided that the resulting collection is not trivial, it does not matter that the materials themselves are not protected (or protectable) by copyright or that the criteria for selecting the materials themselves or their manner of presentation is not original. The required originality is made out solely by the fact that the contents of a particular compilation have been independently collected and not copied from another" (Pattison:1992:113). Although this sweat of brow defence did not overtly provide copyright protection to any non-original contents within the compilation, it did prevent others from unfairly benefiting commercially from the work of the compiler<sup>26</sup>.

From its experience with the software directive the Commission was aware that ultimately the level of originality that would be acceptable to the majority of Member States was that a

<sup>26</sup> e.g. UK case 'Waterlow Directories Ltd. v. Reed Information Services Ltd.' (1990) Here the judge ruled in favour of Waterlow concluding that directory entries cannot be copied to compile a rival directory for commercial exploitation.

work constituted the 'author's own intellectual creation'. However applying this criterion meant that many electronic databases that were protected in the UK under the sweat of brow defence would become ineligible for copyright protection. A move the Commission recognised would prove very unpopular with the UK information industry which was by far the largest in Europe. It was in this context, that the Commission, eager to harmonise and clarify the applicability of copyright to electronic databases, decided to introduce a dual system of protection combining copyright with a new *sui generis* right to protect those electronic databases (that were or would become) ineligible for copyright protection.

### 6. 2. 2. The emergence of database case law: van daele and feist

By the early 1990's while it had become clear that copyright did offer some protection to electronic databases, a lack of consensus remained over the extent of the protection available. However, as case law developed in the area of database protection the Commission was provided with welcome evidence of the fact that copyright alone would be insufficient to provide the necessary level of protection required for electronic databases at the European level. This developing case law also persuaded many interested parties to reconsider their initial opposition to a *sui generis* approach. Two judgements that were particularly significant in this regard were the Dutch case, *Van Daele v. Romme*<sup>27</sup> and the US case, *Feist Publications v. Rural Telephone Service*<sup>28</sup>.

In the context of the casestudy this generates the following question<sup>29</sup>

*Did your opinions change during your involvement with these discussions ?*

In the Dutch case, Van Daele the publisher of one of the leading Dutch language dictionary's the 'Grote Van Daele' brought a case of copyright infringement against Mr. Romme. This charge of infringement arose because Mr. Romme, a crossword enthusiast, had with the help of some colleagues, copied out the 230,000 keyword entries in the Van Daele dictionary into his own database and combined it with a computer program he had developed to search it. This database was then offered to those eager to solve difficult crosswords. Interestingly, although 'the words were not stored alphabetically, since the program required a different order', Van Daele still brought proceedings of infringement against Mr. Romme (Spoor: 1992:10). In both the Utrecht District Court and the Amsterdam Court of Appeals an injunction was granted against Mr. Romme publishing his database on the grounds that Van Daele's selection of keywords was sufficiently original for the compilation to be copyright protected.

On January 4, 1991 the Hoge Raad, (Dutch Supreme Court) over-turned this decision on the grounds that a compilation of factual data does not meet the originality criterion and so cannot be protected by copyright; "Such a collection is no more than a quantity of data that is not as such entitled to copyright. This would only be different if the collection should be the result of a selection expressing *a personal view of its author*" (Spoor:1992:11). Given that the dictionary's use relied on its alphabetical arrangement it was unclear the basis on which the original injunction had been granted, so the Hoge Raad although overturning the original judgement allowed Van Daele to appeal against its decision by referring the case to the Court of Appeals in the Hague.

<sup>27</sup> Dutch Supreme Court - Hoge Raad (HR) January 4, 1991.

<sup>28</sup> US Supreme Court (1991) 111 S.Ct. March 27, 1282.

<sup>29</sup> See, appendix 2 - interview question frame: section B - question 3.

The Appeals Court finally gave its verdict on April 1, 1993 confirming the original Amsterdam Court of Appeals decision via a detailed argument on selection. This argument treated the selection of keywords for the dictionary as a series of choices predicated on assumptions made by the author about the nature of the current Dutch language and its usage. The Court judged that these choices did reflect the *personal view of its author* required by the Supreme Court for the compilation of keywords to be eligible for copyright protection.

While the ultimate outcome was copyright protection for the compilation of keywords in the Van Daele dictionary, the case was significant because it signalled, at least in Dutch law, that there were very real limits on the protection available to compilations of factual data. This was the situation not just where the compilations were comprehensive in nature but also where; “authors took great pains to collect only that data which they considered sufficiently relevant and left out that which they considered obsolete or unimportant. Such exertions do not necessarily amount to *personal creation*” (Spoor:1992:11). On hindsight it is interesting to ponder why Van Daele did not seek protection for its keyword compilation under the Dutch *geschrevenbeschermt* (protection of writings) regime which it must be assumed would have provided a more immediate and less time consuming solution to the actions of Mr. Romme. Shortly after the Dutch Supreme Court had given its decision on Van Daele, a more significant judgement was reached on March 27, 1991 by the US Supreme Court in the case of *Feist Publications v. Rural Telephone Service* (Gorman:1992, Lewis:1992, Samuelson:1992).

In the Feist case the US Supreme Court rejected the sweat of brow defence and denied Rural Telephone copyright protection for its alphabetically listed regional telephone directory. The background to the case is as follows; Rural Telephone (Rural) produced its own regional telephone directory in one part of Kansas. Feist Publications (Feist) also produced a telephone directory but of the whole of the Kansas area which it compiled from the various telephone listings of the individual telephone companies under license, including from Rural. As the competition to sell advertising space in these directories increased, Rural opted to hamper Feist’s production of its Kansas area directory by refusing to license its own telephone listings for inclusion in Feist directory. As a result Feist was left with three choices: to leave out Rural’s listings, create its own telephone list for the area or to copy Rural’s listings without a license. In the event Feist copied Rural’s listings and was sued for copyright infringement. Feist’s copying was proven on the basis of ‘erroneous listings’ that Rural had deliberately placed in its directory and which then appeared in Feist’s publication. In response Feist sued Rural under US anti-trust legislation on the grounds of ‘intent to monopolise’ (Schwarz:1991:179). While the District Court and 10th Circuit Court of Appeals both judged in favour of Rural, a unanimous Supreme Court reversed the judgement.

At the heart of the Supreme Court’s ruling was the US constitutional mandate which aims to promote ‘progress in science and the useful arts’ by granting copyright to works on the basis of their originality. On this basis simply expending effort in making a compilation of materials was not sufficient for Rural’s directory to be deemed original and so eligible for copyright protection. As a result Feist or anyone else was able to copy Rural’s directory without fear of infringing copyright. To qualify for copyright protection the Supreme Court ruled ‘a work must be original to the author. Original meaning only that the work was independently created by the author (as opposed to copied from other works) and possesses at least some *minimal degree of creativity*’ (Gorman:1992:733).

Thus, whilst facts are not copyrightable, a compilation of facts could be if the compiler in his selection or arrangement of those facts showed a minimal degree of creativity. The extent to which this originality criterion required creativity in either the selection, the arrangement, or the selection and arrangement of compilations of facts, and what this implied about the

protection given, provided considerable scope for legal discussion of the case (See, Lewis:1992:183-195). Following Schwarz, for selection to qualify as original 'the criterion for selection as well as the *process* of selection must be creative', and 'while individual pieces of data are not protected, presumably the taking of substantial parts of a compilation of originally selected data will constitute infringement'. However for arrangements; 'even if an arrangement of facts is creative...the copying of the facts themselves is definitely permitted under the Feist case (as long as they are not creatively selected)' (Schwarz:1992:182). In the context of electronic databases where re-arrangement is so easy this implied that there was effectively no copyright protection for creatively arranged compilations of fact, because following a few keystrokes a database containing the same contents but ordered differently could be produced by a competitor without fear of infringing copyright. The Supreme Court was however firm in its ruling and in confirming the constitutional basis for it stated:

"It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation....this is not 'some unforeseen by-product of a statutory scheme' ... It is rather, 'the essence of copyright' ...and a constitutional requirement....the primary objective of copyright is not to reward authors, but to promote science and the useful arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work...This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art" (Gorman:1992:762, Lewis:1992:207, Branscomb:1994:38-39).

Whilst this case law was directly referred to by the Commission in the explanatory memorandum accompanying its proposal (CEC:1992b) it is difficult to gauge its direct influence on the database industry at large. In the UK, at least, database producers remained confident of the copyright protection available to them from UK case law<sup>30</sup>. This stated, the Feist decision in particular, did have an indirect influence on European developments in at least two ways:

- Firstly, at an international level the profile of databases was raised in WIPO's on-going discussions about a protocol to the Berne Convention<sup>31</sup>. This contributed to the decision taken to include the protection of databases in the proposed protocol and to study methods for protecting databases ineligible for copyright protection. Also at the international level by the early 1990's the TRIPS discussions (which were nearing completion as part of the GATT), had included provisions on databases under Article 10(2) harmonising the protection available to electronic and non-electronic compilations.
- Secondly, within Europe this case law provided substantive evidence that copyright protection could not provide a comprehensive solution to the protection of databases. As the explanatory memorandum in the database proposal pointed out in discussing the situation in the US post-Feist " it may well be that electronic databases as well as collections in paper form, which do not meet the test of originality, will be excluded from copyright protection regardless of the skill, labour, effort or financial investment expended in their creation"(CEC:1992b:17). This evidence proved more persuasive to representatives from droit d'auteur countries (eager to maintain a higher originality criteria), than to those from copyright countries. As a result, the Commission had greater

<sup>30</sup> See, *Waterlow Publishers Ltd v. Rose* (1989) cited in (Thorne:1991). Thorne argues that although these judgements show a high level of protection potentially available to protect databases in the UK 'recent developments outside the United Kingdom show a preferable pattern for the protection of compilations', including the Feist judgement.

<sup>31</sup> The WIPO committee of experts met to discuss existing copyright protection for software, databases, and other computer related works including potential solutions on November 4-8, 1991, February 10-18, 1992 and November 30-December 4, 1992.

confidence in pushing forward its proposal advocating a dual (copyright/sui generis) approach.

### 6. 2. 3. Protecting databases: pre-proposal discussions

Although the public hearing on databases took place in April 1990 it was not until after the release of the follow-up Green Paper (CEC:1991) and the adoption of the Software directive in May 1991 (91/250./EEC) that Commission staff in DGIII/F began to re-focus on the preparation of a proposal for the legal protection of databases. During this same period however, DGXIII/B and the LAB had continued to study the issues surrounding databases in the context of its initiatives for the development of a European information market. Indeed, the PROPINTELL study commissioned by DGXIII/B on electronic information and intellectual property rights had already reported in 1990 on the limits of copyright for protecting electronic databases and the need for additional, possibly sui generis protection.

By May 1991 with DGIII's follow-up Green Paper(CEC:1991) giving no indication that such additional protection was going to be proposed, DGXIII/B and the Legal Advisory Board (LAB) held a meeting in Luxembourg<sup>32</sup> to discuss database protection in the Member States. Although the meeting was somewhat inconclusive as regards what action to take, it did highlight that additional measures would be required to protect databases and considered a number of alternatives including by contract, neighbouring rights, unfair competition and sui generis. As a result of this meeting<sup>33</sup> by July 1991 DGXIII/B had prepared specifications for a further 10-month study on databases to start in November 1991 to examine all aspects of their legal protection. This appeared to be part of DGXIII/B's preparations to become the Commission directorate responsible for developing a directive proposal on the issue, which at this time was still a possibility given DGXIII's involvement in the information market.

This study however was never commissioned because in the middle of August, 1991 the deputy Director General of DGIII Mr. Mogg announced the release for intra-service consultation within the Commission of a draft proposal for a directive on the legal protection of databases that had been prepared by DGIII/F/4. That DGXIII was about to initiate a study on databases at the same time that DGIII was preparing a draft proposal for a directive on databases suggests a lack of communication between the two Commission directorates. How and why this breakdown of communications should have occurred is particularly intriguing given that the particular officials concerned with these issues from both DGIII and DGXIII were present at the Luxembourg meeting in the May. The view that this indicates strained relations between the two directorates at the time will be taken up in the context of the analysis of the semi-structured interview data in chapter 7.

This draft proposal was sent out by DGIII to a number of the other Commission directorates<sup>34</sup> requesting comments to be returned by September 20. From the investigative

<sup>32</sup> See, Legal Advisory Board (1991) Information and Discussion Paper 91/2. Covering the LAB meeting May 23-24, 1991 on the findings of the study and the protection of databases in the Member States.

<sup>33</sup> It is important to note in the light of subsequent events that Mrs Czarnota the official from DGIII/F/4 who became directly responsible for the drafting the database proposal attended this meeting.

<sup>34</sup> The draft proposal was formally sent out to the following Director Generals: Mr.Krenzler (DGI), Mr.Ehlermann (DGIV), Ms.Flesch (DGX), Mr.Carpentier(DGXIII), Mr.Von Moltke (DGXXIII) and also to Mr.Dewost of the Commission Legal Service. Upon receiving any draft text normal practice is for a lower ranking official to be delegated direct responsibility for the file. If a response is prepared by this official it is then checked by higher ranking official before its release as part of the intra-service consultation.

telephone interviews the involvement of Commission services in this initial intra-service discussion can be summarised as follows<sup>35</sup>:

- **DGXIII (Telecommunications, Information Technologies and Industries)** - Almost immediately after the proposal was released DGXIII requested to be co-competent with DGIII for the proposed directive. DGIII resisted this request and by the time DGXIII submitted its comments on the proposal in September it had been agreed between the two directorates that DGXIII would become an associated service for the directive. This associated service status while not as important as being co-competent, ensured DGXIII's involvement at every stage of the negotiation process up to the proposals adoption as a directive. DGXIII's main concerns were related to a lack of clarity in the definitions of database, author, user, originality and substantial/insubstantial part; the operation of exceptions for users, and the compulsory license provision. During this period the DGXIII/B/1 officials given responsibility for liaising with DGIII were Mr. Ceuninck and Mr. Papapavlou.
- **DGIV (Competition)** - DGIV whilst not very active during the early intra-services discussion remained interested in the directive as it developed. This was especially the case following the ECJ's judgement in the Magill case (chpt 5 - section 2.4.). The official responsible was Mr. Guttuso<sup>36</sup> from DGIV/A/4 the division responsible for the coordination of competition decisions and industrial and intellectual property rights. For DGIV an initial concern over the dangers of companies abusing dominant market positions was allayed by the compulsory license provisions in the directive proposal.
- **DG1(External Economic Relations)** - DG1 which contributed in only a minor way to the development of the directive proposal, was broadly in favour of the draft text. Its main concerns were with respect to the implications on the Berne Convention and TRIPS (GATT) of the unfair extraction right as it was not part of the international regime of copyright protection and reciprocity of protection for database producers from third countries. The official responsible in DG1/D/3 was Mr.Aznare<sup>37</sup>.
- **DGX (Audio-visual, Information, Communication and Culture)** - The initial reaction of DGX to the draft proposal was, that despite the over-complicated style of the text, the principle of protection for databases was worthwhile. Mrs. Nimenski<sup>38</sup> the official responsible for handling the file confirmed that DGX did not however, contribute significantly to the development of the directive proposal.
- **DGXXIII (Enterprise Policy, Distributive Trades, Tourism and Cooperatives)** - DGXXIII responded favourably to the proposal in early November but sought some

<sup>35</sup> Apart from DGXIII, DGIV, DG1, DGX & DGXXIII - this text was distributed to other Commission services including DGXII and the Consumer policy service. However, following investigation no record of any formal or informal involvement of these other services in the intra-service discussion was found.

<sup>36</sup> DGIV had commissioned its own study on copyright and information, See, Commission of the European Communities(1992) Copyright and Information Limits to the Protection of Literary and Pseudo-literary Works in the Member States of the European Communities, Office of Official Publications, Luxembourg. DGIV's involvement was discussed directly with Mr. Guttuso.

<sup>37</sup> DG1's involvement in the database directive was discussed via telephone with Mr. Aznare formerly of DG1/D/3. He noted that although DG1's role was limited although the topic of database protection did arise occasionally in the bi-lateral meetings with the US team negotiating at TRIPS and also with the US copyright office. He confirmed that given the negotiations on Article 10(2) of TRIPS, DGI had been in favour of protection for all databases.

<sup>38</sup> DGX's involvement in the directive was discussed with Mrs.Nimenski DGX/D/3 via telephone.



clarification on what it deemed to be an unnecessarily complex text. Initially Mr. Rottinger was the official responsible, although he was later replaced by Mr. Burks<sup>39</sup>.

The Commission legal service was also consulted as part of these intra-service discussions to examine the legal basis for the directive proposal. DGIII's initially based its approach on Article 100A of the EC treaty because this Article is for legislation aimed at the 'establishment and functioning of the internal market'. This was the same base it had used successfully for the software directive which the Commission viewed as being complemented by this proposal 'since the contents of the database and the program which stores and manages the materials are difficult to separate' (CEC:1992b:34). Following discussion with the legal service DGIII retained Article 100A but added Articles 57 paragraph 2 and Article 66. Article 57 paragraph 2 concerns the freedom of establishment and was added because differences in legal regime between Member States might prevent the production of goods or provision of services by database producers or hosts in other Member States. Similarly Article 66 concerns the freedom to provide services which might be inhibited by differences in Member States copyright laws<sup>40</sup>. The legal basis for this proposal became more significant after the Treaty on the European Union (TEU) was signed in Maastricht in February 1992. The TEU in promoting an 'ever closer union' designated that measures in a range of policy areas including those designed to harmonise the internal market (Article 100A) would be required to change the procedure under which they were to be negotiated. The database proposal thus became the first European copyright initiative to be negotiated under the new co-decision procedure introduced by the TEU through Article 189b<sup>41</sup>. Previous copyright initiatives having been negotiated under the cooperation procedure Article 189c.

By October 1991 the draft text had been amended following the comments received from the intra-service consultation. Further amendments however were made to the draft following subsequent meetings with DGXIII officials. These contacts with DGXIII continued, and by early January 1992 copies of the final version of the proposal were ready to be sent to the cabinets of the Commissioners of DGIII and DGXIII i.e. Mr. Bangemann and Mr. Pandolfi respectively. While different versions of the draft text had been examined by members of the official hierarchy within DGIII and DGXIII at various times during its preparation, the final version of the draft was scrutinised carefully before being sent to the cabinets. In DGIII this involved numerous officials including Mrs. Czarnota, Mr. Vestrynge (head of unit F/4), Mr. Waterschoot (head of directorate F), Mr. Mogg (deputy director-general) and Mr. Perissich (director-general DGIII). Similarly in DGXIII it involved Mr. Ceuninck and Mr. Papapavlou, Mr. Huber (head of unit B/1), Mr. De Bruine (head of Directorate B), Mr. Parajon Collada (deputy director-general) and Mr. Carpentier (director-general DGXIII)<sup>42</sup>.

Early in the January 1992 the text was officially agreed by the Director-Generals of DGIII and DGXIII and sent onto Commissioner Bangemann (by DGIII) and Commissioner Pandolfi (by DGXIII). Following agreement between the offices of the two Commissioners, the Secretariat General of the Commission was requested to transmit the text to the College of

<sup>39</sup> DGXXIII's involvement in the database directive was discussed via telephone with Mr. Burks from DGXXIII/A/1. He commented that overall DGXXIII's role had been very limited but they had been in favour of extending the protection to all databases from the beginning.

<sup>40</sup> Telephone contact with the Commission's legal service confirmed this information. The officials in the Commission legal service directly involved at the time were Mr. Van Nuffel and Mr. Etienne.

<sup>41</sup> See, Commission of the European Communities (1993) 'List of Proposals Pending before the Council on October 31 for which entry into force of the TEU will require a change in legal base and/or a change in procedure', COM(93) 570 final, November 10 pp.77

<sup>42</sup> It should be noted that during the formulation of the directive both DGIII and DGXIII were reshaped in significant ways. By the beginning of 1993 the unit in DGXIII concerned with the directive had become DGXIII/E/1 and by early in the same year the services in DGIII handling the directive had been wholly moved to DGXV/E/4.

Commissioners. On January 24 1992 the heads<sup>43</sup> of the cabinets in the College met to discuss the proposal on databases. With very minor amendments the heads of cabinet recommended the College of Commissioners adopt the proposal and transmit it onto the Council and Parliament. This recommendation of the heads of cabinet was confirmed at their weekly meeting on January 27<sup>44</sup> and the proposal was adopted by the College of Commissioners for the Commission on January 29, 1992<sup>45</sup>.

Whilst it is not unusual for a directive proposal to pass without problem through the College, in the case of the database proposal, its passage was certainly assisted by Mr. Vestrynge's knowledge of, and contacts within the College, where he had previously worked in the cabinet of the President Jacques Delors. At the same time as the press release was issued, unofficial copies of the proposal were presented informally at the Council working group on intellectual property as well as to press and industry representatives. A few months later on April 15, 1992 the Commission officially presented the proposal to the Council, which at the time was under the Portuguese Presidency. On May 13, a definitive version of this text was published by the Commission and passed on to the Secretariat General of the Council by early June<sup>46</sup>. Following these events the proposal text was officially published in the Official Journal of the European Communities on June 23, 1992 (OJ. no.C156) as the 'Proposal for a Council Directive on the Legal Protection of Databases' COM(92) 24 final - SYN 393 (Appendix 6)

Even before the proposal's adoption by the Commission in January 1992 formal and informal channels of communication built up during the passage of the software directive had ensured that the developing European copyright policy community (i.e. officials from the other European institutions, representatives from the Member States and lobbyists) were aware of the proposal's contents. However, from documentary evidence it is difficult to gauge the extent of involvement and influence any members of this community had on the proposal's development. It is though clear that the official drafting the proposal was open to suggestions and input from outside<sup>47</sup> and that sections of this community had already established their starting positions on the issue<sup>48</sup>. The extent and significance of this involvement during this early period is further investigated in chapter 7.

Certainly from early in 1992 onwards representatives of the information industry and other groups within the copyright policy community became overtly more actively involved, with many alarmed at the overall mix of rights and exceptions that the proposal contained. It would however be inappropriate to give the impression that the Commission services were barraged with petitions from lobbyists or from others within this policy community as they had been during the software directive. Indeed, initially the perception of many from within

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<sup>43</sup> The relevant heads of cabinet were as follows; For Commissioner Bangemann - (Mr. Niebel), For Mr. Pandolfi - (Mr. Manservigi), For President Delor - (Mr. Petite).

<sup>44</sup> See, minutes of these meetings available on request from the Commission Secretariat General, Directorate C; SEC(92) 148 (24/01/92); SEC(92) 102 (27/01/98); SEC(92) 172 (28/01/92). The procedural details described in this section were confirmed during a telephone conversation with the Mr. Ebermann's office (head of Directorate C) in the Commission's Secretariat General.

<sup>45</sup> See, Commission Information Note, January 29, 1992 'Fighting international piracy of databases: European Commission proposes to harmonise legal protection in the Community'; Hill, A.(1992) EC agrees legal safeguards for electronic databases, Financial Times, January 30, 1992.

<sup>46</sup> See, Letter of Council Secretariat General ( 6919/92 dated June 3, 1992 ). Press releases of the Internal Market Council meetings were available on request from EU Council Press Office.

<sup>47</sup> See, speech by Mrs. Czarnota given at the Advisory Group for Aerospace Research and Development (AGARD) Lecture on Intellectual Property Rights and Information, October 24-25, 1991 Brussels.

<sup>48</sup> See for example, EIIA draft Policy Statement on The Legal Protection of Databases (February:1992), IPCC draft consultation on the 'Protection of Compilations, including Databases' prepared by Charles Clarke (September:1991).

the traditional copyright community was that the draft directive was legislation for a niche market that was not of major significance to the interests they represented. This was especially the case as a result of the tacit agreement that had already been reached on formally extending copyright protection to databases in the proposed protocol to the Berne convention and the developments in the TRIPS negotiations. This slow start to the passage of the directive proposal was compounded by the structure of the European electronic information industry. Not only was this industry new and relatively small in comparison to conventional publishing but it remained dominated by a UK market consisting of a few very large firms e.g. Reuters. As a consequence, at the European level, not only was it difficult to achieve consensus in the industry but also many of the information industry representatives lacked experience on how best to promote their concerns on these issues to European policy-makers.

In the context of the casestudy this generates the following question<sup>49</sup>

*During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?*

### **6. 3. Part Two: The Commission database proposal and the formal policy process<sup>50</sup>**

The period between the adoption of the database proposal by the Commission in January 1992 and its formal presentation to the Council in April 1992 provided the Commission with the opportunity to receive first reactions to the draft proposal and to identify potential obstacles to its successful passage to adoption as a directive. The Commission however signalled its eagerness that the directive be adopted quickly by proposing an initial date for implementation of the directive in Member States of January 1, 1993. As was anticipated at the time this deadline was missed, few however, would have forecast that a further five years would pass before the directive was finally implemented in Member States.

The Commission proposal consisted of 14 Articles, 40 recitals and a 56 page 'Explanatory Memorandum' in two parts (General and Particular provisions) and aimed to provide, stable and harmonised legal protection to electronic databases throughout the European Community. The most significant features of the proposal were the clear definition of the term 'database', the dual approach to protection offered by copyright and the right to prevent unfair extraction of a database's contents, and a compulsory license provision. Before examining the reaction of the Economic and Social Committee (ECOSOC) and the first reading in the European Parliament that led to the Commission's amended proposal<sup>51</sup> it is important to analyse these key features and the other provisions in the proposal.

In Article 1(1) of the directive proposal a database is defined as 'a collection of works or materials arranged, stored and accessed by electronic means, and the electronic materials

<sup>49</sup> See, appendix 2 - interview question frame: section B - question 4.

<sup>50</sup> This section provides a summary of the main features of the Commission's proposal. For more comprehensive legal analysis of the proposal text, See, Kunzlik, P.F. (1992) Proposed EC Council Directive on the Legal Protection of Databases, *CLSR* (8) May-June pp.116-120., Pattison, M.(1992) the European Commission's Proposal on the Protection of Computer Databases, *EIPR* 4, pp.113-120, Eisenschitz, T.(1993) The EC Draft Directive on the Legal Protection of Databases - an information scientist's reaction, *JIS* (19)pp.77-80., Oppenheim, C.(1992) Copyright, Controversy and Compulsory Licenses, *Information World Review*, March pp.6. Powell, M.(1994) The EC Draft Database Directive: A Revolutionary Means of Protecting Databases, *International Computer Lawyer* Vol.2, No.3 March pp.11-20.

<sup>51</sup> Commission of the European Communities (1993) Amended Proposal for a Council Directive on the Legal Protection of Databases - COM(93) 464 Final - SYN 393, October 4, 1993.

necessary for the operation of the database such as its thesaurus, index or system for obtaining or presenting information'. This broad definition<sup>52</sup> is only qualified in that 'it shall not apply to any computer programme used in the making or operation of the database'- Article 1(1), and that it does not apply to non-electronic databases<sup>53</sup>. Given the breadth of this definition it is not surprising that considerable discussion arose over the need for its clarification. Concerns included the potential difficulties of differentiating between computer programmes and the 'other electronic materials necessary for the operation of the database'(Pattison:1992:115)<sup>54</sup>, and the adequacy of such a definition in the context of interactive multimedia products (Powell:1994:12).

The first part of the dual approach is described in Article 2(1) which provides copyright protection for databases 'as collections within the meaning of Article 2(5) of the Berne Convention'. This removed the possibility of treating on-line databases as cable programmes as had been argued by some people was the case under UK law (Oppenheim:1992). To qualify for this copyright protection a database had to be original as defined by Article 2(3) '...that it is a collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied to determine the eligibility of a database for this protection'. Although this criteria was adopted directly from Article 3(1) of the Software directive, as Article 2(4) of the proposal indicates this copyright protection is restricted to selection or arrangement<sup>55</sup> and does not extend to the contents of the database<sup>56</sup>. As however, case law had already begun to show (e.g. Feist, Van Dale) defining intellectual creativity in selection or arrangement in practice was problematic. "As to selection, will it therefore be sufficient for the author merely to select the subject-matter or scope of the database and then to select what source materials to use, or must there be some further intellectual effort? . . . As for arrangement, does this relate to the order in which the data is held in the database, or to the way in which the data appears on screen to the user, or to something else? "(Hughes & Weightman:1992:148-49). Regardless of these difficulties, database producers and hosts in the UK immediately became aware that because of the slightly higher originality criteria applied some databases that were, at the time, eligible for copyright protection under the UK's 'sweat of brow' copyright would be ineligible for copyright protection<sup>57</sup> under the proposed directive.

The proposal's provisions on authorship in Article 3 were also directly adapted from the Software directive. As a result under Article 3(1) the author of the database is person who created it or subject to Member States laws the 'legal person designated as the rightholder by that legislation'. While Article 3(4) provides employers with exclusive economic rights, unless otherwise provided by contract, Recitals 22 and 23 indicate that the moral rights of authors are outside the scope of the directive proposal. The text does not however mention the situation in relation to commissioned works and works made for hire<sup>58</sup> or computer

<sup>52</sup> See, also Recitals 13 and 16.

<sup>53</sup> See, Article 2(2) and Recital 19

<sup>54</sup> See, also Recitals 17 and 18. This difficulty was compounded because the Software directive does not explicitly define 'computer programme' - (Software Directive 91/250/EEC May 14, 1991 OJ. L122, 17/05/91).

<sup>55</sup> See, also Recitals 14 and 15

<sup>56</sup> See, also Recitals 20 and 21

<sup>57</sup> For a detailed discussion of this originality criteria as applied in the Software Directive See pp.43-45 in Czarnota, B. & Hart, R.(1991) Legal Protection of Computer Programs in Europe - A guide to the EC Directive, Butterworths.

<sup>58</sup> The Commission's Explanatory Memorandum states 'Commissioned works, or works made for hire, or those created by an employee not acting under the control of his employer, are not regulated by this paragraph [Article 3(4)] and accordingly fall within the provisions of paragraph 1 of this Article [Article 3(1)]. Paragraph 3.4. pp.44.

generated databases<sup>59</sup>. Although the incorporation into a database of works protected by copyright or other rights require the authors permission Article 4 allows for the incorporation into a database of 'bibliographical material or brief abstracts, quotations or summaries which do not substitute for the original works' without 'the authorisation of the rightholder in those works'.

While Article 5 lists the exclusive rights of the author/rightholder including over temporary reproductions of any kind, Article 6 identifies the exceptions to copyright in the selection and arrangement. These exceptions are necessary because ". . .an infringement would take place every time the database was accessed if no derogation were provided since accessing the database, of necessity, involves performance of some of the restricted acts, notably the act of reproduction"(Explanatory Memorandum:1992 :47 - para 6.1.)<sup>60</sup>. Article 6(2) raises issues of the extent to which these exceptions can be overturned by 'contractual arrangements'. Article 6(3) affirms these exceptions 'are without prejudice to any rights subsisting in the works or materials contained in the database'. Article 7 does however identify two exceptions permissible 'in relation to the copyright in the contents'. Article 7(1) requires Member States to apply the same exceptions to copyright in the contents of the database 'as those which apply in the legislation of the Member States to the works or materials themselves contained therein, in respect of brief quotations, and illustrations for the purposes of teaching, provided that such utilisation is compatible with fair practice'<sup>61</sup>. The proposal to include teaching as part of the permissible exceptions was welcomed by users, particularly in the UK where fair dealing only ever stretched to research and private study, unlike the US which has always included teaching as part of its fair use category (Eisenschitz:1993:78). Article 9(1) confirmed that the term of copyright protection would be the same as that provided for literary works<sup>62</sup>.

The second part of the dual approach and the most innovative aspect of the directive proposal is identified in Article 2(5) as a 'right for the maker of a database to prevent unauthorised extraction or re-utilisation, from that database, of its contents, in whole or in substantial part, for commercial purposes'. Whilst this right would apply whether or not the database itself was eligible for copyright protection, it would not apply 'to the contents of a database where these are works already protected by copyright or neighbouring rights'. This last point proved controversial for some interested parties who argued that the protection offered should be cumulative<sup>63</sup>. Thus where a database was ineligible for copyright protection, due to a non-original selection and arrangement it would be protected by the new sui generis right<sup>64</sup>. Given the political pressure to complete the internal market the Commission justified the introduction of the sui generis right on economic grounds as a means of creating 'a climate in which investment in data processing can be stimulated and protected against misappropriation'(Explanatory Memorandum:1992: 25 para 3.2.8). This justification was criticised by those who pointed out that the continued rapid growth of the database industry in both Europe and the US provided little evidence that investment was being inhibited (Cane:1992). While others argued that the new right was unnecessary as databases were already adequately protected by copyright (Oppenheim:1992).

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<sup>59</sup> In the Commission's Explanatory Memorandum limited reference is made to the issue of computer generated databases, See, (Section 3.1.8. - pp.20) and ( Section 3.2.3. - pp.23)

<sup>60</sup> See, also Recitals 24 and 25.

<sup>61</sup> See, also Recital 26.

<sup>62</sup> Following the adoption of the Duration Directive this protection became life of the author plus 70 years. See, Council Directive 93/98/EEC October 29, 1993 harmonising the term of protection of copyright and certain related rights, OJ. No.290/9 24/11/93.

<sup>63</sup> See, for example, British Computer Society(BCS) Intellectual Property Committee Comments on the EC Proposal for a Council Directive on the Legal Protection of Databases (1993) CLSR (9) pp.4-8.

<sup>64</sup> See, Recitals 28 and 29.

In recognition of the potential danger of creating information monopolies via the sui generis right Article 8 provided for the compulsory licensing of the contents of a database in two circumstances. Article 8(1) states where 'the works or materials contained in the database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilise, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms. Article 8(2) states a compulsory license will also apply 'if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so'.

These provisions proved to be among the most controversial aspects of the Commission's proposal for a number of reasons. Firstly, although it appears that a compulsory license applies only in cases where the contents of the database are non-copyrightable this is not explicitly stated, leaving the situation where a database contains both copyright and non-copyright protected materials unclear. This is compounded by the phrase 'cannot be independently created, collected or obtained from any other source' which appears to be an attempt by the Commission to pre-empt further Magill type cases. This is confusing because the Magill case concerned copyright in TV listings and would therefore not have been prevented by this provision (Pattison:1992:118)<sup>65</sup>. Similarly, the provisions for a compulsory license in the case of a public body in Article 8(2) requires clarification as to whether this extends to public databases where the contents are copyright protected works. Secondly, despite the provision for arbitration in Article 8(3), many saw the potential for dispute over the notion of 'fair and non-discriminatory terms' in negotiating license payments between rightholders and licensees. The remainder of Article 8 provides for exceptions to the sui generis right. Articles 8(4) and 8(5) allow a lawful user to use insubstantial parts as defined in Article 1(3), without the authorisation of the rightholder. Given the quantitative and qualitative criteria identified in Article 1(3) it is unclear in practice what parts of a database could actually be used without risking the challenge of having prejudiced the rightholder's exclusive rights. In the case of commercial use (Article 8(4). ), an additional requirement of acknowledging the source is also imposed, thus further restricting these exceptions. Article 8(6) also states that the provisions of Article 8 only apply to the extent that they do not conflict with any prior rights or obligations including 'matters such as personal data protection, privacy, security or confidentiality'.

Article 9(3) states that the sui generis right 'shall expire at the end of a period of 10 years from the date when the database is first lawfully made available to the public'. Although whether subscriber access or confidential access constitutes 'made available to the public' is unclear. Article 9(4) qualifies the term of protection by stating that 'insubstantial changes to the contents of the database shall not extend the original period of protection of that database by the right to prevent unfair extraction'. Unfortunately where in the case of copyright protection the term insubstantial changes is defined (Article 1(4).), it is not defined for the sui generis right. As a consequence, it is unclear what degree of change would be necessary for a database to be eligible to a further period of protection and whether this implies that de facto perpetual protection would be possible. Aside from the requirement on Member States to provide 'appropriate remedies against infringement of these rights (Article 10), and the final provisions (Article 13) including an implementation date of January 1, 1993, there were two other significant provisions in the proposal.

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<sup>65</sup> Some clarification is provided by Recital 33. However para 8.1. pp.51 of the explanatory memorandum using the example of the Stock market states that 'if the Stock Market refused to supply the figures to more than one applicant, remedies under competition rules might have to be sought to deal with that issue'. For a discussion of the potential confusion here., See, (Kunzlik:1992:118).

Firstly, Article 11 applies the principle of reciprocity rather than national treatment in relation to the sui generis right. Thus, Article 11(1) states that the sui generis right will only apply to ‘databases whose makers are nationals of the Member States or who have their habitual residence on the territory of the Community’. Article 11(2) clarifies the position of databases created by employees and requires companies wishing to be eligible to apply the sui generis right to have ‘an effective and continuous link with the economy of one of the Member States’. The proposal’s recitals offer no further explanation of ‘effective and continuous’. Article 11(3) states that the Council may conclude agreements to extend the sui generis right to third countries ‘acting on a proposal from the Commission’, while recital 38 states that this will occur ‘if such third countries offer comparable protection to databases produced by nationals of the Member States’. Unsurprisingly this provision was strongly criticised by database producers, particularly from the US. The use of this reciprocity clause indicates the extent to which the Commission viewed this proposal as part of the Community’s wider industrial policy. That many US companies providing database services within the Community would not be eligible to apply for sui generis protection because no such legislation existed in the US, was clearly an attempt by the Commission to assist European database producers over their US competitors. A model for this reciprocity clause was previously used in Article 24 of the directive proposal on data protection<sup>66</sup>. Secondly, Article 12(1) provides that the provisions of the directive are without prejudice to other legal provisions. However, unlike a similar provision in Article 9(1) of the Software directive, this provision does not specifically exclude the possibility of database producers overriding user exceptions by contract.

As this summary highlights the methods proposed by the Commission to protect electronic databases in Europe where as much about encouraging investment in the European information industry in the context of the Community’s wider industrial policy, as about any urgent need to harmonise legal protection across Europe. Despite initial opposition from industry, the Commission persevered with the introduction of the sui generis right as a means of differentiating the protection available to database producers from Europe and those from third countries (notably the US). In terms of the largest European database market (in the UK) the Commission also anticipated that the proposed dual approach would provide a degree of protection high enough to receive the UK’s approval in Council<sup>67</sup>. “The relative weakness of the European electronics information market is as much due to linguistically fragmented markets and structural deficiencies (low installed base of CD-ROM drives and prohibitively expensive telecommunications services in particular) as to any legislative inadequacy” (Powell:1994:11). Although the database proposal was strongly influenced by the Software directive, its innovative dual approach confirmed that it could no longer be considered simply as a proposal concerned with a niche market. Indeed as discussions on the proposal gradually developed during its passage to adoption it became clear that the legal protection of databases involved a wide range of issues central to debates on the impact of new digital information technologies, products and services on copyright regimes and other areas of information policy and law.

In the context of the casestudy this generates the following question<sup>68</sup>

***Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?***

<sup>66</sup> See, COM (90)314 final - SYN 287, OJ no. C227.

<sup>67</sup> Given the extension of qualified majority voting (QMV) introduced by Maastricht the Commission could risk the proposal proving unpopular with the UK, if other Member States supported it.

<sup>68</sup> See, appendix 2 - interview question frame: section B - question 5.

### 6. 3. 1. From proposal to amended text

Although the final opinion of the Economic and Social Committee (ECOSOC)<sup>69</sup> (Appendix 7) identifies June 18, 1992 as the formal date on which the Council decided to consult the ECOSOC on the database proposal, as early as March 1992<sup>70</sup> the bureau of the ECOSOC had decided that the 'Section for Industry, Commerce, Crafts and Services' would be responsible for preparing an opinion on this proposal. Indeed, by April 1992 under the chairmanship of Mr. Nierhaus this section had created a study group<sup>71</sup> and appointed Mr. Moreland<sup>72</sup> as its rapporteur, who by the first meeting of this study group on April 14 had prepared a working document on the Commission's proposal. In preparing this document, subsequent working documents and the draft opinion Mr. Moreland received assistance from a legal expert Mr. Small whom he had previously employed when preparing the Committee's opinion on the software directive.

In total the ECOSOC study group formally met four times (April 14, June 2, September 16 and November 6) to prepare the Committee's draft opinion. Commission representatives from DGIII/F/4 (Mrs. Czarnota) and DGXIII/B/1 (Mr. Ceuninck) attended these meetings and after each Mr. Moreland proceeded to prepare a further working document on the proposal. At the first of these meetings following an introduction of the proposal by Mrs. Czarnota, it quickly became apparent that some members of the study group<sup>73</sup> and the rapporteur in particular, were doubtful of the utility and limited strength of the sui generis right and were concerned over the implications of the proposal's originality criteria on UK databases that at the time were eligible for copyright protection under 'sweat of brow'. That these concerns remained evident in the final opinion of the ECOSOC and that they so closely mirrored the views of the UK information industry at the time<sup>74</sup>, highlighted that for some, their views on the sui generis right had changed little since the April 1990 hearing. It also confirmed that the introduction of the compulsory licensing provision as a balance to the sui generis right, had made the proposal even more unpopular with these right holder interests and that they would lobby for its removal (Hampton:1992). The ECOSOC study group presented the rapporteur's report at a meeting of the Section for Industry, Commerce, Crafts and Services on November 6. This report was adopted without amendments as the section's opinion unanimously (with one abstention) and was passed on to the ECOSOC secretariat to await a vote of the plenary

<sup>69</sup> See, OJ. No. C19/3 January 25. 1993.

<sup>70</sup> See, ECOSOC 'information note' March 20, 1992 (IND/451 - 322/92). Details confirmed in numerous direct contacts with staff of ECOSOC Secretariat Direction A (industry).

<sup>71</sup> The other Members of the study group were: Mr. Bell (Group 1 - UK, since left), Mr. Bernabei (Group 1 - Italy), Mr. Giacomelli (Group 1 - Luxembourg, since left), Mr. Pardon (Group 1 - Belgium, deceased), Mr. Carroll (Group 2 - Ireland), Mr. Diapoulis (Group 2 - Greece, since left), Mr. Nierhaus (Group 2 - Germany, since left), Mr. Pellarini (Group 2 - Italy), Mr. Forgas Y Cabrera (Group 3 - Spain), Mr. Sa Borges (Group 3 - Portugal), Mr. Salmon (Group 3 - France, since left). The ECOSOC is divided into 3 groups: Group 1 (Employers), Group 2 (Workers) and Group 3 (Various interests).

<sup>72</sup> Mr. Moreland from the UK is a member of Group 3 (various interests) in the ECOSOC, he was formally interviewed as part of this study. He was also rapporteur for ECOSOC on the software directive. Mr. Moreland had extensive contacts with the UK information industry and attending DTi and CBI hearings on the proposal.

<sup>73</sup> The extent of study group member involvement in the proposal appears to have varied considerably. While some members had concerns over the sui generis right including its duration e.g. Mr. Bell, others could not recall the proposal at all e.g. Mr. Carroll. Information confirmed during telephone contact.

<sup>74</sup> See, Worlock, D. (1992) Legal Protection and Database Providers, speech given at the Conference of the Instituut voor Informatica en Recht on International Software and Database Protection, June 15, 1992, Amsterdam. Mr. Worlock was President of the European Information Industry Association (EIIA).



session of the ECOSOC. This plenary session took place on November 24 at which the opinion was adopted without debate unanimously<sup>75</sup>.

Although the ECOSOC opinion identified a number of concerns about the Commission's proposal it would be wrong to over-estimate the degree of influence that its opinion had on this proposal per se or in the formulation process more generally. This is due to the limited powers that the ECOSOC has under the Treaty. As a consequence the other institutions, particularly the Commission and Council often treat the opinions of the ECOSOC as of little importance and many lobbying organisations frequently by-pass discussion in the ECOSOC completely. "Other sources of weakness include the part-time capacity of its members, the personal rather than representational nature of much of its membership, and the perception by many interests that advisory committees and direct forms of lobbying are more effective channels of influence"(Nugent:199:310).

During this same period, the proposal was also being discussed in a number of other arenas. For its part the Commission, and in particular officials from DGIII/F/4 were active in making presentations at conferences and workshops<sup>76</sup> as well as engaging in face-to-face meetings with interested parties<sup>77</sup>. The proposal was also discussed in Luxembourg by the legal advisory board (LAB) with Commission representatives including Mr.Ceuninck, Mr.Papapavlou(DGXIII) and Mrs.Czarnota (DGIII)<sup>78</sup>. Mrs.Czarnota also participated in discussions in the USA where the proposal was strongly opposed by US database operators because it destabilised the existing European regime with which they were familiar and raised the threat of reciprocity provisions that the US was unlikely to be able to satisfy (Hupper:1992). In the Member States too, governments had started to consult with interested parties on the directive proposal<sup>79</sup>, although the size and extent of these consultations varied markedly between Member States due in part to the uneven distribution of the information industry across Europe and differences in political tradition on public consultations. The strong UK information industry presence evident in these early European consultations is perhaps unsurprising, but it cannot be assumed that this presence automatically correlates with any degree of influence over the proposal. More fundamentally it is also problematic to assume that policy statements, particularly those from European trade associations, represent a united view on a proposal as these statements are frequently a compromise amongst a range of often divergent interests<sup>80</sup>. This acknowledged, the limited representation of information users during this and other copyright consultations has continued to be a worrying

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<sup>75</sup> Telephone contact with the ECOSOC secretariat confirmed that this opinion was adopted without debate at the plenary session and that no official minutes were available for the 4 study group meetings.

<sup>76</sup> See, for example, Dr.Drier's presentation on the EC Database proposal on behalf of the Commission at the Instituut voor Informatica en Recht Conference on International Software and Database Protection, June 15, 1992, Amsterdam. Mrs.Czarnota's presentation at the French Ministry of Education and Culture workshop on the Database proposal, July 1992.

<sup>77</sup> See, for example, Mrs.Czarnota's meeting with representatives from the EIIA on September 21, 1992 and with representatives of EUSIDIC on November 9, 1992. (Information from EIIA and EUSIDIC newsletters and from contact with EIIA and EUSIDIC representatives).

<sup>78</sup> See, Triaille, J.P.(1992) La proposition de directive relative a la protection juridique des bases de donnees: Synthese des discussions, Meeting of the LAB, July 1, 1992, File No.92/2.

<sup>79</sup> See, e.g. Initial public meeting held by the UK government's Patent Office - a division of the Department of Trade and Industry (DTi) on the Legal Protection of Databases at the Patent Office on October 29, 1992.

<sup>80</sup> For example, Within the EIIA, while database producers were eager for stronger protection in the database proposal, the information brokers division of the EIIA saw dangers to their own activities if such proposals were adopted. See, Memorandum of EIRENE - The European Information researchers Association (Broking division of the EIIA) on the proposal for a Council Directive on the Legal protection of databases by the EEC, June, 1992.

characteristic of policy formulation on these issues at the European level (LAB: 1995, Eisenschitz & Turner:1997).

In the context of the casestudy this generates the following question<sup>81</sup>

*Did any international policy developments impact on the outcome of the Directive?*

Following the formal request of the Council for the European Parliament to examine the Commission's proposal, the President of the Parliament announced on July 6, 1992 that he had referred the proposal to the Committee on Legal Affairs and Citizens Rights<sup>82</sup> as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Energy, Research and Technology for their opinions<sup>83</sup>. Mr. Garcia Amigo, a Spanish MEP and member of the EPP political grouping, who had previously been appointed as the rapporteur of the Legal Affairs Committee, prepared some comments for discussion at the first meeting of this committee on December 4, 1992. These comments included concerns over the lack of clarity on the interaction between copyright and the sui generis right and a query over the Commission's reasoning for limiting the directive to electronic databases. Lobbying from industry that was pushing for an extension in the term of protection for the sui generis right was also noted (**Appendix 8**)<sup>84</sup>.

For the committee's next meeting (16-18 March, 1993) Mr. Garcia Amigo prepared a working document and organised a public hearing for March 17 at which experts and interested parties were invited to make presentations<sup>85</sup>. While these presentations were generally favourable to the proposal, those of Mr. Clarke and Mr. Wojcik were more in favour of extending the UK's sweat of brow test to the rest of Europe and/or introducing a form of neighbouring right, than retaining the sui generis right. Given the number of presentations

<sup>81</sup> See, appendix 2 - interview question frame: section B - question 6.

<sup>82</sup> Although the membership of the Committee changed between meetings because of the system of substitute members, the MEPs most significantly involved were: Mr. Garcia Amigo (EPP), Mr. Bocklet (EPP) - (chairman of Committee), Lord Inglewood (EPP), Mrs. Fontaine (EPP), Mrs. Salema O. Martins (ELDR), Mr. Bru Puron (PES), Mr. Medina Ortega (PES), Mrs. Grund (PES), Mrs. Oddy (PES) and Mr. Hoon (PES).

<sup>83</sup> The Energy Committee provided the Legal Affairs Committee with a short opinion approving the proposal on May 26, 1993 - no suggested amendments were tabled. The Economic and Monetary Affairs Committee (ECON) with Mr. Wettig as its rapporteur started its work January 27/28, 1993 and adopted its opinion June 2, 1993 which it passed it on to the Legal Affairs Committee. The ECON proposed 3 amendments: clarifying the compulsory license - Article 8(1), extending sui generis to 15 years with further protection possible after substantial change - Article 9(3) and a proposal for a new provision to review the implementation of the directive after the first 5 years and every 2 years thereafter - Article 13(3).

<sup>84</sup> In correspondence with Mr. Garcia Amigo he was not prepared to discuss the directive. Information on the Legal Affairs Committee discussion of the proposal (both readings) was acquired through telephone contact with Mr. Aidan Feeney (now in Council Secretariat) and Mrs. Mercedes Costi in the Secretariat of the Legal Affairs Committee. Mrs. Costi was directly involved in the preparation of the document containing the committee's proposed amendments and in various draft working documents of Mr. Garcia Amigo. Discussions were also held with the Secretaries of the two largest political groupings concerned with the Legal Affairs Committee - Mr. Clarke (PES) and Mr. Kavalierakis (EPP).

<sup>85</sup> Formal presentations with accompanying reports were made by the following organisations; Mr. Asenjo

(Director of databases for the Spanish National Library, Madrid), Mr. Baker (Legal Director of Reed/Elsevier), Mr. Clarke (Legal Council for Federation of European Publishers), Mr. Lafferranderie (European Space Agency), Mr. Mahon (Director of EUSIDIC), Dr. Vivant (Professor at Montpellier University, France), Mr. Wojcik (Dun & Bradstreet). A written submission was also presented by M/s Giavarra (EBLIDA).

made at the hearing it might be assumed that the proposal received a lot of attention in Parliament. In fact, some indication of the perceived importance of the directive proposal amongst parliamentarians can be gauged by the fact that only four members of the Legal Affairs Committee attended this hearing<sup>86</sup>. This stated, from the text of the revised Committee working document of April 20, 1993 which contained 69 proposed amendments, these presentations and other lobbying activities, particularly by database producers<sup>87</sup> appear to have had influence on Mr. Garcia Amigo and other members of the committee, most notably the conservative MEP Lord Inglewood (UK). The most important amendments tabled at the time were:

- The extension of the proposal to include non-electronic as well as electronic databases.
- The extension of the term of protection of the sui generis right to 15 years from 10 years.
- The introduction of a system of 'date stamping' to guarantee protection for additions to a database.
- The clarification of 'substantial' and 'insubstantial' change in relation to the term of protection and the replacement of the term 'unfair extraction' by 'unauthorised extraction'

At the following meetings of the committee on April 26 and June 1, 1993 these amendments were discussed and reactions given by committee members as well as the Commission<sup>88</sup>. For Mr. Garcia Amigo and Lord Inglewood the extension of the term of the sui generis to 15 years and the introduction of a system of data stamping were two amendments that they were keen to have introduced into the Commission proposal. However, it is clear from the amendment tabled by Mrs. Salema O. Martins that there was not complete agreement over the Commission's proposal. This amendment proposed a resolution, pursuant to Rule 41(4) of the parliamentary rules of procedure, calling on the Commission to withdraw its proposal and to submit a clearer, more simply worded text consistent with existing law on intellectual property. While other committee members were also critical of the over-complex nature of the Commission's proposal, they were persuaded by the views of the rapporteur and Lord Inglewood that the legislation was necessary and the Parliament should not create unnecessary obstacles to its passage.

At its last meeting on the proposal on June 9, 1993 the Committee adopted its amendments to the proposal by 8 votes to 1 (plus 1 abstention). The report of the Committee with its proposed amendments was then prepared for debate in the parliament which took place on June 21, 1993. During the parliamentary debate the number of amendments was reduced and the Commission represented by Mr. Millan confirmed that it would be able to accept the majority of the amendments proposed. In its Plenary session on June 23, 1993 the Parliament adopted the Legal Affairs Committee report subject to a number of amendments<sup>89</sup>. The most of these being the Parliament's rejection by 178 votes to 128 (plus 1 abstention) of the amendment extending the application of the proposal to non-electronic databases. The Parliament also rejected the proposed amendment to introduce a system of 'date stamping' because of the potential adverse effect on the information brokers, users and the free flow of information. The parliamentary first reading approving the amended proposal was re-

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<sup>86</sup> See, 'Report of the Second Meeting of UK Interests to discuss the proposal on Legal Protection of Databases at the Patent Office April 29, 1993' by Patent Office, DTi May 18, 1993.

<sup>87</sup> See, for example Submissions made by Reuters and the UK Confederation of Information Communication Industries(CICI), March 1993.

<sup>88</sup> Although the same Commission officials attended these parliamentary meetings, as a result of internal changes within the Commission, by this time they were representing to DGXV/E/4 (previously DGIII/F/4) and DGXIII/E/1 (previously DGXIII/B/1). Shortly afterwards in October 1993 Mr. Ceuninck left DGXIII and was replaced in his post by Maria Olivan.

<sup>89</sup> OJ. No. C194 July 19, 1993.

confirmed at the parliamentary plenary session on December 2, 1993<sup>90</sup>. This reconfirmation was necessitated by the coming into force of the Treaty on European Union that changed the procedure under which the directive proposal was being negotiated from the co-operation procedure to the co-decision procedure.

Immediately after the vote of the Legal Affairs Committee on June 9, the Commission (DGXV/E/4) began to prepare a draft amended proposal. This draft was revised after the Parliament's plenary vote on June 23 and sent on for intra-service consultation to DGXIII in middle of August. DGXV requested DGXIII to confirm its agreement with the draft and to submit any comments on it back to DGXV by September 3 to enable the text to be transferred rapidly to the Council to ensure that the new implementation deadline of January 1, 1995 could be met. Although DGXIII accepted the extension of the term of protection of the sui generis right to 15 years it still expressed concerns over placing the burden of proof on the user that any extraction and re-utilisation of insubstantial parts of a database did not prejudice the owners exclusive rights (Article 11(8)b) and the provisions of Article 15(2) on the retro-active nature of the protection offered. In the event, the Commission services adopted the amended proposal following agreement that these concerns would be raised in the context of the Council discussions. The amended proposal (COM(93) 464 final - SYN 393) was adopted by the Commission on October 4, 1993<sup>91</sup> (**Appendix 9**) and presented to the Council.

As well as the extension in the term of protection for the sui generis right, the Commission in its amended proposal accepted a further 31 of the 37 amendments proposed by the Parliament. The Commission also significantly reshaped the proposal and separated the copyright and sui generis right into separate chapters. Of the rejected amendments, most were concerned with definitions, and were not accepted by the Commission because similar topics were under discussion at the international level in WIPO and at the GATT-TRIPS negotiations (Chalton:1994:94-102). At the same time the adoption of the duration directive on October 29, 1993 confirmed that the term of copyright protection would be extended to 70 years following its implementation in July 1995.

In comparison with previous European copyright initiatives (e.g. Rental or Duration directives), the issue of database protection had not, during this first phase up to the amended text aroused huge interest or generated much controversy. Whilst interests, particularly from the information industry in the UK and to a lesser extent the US<sup>92</sup> had provided the most active response to the Commission's proposal, in other Member States reaction had been very restrained<sup>93</sup>. However, given the later concerns about the directive expressed by some writers on behalf of authors, intermediaries and information users<sup>94</sup>, a lack of awareness amongst these groups (partly due to DGIII's consultation methods), may account for their initial lack

<sup>90</sup> OJ. No. C342 December 20, 1993

<sup>91</sup> See, COM (93)464 final - SYN 393 (OJ. No. C308/1 November 15, 1993).

<sup>92</sup> See, for example, responses to the proposal from: EC Committee of the American Chamber of Commerce (AMCHAM), January 1993; US Information Industry Association (IIA), December 1993; National Federation of Abstracting and Information Services (NFAIS), February 1993.

<sup>93</sup> Particularly in this first phase of the directive proposal the information industry in other Member States aware that the UK information industry was active in the proposal adopted the position that if the proposal was good enough for UK operators like Reuters it would be good enough for them and so they did not feel any great necessity to become active themselves. Information from telephone conversation with the director of DGXV/E Mr. Waterschoot, August 11, 1997.

<sup>94</sup> See, Cornish, W.R.(1997) Protection of and vis-a-vis Databases, ALAI Study Days, pp.435-442, Koumantos, G.(1997) Les Bases de Donnees dans la Directive Communautaire, RIDA, January pp. 79 - 134, Eisenschtz and Turner(1997) Rights and responsibilities in the Digital Age: Problems with stronger copyright in an Information Society, JIS,23 (3) pp.209-223. These concerns will be discussed at length below.

of involvement and apparent lack of interest in the proposal. This low-key start should not however be allowed to mask the strengthening of protection that had already occurred in the amended proposal. Quite apart from the extension of sui generis protection to 15 years and the introduction of a 'burden of proof' requirement on users of insubstantial parts (See, Article 11(8)b amended text), a number of other small changes<sup>95</sup> had tightened the overall protection available to database producers and publishers, while a Parliamentary amendment that would have enhanced user exceptions had been rejected<sup>96</sup>. "The European Commission's ingenious project had already suffered considerable erosion by the time the amended proposal was put forward in 1993. The project's conversion from a relatively weak liability regime to a strong exclusive property right, however, occurred during the closed proceedings of the European Council of Ministers, which produced the Common Position of July 10, 1995" (Reichman & Samuelson:1997:84).

### 6. 3. 2. Database protection transformed: towards a Council common position

The Commission's database proposal was submitted to the Council on April 15, 1992 and formally presented to the Council copyright working<sup>97</sup> group towards the end of the Portuguese Presidency in June 1992. In the six months that followed, during which the UK held the Council Presidency, no evidence could be found<sup>98</sup> that the proposal had been discussed in Council. Given the dominance of the UK information industry in the European market, quite why the UK government chose not to discuss the proposal is difficult to fully explain. Certainly on the basis of the Patent Office's report of its initial public meeting of interested parties on the proposal, it is clear that the UK government were aware of initial hostility from industry towards the Commission's initiative "It would not be unreasonable for the Community to follow the UK since the database market is likely to become very large and the UK is currently at its head. The UK has the most up-to-date legislation and arguably the most relevant...a copyright system based on 'author's rights' as envisaged in the proposal would need a complementary regime of anti-competition law which is not in place in the UK. The UK would be at the risk of coming from the strongest protection and going to the weakest" (Patent Office:1992). The UK government may have therefore decided not to debate the issue in Council to avoid tension developing with its own industry, preferring to wait for the result of the European Parliament's first reading.

Denmark took over the Council Presidency in the first half of 1993 followed by Belgium in the second half. The Danish Presidency which held 3 meetings<sup>99</sup> of the Council working group exhibited an eagerness to discuss the database proposal. This eagerness was at least

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<sup>95</sup> For example, examine the following changes: Articles 4(1) & 4(2) in proposal with Article 5(1) & (2) in amended text, Article 8 in proposal with Article 11 in amended text (on the compulsory license) and the addition of the new provisions in Article 9(2)b (on the term of protection).

<sup>96</sup> See, Appendix 9 - Explanatory Memorandum to amended text: rejected amendment (c) pp.3.

<sup>97</sup> During the negotiations of the Council working group the representatives of Member State delegations were remarkably consistent including: Mr. Jenkins(UK - Patent Office), Mr. K. Kemper (Germany - Ministry of Justice), Mde. de Montluc (France - Ministry of Culture) and Mde. Lewis (France - INPI), Mr. Norup-Nielsen (Denmark - Ministry of Culture), Mr. Debrulle (Belgium - Ministry of Justice), Mr. Spagnuolo (Italy - Ministry of Justice), Mde. Verschuur de Sonnaville (Netherlands - Ministry of Justice). The DGXV/E/4 of the Commission was represented by Mrs. Czarnota (DGXV/E/4) and later by Mr. Vandoren and Mr. Gaster, DGXIII/E/1 was represented by Mr. Ceuninck and later by Mrs. Olivan and briefly by Mr. Bischoff. The Council Secretariat was represented by Mr. Mellor (DG/C/1) and from its Legal Service by Mrs. Kyriakopoulou.

<sup>98</sup> Press releases from the Internal Market Council and from the Council Secretariat General for this period make no mention of discussions of the Database proposal. Further investigation conducted on my behalf by officials of the Council press office produced no additional information and confirmed that the proposal had not been discussed in Council.

<sup>99</sup> The 3 meetings in 1993 were held on: January 28-29, March 24-25 and June 10-11.

partly due to national pride based on the perception that the Commission's proposal had been modeled in some aspects on the Danish catalogue rule. The main purpose of these meetings was to familiarize the Member States representatives in the Council working group with the proposal text and to provide them with the opportunity to question the Commission on its initiative. These discussions continued but were not as frequent during the Belgian Presidency as the Council awaited the Parliament's first reading and the preparation by the Commission of its amended proposal. This amended proposal was formally transferred by the Commission to the Council on October 12, 1993, with the working group meeting only once before the start of the Greek Presidency to examine the new text.

As a report at the time confirmed "much of the activity in the Council working group to date has been Member States' delegations probing the meaning and effect of the proposal rather than seeking to influence changes to it. . . However, as a common understanding of what is on the table is acquired Member States will be able to move towards seeking to influence a (more) final version of the proposal. The Commission is likely in due course to modify its proposal in the light of the discussion in the working group and consolidated texts produced by the Presidency, the opinion of the Parliament and lobbying from interests" (Patent Office:1993). This report went on to highlight that despite Member States delegations agreeing to proceed with the Commission's proposal, the complexity of the text<sup>100</sup> and technical nature of its subject matter had led to a consensus that negotiations should not be rushed. Indeed the Danish Presidency had already predicted by this period that the directive proposal would not be ready for the Internal Market Council before the German Presidency in the latter half of 1994. By the beginning of 1994 (with Greece holding the Council Presidency) a number of developments in Europe and the US (Sections 3.3.3 and 3.3.4) had begun to change the policy environment in which the protection of databases was being discussed. However, more immediately significant for the work of the Council working group was the completion of the TRIPS agreement in December 1993 which under Article 10(2) extended copyright protection to both electronic and non-electronic databases.

Following the working group's initial examination of the Commission's amended proposal at the end of 1993, the Council Secretariat prepared the Council's first consolidated text<sup>101</sup> on January 20, 1994 in preparation for the group's first meeting under the Greek Presidency (January 30 - February 1 & 2). At this first meeting the major debate concerned the extension of the scope of the directive (Article 1) to non-electronic databases although this faced direct opposition from France, Belgium and Portugal. Other issues included a request by some delegations including (France and Germany) for the deletion of Article 3(4) on the economic rights of employers over the work of their employees and agreement to delete the term 'unauthorised' from the definition of the sui generis right in Article 10. The Greek Presidency decided to refer the question of the extension of the scope of the directive to the COREPER<sup>102</sup> at its meeting on February 23. At this meeting the majority opinion in favour of an extension to include non-electronic databases was noted as was the need to place the issue before the Internal Market Council on March 10. In the event however, this directive

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<sup>100</sup>Some of this complexity was due to difficulties with textual translations including ambiguity of certain terms e.g. the term contents in English meaning either a single element or all the elements or the term copie in French meaning 'fake' and the term exemplaire meaning a copy. As a result delegations were often at cross-purposes in discussing particularly points (Patent Office:1993).

<sup>101</sup> Council document No. 4256/94 from Council Secretariat to Council working group on Copyright.

<sup>102</sup> Representatives from COREPER 1 frequently attended the meetings of the working group and received briefings from their delegations in the working group to remain up-to-date. COREPER 1 representatives included; Mr.Baker(UK), Mr.Schurmann(Germany), Mr.Dobelle (France), Mr.Voetmann(Denmark), Mrs. Vandriessche(Belgium), Mr.Buresti (Italy), Mr. Bosch (Netherlands).

proposal was not placed before the Internal Market Council on this date<sup>103</sup>. During February the Commission (DGXV<sup>104</sup> & DGXIII) engaged in internal discussion to examine the consolidated text and to discuss the issues that had proved problematic for the Member States delegations. During these meetings the Commission agreed that it would not object to an extension of the scope of the copyright aspect of the directive to include non-electronic databases.

The second consolidated text<sup>105</sup> was prepared by the Council Secretariat on March 18 following a further meeting of the Council working group on March 7-8 that focused on the sui generis right. While Germany and the UK continued to express some general reservations over the need for a sui generis right, other delegations reserved their positions and concentrated on particular provisions in the proposal's sui generis chapter. On the issue of compulsory licensing, the Commission explained to delegations that these provisions codified the application of Article 85 and 86 of the Treaty thereby preventing the need for the intervention of national courts or competition authorities to obtain licenses. While most delegations reserved their positions, France opposed the introduction of compulsory licenses on public bodies while the UK argued that such licenses should only be available in situations where information arises from activities other than its direct procurement (Patent Office:1994a). On the issue of exceptions to the sui generis right, Germany, the UK and Ireland all felt that the exceptions should be similar under copyright and sui generis rights, while all delegations except Spain were in favour of deleting the burden of proof provision (See, Article 11(8)b amended proposal). On the term of protection, Germany, the UK and Ireland continued to push for a one-off 50-year term for all databases, while other delegations were satisfied with the 15 year term.

On the issue of sui generis protection being extended for a further period following updating of a database's contents the Commission (Mrs Czarnota) argued that the sui generis right extended to individual data items. This view was strongly opposed by the UK, Ireland, Denmark and Italy who argued that the rights subsisted in the collection as a whole and not in individual data items (Patent Office:1994a). Up to this point in the Council working group negotiations, much of the time had been spent on clarifying the text but as delegations became more familiar with it they began to push for the changes they deemed in their national interest. It was also clear that by this stage clear tensions were emerging between the approach of the Commission and the Member states. "Although no consensus is emerging, owing to a lack of clear thought and direction, the Commission seemingly is becoming more isolated from Member States. This is tending to create a vacuum of ideas. "(Patent Office:1994a)<sup>106</sup>.

The second consolidated text was further discussed by the Council working group at its meeting on April 18-19, 1994. The definition of the term database continued to prove

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<sup>103</sup> Examination of press releases from the Council Secretariat on March 8 (5179/64 - Presse 29) and March 10 (5392/94 - Presse 34) concerning the 1736th Internal Market Council meeting of March 10 highlight that this issue was not addressed.

<sup>104</sup> In the latter half of 1993 Mr.Vandoren was appointed as the new head of unit for DGXV/E/4. This appointment followed a period of several months during which Mrs.Czarnota had been its acting head following the departure of Mr.Vestrynge in February/March 1993. Mr.Gaster another official from DGXV/E/4 also became involved in the directive and within a short time was attending the meetings of the Council copyright working group with Mrs.Czarnota.

<sup>105</sup> Council document No. 5693/94 from Council Secretariat to Council working group on Copyright.

<sup>106</sup> Patent Office officials involved in the Council negotiations met with the Confederation for British Industry's(CBI) working group on the directive on March 25, 1994. The key points expressed by the CBI's group chairman Mr.Rappoport can be summarised as: General support for the proposal, preference for a copyright solution based on TRIPS, concern over the practical application of the sui generis right and strong opposition to the compulsory license provision.

problematic, as did the extension of the scope of the directive to include non-electronic databases that faced on-going opposition from France, Belgium and Portugal. On the issue of the level of originality required for copyright protection, most delegations were in favour of adopting the phrasing used in the TRIPS agreement while France continued to argue for the inclusion of the notion of the author's own personality. Two further meetings of the Council working group were held during the Greek Presidency on May 6 and May 24-25 providing the basis for the Council Secretariat's preparation of the third consolidated text on June 22<sup>107</sup>. By the end of the Greek Presidency because of disagreements amongst delegations over a range of issues the discussions in the Council working group had almost reached a standstill and little or no progress was being made. Indeed, a move by the Presidency to include the draft directive in the agenda for the COREPER and next Internal Market Council in June were strongly opposed by most delegations (White:1994).

Why the negotiations should have become bogged down is not clear from the documentation and will be taken up again in chapter 7. It is however clear that within a very short period of time a range of external events had begun to influence the perspectives and attitudes of Member State delegations and to give new impetus to their negotiations; Firstly, the Bangemann group had produced its report and follow-up action plan (Section 3.3.3.) by July 1994, with the report specifically mentioning the urgent need for the completion of the database directive<sup>108</sup>. This report also promoted the data protection directive which was nearing a common position in Council and which had also been generating concern within the information sector. Secondly, the Commission (DGXV) had begun its own consultations on the need to respond to the challenges posed to copyright regimes by digital technologies<sup>109</sup> (Section 3.3.4.). As the Commission questionnaire (**Appendix 10**) that initiated this consultation illustrates the issues being raised were similar to those at the centre of the debates on the database directive in the Council working group; the scope of protection, compulsory licensing, multimedia and the need for sui generis rights<sup>110</sup>. Thirdly, in the political arena too developments including agreement with Finland, Sweden and Austria on the terms for their accession to the EU and the European Parliament's fourth direct elections had changed the context for the working group's negotiations. Finally, the emergence of interactive multimedia products and services, the internet and other delivery channels and the popular realisation that 'content' was central to the developing information society had enhanced the profile of the Council negotiations on the databases amongst a wider range of interest groups concerned with copyright related issues (Kaye:1995).

In the context of the casestudy this generates the following question<sup>111</sup>

***How do you account for higher public profile of the Database directive ? Do you agree with the characterisation of the Directive as the Cornerstone of the Multimedia society ?***

<sup>107</sup> Council document No. 7617/94 from Council Secretariat to Council working group on Copyright.

<sup>108</sup> "...the legal protection of electronic databases, should be completed as a matter of priority." (Bangemann Report:1994:18).

<sup>109</sup> In early June DGXV/E/4 under the direction of Mr.Vandoren released a questionnaire to interested parties on Copyright and Related Rights in the Information Society. On July 7-8 a public hearing was organised and attended by 160 representatives of European companies and associations, EFTA representatives, other non-EU European countries and most of the members of the Council copyright working group. The Commission later published the replies of these interested parties to the questionnaire (1995 - 484 ISBN 92-827-0204-9) Office for Official Publications, Luxembourg.

<sup>110</sup> Throughout this period Commission representatives continued to have contact with the information industry lobbyists and to speak at conferences and seminars. See for example Mr. Vandoren's speech on European Union Harmonisation of Copyright and Related Rights at the ECIS/ACIS Symposium on Copyright in the Digital Age, Brussels April 21, 1994.



While these and other developments changed the context in which the directive was being negotiated, within the Council working group a new dynamism in the shape and speed of the negotiations was evident from the beginning of the Germany Presidency in the second half of 1994. When the working group met for the first time on July 18-19 under the direction of its new President Mr. Kemper, it immediately began to work towards identifying the Articles of the directive proposal that were giving rise to conflict amongst the Member States delegations. The meeting was also the first time representatives of the future Member States (Finland<sup>112</sup>, Sweden and Austria) attended (as observers) the meetings of the Council working group. The German Presidency was eager for the working group delegations to prepare their final positions during the summer recess so as to enable them to return in September for final negotiations of the directive. To facilitate this the Presidency distributed a questionnaire to the delegations to enable the identification of those Articles proving most problematic. This procedure identified the following issues<sup>113</sup>:

- Definition and Scope(Article 1) - whether to adopt the TRIPS definition thereby extending the scope to non-electronic databases and whether such an extension would apply to both copyright and sui generis rights, whether CD's should be covered by the directive.
- Authorship (Article 3) - whether to delete Article 3(4) concerning employee/employer economic rights.
- Incorporation of data into a database (Article 5) whether bibliographical references require authorisation, the production of some multimedia products relying on the lack of such a requirement.
- Exceptions to copyright in contents (Article 8) - whether to refer to the Berne Convention's Article 9(2), Article 10 or either and the application therein of Member States traditional copyright exceptions.
- Exceptions to Sui Generis right(Article 11) - whether there should be compulsory license provisions and what exceptions should be available.
- Term of Protection of the Sui Generis Right (Article 12) - how to assess substantial change and whether it opens up the possibility of near perpetual protection, the need for date stamping to identify additions to a database, the need for a maximum period of protection e.g. 50 years.
- Beneficiaries of Protection (Article 13) - whether reciprocity or national treatment should be applied to the sui generis right
- Application over time (Article 15a) - whether the protection offered should be retro-active to afford protection to databases created before the directive, and the cost implications for the database industry if this Article were not agreed.

Following the summer recess the Council working group had its second meeting under the German Presidency on September 16 at which the working group began to discuss these issues in the context of the third consolidated text. Reasonable progress was made, particularly with regard to the copyright chapter of the proposal. However, by the next working group meeting on October 10-11-12 much of the new impetus appeared to have evaporated as a number of delegations reversed their previous positions on issues e.g. the UK

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<sup>111</sup> See, appendix 2 - interview question frame: section B - question 7.

<sup>112</sup> Mr. Liedes from the Finnish delegation is likely to have had some influence on the working group discussions because at the time he was chair of a WIPO committee examining the issue of database protection.

<sup>113</sup> See, Report of the Third Meeting of UK Interests to discuss the proposal on Legal Protection of Databases at the Patent Office September 21, 1994 by Patent Office, DTi.

no longer supported the deletion of Article 3(4). Above all the sui generis right continued to prove the most difficult and controversial aspect of the Commission's proposal.

In an effort to facilitate progress the Commission therefore made two suggestions for changes to the sui generis right. Firstly, that it should apply even where the contents of a database were eligible for copyright protection. Secondly, that if the sui generis right were to be extended to non-electronic databases it should include a test of eligibility such that it would only apply to collections demonstrating investment in either obtaining, verifying or the presentation of their contents. It is important to note that throughout this period not only was the Commission engaged in regular meetings with the Presidency outside the confines of the working group meetings but also most of the delegations were also engaging in regular and direct contacts with interested parties in their own countries<sup>114</sup>. A further meeting of the working group took place on November 7-8 at which the only notable development was the announcement of Mrs.Czarnota's departure from the negotiations. From this point on Mr.Gaster was, under guidance from Mr.Vandoren DGXV/E/4 main representative in the Council working group. The extent of the different style adopted by Mr.Gaster and its impact on the negotiations will be taken up again in the next chapter.

The last meeting of the working group under the German Presidency took place on November 16 at which the wording for the copyright Articles of the proposal were finalised subject to political agreement in the COREPER. The sui generis chapter however continued to prove problematic e.g. the UK, Ireland, Denmark and the Netherlands remained in favour of extending the sui generis right to non-electronic databases. Such were the difficulties that the Presidency placed the proposal on the agenda of the next COREPER meeting which took place on December 2, including a question on the need for the sui generis right per se. Certainly some of the resistance to the sui generis right had come from the Presidency itself which had throughout remained in favour of copyright harmonisation backed up with a regime of unfair competition rules as already existed in Germany. At this meeting of the COREPER, France, Belgium and Portugal remained opposed to an extension of the scope of the directive to non-electronic databases. The meeting also agreed that there was a need subject to further discussion in the working group for closer definition of the scope and content of the sui generis right. The COREPER also did not consider that sufficient agreement had been reached on the copyright chapter of the directive and referred this back to the working group for further discussion. As a consequence the proposal was not presented at the next internal market Council on December 8, 1994 as was initially timetabled by the German Presidency.

The first meeting of the working group under the French Presidency took place on January 16-17, 1995. The Chairman of these meetings was Mr.Dobelle, who began by setting out a timetable for the French Presidency, the main objective of which was to reach a common position on a fourth consolidated text (**Appendix 11**) by the time of the internal market Council in early June. A further meeting of the working group was held on February 20-21 after which the Council Secretariat prepared the fourth consolidated text which was presented at the next working group meeting on March 29-30. At this meeting and at a subsequent meeting on April 21, the working group was successful in revising the whole of the fourth consolidated text (Oppenheim:1995). These meetings also clarified the remaining points of disagreement that the Presidency proposed should be presented for resolution to the COREPER at its next meeting on April 26. As the two reports from the Presidency to the COREPER (**Appendix 12a and 12b**) indicate it is from this period onwards in the negotiations, that the most dramatic changes occurred in the text of the directive, particularly

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<sup>114</sup> See, for example, the letters sent out to interested parties at the end of October 1994 by the UK's Patent Office containing a summary of conclusions of the third meeting of UK interests and also a new version of the latest Council text of the directive.

to the sui generis chapter. The last two meetings of the Council working group took place on May 8 and May 15, by which time the majority of delegations supported:

- An extension of the scope of the directive to all types of databases (France also agreed to this extension).
- The deletion of Article 3(4) concerning databases created by employees and addition of recital 29.
- The prohibition of reproduction for private purposes of all electronic databases.
- The protection of databases composed of copyright works by the sui generis right.
- An exception to the sui generis right concerning extraction and/or re-utilisation for private purposes of a substantial part of the contents of a non-electronic database.
- An exception to the sui generis right concerning the extraction and/or re-utilisation for scientific research or educational purposes of a substantial part of the contents of a database
- The extension of the sui generis right to databases made in third countries on a reciprocal basis (Germany, Austria, Sweden and the UK argued for national treatment).
- A 15-year term of protection for the sui generis right (including the UK and Ireland).
- Confirmation that contractual provisions contrary to Articles 7(2), 11, 11a & 11b would be null and void.

Following the last meeting of the Council working group the provisions above, as well as those provisions where agreement had not been reached (e.g. compulsory licenses), were transferred to the COREPER. The COREPER then met a further three times on May 19, 24 and 29-31 to facilitate agreement on an overall compromise proposal that could be presented for adoption to the internal market Council on June 6. The most significant change to the text occurred at the last of these meetings (following a suggestion by the Presidency) where it was proposed the compulsory license provisions be deleted (**Appendix 13a**)<sup>115</sup>. As **Appendix 13b** highlights the Presidency then transferred this overall compromise package to the internal market Council seeking confirmation of the package and the majority agreements that had been reached on a number of outstanding issues (including the deletion of compulsory license provisions). At the meeting of the internal market Council in Luxembourg on June 6, *political agreement* was reached (with two abstentions from Finland and Portugal) on the directive proposal. Only two minor modifications were added to the text; one from the German delegation requesting a reduction from 3 to 2 years for the implementation date i.e. January 1, 1998, and the other concerning the re-editing of recital 37 concerning Article 10(1) of the Berne Convention<sup>116</sup>. The internal market Council then returned the directive proposal to the COREPER so that it could formally prepare the complete text with minor changes and translation corrections for adoption. The text of the common position was formally adopted (Portugal abstained) by the Council on July 10, 1995 (**Appendix 14**)<sup>117</sup>.

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<sup>115</sup> The grounds cited for deleting this provision were that 'during the negotiations the scope of the sui generis right was limited and exceptions were provided for which did not appear in the Commission proposal. In view of these limitations, the justification for the non-voluntary licenses as a counter-balance to a strong sui generis right was considerably reduced'. The only counter balance to its removal was the inclusion of a revision clause in Article 16(3) that the Commission could introduce such licenses at a later stage if it felt they were justified. That the ECJ had by this stage delivered its final judgement in the Magill case on April 6, 1995 may also have made certain delegations more comfortable with the idea of dropping these license provisions, because the strength of Article 85 and 86 of the treaty to prevent an abuse of a dominant position and information monopolies had been proven.

<sup>116</sup> See, Press Releases from; the Council Secretariat (7568/95 - Presse 162), the Commission (IP(95)572 - June 7) and the Financial Times, (European News Digest - June 7).

<sup>117</sup> OJ. no.C288/14 October 30, 1995.

Whilst at the time, there remained the possibility that the European Parliament would veto the common position over the removal of the compulsory licensing provisions and the sui generis right, in the end the final text of the directive remained very similar to the text of the July Council common position. The documents discussed above bear witness to the strengthening of, particularly the sui generis right that took place during the Council negotiations under the German and French Presidencies. Indeed Commission officials directly involved in these negotiations have acknowledged this process “In the course of controversial negotiations at the Council since the summer of 1994, the business law-like approach was strengthened and finally a right protecting substantial investments in databases saw the light of day. Hence a protection of the ‘sweat of brow’ by a sui generis right was finally established and the dogmatic conflict between copyright and droit d’auteur in the area of databases was replaced by a dualistic concept” (Gaster:1996).

In the context of the casestudy this generates the following question<sup>118</sup>

*How adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?*

### 6. 3. 3. From Second Reading to Adopted Text

Following the Council common position, the Commission began its own intra-service discussions to prepare a communication<sup>119</sup> to the Parliament prior to the start of the second reading. These intra-service discussions<sup>120</sup> finally led to the acceptance of the Council common position on September 14, 1995 and agreement on the Commission’s communication to the Parliament. Both these documents were transferred to the Parliament that began its second reading on September 21, 1995. Although the Commission’s communication<sup>121</sup> commended the common position to the Parliament as a ‘balanced compromise’ it went on to state that ‘it would have preferred to retain the non-voluntary licensing arrangements advocated in its own proposal for a Directive’ on the basis that ‘the inclusion within the Directive of precise criteria could have resolved, in this field, potential conflicts between exercising intellectual property rights and competition law rights’. This stated, the communication was careful to remain firmly in support of the common position, identifying the review provision in Article 16(3) as an adequate safeguard to the removal of compulsory licensing provision. It also linked the successful passage of this directive to other on-going European and international initiatives<sup>122</sup> “This compromise text is of great importance in the context of the information society since most of the new products and services will operate from databases. The harmonised system as established by the eventual Directive will enable the doctrine of copyright to be brought closer to that of droit d’auteur in this crucial sector. This in itself will undoubtedly have a non-negligible effect on the work of the international bodies responsible for harmonising intellectual property law at the global level ” (SEC(95)1430 final).

From the start of the second reading under the rules of the co-decision procedure the Parliament had three months to act on the Council’s common position. Initially rightholder lobbyists were concerned that the Parliament might veto the directive proposal because of the

<sup>118</sup> See, appendix 2 - interview question frame: section B - question 8.

<sup>119</sup> This communication is pursuant to paragraph 2 of Article 189b (the Co-decision procedure).

<sup>120</sup> Involving DG1, DGIII, DGIV, DGX, DGXIII, DGXXIII, the new DGXXIV for Consumer policy and the Commission’s legal service.

<sup>121</sup> Commission Secretariat General document: SEC(95)1430 final

<sup>122</sup> On July 19, 1995 the Commission published its second copyright Green Paper entitled ‘Copyright and Related Rights in the Information Society COM(95).

deletion of the compulsory licensing provisions. In the event however, the second reading proved to be both quick and uncontroversial. The Parliament's Committee on Legal Affairs and Citizen's Rights<sup>123</sup> with Mrs. Palacio-Vallelersundi<sup>124</sup> (a Spanish MEP and member of the EPP political grouping) as its rapporteur approved its report in favour of adopting the Council's common position subject to a few minor technical amendments to the text on November 20, 1995. This report with its proposed amendments was then debated in a parliamentary session on December 13, 1995. During this debate the Commission represented by Commissioner Monti confirmed that it would be able to accept the Parliament's proposed amendments and affirmed that the directive placed the European Union at the forefront of international efforts to protect this sector. At its plenary session on December 14 the Parliament voted in favour of adopting Mrs. Palacio-Vallelersundi's report with its 11 proposed amendments<sup>125</sup>.

Following the Parliamentary vote the Commission began to prepare the new modified text of the directive proposal and its opinion on the Parliament's amendments. Of the 11 amendments, 3 concerned linguistic corrections, 4 the recitals and 4 the proposal's Articles. Of these, the most significant amendments were to ensure that; where a database is used for the purpose of illustration for teaching or scientific research the source is indicated ( Article 6(2)b ) and the replacement of the term 'successors in title' with the term 'rightholders' ( Article 11(1) ) concerning the beneficiaries of protection under the sui generis right. The other amendments were minor and concerned with editorial changes to the text. The Commission presented its opinion<sup>126</sup> on the Parliament's amendments a long with the modified proposal on January 10, 1996 according to Article 189A(2) of the EC Treaty. Following a period for preparation of a final version of the text, the directive on the legal protection of databases was adopted unanimously with an abstention by Portugal on February 26, 1996<sup>127</sup>. The Directive was formally enacted on March 11, 1996 following the signing of the text by the President of the Council<sup>128</sup> and by Mr. Hansch, President of the European Parliament<sup>129</sup>(**Appendix 15**) with an implementation date in Member States of January 1, 1998.

In the context of the casestudy this generates the following question<sup>130</sup>

*How would you assess the significance of the Database directive for current and future European copyright policy formulation ?*

#### **6. 4. The database directive revisited: the need for further analysis**

Since its adoption the database directive has become the focus for a number of criticisms, particularly because of the strengthening of the sui generis right that occurred during the

<sup>123</sup> During the second reading Mr. Medina Ortega, (a Spanish MEP and member of the PES political grouping) acted as shadow rapporteur.

<sup>124</sup> Following numerous attempts to organise an interview with Mrs. Palacio-Vallelersundi (including 3 visits to the European Parliament), it became clear that an interview as part of this study would not be possible.

<sup>125</sup> Of the 11 amendments only 8 were voted on in the Parliamentary vote as the other 3 were concerned purely with linguistic differences between various versions of the text. OJ. No.C17 January 22, 1996.

<sup>126</sup> Commission document: COM(96) 2 final - COD 393.

<sup>127</sup> This took place during a meeting of the Agriculture Council, Council press release 5300/96 (Presse 36). See, European Commission's Spokesman's Service: press release (IP/96/171 - February 27, 1996).

<sup>128</sup> At the time during the Italy Presidency, this was Mr. Dini.

<sup>129</sup> Directive 96/9/EC on the Legal Protection of Databases, OJ. No.L77/20 March 27, 1996.

<sup>130</sup> See, appendix 2 - interview question frame: section C - question 9.

Council negotiations. For some writers the final solution proved so unsatisfactory that it led to them to argue for the development of an alternative regime of neighbouring rights protection for databases and for the “need to re-establish the basic concepts of copyright, and ask ourselves if copyright can protect this ‘technological’ subject matter without distorting that law’s most fundamental principles” (Garrigues:1997:3).

Other writers have been critical, not of the directive’s two-tier approach per se, but of the text’s lack of clarity, the optionality of many of its provisions and the frequency with which contentious issues were placed in the directive’s recitals. “...the preamble includes not only new rules of law [e.g. recital 19] which ought to have been placed among the provisions of the directive but also stands on contentious copyright issues [e.g. recital 44] and ambiguous wording [e.g. recitals 21 & 46] ...are the rules of law which are set out in the preamble to be considered mandatory ones for the Member States and must they be written into their respective national laws ? According to the general principles of law, the answer must be no, even if the implications of such an answer would be detrimental to the harmonisation sought”(Koumantos:1997:88). Indeed, even amongst supporters of the database directive, complaints have been made concerning the issues left unresolved including definitions of ‘substantial part’, ‘substantial investment’ and the extent to which the sui generis right ends up offering de facto perpetual protection to database owners (Mirchin:1997:6).

Above all the sui generis right has been singled out for criticism. It has been argued that the deletion of the compulsory license provisions right at the end of the Council negotiations may well result in abuses of dominant positions by information producers (LAB:1995:3). It has also been argued that the initial fears of overprotection in the directive were realised in the adopted text as a result of the imbalance of rights evident in the other provisions on the sui generis right<sup>131</sup>. Aside from these general arguments it has been claimed that the final solution will enable rights holders to acquire greater protection under the sui generis right than has ever been offered by copyright.

The two most important arguments in this regard are;

- Firstly, the sui generis right does not distinguish between (non-copyrightable) ideas and their (copyrightable) expressions thus it potentially inhibits the evolution of a “public domain substratum from which either research workers or second comers are progressively entitled to withdraw previously generated data without seeking licenses that may or may not be granted ”(Reichman & Samuelson:1997:88). An extension of this argument is that in effect investors “obtain proprietary rights in data as such, a type of ownership that the copyright paradigm expressly excludes”(ibid:1997:89).
- Secondly, exceptions to the sui generis right are narrower than those applicable under copyright. This is most clearly illustrated by the lack of an exception under the sui generis right similar to the copyright provision in Article 6(2)d for: ‘other exceptions to copyright traditionally authorised’ (Oppenheim: 1997:9). Of the exceptions available under the sui generis right most are optional and may be over-ridden by contract except for Article 8 which in section 8(1) provides the right for lawful users to extract or re-utilise insubstantial parts of a database’s contents. However, given that the substantiality of the parts taken can be judged either qualitatively or quantitatively and must not conflict with the ‘normal exploitation of the database’ it will remain for the courts to decide whether any infringement has taken place.

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<sup>131</sup>The strongest criticisms of EU and US approaches to database protection have come from Reichman, J.H. & Samuelson, P.(1997) Intellectual Property Rights in Data ? Vanderbilt Law Review Vol.50:51, pp.51-166.

Extensive legal analysis of the text of the database directive as adopted has been conducted elsewhere<sup>132</sup>. It is however important to highlight that many of the criticisms of the database directive can be linked to more general concerns about the European approach to the adaptation of copyright regimes to the digital environment. In particular, concerns have been expressed about the potentially negative impact of such approaches on the balance of rights in copyright and the free flow of information more generally. For example, the Commission's second green paper (CEC:1995b) was heavily criticised for its bias towards a strengthening of intellectual property protection in digital environments and its tendency to examine existing and future rights only from a rights holder perspective (LAB:1995). More specifically concerns were also expressed about the scope of the reproduction right and its application to temporary copies<sup>133</sup>, the lack of consideration of the need for copyright exceptions in digital environments and the overall detrimental effect of these changes on the related issues of information access, freedom of speech and information privacy<sup>134</sup>. Even more significant in the context of this casestudy the green paper and the Commission's consultation process were strongly criticised for the under-representation of information users including libraries, intermediaries, universities and end users (LAB:1995). It is in this context that the database directive is analysed further through 40 semi-structured interviews with key policy actors. This analysis aims to further describe and explain the role of human, organisational and contextual factors in shaping the formulation of the directive.

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<sup>132</sup>For detailed discussion of these issues and an Article by Article analysis of the directive See, Gaster, J.L. & Powell, M (1997) *Legal Protection of Databases in Europe - A Guide to the EC Directive*, Butterworths, Strowel, A. & Triaille, J. (1997) *Le Droit D'auteur, du Logiciel au Multimedia: Droit belge, Droit Europeen, Droit Compare*, CRID, Story Scientia, Bruylant Bruxelles., Koumantos, G.(1997) *Les Bases de Donnees dans La Directive Communautaire*, RIDA, no.171 (Janvier) pp.78-135., Gaster, J.L.(1996) *La Protection Juridique des Bases de Donnees dans l'Union Europeenne*, *Revue du March Unique Europeen* No.4, pp.55-79., Dellebeke, M.(ed)(1997) *Copyright in Cyberspace, Copyright and the Global Information Infrastructure*, ALAI Study Days, Cramwinckel, Amsterdam - Part V. *Protection of and vis-a-vis databases* pp.435-541., Gaster, J.L.(1996) *La Nouvelle Directive Europeenne concernant la Protection Juridique des Bases de Donnees*, *Auteurs & Media*, No.2 (Juin) pp.187-192.

<sup>133</sup> For a detailed legal discussion of these issues, See, Spoor, J.(1996) *The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right ?*, and, Hugenholtz, P.B.(1996) *Adapting Copyright to the Information Superhighway*, both in Hugenholtz, P.B. (ed)(1996) *The Future of Copyright in a Digital Environment*, Kluwer International.

<sup>134</sup>The term 'information privacy' used here to encapsulate both the right to privacy (Article 8 European Convention of Human Rights) and data protection (EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data - adopted October 24, 1995 OJ. No. L281/31, November 23, 1995).

## 7. Interview analysis

. “.this legislative history illustrates how a modest, pro-competitive initial proposal for *sui generis* protection has been transformed into a virtual absolute monopoly by the backdoor lobbying efforts of publishers and by the coordinated efforts of US and EU officials to propagate a protectionist strategy for the global information infrastructure”(Reichman & Samuelson: 1997:75).

### 7. 1. Introduction

This chapter provides a detailed analysis of the interview transcripts presented in Volume 2 of the thesis. These transcripts were compiled from semi-structured interviews conducted with forty policy actors directly involved in the formulation of the database directive. Following an introduction, this chapter is divided into four main sections reflecting the structure of the interview question frame. The first section examines the structural characteristics of the interviewees and specifically in relation to the interested parties summarises their formal lobbying positions on the directive (compiled from policy submissions made by these groups during the formulation process). The second section analyses interviewee responses to eight questions on the database directive and the role of policy actors during its formulation. The third section analyses interviewee responses to three questions on European copyright policy and its links with the formulation of the database directive. The fourth section analyses interviewee responses to four questions on the relationship between copyright policy and other information policies in the digital age.

#### 7. 1. 1. Policy actors in the formulation process

By the end of 1998 the database directive had formally been implemented into the national laws of most Member States. Aside from the substantive protection the directive offered to databases and their contents, it had also become a precedent shaping on-going European initiatives for copyright in the digital environment. In this context and given the concerns expressed about the directive text as finally adopted (section 6.4) this chapter examines a range of factors that influenced its formulation through the analysis of semi-structured interview data.

Clearly in any formulation process there are likely to be a range of different interests to balance, but there is a danger that glib references to terms like horse-trading, lobbying and bureaucracy, obscure how these positions are mediated at a European level. This is partly because even when it is assumed (as in chapter 6) that differentials in the power of actors do exist both within and between the European institutions and the different interest groups, it remains difficult from the documentary evidence to evaluate the influence of these factors on the final policy solution.

In the case of the database directive two substantive reasons for attempting to examine these processes in greater detail are:

- Firstly, the documentary analysis provided in chapter 6 while helpful in illuminating the legal issues and providing a timetable within which to discuss them, suggests a linear and causal chain of events that requires corroboration. At the most general level, it is clear that information policy exists on at least two levels “that which is explicit and recorded in documentary form, and that which is expressed implicitly in the form of habits, received wisdom’s, unwritten codes of behaviour, expectations and societal norms” (Rowlands: 1996:20). At a practical level access to this non-documentary information can only be gained by engaging directly with the policy actors involved in the formulation process.



- Secondly, the nature of digital environments means that policy decisions in one field e.g. copyright, may impact on other areas of policy concerned with the regulation of information e.g. privacy, free speech. Given that digital environments have yet to become fully developed how policy decisions in any one field are achieved becomes of ever more importance, especially as these environments have begun to problematise our basic notions of communication, political representation and democracy. “.to concentrate on copyright in isolation involves ignoring the political implications of modifying copyright in the information society. In this respect, there is much more at stake than potential clashes with established rights such as free speech and privacy. Those rubrics have been rallying points partly because of their acknowledged status. . . the whole way in which we decide to regulate the Internet has political implications, so that copyright regulation cannot be separated out from politics” (Bently & Burell:1997:1221).

## **7. 2. Information on the interviewees and organisations represented**

Analysis of section A of the interview question frame is divided into two parts. Firstly, table 7.1 presents the interviewees structural characteristics (i.e. gender, nationality, role in the formulation process and professional training). Secondly, section 7.2.1. complements the documentary analysis provided in chapter 6 by briefly summarising the formal lobbying positions of the interested parties during the formulation of the database directive. These formal positions were compiled from policy statements and policy submissions made by the interested parties during the formulation of the directive and collected during the semi-structured interview.

Table 7.1. illustrates a number of structural characteristics of the forty policy actors interviewed. This analysis draws attention to two points:

Firstly, the overwhelming dominance of legal professionals and more particularly intellectual property specialists. While at one level this may seem unsurprising in the context of European copyright policy, it does highlight a general absence of information professionals and database specialists from the database policy process. While copyright specialists are undoubtedly well qualified to participate in policy discussions aimed at harmonising differences between copyright and authors rights (*droit d’auteur*) systems (sections: 3.3.1 & 3.3.2.), in the context of the database directive questions are raised over the suitability of these experts to examine the introduction of *sui generis* protection for pseudo-intellectual database compilations. Compilations that in most Member States had traditionally been outside the scope of the copyright paradigm.

Secondly, the high proportion of British nationals representing interested parties (transcripts 19-40) at the European level. This is partly explained by the dominance of the UK database industry in the European information market and partly by the interview selection process. It does however raise the issue of the extent to which nationality impacts on policy actors stances towards the policy issues i.e. did familiarity with UK copyright and ‘sweat of brow’ protection make the *sui generis* solution more acceptable to these policy actors ? It also focuses attention on the impact of differences between the copyright and authors rights (*droit d’auteur*) systems on the directive.

**Table 7. 1.** Structural characteristics of interviewees

| Interview Number | Gender | Nationality | Role in the Database Formulation Process    | Professional Training     |
|------------------|--------|-------------|---|---------------------------|
| 1.               | Female | British     | Draughtsman - proposal rapporteur DGIII     | Law: Copyright            |
| 2.               | Male   | Belgian     | Head of Unit DGIII/F/4                      | Law: EC Competition       |
| 3.               | Male   | German      | Proposal rapporteur DGXV/E/4                | Law:                      |
| 4.               | Female | French      | Representative from DGIII/F/4               | Law:intellectual property |
| 5.               | Male   | Belgian     | Representative from DGXIII/B/1              | MBA & Patent Law          |
| 6.               | Male   | Greek       | Legal Counsel from DGXIII/B/1               | Law:                      |
| 7.               | Female | Spanish     | Representative from DGXIII/E/1              | Law:intellectual property |
| 8.               | Male   | French      | Representative from DGXIII/E/1              | -                         |
| 9.               | Male   | British     | Principal Administrator Council Secretariat | Law: Patents              |
| 10.              | Female | Greek       | Representative from Council Legal Service   | Law:intellectual property |
| 11.              | Male   | British     | Rapporteur ECOSOC                           | Economics                 |
| 12.              | Male   | British     | Legal Counsel for ECOSOC rapporteur         | Law:intellectual property |
| 13.              | Female | British     | Member of EP Legal Affairs committee        | -                         |
| 14.              | Male   | Spanish     | Shadow rapporteur in European Parliament    | Law:                      |
| 15.              | Male   | British     | Head of UK Council Working Group team       | Law: Patents              |
| 16.              | Male   | British     | Representative in Council Working group     | -                         |
| 17.              | Male   | Belgian     | Representative in Council Working group     | Law:                      |
| 18.              | Female | French      | Representative in Council Working group     | Law:intellectual property |
| 19.              | Male   | British     | Legal Counsel for FEP                       | Law:intellectual property |
| 20.              | Male   | British     | Chief Executive UK Publishers Association   | Law:intellectual property |
| 21.              | Female | Belgian     | Member of FEP Representation                | Journalism                |
| 22.              | Male   | British     | Legal Counsel for EPC                       | Law:intellectual property |
| 23.              | Male   | British     | Representative for Reuters                  | Information Science       |
| 24.              | Male   | Irish       | Executive Director of EUSIDIC               | Information Science       |
| 25.              | Male   | British     | Dun & Bradstreet & AMCHAM                   | Law:                      |
| 26.              | Male   | British     | Reed-Elsevier & rapporteur for UK CBI       | Mathematics & Statistics  |
| 27.              | Male   | British     | President of the EIIA                       | -                         |
| 28.              | Male   | American    | Vice-President of the IIA (USA)             | -                         |
| 29.              | Male   | French      | Professional EU lobby consultant (B/W)      | Law:                      |
| 30.              | Male   | Dutch       | Legal Counsel for UNICE & Phillips          | Law:                      |
| 31.              | Female | German      | EC Legal Counsel for Bertelsmann            | Law:                      |
| 32.              | Female | Italian     | EC Legal Counsel for IFPI                   | Law:intellectual property |
| 33.              | Female | Danish      | EC Representative for the IFJ               | Journalism                |
| 34.              | Female | French      | EC representative for AIDAA                 | Law:                      |
| 35.              | Male   | Belgian     | Secretary-General for the EAPA              | -                         |
| 36.              | Male   | British     | Director of Public Affairs for FEDMA        | Direct marketing          |
| 37.              | Female | Dutch       | Director of EBLIDA                          | Law:                      |
| 38.              | Female | British     | EC Representative for IFLA                  | Librarian                 |
| 39.              | Male   | Belgian     | Intellectual Property Expert CRID           | Law:intellectual property |
| 40.              | Male   | British     | Senior consultant Brussels law Firm         | Law: EC competition       |

### 7.2.1. Overview of interested parties in the formulation process

The documentary analysis in the previous chapter provided considerable detail on the involvement of the main European institutions in the formulation of the database directive and highlighted the changes made to the directive proposal text up to its adoption. It did not however provide detail on the views and reactions of interested parties. As a result, before examining in detail the role of policy actors in the formulation process it is helpful to provide an overview of the formal positions of these interested parties<sup>1</sup>. Using the categorisation detailed in section 5.2.4. the reactions of these interested parties to the release of the formal database proposal and subsequent changes in the text are summarised. The initial phase of the formulation process: from the 1988 copyright Green paper through to the release of the formal proposal is addressed in the general overview.

- General Overview and Phase One: up to the release of the formal proposal

Overall, and in comparison to other European copyright initiatives, the database directive did not generate a great deal of lobbying from interested parties during its formulation. However, as has previously been mentioned by the time of its adoption the directive had become the focus for a good deal of discussion particularly from those concerned about the Commission's apparent over-protectionist stance towards copyright issues.

In the initial phase of the formulation process: from the publication of the 1988 Copyright Green Paper through the April 1990 public hearing and up to the publication of the Commission proposal there is little documentary evidence of much lobbying on the issue of database protection. As the Commission's summary of the April 1990 hearing indicates while there was general support for a copyright solution, there was a distinct lack of support for any form of sui generis right (see, Appendix 4). It is however clear that by late 1991 versions of the Commission's draft proposal were already circulating amongst some of the interested parties including Reuters, EIIA, IIA, EUSIDIC and FEP. All of these groups remained involved and active throughout the directive's formulation.

- Phase Two the Database Directive: Overview of the formal lobbying positions of interested parties

#### 1. Individual Information and Database companies:

*Dun & Bradstreet(D&B)* as a large database operator/ information provider and with a US-based parent company, was directly involved in lobbying on the directive, although there is little evidence of any direct involvement before the publication of the Commission proposal. D&B was, as an active member of AMCHAM on the directive and contributed to shaping AMCHAM's policy statements. Like other information providers the key issues mainly concerned the sui generis right. In particular D&B lobbied for:

1. A longer period of initial protection for the sui generis right;
2. Greater clarity on how databases would be eligible for on-going sui generis protection i.e. up- dating and substantial change;
3. For the sui generis right to apply whether the contents of a database are eligible for copyright protection or not;
4. Greater clarity over the user exceptions to prevent prejudice of the exclusive rights of database owners in the copyright and sui generis sections of the draft directive;
5. General opposition to the compulsory licensing provisions;
6. General support for an extension of the scope of the directive to cover non-electronic databases;

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<sup>1</sup>This overview summarises the general positions and views of the interested parties taken from formal policy submissions collected as part of section A of the interview question frame.

7. Support for the provision in the original proposal automatically transferring all employees economic rights in the creation of databases to their employers;
8. D&B because of its US-base also expressed opposition to the reciprocity clause and promoted the use of national treatment.

Apart from written submissions and a formal presentation to the European Parliament (First Reading) D&B kept up regular contacts with the Commission DGIII and later DGXV and retained close contacts with other interested parties including the EIIA, Reuters and publishing groups at the European level. D&B also participated actively in the UK government's consultations on the directive.

*Reuters* as possibly the largest database operator/information provider in Europe, was directly involved in lobbying on the directive from early on in the formulation process. As a participant in the April 1990 hearing it retained its contacts with Commission staff involved in drafting the initial proposal. Reuters expressed similar concerns over the directive as D&B, although it was not opposed to the reciprocity clause. Aside from written submissions to the Commission and Council, Reuters had contacts with other interested parties including D&B, IFPI and publishing groups (FEP). It also participated in UK government consultations on the directive. Reuters was a member of the both the EIIA and IIA during the formulation of the directive.

*Reed-Elsevier* as a major European Publisher/database operator became involved in the database discussions after the April 1990 hearing. Reed-Elsevier shared similar lobbying objectives to other information providers (e.g. D&B, Reuters) but proved particularly in favour of the directive's reciprocity clause. Reed-Elsevier made a formal presentation to the European Parliament (First Reading) but after this concentrated its lobbying activities on the UK government and UK officials in the Council working group through its involvement with the CBI (Confederation of British Industry). During the formulation of the database directive it was a member of the EIIA and IIA.

*Bertelsmann* as a major European media company with interests in publishing, music and audio-visual products contributed to consultations on the database directive, although much of its lobbying activity took place at the German national level and with the German representatives in the Council working group. At the European level Bertelsmann was also represented by IFPI's submissions on the directive. Overall, like the other rights holders it was generally supportive of the Commission's initiative to harmonise the legal protection available to databases.

## **2. Trade Associations:**

### **a) Horizontal associations: representing cross-sectoral business interests**

*UNICE (Union of Industrial and Employers' Confederations of Europe)* as the largest European lobby group representing European business interests and composed of 33 industry and employers federations in 25 European countries, participated in European consultations on the database directive from the April 1990 hearing through to the directive's adoption and lobbied the Commission, Parliament and Council directly. As well as being in broad agreement with other rights holders aims UNICE's concerns covered:

1. Ensuring that with the extension of the scope of the directive to cover non-electronic databases that not all multimedia products would automatically be regarded as databases;
2. The deletion of the provision automatically transferring all employees economic rights to employers in the creation of a database;
3. Providing support for the reciprocity clause and opposition to the compulsory licensing provisions.

Member organisations include the UK's CBI (Confederation of British Industry) which was active at the UK level on the database directive.

*AMCHAM (EU Committee of the American Chamber of Commerce: IPR subcommittee)* as the main lobbying organisation representing the views of European companies of American parentage contributed at all stages of the formal policy process with submissions to the Commission, Parliament and Council. Its key concerns replicate those articulated for D&B above. Other member companies include Time Warner, IBM, and Microsoft.

#### **b) Vertical Associations: representing specific sectoral interests**

##### **Information Industry and Information services:**

*EIIA (European Information Industry Association) and IIA (Information Industry Association - USA)* both these associations represent the views of the information industry i.e. database publishers, on-line services, Internet service providers, software publishers, telecommunications companies and financial information services. In the context of the database directive members included Dun & Bradstreet, Reuters, Reed-Elsevier, FEDMA. The EIIA also had contacts with EUSIDIC and publishing groups. Unsurprisingly the IIA and particularly the EIIA were active throughout the formulation of the directive. In common with individual database operators (see D&B above) the EIIA was in favour of a longer initial term of sui generis protection and more clarity on subsequent protection, more narrowly defined exceptions for users of particularly electronic databases and a rejection of the compulsory licensing provisions, although some members did support the idea of licenses for public sector databases to encourage the development of the VADS (value added data services) market. The EIIA also expressed a preference for national treatment rather than reciprocity for the sui generis protection

*EUSIDIC (European Association of Information Services)* as a European association representing the interests of both information suppliers and information users it was active throughout the passage of the directive. EUSIDIC representatives attended the April 1990 hearing and made a formal presentation to the European Parliament (First Reading) at which it acted as a representative for the EIIA and EBLIDA. EUSIDIC members include; Financial Times Ltd, INSPEC (institute for electrical engineers), Knight-Ridder Information and Springer-Verlag. With its broad membership EUSIDIC struggled to maintain a coherent position towards the directive except in relation to the reciprocity clause which it did not support. On other issues such as user exceptions and compulsory licensing EUSIDIC was not so definitive, although the total deletion of the compulsory licensing provisions was upsetting to some EUSIDIC members.

*FEDMA (Federation of European Direct Marketing Associations)* as a European association of national direct marketing associations plus a number of individual publishers including Time Warner, Polygram, Dun & Bradstreet contributed to the formulation process for the database directive, although with discussion of the data protection directive taking place during the same period, it was definitely a secondary priority and FEDMA did not make any formal submissions to the Commission until after the first reading in the European Parliament. In general FEDMA's views mirror those of other rights holders except with regard to the reciprocity clause which it supported. Its position relied heavily on Dun & Bradstreet as one of its members.

*EAPA (European Alliance of Press Agencies)* as an association of national Press Agencies in eastern and western Europe who by the late 1980's were already using database technology the draft directive was clearly of interest as a means of providing protection for their press releases. The EAPA was involved very early on in the discussions but by the end of 1993 had begun to focus its attention on database discussions at the international level in WIPO. The

EAPA attended the April 1990 hearing and were keen to see the scope of the directive extended to non-electronic databases and for harmonisation to also be pushed at the international level. The EAPA had contacts with Reuters during this earlier period and shared similar views on the directive except with regard to Article 3(4) in the original proposal on employees economic rights where the EAPA lobbied with other organisations representing authors rights for its removal e.g. IFJ, AIDAA.

**Publishers:**

*FEP(Federation of European Publishers), PA(Publishers Association- UK) and EPC (European Publishers Council)* represent a broad range of views from the book and newspaper publishing industry. Unsurprisingly these organisations, particularly the FEP have actively lobbied on behalf of the interests of publishers in all European copyright initiatives with the database directive being no exception. Publishers continued to push for a wholly copyright based solution and remained unconvinced of the benefits of the sui generis right. At a practical level however their lobbying position was very similar to other rights holders e.g. D&B, including a preference for national treatment for the sui generis right and active lobbying on the tightening of permissible exceptions under copyright and the sui generis right. The FEP maintained good contacts with other publishers (e.g. IFPI) and representatives of the information industry Reuters and Dun & Bradstreet.

*IFPI (International Federation of the Phonographic Industry)* representing over 1000 producers and distributors of sound and music video recordings in 72 countries around the world (members include Bertelsmann). IFPI became active in lobbying quite late on and its views mirrored those of other rights holders e.g. FEP. More specifically it lobbied on the issue of sound carriers i.e. CD's, vinyl records and cassettes and their exclusion as databases but it also expressed the view that aural collections should not automatically be excluded from protection as databases. IFPI made its own submissions on the directive but was also involved in statements with the FEP

**Authors:**

*IFJ (International Federation of Journalists) and AIDAA(Association Internationale des Auteurs de l'Audiovisuel - International Association of Audio-visual Authors)* for associations representing the views of authors the database directive was not a key issue. However both groups lobbied successfully for the deletion of Article 3(4) in the original proposal that would have allowed the transfer of all employees economic rights to employers. While traditionally there is agreement between authors and publishers on the need for strong copyright protection on this issue they were in direct conflict during the formulation of the database directive on this issue.

**3. Users and Legal Experts**

*EBLIDA(European Bureau of Library, Information and Documentation Associations) and IFLA/LA (International Federation of Library Associations/ Library Association - UK)* these associations represent the interests of libraries at the European and International levels. During the database directive most of their activity appears to have taken place up to the amended proposal and included attendance at the April 1990 hearing and a written submission to the Parliament (first reading). At this stage these associations were reasonably satisfied with the directive and supported the overall goal of harmonising protection for databases. Subsequent to the common position however these groups expressed surprise at the extent of the transformation of the directive that had occurred during the Council negotiations including the removal of the compulsory license provisions, the tightening of permissible exceptions under copyright and the sui generis right and the possibility that the directive allowed for perpetual rolling sui generis protection.

*CRID (Centre de Recherches Informatique et Droit)* this legal research centre followed the passage of the directive from an academic perspective and had representatives on DGXIII's

legal advisory board (LAB).

*B/W Partners (professional EU lobbying consultants) and Norall, Forrester & Sutton (Brussels Law Firm)* Both these organisations provide professional lobbying and consultancy services in the copyright field and followed the passage of the directive as part of their work in seeking potential clients.

The next three sections of this chapter analyse the interview transcripts presented in volume 2. This analysis is divided into three sections consisting of a total of 15 questions:

- Section 7.3. analyses responses to 8 questions specifically on policy formulation for the database directive;
- Section 7.4. analyses responses to 3 questions on the links between the directive and European copyright policy more generally;
- Section 7.5. analyses responses to 4 questions on the links between copyright policy and other areas of information policy in digital environments.

Analysis of the semi-structured interviews enables an examination of how different policy actors influenced the shape of the directive and participated in the formulation process. The data locates the position and involvement of each interviewee as a policy actor in policy environment and builds up a rich picture of events and their contexts in relation to this specific directive.

### **7. 3. Policy formulation for the database directive**

This section compares and summarises the responses from the 40 interviewees to the first 8 questions of the interview question frame. While some of this data is tabulated, analysis generally involves directive reference to the interview transcripts. As explained in chapter 5 specific transcripts are referred to by interview number, page and line numbers, for example interview 21 transcript page 5 lines 20-25 would be referenced as follows [1:5:20-25]

- *Question 1. When was your first contact with European discussions on Databases ? What factors led to Databases becoming a focus for European public policy discussions ?*

**Table 7.2. Interviewees period of involvement in the database discussions**

| Interview number | June 1988<br>Copyright<br>Green<br>Paper         | April 1990<br>Public<br>Hearing | April<br>1992<br>Formal<br>Proposal | October 1993<br>Amended<br>Proposal | July 1995<br>Common<br>Position | March 1996<br>Adopted<br>Directive |
|------------------|--|---------------------------------|-------------------------------------|-------------------------------------|---------------------------------|------------------------------------|
| 1.               | [From 1986 to early November 1994]               |                                 |                                     |                                     |                                 |                                    |
| 2.               | [From late 1989 to February 1993]                |                                 |                                     |                                     |                                 |                                    |
| 3.               | [From November 1993 into implementation]         |                                 |                                     |                                     |                                 |                                    |
| 4.               | [From May 1991 to October 1993]                  |                                 |                                     |                                     |                                 |                                    |
| 5.               | [From March 1991 to October 1993]                |                                 |                                     |                                     |                                 |                                    |
| 6.               | [From 1985 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 7.               | [From October 1993 to April 1995]                |                                 |                                     |                                     |                                 |                                    |
| 8.               | [From April 1995]                                |                                 |                                     |                                     |                                 |                                    |
| 9.               | [From January 1991]                              |                                 |                                     |                                     |                                 |                                    |
| 10.              | [From September 1991 to December 1994]           |                                 |                                     |                                     |                                 |                                    |
| 11.              | [From 1988 to July 1995 and the Common position] |                                 |                                     |                                     |                                 |                                    |
| 12.              | [From 1988 to July 1995 and the Common position] |                                 |                                     |                                     |                                 |                                    |
| 13.              | [From December 1992 to December 1995]            |                                 |                                     |                                     |                                 |                                    |
| 14.              | [From December 1992 to December 1995]            |                                 |                                     |                                     |                                 |                                    |
| 15.              | [From 1988 to the directive's adoption]          |                                 |                                     |                                     |                                 |                                    |
| 16.              | [From 1988 to the directive's adoption]          |                                 |                                     |                                     |                                 |                                    |
| 17.              | [From June 1993 into implementation]             |                                 |                                     |                                     |                                 |                                    |
| 18.              | [From 1988 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 19.              | [From 1986 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 20.              | [From 1986 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 21.              | [From January 1991 into implementation]          |                                 |                                     |                                     |                                 |                                    |
| 22.              | [From February 1994 into implementation]         |                                 |                                     |                                     |                                 |                                    |
| 23.              | [From 1987 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 24.              | [From 1986 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 25.              | [From June 1992 to the directive's adoption]     |                                 |                                     |                                     |                                 |                                    |
| 26.              | [From November 1990 to April 1995]               |                                 |                                     |                                     |                                 |                                    |
| 27.              | [From 1986 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 28.              | [From December 1994 into implementation]         |                                 |                                     |                                     |                                 |                                    |
| 29.              | [From March 1989 into implementation]            |                                 |                                     |                                     |                                 |                                    |
| 30.              | [From 1988 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 31.              | [From May 1992 to the directive's adoption]      |                                 |                                     |                                     |                                 |                                    |
| 32.              | [From November 1991 to November 1995]            |                                 |                                     |                                     |                                 |                                    |
| 33.              | [From 1988 into implementation]                  |                                 |                                     |                                     |                                 |                                    |
| 34.              | [From April 1989 into implementation]            |                                 |                                     |                                     |                                 |                                    |
| 35.              | [From 1988 to December 1993]                     |                                 |                                     |                                     |                                 |                                    |
| 36.              | [From February 1992 into implementation]         |                                 |                                     |                                     |                                 |                                    |
| 37.              | [From September 1990 into implementation]        |                                 |                                     |                                     |                                 |                                    |
| 38.              | [From May 1992 into implementation]              |                                 |                                     |                                     |                                 |                                    |
| 39.              | [From September 1990 into implementation]        |                                 |                                     |                                     |                                 |                                    |
| 40.              | [From March 1989 into implementation]            |                                 |                                     |                                     |                                 |                                    |

This question provides background data on the interviewees involvement in the database discussions and their understanding of the origins of the databases as a focus for European policy action. Responses to the first part of this question are presented in Table 7.2. This



provides a graphical representation of interviewees first contact with and period of involvement in the database discussions. This involvement is assessed in terms of their participation in and knowledge of the key policy documents and events identified from the documentary evidence. Table 7.2. also provides some insight into interviewees involvement in European copyright policy more generally, for example [4:1:13-17], [7:1:13-18], [22:1:13-18], [27:1:13-20], [40:1:13-18].

The second part of this question examines interviewees opinions on the range of factors that contributed to the emergence of database protection as a focus for European level policy action. This question is particularly concerned with the initial phase of the formulation process. The responses can be summarised as follows:

First, a number of interviewees were simply unsure as to why database protection became a focus for European policy action, for example [9:1:25-28], [10:1:39-41], [33:1:27-29], [38:1:23-27]. Within this perspective some interviewees explained their lack of clarity by pointing out that they had joined the database discussions after the release of the formal proposal and had just accepted the directive as part of European policy developments in the copyright field, for example [22:1:13-16], [25:1:47-51], [28:1:13-17]. Other interviewees explained part of the problem was because of the confusion created by the over-complex initial proposal text which obscured the wider implications of the proposed directive [17:1:16-20], [18:1:19-27], [26:1:38-40], [37:1:16-22], while one interviewee explained that because the directive was not a priority for her association she had not investigated its background [34:1:20-25].

Second, a majority of interviewees explained database protection more specifically in terms of European Commission efforts to harmonise European copyright regimes in the face of challenges from digital technologies and as part of the wider European project to complete the internal market<sup>2</sup>, for example [13:1:23-26], [16:1:24-27], [29:1:19-32], [32:1:29-30], [36:1:41-47]. Within this the database proposal was seen to have been developed solely by the Commission rather than in response to lobbying from industry, for example [12:1:18-27], [30:1:30-35], [31:1:21-23]. At a more detailed level this perspective had two strands, the first and most common focusing on the activities of Commission service DGIII after the 1988 copyright Green Paper and tying the database proposal to the earlier software directive, and the second on the initial development of the European information market from the late 1980's onwards and the role of Commission service DGXIII in recognising the need for its legal protection.

This first strand focused particularly on the role, ambitions and attitudes of two DGIII officials Mr. Verstrygne and Mrs.Czarnota who were identified as the driving force behind both the database directive and the computer software directive, for example [5:1:27-40], [35:1:37-42], [40:1:19-23]. Indeed a number of interviewees expressed the view that; given the initial lack of industry enthusiasm for a European directive on this issue; the opposition to any form of sui generis approach evident at the 1990 public hearing; and, the weakness of the internal market argument, it was only the strong will of these officials that prevented the proposal from being dropped, for example [10:2:1-5], [11:1:32-43], [17:1:43-49], [23:1:40-48]. Aligned to this perspective was the view that the main reason for Commission activity in the area of database protection was as a form of industrial policy because of concerns over the dominance of the US database industry in Europe [40:1:29-38].

The second strand whilst acknowledging DGIII as the lead Commission service in the formal policy process examined the early development of the European information market and the role of Commission service DGXIII, for example [7:1:20-26], [8:3:47-51], [19:1:20-23], [21:1:23-25]. Within this perspective some interviewees attributed the beginnings of the

<sup>2</sup> See, discussion of European copyright harmonisation in section 3.2.2.

European information services market variously to developments in the UK [27:1:13-31] and France & Germany [24:1:13-34] while others identified the DGXIII PROPINTELL study as a major step in identifying database protection as an issue in need of European action and traced the Commission's role in copyright harmonisation back to the early seminal copyright study by Professor Adolf Dietz in the late 1970's [39:1:13-27], [3:1:17-24].

Third, in the context of this majority view identifying European policy action on databases as very much a creation of the European Commission rather than as a policy response to pressure from industry or particular Member States it is useful to analyse and compare the responses of the Commission officials most directly involved. A perspective from an official in DGXIII echoes the documentary evidence by referring to early DGXIII activities aimed at encouraging the development of the European information market and the commissioning studies like the PROPINTELL report. These DGXIII activities fed into DGIII's work on the 1988 copyright Green Paper and in particular chapter 6 on databases, although because of the personalities involved tensions developed between DGXIII and DGIII officials over who should lead a directive proposal on this issue [6:1:31-57]. In contrast the DGIII officials involved at this early stage, although acknowledging contacts with DGXIII, presented database protection as an issue that along with computer software DGIII had identified in the period after the 1985 White paper [2:1:20-27], [1:1:13-25]. Within this perspective, the draughtsman of the directive proposal emphasized that although the issue of database protection was linked to the controversial issue of software protection, a number of reasons kept it from becoming a priority issue. These reasons were partly practical and partly because of the general lack of lobbying from the database industry, which at the time was dominated by a few large companies mainly in the UK and had yet to develop good channels of European level representation [1:1:19-53]. Given these comments it is perhaps unsurprising that another DGIII official described the draughtsman as 'the mother of the database directive' [4:1:19].

- *Question 2. What was your involvement in the Database discussions both formally and informally ? Which factors would you identify as the most important in leading to the Directive's adoption ?*

This question aims to verify the key policy issues and events in the formulation process and at a practical level to reveal the role of policy actors. Using the two phase model of the formulation process responses can be summarised as follows:

During the *first phase of the formulation process* up to the publication of the formal proposal, the interview responses echo the documentary evidence by confirming that the issue of database protection initially had a low policy profile and was overshadowed by other copyright initiatives, including in particular the huge lobbying that took place on the software directive, for example [2:1:47-55], [40:1:43-45]. Having opted for a copyright based solution to the protection of databases in the 1988 Green Paper, the Commission up to and beyond the April 1990 hearing began to gather information on potential solutions. These activities included trips to the USA where discussions were held with information industry representatives [1:2:4-11]. As a result, Commission officials quickly became aware of the problems they faced in using copyright to protect database products and the need for some additional form of protection [2:1:58-59 and 2:2:1-5]. During this period as tensions between particular officials in DGIII and DGXIII increased [1:2:21-32] DGIII began to try to canvas industry support for a proposal on databases [25:2:8-12], [35:1:47-49 and 35:2:9-14], [36:1:53-58], because they anticipated that there might be opposition to their directive proposal particularly from the UK industry [26:1:52-58].

However, despite these activities in the period after the April 1990 hearing there remained a general lack of industry support for a directive proposal and while general agreement was

reached that any proposal produced should be based on copyright, *sui generis* type solutions were rejected, for example, [19:1:38-41], [20:2:2-7], [32:1:42-47], [39:1:36-42]. A number of the interested parties also expressed doubts over the need for a directive, arguing that it did not solve any specific problem [24:2:22-27], [29:2:4-8]. Others cast aspersion on the motivations driving the proposal, suggesting that it was to do with particular Commission officials career ambitions and the Commission's desire to expand its competence in the field of IPRs, for example [23:2:30-32], [24:1:53-57], [40:2:4-8]. This lack of enthusiasm for a proposal on databases appears to have been shared by the UK government who felt confident that they had covered this issue in their 1988 Copyright Act [15:1:47-50], [20:1:48-59 and 20:2:2-14], [29:2:26-32].

In this context and given that by the end of January 1992 the Commission had adopted a proposal on database protection it is perhaps unsurprising that a majority of interviewees identify the definition of the *sui generis* right as the most important factor in this first phase and in the formulation process more generally, for example [1:2:48-49], [6:2:11-13], [8:4:8-12], [17:2:6-9], [22:1:44-46]. In explaining the Commission's decision to opt for the innovative dual system of protection in its proposal two key reasons can be identified from the responses of the Commission officials involved. First, from the software directive the Commission was aware that copyright alone could not offer the necessary degree of protection to databases. Second, the draughtsman of the directive proposal was herself partly motivated by a desire to explicitly codify principles in European law that would prevent a future Magill type judgment<sup>3</sup> [1:2:48-59 and 1:3:1-8], [2:2:4-10]. However, at a practical level within the Commission another important factor was confidence amongst DGIII officials that they could get this proposal adopted by the College of Commissioners, for example [1:2:21-23], [3:1:44-45], [5:2:7-14].

After the publication of the database proposal the other European institutions became directly involved in the formulation process. In terms of the most important factors leading to the directive's adoption the interview responses echo the documentary evidence in identifying the scope and duration of the *sui generis* right, the extension of the scope of the directive to cover non-electronic databases, defining the term databases, the issue of compulsory licensing and the exceptions permissible under both copyright and *sui generis* right and the reciprocity clause, for example [3:1:46-48], [6:2:16-28], [9:1:54-9 and 9:2:1-49] [20:2:27-41 and 20:3:1-4], [23:2:43-55 and 23:3:1-2]. From the outset the *sui generis* created the most confusion and difficulty in the formulation process [36:2:12-19]. While this was initially partly to do with the over-complicated proposal text (see Question 1) which had been designed to prevent the deletion of the *sui generis* right [1:3:2-7] the major reasons appears to be the prevalence of a '*copyright lens*' particularly in the Council working group through which debates on the *sui generis* right were refracted, for example [1:3:13-34], [7:2:10-13].

During the *second phase of the directive's formulation* the Commission was involved at every stage engaging in negotiation and consultation with the other European institutions and interested parties. Internal to the Commission, DGIII led the proposal and adopted a policy stance very much aligned with industry representatives, while DGXIII tried to safeguard the free flow of information and the interests of consumers and users [1:2:21-40], [5:1:57-59 and 5:2:1-4]. Aside from these different stances, tensions between officials from DGIII and DGXIII appear to have arisen because of the personalities involved. At a practical level this resulted in DGXIII officials often not being kept informed of developments in the Commission's position [7:1:39-55], [17:2:49-52].

In terms of the policy process the interview responses ascribed little importance to the role of the Economic and Social Committee (ECOSOC), a typical perspective being [30:1:55-58],

<sup>3</sup> See, Section 3.2.4. - original Commission decision: *Magill TV Guide v. ITP, BBC and RTE* 89/205/EEC (IV/31.851) OJ 1989 L78/43.

which was itself a view echoed by ECOSOC representatives interviewed [12:1:55-59]. Similarly, most of the interviewee responses addressing the role of the Parliament did not ascribe it a very important role during these discussions. From a DGIII perspective the first reading was simply a matter of keeping 'control' of the discussions [1:4:4-11], [4:2:4-13], while many interested parties were disparaging about the lack of understanding or interest amongst Parliamentarians on the directive, for example [20:2:49-57], [21:1:41-45], [24:1:55-59 and 24:2:1-3], [27:2:32-37], [30:2:6-9], [37:1:50-56]. In this context interviews with the Parliamentarians appear to add weight to the view that they had a limited understanding of the issues [13:1:31-44], [14:1:30-52].

The interview responses testify to the importance of the negotiations in the Council working group where Commission officials and Member State representatives negotiated the directive to a common position in July 1995. The interviewee data highlights a number of important issues and events during this negotiation process. Shortly after the directive proposal was presented at Council the UK government tabled a motion for the directive to be withdrawn and then after this failed used the UK Presidency to stall the directive [1:3:38-49], [23:2:35-39]. Denmark held the next Council Presidency and proved eager to assist the rapid development of the proposal. This was because its delegation was proud that the sui generis right had been at least partly modeled on Denmark's 'catalogue rule', although it is clear that knowledge of this rule ended up leading to some confusion in discussion of the sui generis right [1:4:16-29]. Belgium held the Presidency in the second semester of 1993 and had a strong *droit d'auteur* position although basically the Council working group was at this time awaiting the amended proposal text following the Parliamentary first reading. After this, progress in the negotiations became very slow under the Greek Presidency who were uninterested in the proposal and who had a Council chairman who was neither a copyright or database expert [1:4:37-48]. Another major factor in the lack of progress was the negotiating style of the Commission rapporteur which produced an adverse reaction from the Member States representatives for example, [10:2:44-50], [12:2:12-20], [16:1:38-42], [17:2:32-46], [18:2:8-18]. This perspective on the domineering style of the Commission rapporteur contrasts with views from a number of industry representatives who described this rapporteur as very open and willing to discuss all aspects of the directive, for example [25:2:14-15], [29:1:53-57], [31:1:42-45].

The dramatic increase of speed in the negotiations that took place under the French Presidency was the result of a range of factors including the change of Commission rapporteur, the Presidency's negotiating skill and ability to resolve disputes amongst its own delegation [1:5:10-21], and the maturing of the debate in the context of the emerging information society, for example [3:2:4-7], [10:2:30-42], [16:1:44-46], [32:1:45-47]. However, for some the speed of negotiations highlighted the undemocratic nature of the European policy process in that unelected civil servants more concerned with document management and satisfying European industry than with developing balanced solutions, can transform proposal texts in the last few weeks of a two and half year negotiation process, the best example being the deletion of the compulsory license provisions in the penultimate Council working group meeting [6:2:21-36], [9:2:41-46], [22:1:45-46], [24:2:5-20]. Certainly a contributory factor in some of the changes made to the directive text was the role of particular interested parties in lobbying the Commission and their Member State delegations during the negotiations of the Council working group. However amongst these interested parties, while some industry lobbyists retain good contacts with the Commission and members of the Council working group throughout [21:1:36-38], [30:2:11-13], [34:1:56-59], others found the Council negotiations to be like a 'black hole' [23:3:4-5] with little information emerging on the directive's development, so that by the time the directive had been transformed at the Common position stage it was too late for them to articulate their concerns [37:1:38-41], [38:1:36-37].

In the second reading in Parliament while there was the possibility that the directive would be

amended to bring back the compulsory licensing provisions hard lobbying from industry and the rapporteurs general support for the directive ensured only minor editorial changes were made, for example [13:1:38-44], [14:1:34-43], [36:2:27-36].

• **Question 3. Did your opinions change during your involvement with these discussions ?**

This question aims to reveal the influence of developments in the database proposal and in the wider policy context on policy actors opinions and in particular on those of the interested parties (most of whom were against the sui generis approach at the April 1990 hearing). These responses are examined within the three categories of policy actors identified.

**Amongst the interested parties;** *publishers* overall retained their opposition to the sui generis right throughout the formulation process and continued to argue for a wholly copyright based solution rather than the directive's dual system of protection that they viewed as a new and untested form of protection that was not applicable internationally. Ultimately however with the deletion of the compulsory license provisions and general strengthening of the protection offered by the sui generis right they became satisfied with the directive as adopted and viewed it as an important step in the extension of copyright into the digital environment for example, [19:2:17-29], [20:3:8-13], [21:2:7-14], [22:1:50-51], [26:2:11-14], [31:2:1-2], [32:2:3-15].

*Other right holders* who remained sceptical about the need for the directive acknowledged that at a practical level as the directive proposal had developed so their opinions had evolved, particularly as the discussions of the information society, multimedia and the Internet recontextualised the formulation process [23:3:15-19], [24:2:31-52]. Similarly *authors* groups opinions on the overall importance of the directive changed as these technological developments became the focus for high level political discussions [33:2:6-9], [34:2:34-54]. While industry opposition to the compulsory license provisions remained strong throughout, some information industry representatives gradually became uneasy with this position viewing it as a 'knee jerk' reaction from rights holders. Indeed these representatives saw the potential in these provisions for opening up the commercialisation of public sector information [25:2:36-50], [27:2:53-58 and 27:3:1-8]. The opinions of *library and end users representatives* certainly changed towards the directive particularly after the common position which came as something of a shock and which they considered raised serious concerns for information access in digital environments [37:2:18-23], [38:2:4-19].

**Amongst European policy-makers** responses from ECOSOC and Parliamentary representatives were generally supportive of the directive and indicate that they did not change their opinions during its negotiation, although some acknowledged that this was partly due to the limited nature of their involvement in its formulation [11:2:34-37], [12:2:12-15], [13:1:48-49], [14:1:56-58]. In the Council working group most representatives indicated that their opinions had undergone some change either as a result of the negotiations and greater familiarity with the sui generis right or more generally because discussions of the information society had repositioned the directive in the wider context [15:2:16-20], [16:1:53-56], [17:2:57-59], [18:2:22-25].

**Amongst European civil servants** most of the responses from Commission officials indicated no dramatic shift in opinions although there was acknowledgment that the directive as adopted was not exactly what they had anticipated. The DGIII officials highlighted that although the need for political resolution in Council forced certain changes that were not ideal the basic strategy of getting the dual system of protection adopted had remained clear from the beginning [2:2:24-26], [3:2:11-20]. Similarly DGXIII officials goals of trying to maintain a good balance of rights in the directive that would benefit the development of information

markets while not adversely affecting information access remained the same during the formulation process. However, the dropping of the compulsory license provisions was a big disappointment to DGXIII officials [6:2:46-50], [7:2:17-25], [8:4:19-20]. Amongst the Council officials aside from becoming more familiar with the directive their views did not change inasmuch as they tried to remain neutral. However one official expressed surprise at the speed with which the French Presidency managed to push the directive to adoption, while the other official partly explained this by pointing to a Presidency's ability to work in cooperation with the Commission and Council secretariat to resolve issues before formal meetings of the Council working group [9:3:5-17], [10:3:3-14].

- **Question 4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?**

This question aims to reveal the interconnections between policy actors and to examine interviewees assessments of their influence in shaping the database directive. Responses to this question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the interested parties** while no formal alliances were formed, the interview data testifies to the very close contacts between policy actors sharing similar lobbying aspirations. Broadly speaking these fall into the three traditionally identifiable groups common to most copyright discussions i.e. rights holders, authors and users. Within the *rights holder group* the FEP, Dun & Bradstreet and Reuters as the three most active right holder lobbyists variously maintained contacts with most of the other rights holder interests. Firstly, the FEP acted as focus for publishers interests and maintained close contacts with the PA, IFPI, Bertelsmann and Reed-Elsevier [19:2:34-38], [20:3:27-39], [21:2:22-41], [26:2:25-30], [31:2:13-18], [32:2:34-39]. Secondly, Dun & Bradstreet acted as a focus for many of the information industry groups and maintained contacts with the EIIA, IIA, FEDMA, the publishers Bertelsmann and Reed and through the EIIA contacts with EUSIDIC [25:3:4-8], [24:3:2-8], [27:3:13-16], [28:1:27-31], [36:2:43-45]. Thirdly, Reuters who maintained contacts with both the publishers through the FEP and the rest of the information industry through Dun & Bradstreet and the EIIA [23:3:26-32], [19:2:34-38], [20:3:27-39], [25:3:4-8], [35:3:4-11]. Unsurprisingly given the size of the UNICE lobby it did not maintain close contacts with any other groups although its concerns did overlap with other rights holder groups [30:2:39-44].

Within the *authors group* neither the IFJ or AIDAA maintained close contacts with any other organisations. This was because of their relatively limited involvement in the database discussions which focused specifically on lobbying for the deletion of Article 3(4) in the original proposal that would have affected employees economic rights. Both associations however acknowledged that as discussions of copyright in the information society have become more high profile they have begun to forge links with other organisations concerned with the protection of the rights of authors and users [33:2:15-24], [34:3:4-11]. Within the *users group* while EBLIDA and IFLA followed the directive they only became actively concerned after the Council common position had been agreed which was too late to galvanize an effective lobby from amongst its contacts with academic experts and other user groups like BEUC (European Consumers Association) [37:2:28-37], [38:2:24-30]. Indeed the lack of users in the formulation process was a surprise to one right holder representative [20:3:43-45] while another remembered that when they did arrive late on in the discussions they had a negative opinion of the directive [26:2:39-41].

In terms of how influential these different interested parties felt their perspectives were on the directive the interview responses can be summarised as follows: Amongst the *rights holders*, apart from one notable exception [20:3:27-33] there was a general reluctance to claim influence over the directive, although it is clear that most of their lobbying activities were

directed at the Commission. A majority of rights holders commented that while it was difficult to assess their own influence, by comparing their lobbying positions and the changes that took place in the directive text they felt that their opinions had often been taken on board, particularly in the deletion of the compulsory license provisions, for example [19:2:55-57], [26:2:46-48], [36:3:13-16] although they also acknowledged that they were not always successful i.e. they did not succeed in preventing the deletion of Article 3(4) on employees economic rights [32:2:40-44], [30:2:53-57]. Some of the responses also suggested that the degree of influence as a lobbyist often relied on a shared nationality or good inter-personal relations with particular Commission officials or policy-makers [24:3:24-29], [25:3:19-26], [31:2:35-37]. Amongst the *authors representatives* the view was that whilst they had not generally been influential their lobbying had ensured the deletion of Article 3(4) which they considered a great success given the opposition from rights holders to the removal of this Article [33:2:32-34], [34:3:18-21]. *User groups* acknowledged that they had little influence on the directive and pointed out that exerting influence was always difficult in the copyright field because civil servants and policy-makers tended to have starting positions sympathetic to the demands of industry for more protection [37:2:39-57], [38:2:32-42].

**Amongst European policy-makers**, ECOSOC representatives did not form any alliances although as part of their activities in generating an official ECOSOC opinion they did have direct contacts with the Commission, and members of the UK Council working group as well as representatives from UNICE, the CBI and publishers groups [11:2:47-52], [12:2:25-34]. They did not however consider that opinions from the ECOSOC were important or influential in the formulation of the database directive or in European policy-making more generally because as an institution it does not have any power under the EC treaty. The only exception identified being where the ECOSOC gives a very critical opinion of a Commission proposal which usually indicates that the proposal will be unacceptable to the Parliament and Council [11:3:31-37], [12:2:40-42]. Similarly the Parliamentary representatives did not consider that they had been very influential on the database directive which had received cross-party support as a necessary harmonisation measure and which particularly by the second reading had become from their perspective, a formality for adoption [13:1:54-58], [14:2:4-13].

Within the Council working group all the representatives interviewed commented that as part of the normal negotiation process ad hoc alliances had been formed between Member State delegations on particular points of discussion particularly on the sui generis right [17:3:19-26]. More generally with copyright legislation the responses indicated a common division between copyright countries and droit d'auteur countries and within this common ad hoc alliances between France, Belgium and Luxembourg; Denmark, Finland and Sweden; the UK and Ireland; and, Italy and Spain [15:2:25-29], [16:2:9-11], [17:3:14-17], [18:2:41-54]. In terms of influence the UK and French representatives were very clear that they had been very influential in shaping the database directive, the former because the UK has the largest database industry and is the main copyright country in the EU, the latter because during its Presidency of the Council it achieved the directive's common position [15:2:31-38],[16:2:13-15], [18:2:52-59]. The Belgian representative indicated that Belgium was not influential and could not prevent the deletion of the compulsory license provisions which ultimately were dropped as part of a political bargain done by the Presidency and Commission to ensure the directive's adoption [17:3:28-43], [18:3:5-15].

**Amongst the European civil servants** interviewed the majority stated explicitly that their role was not to form alliances but to remain neutral in the policy process, for example [3:2:25], [4:2:32-33], [7:2:30], [9:3:21-23], [10:3:19-21] However, particularly the Commission officials interviewed acknowledged that they had engaged in contacts with other civil servants, policy-makers and interested parties during the formulation process [1:6:5-7], [6:2:55-59 and 6:3:1-3]. In terms of influence in shaping the directive there was a sharp division between on the one hand officials from the Council and from DGXIII and on the other officials from DGIII & DGXV. The official from the Council secretariat commented

that he had little influence on the directive itself but had facilitated the smooth running of the Council negotiations and ensured the correct procedures were followed [9:3:31-38] and [9:3:52-55]. Similarly DGXIII officials commented that they had little influence on the directive. This they accounted for in terms of the strained relations they had at the time with DGIII (later DGXV) and because of the domineering personality of the DGIII rapporteur [5:2:49-56], [7:2:30-35], [8:4:56-58].

In contrast the DGIII officials interviewed were very clear that they were among the most influential policy actors in the formulation of the database directive. This influence began with the development of the initial database proposal and its successful adoption by the Commission[2:2:41-46] and continued through the first reading in Parliament [4:2:9-13] into the Council negotiations, where one official claimed that without his efforts the directive would never have been adopted [3:2:44-51]. From these responses it is clear that the main focus of the Commission activities was in the Council at the negotiating table with the Member States delegations where DGIII tried to exert control by working both directly with the Presidency and by holding extra meetings with key Member State delegations [1:6:8-19], [3:2:53-56].

• *Question 5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?*

This question aims to reveal interviewees assessment of the most influential policy actors in shaping the database directive and to provide insight into the different ways in which this influence is exerted in the policy process. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

Overall, the interview responses show a high degree of consensus in their identification of the most powerful policy actors in the formulation process. While at the broadest level these responses acknowledge that under the terms of the EC treaty ultimately power rests with the Council as the executive decision-making body, more specifically they all identified the same Member State representatives in the Council working group, the same officials in DGIII and DGXV of the Commission and the same lobbyists from amongst the interested parties as the most powerful actors, for example [5:3-4], [6:3], [10:3-4], [11:3-4], [16:2], [17:3-4], [20:4], [24:3], [26:2-3], [31:2], [39:2]. Noticeably the interview data also highlighted the limited influence of the ECOSOC and Parliament during the formulation of the database directive, for example [2:3:33-38], [21:2:56-59 and 21:3:1-11], [23:4:8-11], [25:4:21-28], [31:2:46-52], [32:3:21-29], [34:3:31-43], [40:3:51-54].

**In the category of European civil servants** the interview data (*including responses from the civil servants interviewed*) identifies three Commission officials as having been very influential at different times during the formulation process i.e. Mr. Jean-francois Verstrygne (DGIII/F/4) Mrs. Bridget Czarnota (DGIII/F/4 & DGXV/E/4) and Mr. Jens Gaster (DGXV/E/4). From the perspectives of the civil servants interviewed Mrs.Czarnota and Mr.Verstrygne were identified as instrumental in generating the original proposal and as the 'formidable team' that ensured its adoption by the Commission and drove it through its first reading in Parliament and into the Council negotiations[3:3:3-6], [4:3:27-32], [5:3:20-26], [9:4:9-19], [10:3:23-26] While Mr. Gaster was identified as the Commission rapporteur who negotiated the common position and took the directive through the second reading in Parliament to its final adoption [6:3:16-18], [7:2:46-50], [8:5:13-14]. From the perspective of the European policy-makers interviewed similar views were expressed about the role of these three Commission officials[11:4:10-13], [16:2:32-33], [17:3:48-52], [18:3:40-57] and in particular about Mrs.Czarnota who was described by the UK's representative in the Council working group as a 'worthy opponent' [16:1:40]. However, while some of these interviewees were keen not to overplay the role of the Commission, reference was made to a rumour that



Mrs.Czarnota did not negotiate the directive through to adoption because she had become 'unprofessionally involved in the directive' such that her negotiating style had begun to impact negatively on the Council discussions [17:3:54-59], [18:3:23-38] (see Question 2). From the perspective of the interested parties interviewed, again similar views were expressed about the importance of these three Commission officials and the Commission more generally, for example [20:4:4-7], [24:3:40-44], [25:3:31-39], [29:2:50-54], [32:2:54-59], [34:3:45-49], [35:3:30-31], [37:3:14], [39:2:24-29], and in particular about the role of Mrs. Czarnota whose departure before the directive's adoption was also explained in terms of similar rumours [23:3:57-59], [24:4:2-7].

In shaping the database directive these DGIII officials clearly had a major role, not only in identifying databases as an issue for copyright harmonisation and in preparing the original database proposal with its innovative dual system of protection but also in the formal policy process in pushing the draft directive forward to its adoption. At a practical level this involved a number of different strategies. Firstly, the contacts built up by Mrs.Czarnota and Mr.Verstrygne during their negotiation of the software directive within the Commission hierarchy ensured that they were confident of their proposal being formally adopted by the College of Commissioners. Secondly, the copyright section of the proposal was designed to satisfy the majority *droit d'auteur* Member States in the Council while the *sui generis* right was tied to it as a means of creating an overall compromise package that might be supported by the UK and other copyright countries. Thirdly, in dealing with the ECOSOC and Parliament the strategy adopted was aimed at maintaining control over the proposal and preventing any misunderstandings or misinterpretations. Fourthly, the main work of these Commission officials was in the Council working group where the strategy was to work closely with the Presidency to keep control of the meeting timetables and agendas. Outside the meetings the Commission also contacted the other Member States delegations particularly the floating voters (especially if these were from larger Member States with more votes under qualified majority voting (QMV)). Negotiating tactics varied depending on the particular Member State delegate's personality and the Commission official's knowledge of that Member State's main priorities for the directive. But in the working group meetings tactics also varied from sounding positive and upbeat about progress (even if none had been made) to being displeased and finding arguments against a particular Member State's position. These Commission officials also turned industry lobbyists to their advantage by inviting them to make presentations to the Council that supported the Commission's arguments. Alongside these activities a lot of the work involved just being patient and waiting to see if Member States positions changed, which often occurred as a result of inputs from the Member State level or other sources including lobbying, for example [1:6:1-59 and 1:7:1-46], [2:3:6-43], [3:3:4-21], [4:3:27-32], [5:3:41-47].

However, while these Commission officials deployed a range of strategies and tactics in the negotiation of the database directive, the interviewee data testifies to the fact that the Commission was never in total control of the formulation process and that in fact, particularly in the case of Mrs.Czarnota her strong personality and rigid negotiating style actually impeded progress in the Council negotiations, for example [5:3:28-39], [7:2:46-53], [11:3:12-17], [17:3:54-59], [18:3:23-34]. Similarly a number of interested parties expressed concerns about the power of the Commission during the formulation process and in particular about the role of 'faceless bureaucrats' for whom policy-making appeared to be simply about getting directives adopted regardless of their content or impact on industry [23:4:2-6], [24:3:40-59], [29:3:10-18], [30:3:13-25]. One interviewee qualified this view by classifying Commission officials into two types; those that invest themselves into the topic being discussed and those who merely see a directive as a chance for career advancement [25:3:41-48].

**In the category of European policy-makers** the interview data (*including responses from the policy-makers interviewed*) identifies Member State representatives from France, Germany and the UK in the Council working group as having been very influential in the

formulation of the database directive i.e. Mr. Dobelle (Chairman of the Council working group during the French Presidency), Madame De Montluc (Member of the Council working group for France from the French Ministry of Culture), Mr. Kemper (Chairman of the Council working group during the German Presidency and member of the Council working group for Germany from the German Ministry of Justice) and Mr. Jenkins Member of the Council working group for the UK from the UK's Department of Trade and Industry - Patent Office). From the perspectives of the policy-makers interviewed an important general point made was that with all 'internal market directives' the politics of the negotiation normally always revolves around the positions of the three largest Member States (France, Germany and the UK) because of the system of Qualified Majority Voting (QMV). More specifically, the UK was identified as a key player because it has by far the largest and most active database industry, it is the largest Member State with a copyright system and with its traditional 'sweat of brow' protection was a major reason for the introduction of the dual system of protection in the directive. Germany was identified as a key player particularly during its own Presidency because of its success in finalising agreement on the copyright section of the directive. France was identified as a key player because during its Presidency the most dramatic changes were negotiated to the directive text and final agreement was reached on a common position that led directly on to the directive's adoption, for example [11:3:42-57], [12:2:47-53], [15:2:43-46], [17:4:4-17], [18:2:56-59]. Noticeably both Parliamentarians interviewed could not remember anything about who were the dominant actors in the policy process [13:2:29-33], [14:2:18]. From the perspectives of the civil servants interviewed generally similar views were expressed about the importance of France, Germany and the UK, for example [1:4-7], [2:3:14-23], [5:3:41-47], [7:3:11-31], [8:5:14-15], [9:4:25-29], [10:3:53-57]. From the perspectives of the interested parties interviewed again similar views were expressed about the role of France, Germany and the UK, for example [19:4:12-17], [20:4:24-25], [24:3:34-38], [30:3:7-11], [35:3:31-35], [37:3:4-12], [38:2:54-58], [40:3:19-30].

In shaping the database directive these representatives in the Council working group clearly had a major role. The interviewee data highlights that overall the negotiations in the Council working group proceeded relatively slowly until the German Presidency when they began to pick up speed and during the French Presidency when the negotiations were at their most dynamic. The initial slowness of the negotiations was the result of a number of factors including the negative reaction of Member States delegations to the Commission's negotiating style, the relatively low level of lobbying on the issue and the fact that the sui generis right was discussed from a purist *droit d'auteur* position by many of the Council delegations. The UK was initially against the directive but eventually accepted that it was inevitable and so participated actively in the negotiations and tried to strengthening the sui generis right to compensate for its loss of the 'sweat of brow' defense. Indeed in the opinion of one prominent Commission official 'the UK managed to have its cake and eat it' by negotiating away the compulsory license provisions and pushing many difficult issues into the directive's non-binding recitals [1:7:29-46]. Under the German Presidency the copyright sections of the directive were successfully concluded but the Germans were unsuccessful in removing the sui generis right which they did not support and which they would have preferred to replace with a system of unfair competition rules. For the French Presidency part of its success in facilitating a common position was its ability to resolve the differences of opinion on the sui generis right between representatives in its own delegation in the Council working group. These differences had led to the different positions being articulated by the French delegation on the sui generis right depending on whether representatives from the Ministry of Culture or Ministry of Industry attended the Council working group meetings. Ultimately, the penultimate Council working group meeting under the French Presidency proved to be the most significant because at this meeting the political deal was struck to delete the compulsory license provisions to achieve a common position, for example [1:5:3-59], [2:3:25-31], [3:2:53-56], [4:2:37-55 and 4:3:4-13], [5:3:49-58], [6:3:26-32], [7:3:1-41], [9:4:25-36], [25:4:4-19], [36:3:21-30].

However, while these Member State delegations were the most prominent in the Council negotiations there are obvious limits on the power of any single delegation or Presidency to exert control over the other Member State delegations in reaching a common position [9:4:38-46]. The interview data also highlights that regardless of the merits of particular provisions within a directive ultimately agreement in Council is about political decisions taken by Member States COREPER representatives higher in the Council hierarchy who often have little intimate knowledge of the issues being discussed, for example [9:3:40-50], [10:4:15-28].

**In the category of interested parties** the interview *data (including responses from the interested parties interviewed)* identifies that the directive did not give rise to a great deal of lobbying and that most of the European lobbying that did take place was generated from UK-based companies or European associations represented by British nationals. This lobbying was also focused mainly on the Commission rapporteurs in DGIII (later DGXV) and Member State representatives in the Council working group. The most prominent and active lobbyists were Dun & Bradstreet (represented by Barry Wojcik), Publishers interests (represented by Charles Clarke and Clive Bradley), Reuters (represented by John Stevens and Catherine Stewart), Reed-Elsevier (represented by Quentin Rappoport), and the EIIA (represented by David Worlock) for example [19:2:40-47], [20:4:19-22], [24:3:24-29], [26:2:32-37 and 26:2:53-59], [29:2:56-59 and 29:3:1-2], [31:2:42-44], [33:2:51-53], [37:3:15-16], [38:2:47-52], [40:3:36-42].

From the perspectives of the civil servants interviewed generally similar views were expressed about the most important interested parties, although the involvement late on in the discussions of other interested parties such as IFPI was linked to the development of wider discussions on multimedia and the information society, for example [4:3:35-41], [5:4:12-15], [6:3:34-36], [7:2:55-57]. One Commission official also made the point that whilst it is relatively easy to identify the key policy actors it is much more difficult to draw conclusions thereafter about their power or ability to exert influence in the formulation process [8:5:5-9]. From the perspectives of the policy-makers interviewed, again, similar views were expressed about lobbying at the European level although it was also acknowledged particularly by Members of the Council working group that additional lobbying took place at the national level from a range of interested parties, for example [11:4:6-8], [15:2:53-54], [17:4:26-30], [18:4:14-19]. One interviewee also made the point that in the pre-proposal period much of the lobbying was a direct roll-over from lobbyists involved in the software directive [12:3:4-9].

In shaping the database directive these interested parties clearly had a role. The interview data however indicates that overall during the formulation of the database directive there was not a great deal of lobbying and that most of the lobbying that did occur was focused on DGIII officials in the Commission and representatives in the Council working group, particularly those from the UK [11:3:50-53]. Given that the Commission officials preparing any proposal have limited resources the most common strategy employed by these lobbyists was to ensure that these officials were contacted early on in the formulation process and supplied with documents, facts and figures. These interested parties also publicly gave support to the proposal and maintained frequent contacts with these officials throughout the formulation process [29:2:48-54], [32:3:6-19], [33:2:46-49], [34:3:51-59], [39:2:38-41], [40:3:26-42]. In terms of lobbying the Council lobbyists from European associations try to encourage their national Members to contact and participate in lobbying their Member State representatives in the working group although it is clearly not always easy, particularly if it is difficult to reach a common position amongst one's members [21:3:13-38], [27:3:40-45], [34:3:27-29]. The degree of success these lobbyists have however clearly depends a great deal on the preferences and stances of the officials and policy-makers with whom they interact [25:3:19-26] and it is clear that while some groups often have little or no information on how the Council negotiations are proceeding other groups are deliberately leaked documents to ensure support and public lobbying on key issues [21:3:29-32].

Crucially regardless of the strategies and tactics employed the interview data highlights that the European policy process is highly complex and that no single individual, institution or Member State is ever in overall control, even if some like to make claims to the contrary. [8:5:19-27], [9:2:51-59].

• ***Question 6. Did any international policy developments impact on the outcome of the Directive?***

This question aims to reveal policy actors assessment of the impact of policy developments outside the direct negotiation process on the database directive. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

While a few interviewees either could not remember or were vague in their responses to this question [11:4:22-28][13:2:37-38], [14:2:29-30], [33:3:2-4] the remaining interviewee responses identified some or all of a common range of policy developments as having been referred to or discussed during the directive's formulation. There were however differences of opinion with regard to assessing the impact of these developments in shaping the directive as finally adopted. The common range of policy events identified were the US Feist case, the GATT (TRIPS) agreement (i.e. Article 10(2) on databases), the Magill case, and the Dutch Van Daele case.

**Amongst the European civil servants** interviewed the US Feist case and to a lesser extent the Dutch Van Daele case and Commission decision in the Magill judgment were identified as having been important in the early phase of the directive's formulation [1:7:48-50] [2:3:47], [5:4:23], [6:3:46], [8:5:31]. More specifically the Feist case was mentioned in the Commission's explanatory memorandum to its proposal and was used to highlight the need for the directive per se and the sui generis right in particular [7:3:50-52], [9:4:50-54], [10:4:38-40]. Together with the Van Daele case, the Commission used Feist to illustrate the loop-holes in copyright law for the protection of compilations and by association databases [3:3:25-27], [4:3:50-51] while the Magill case was cited as part of the reason for including the compulsory license provisions [4:3:51-53]. The TRIPS agreement was identified as having been important in raising the international profile of discussions on database protection and, in the Council working group [1:7:52-59], [6:3:47-48], [7:3:45-48] it aided the French Presidency in pushing the directive to a common position because it meant the directive was being negotiated in an international environment that recognised database protection [10:4:27-40]. One interviewee pointed out that the database directive itself contributed to setting the WIPO agenda in discussing database protection [8:5:33-34].

**Amongst the European policy-makers** interviewed similar views were expressed about these policy developments. More specifically the Feist case, even though it did not overtly effect UK case law was accredited with having made it more difficult for the UK government and industry to try and defend the sweat of brow defense [12:3:13-16], [16:2:45-49]. The case was also referred to as having formed part of the Council discussions on the directive's reciprocity clause [18:4:34-37]. The TRIPS agreement was also identified as having been discussed during the formulation process. While some responses were unsure of its impact or viewed it simply as forming a background to the Council discussions [12:3:18], [15:3:27-29],[16:2:46] others identified it as an argument used by the Commission and German Presidency for the speedy adoption of the database directive [18:4:23-26] and for extending the scope of the directive to cover non-electronic databases [17:4:34-43]. While no references were made to the Dutch Van Daele case, the final judgment in the Magill case was mentioned as having formed part of the background to the final stages of the database negotiations [12:3:18-22], [17:4:57-59], [18:4:28-32]. Additionally two responses mentioned that the on-going WIPO discussions on database protection had an impact particularly after the arrival in the Council working group of the Finnish representative Mr. Jukka Liedes who at the time

was chairing the WIPO committee considering this issue [16:2:40-43], [17:4:57-59].

**Amongst the interested parties** interviewed the same range of policy events were identified, for example [39:2:50-52], [40:3:58-59]. The Feist case was identified in the majority of responses as significant in the early phase of the database directive's formulation, for example [20:4:29], [21:3:54-59], [27:3:49], [28:2:9-15], [31:3:8-10], [33:2:57-59]. More specifically it was accredited with having persuaded droit d'auteur countries of the Commission's arguments on the need for database protection [22:2:19-22], [23:4:20-29], [25:4: 33-36] and amongst particularly UK based interested parties of the fact that the sui generis right was as close as they were going to get in terms of protection to replace the sweat of brow defense [19:4:30-35], [24:4:14-17]. The case was also mentioned with regard to the question of reciprocity [25:4:43-47], [29:3:24-26]. On the TRIPS agreement, while some interviewees viewed it merely as providing a background to the on-going database discussions [23:4:36-37], [29:3:24-25] others identified it as important in the extension of the scope of the database directive to cover non-electronic databases [19:4:26-28], [30:3:38-40], [31:3:10-12], [32:3:37-39], [38:3:4-6]. The final Magill judgment was identified by some interviewees as influential in the deletion of the compulsory license provisions from the database directive by Council because it highlighted that European competition rules prevented abuse of dominant position [20:4:31-33], [23:4:31-34], [24:4:19-21], [32:3:46-47]. The Van Daele case was also mentioned but its significance down-played [30:3:26-33], [32:3:33-35], [37:3:20-22], [39:2:51], [40:3:51] and one interviewee identified the database directive itself as having set the international agenda for discussions of the protection of databases in WIPO[24:4:23-25].

- *Question 7. How do you account for higher public profile of the Database directive ? Do you agree with the characterisation of the Directive as the Cornerstone of the Multimedia society ?*

This question aims to reveal policy actors perceptions of the database directive's public profile and in particular how they would characterise the significance of the directive in the wider context of developments in multimedia and the information society. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

Overall the interview responses show a high degree of consensus in answering this question. The most typical perspective being that the database directive's higher profile was only relative, in that outside copyright circles it was known only as part of European efforts in the field of copyright, themselves linked to wider debates on the information society. The directive's characterisation as the cornerstone of the multimedia society was also generally disputed, although it was acknowledged as an important building block in the Commission's approach to extending copyright into the digital environment, for example [1:8:5-29], [11:4:33-38], [21:4:5-11], [32:3:52-58], [39:2:57-58 and 39:3:1-2].

**Amongst the European civil servants** interviewed the general view was that the database directive remained relatively unknown outside of copyright circles and that any higher profile it had was as a direct result of the higher profile of copyright discussions in Europe and Internationally and the emergence of initiatives on the Information society [1:8:5-7], [3:3:46-48], [7:3:57-59], [8:5:48-50], [9:5:10-16], [10:5:5-7]. The characterisation of the directive as the cornerstone of the multimedia society was disputed. However, one response highlighted that initially the directive certainly had the potential to be a multimedia directive and that this was only prevented because of lobbying from groups like IFPI towards the end of the negotiations, for the exclusion of CD's from the scope of the directive [1:8:9-14]. Others responses suggested that it was still too early to assess the significance of the directive for the emerging information society but that clearly the directive was significant in terms of the Commission's future approach to the digital environment [3:3:50-52], [4:4:8-13], [6:3:53-55], [9:5:114-16], [10:5:5-9]. Aligned to this point was the view that the directive's potentially

most significant aspect remains its sui generis right which may yet become an important model for other legislation [6:3:53-57], [7:4:4-11]. It was also acknowledged that despite the fact that the description of the directive as a cornerstone had come from the Commission itself [2:3:57-59], debates on the information society and multimedia had actually ended up causing confusion during the directive's formulation [1:8:21-25].

**Amongst the European policy-makers** interviewed similar views were expressed both about firstly, the directive's higher profile being relative and as a result of its links to wider debates on copyright and the information society, and secondly, skepticism towards characterising the directive as the cornerstone of the multimedia society [13:2:43-48], [14:2:35-39], [15:3:36-41], [16:3:54-58], [17:5:8-12], [18:4:42-50]. More specifically the directive was identified as an important part of the Commission's approach to the digital environment [11:4:36-38], [15:3:45-47], [17:5:15-17]. One response offering a UK perspective suggested that the directive might ultimately be more significant in droit d'auteur countries and had ultimately been something of a triumph for the Anglo-saxon copyright tradition [12:3:27-42]

**Amongst the interested parties** interviewed similar views were expressed, with a majority of the responses tying the directive's relatively higher public profile to the higher public profile of copyright discussions and the information society debates generally, for example [21:4:5-6], [22:2:31-33], [26:3:22-26], [27:3:56-59], [30:3:45-46], [33:3:9-15], [37:3:27-32], [39:2:57-58 and 39:3:1-2], [40:4:8-11] as well as international discussions on database protection including those at WIPO [19:4:40-42], [20:4:38-40], [28:2:20-22], [32:3:48-55], [37:3:38-42]. The majority of the responses were also skeptical of characterising the directive as the cornerstone of the multimedia society [23:4:42-49], [26:3:28-30], [30:3:45-52], [31:3:17-18], [32:3:52-54], [33:3:17-19] although some felt it was still too early to make an accurate assessment of the directive's impact [25:4:51-55]. A number did however consider that the directive had already proved important as a model for the Commission's approach to extending copyright into the digital realm [20:4:44-47], [21:4:8-10], [22:2:42-45], [23:5:1-3], [37:3:34-38], [38:3:16-19] and taken together with the software directive was a significant step in the protection of copyright works on-line [31:3:17-21], [40:4:29-34]. Noticeably for a number of interviewees the most important aspect of the directive was its sui generis right which was identified as potentially being the most significant contribution to the protection of intellectual property rights in the digital environment [19:4:44-48], [22:2:35-40], [36:4:1-4], [40:4:33-34]. Although from a US perspective it was pointed out that until harmonisation of this new right was international it would continue to excentuate differences in protection in the global information market [28:2:22-26].

Contrasting with these views supporting the sui generis right was one perspective highlighting its dangers particularly for secondary compilers of information such as multimedia producers. The argument being that as we move into an 'information' society it is dangerous to give collectors of information power (through royalties and licenses) over the actions of innovators and creators who may be prevented from building on others ideas because of cost. In this context the potential of the sui generis right to end up providing perpetual rolling protection rather than just 15 years was of real concern. It was also argued that the continued expansion of this primary compiling posed a threat to the public domain and that greater consideration needed to be given to what in the digital environment it was legitimate to protect [29:3:43-59 and 29:4:2-27]

- **Question 8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?**

This question aims to reveal policy actors assessments of the adequacy of the policy process in terms of facilitating consultation with the full range of interested parties involved during the directive's formulation. Responses to the question are examined within the three

categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed a range of views were expressed; In terms of the Commission there was general agreement that as the proposer of draft legislation it is the key institution for coordinating formal consultations and tends to be the main focus for interested parties lobbying activities. In conducting consultations there was also agreement that the Commission made every effort to provide interested parties with the opportunity to express their views, although it was pointed out that with the Commission's limited resources and the general increase in lobbying in recent years these consultations had begun to impede the policy process, for example [3:3:57-59], [4:4:18-20], [5:4:35-37], [6:4:25-28]. In contrast a number of the interview responses identified the database directive as a proposal that had aroused very little lobbying from interested parties [1:8:39-43], [2:4:12-14], [10:5:14-15] one explanation being that the proposal had been ahead of its time and so had not initially been recognised as important [2:4:17-24]. Other responses highlighted a more general difficulty in conducting consultations in the copyright field i.e. while rights holders tend to be powerful, well resourced groups articulating strong, clear views demanding more protection, users are often fragmented, difficult to identify and tend to articulate a range of broad often ill defined concerns. While it was pointed out that perhaps in an economic community rights holders views should carry more weight, concerns were expressed about the negative impact of this dominance on the balance of rights in the database proposal particularly because the sympathies of the Commission rapporteur lay with rights holders [5:4:12-19 and 5:4:39-46], [6:4:30-35], [7:4:26-27]. Aligned to these views was the perspective that during the database directive perhaps consultations had not adequately represented the full range of views but that ultimately they were not that important even though in the interests of transparency they created the impression that they were, an example given was that after the penultimate Council working group meeting lobbyists remained unaware that the deal had been done [3:4:9-12], [8:5:55-59 and 8:6:1-6]. However, more generally it was also noted that increasingly a key problem in the consultations was the leaking of information during the negotiating process and the attempts by lobbyists to play Commission officials off against one another [3:4:16-21].

On the Parliament, while it was acknowledged that formally it was part of the consultation process and should have an important place in representing the views of, particularly users, the interview data suggested that how effectively it carried out its role depended heavily on the individual parliamentarians involved in particular policy process [6:4:37-39]. On the role of the Council while it was acknowledged that it did not engage in formal consultation with interested parties except through those carried out by the Commission and Parliament, it was noted that lobby groups did often make submissions direct to the Council working group, as database producers and publishers had done during the database directive. No attempts however were made to encourage Member State delegations to examine these submissions [9:5:21-36].

**Amongst the European policy-makers** interviewed there was also a general consensus that the Commission was the key institution in coordinating consultations and that it made a good job of being open to submissions from the full range of interested parties, for example [12:3:47-48], [13:2:53], [14:2:46-47], [16:3:4-6], [18:4:55-56] although it was noted that the success of such consultations relied heavily on the ability of the interested parties to express their views clearly [11:4:43-46], [15:3:52-54], [17:5:29-31]. One interviewee did however note that in the copyright field it had become common practice for Commission officials to leak copies of draft proposals to selected interested parties, a practice that raised questions over the relationships between particular officials and particular lobbyists and the impact of these pre-publication consultations on the shape of Commission proposals [12:3:50-59]. On the role of the Parliament the interview responses highlighted the fact that the whole of the formal policy process was itself a form of consultation and that under the co-decision procedure (as used for the database directive) the Parliament had greater powers [11:4:48-52],

[14:2:44-45]. Additionally one interviewee commented that while generally European consultations were open, the decision-making process in the Council continued to remain opaque [13:2:454-55], while another confirmed that submissions from database producers had been made direct to the Council working group although these submissions were never directly discussed by the working group [17:5:22-27]. One interviewee also provided a perspective on the UK consultations held on the directive which were described as not very useful but as the best way to protect the government from accusations of not having engaged in discussions with interested parties. Again the point was made that it was difficult to get representation from users because they were difficult to identify [16:3:11-23]

**Amongst the interested parties** interviewed the responses confirmed that the main focus of their lobbying activities was with the Commission and in particular with the officials in charge of the database proposal. While there was general agreement that the Commission conducted its formal consultations openly, there were contrasting views over the importance of these consultations and over the power of different interested parties in the policy process [19:4:53-56],[20:5:32-35],[21:4:15-22], [22:2:50-52], [25:5:15-16], [27:4:6-8], [32:4:10-11], [34:4:47-49]. More specifically, a majority of the responses acknowledged the high proportion of rights holders in the policy process and indicated that these groups had more influence than user groups because of the pro-industry stance of DGXV officials and because of their huge investments in the information sector [21:4:24-27], [23:5:11-14], [26:3:35-37], [29:4:32-36], [30:4:4-11], [33:3:29-32], [35:4:30-33], [39:3:7-10]. An alternative explanation for this right holder dominance was that users and academics only became actively involved in lobbying on the database directive after the Council common position which was in reality too late. These groups also tend to focus their efforts on DGXIII officials with whom they have contacts through the libraries program and information society initiatives rather than DGXV officials directly in charge of the copyright proposals [19:4:58-59 and 19:5:1-8] While user and library representatives themselves argued that a main drawback in participating in the lobbying process was a lack of information, information that rights holders appeared to have access to, particularly in the last six months of Council negotiations on the database directive when the most dramatic changes were made [37:3:47-55], [38:3:24-33]

Amongst the rights holders themselves there were also a range of views on the consultation process. At the most general level one interviewee highlighted the tendency on the part of Commission officials to prefer to consult with representatives of single firms rather than trade associations on the grounds that the associations don't have clear opinions because they have to build a compromise position amongst diverse members, although the validity of this reasoning was disputed by the interviewee [20:4:58-59 and 20:5:1-7]. Another referred to way in which amongst interested parties the directive was discussed through a copyright lens that coloured the nature of all the debates that took place [25:5:16-23] while another questioned the purpose of consultation per se given that interested parties at the April 1990 hearing had rejected the sui generis and the Commission had gone ahead and produced the proposal anyway [24:5:1-4]. A number of other responses touched on the difficulties of consultation with Parliamentarians who often exhibit a lack of interest or expertise on issues [31:3:48-59], [36:4:13-15] and with the Council where decisions appear to be made by civil servants working for the different Member State delegations [21:4:30-35].



## 7. 4. European policy for copyright

- *Question 9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?*

This question aims to reveal policy actors assessment of the importance of the database directive within European copyright policy generally. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

Overall the interview responses show a high degree of consensus in answering this question. The most typical perspective being that the database directive when taken together with the software directive, is important for current European copyright policy as part of the first attempts by the Commission to protect copyright works in digital formats. In terms of future copyright policies most responses suggest that while perhaps ultimately only time will tell the true significance of these directives, they are already being used as starting points for the Commission's most recent proposals, for example [3:4:28-31] [6:4:52-55], [10:5:40-41], [12:4:8-14], [15:4:6-12], [18:5:7-10], [21:4:41-48],[24:5:11-14], [30:4:18-21], [36:4:26-28], [39:3:19-23].

**Amongst the European civil servants** interviewed while the most common response was that the database directive together with the software directive were important for European copyright policy [1:9:14-16], [4:4:27-30], [9:5:57-58] it was the sui generis right that was identified as the database directive's most significant contribution. More specifically, responses viewed the sui generis approach as a valuable attempt in adapting copyright type laws to keep pace with technological developments [2:4:33-38], [3:4:33-36], [7:4:34-41], [8:6:10-14]. A number of responses also made additional remarks on European copyright policy more generally. One Commission official indicating that while the specific contents of future copyright proposals would be different, the mechanics of the policy-making process would remain similar to those in the database directive. These comments also highlighted the unique and powerful place of the Commission in being able to push through legislation primarily by slanting its initial proposals in a manner that will satisfy a sufficiently large coalition of industry and Member State interests to facilitate a directive's adoption [5:4:57-59 and 5:5:1-10]. Other Commission officials highlighted how successful the Commission had been in the copyright field with five directives in as many years [2:4:40-44-42] while another acknowledged that as a consequence of the 'salami slice approach to copyright harmonisation' the result had been clear inconsistencies in the level of harmonisation achieved across the Member States, with the majority leaning towards the droit d'auteur tradition [1:9:18-34]. Aligned to this view was the point that a major weakness of European copyright policy had remained the lack of harmonisation between Member States of copyright exceptions which are fundamental to the balance of rights, although it was acknowledged that DGXV were now moving on this issue [6:4:57-58 and 6:5:1-2]

**Amongst the European policy-makers** interviewed the most common view expressed was similarly that while ultimately it was a matter of waiting to see how significant the database directive would be for future developments, taken together with the software directive it was important within European copyright policy for being the first direct initiatives aimed at protecting copyright works in digital formats [11:5:4-10], [14:2:55-56], [16:3:30-34], [18:5:7-10]. More specifically the sui generis approach was identified as likely to prove the directive's most significant contribution both because of the protection it provides to content providers and because of its innovative solution to differences between the copyright and droit d'auteur traditions[17:5:338-41], [18:5:12-15]. Additionally it was highlighted that while the database directive was one of the first attempts to deal with digital environments a large number of issues remained including copyright exceptions, the use of technical systems for copyright management and protection etc.[16:3:36-48]

**Amongst the interested parties** interviewed, as with the other interviews, the most typical response was that the database directive along with the software directive were significant as bases for Commission copyright proposals for the digital world [21:4:41-48], [31:4:9], [32:4:27-35], [35:4:35-37], [36:4:26-28]. A number of responses suggested that it was still a little too early to tell and a lot depended on the directive's implementation and the substance of the Commission's proposals on among other issues the scope of the reproduction right, permissible exceptions and technical systems for copyright protection [22:3:4-13 ], [25:5:30], [30:4:18-30], [33:3:44-56], [37:4:6-8]. Some responses focused on the sui generis right as the directive's most significant aspect [38:3:41-43] because of the manner in which it opened up the debate on exceptions in digital environments [34:5:18-20], [35:4:40-42]. Aligned to these views were responses that identified the directive as having highlighted the limits of copyright protection. These responses also questioned whether in fact copyright had been the best approach to protecting databases, with alternatives such as contracts and technical systems having since been discussed in US debates on database protection [27:4:15-27], [40:5:11-18]. These responses also suggested that the lack of consideration of such alternatives or even the economics of the database industry during the directive's formulation, was due to the dominance in these European policy discussions of a 'copyright lens' through which all proposals were filtered [40:4:53-58], [27:4:29-34]. Another interviewee was also critical of the adopted directive arguing that it would prove problematic during its implementation [23:5:52-59 and 23:6:1-13], while the Commission itself was criticised for playing politics in its use of the internal market argument as a justification for its copyright proposals, an argument it neatly dropped when it did not want to take any action [19:5:15-19], [29:4:53-59].

Finally one interviewee commented that aside from the directive's content it was a good example of how any future copyright policy is likely to be made i.e. with the most dramatic changes in a text occurring just before its adoption. This process was described as problematic because it meant that ultimately policy solutions were driven by politics and rather than sound legal argument [30:4:23-34].

• *Question 10. As the global Information Society develops what role will copyright harmonisation play in the process of European integration ?*

This question aims to reveal how policy actors viewed on-going copyright harmonisation in Europe within the broader context of the developing global information society. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed the majority of responses identified two trends. First, the development of further copyright directive proposals (as detailed in the Commission's 1995 Green Paper and 1996 Follow-up communication) justified in terms of the needs of the internal market and second, an increasing focus from the Commission and Member States on pushing for international copyright harmonisation to the European standard in recognition of the global nature of the information society, like at the 1996 WIPO diplomatic conference [2:4:49-52], [3:4:41-48], [4:4:40-48], [8:6:22-26], [9:6:7-9], [10:6:1-11]. Responses however differed over the impact of these trends on European integration and over what at a philosophical level the term integration implied in a post-Maastricht pre-monetary union Europe. For some these copyright policy developments were merely a small part of European initiatives directed towards European enlargement via the accession of former Eastern block countries [1:9:39-41], [4:4:35-38], [7:4:51-54] while for others there was a perception that regardless of developments in the information society, Europe was heading for a period of consolidation rather than further integration [3:4:50-55], [9:6:11-14], [10:6:13-17]. Additionally, while it was acknowledged that copyright harmonisation formed part of European efforts to further economic integration concerns were expressed about the

lack of consideration in copyright policy that had been given to Europe's cultural dimension especially as the deployment of new technologies was strengthening the dominance of Anglo-American culture [6:5:7-18]

**Amongst the European policy-makers** interviewed a majority similarly identified two trends; further Commission copyright directive proposals for the digital environment and an increasing focus on pushing for international copyright harmonisation [12:4:19-24], [13:3:13-15], [14:3:4-5], [15:4:17-20], [16:3:53-56], [17:5:54-57]. On the first of these trends, one interviewee commented that in an historical perspective the Commission had always been over-ambitious in the timetable it had set for its copyright policy proposals and while a lot had been achieved there was a need to recognise the complex and difficult nature of copyright harmonisation [11:5:15-30]. Another interviewee made the observation that the database directive was a good illustration of the way that the Commission was trying to use European legislation as a platform for the further harmonisation of international copyright even though at WIPO the database proposal had ultimately been rejected. The interviewee went on to suggest that as the information society developed IPRs in general and copyright in particular would become increasingly important to the EU's economic growth [18:5:20-34].

**Amongst the interested parties** interviewed a majority also identified the same two trends as the other interviewees i.e. further Commission copyright proposals for the digital environment and an increasing focus on international harmonisation [20:6:8-10], [21:5:13-21], [23:6:18-22], [26:3:51-52], [27:4:39-41], [29:5:12-18], [30:4:44-48], [32:5:4-9], [33:5:4-19], [34:5:32-43], [37:4:13-18], [38:3:47-49], [39:3:28-29]. Additionally the enlargement of the EU and the harmonisation of copyright regimes in former eastern block countries in preparation for their accession to the EU was noted [19:5:36-38], [35:4:51-53], [36:4:46-50]. The needs of the internal market as the basis for Commission action in the field of copyright produced a division in opinions. For some this was a legitimate basis for further copyright harmonisation particularly on exceptions for digital environments and the legal protection of technical copyright management systems [25:5:35-52] while others questioned the validity of these actions under the rules of subsidiarity [23:6:24-28] or bemoaned the lack of political leadership in consideration of these copyright policy issues in the developing information society [24:5:19-29], [29:5:25-30]. In this context the inconsistencies that exist between different copyright directives were noted, as were the potentially damaging effects on the information society of over-strong copyright protection [30:4:50-58]. However, the general right holder view was that copyright alone was not enough protection and technical systems would aid in the enforcement of these rights in the emerging information society [20:6:11-30], [31:4:14-19], [40:5:26-28]

- *Question 11. Which other factors, if any, would you identify as being significant in affecting how copyright issues are framed and discussed at the European level ?*

This question aims to reveal actors perspectives on other factors that they consider to be significant in shaping copyright policy processes at the European level. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed a number of factors were identified as important in shaping European copyright policy. At the broadest level the expansion in the scope and strength of intellectual property rights was linked to the rise of market economics and concerns were expressed about the danger that with concepts like the sui generis right, ideas and information per se were potentially being brought within rights holders exclusive rights to the detriment of the balance in copyright [5:5:33-50]. On the role of the Commission and its officials a range of views were expressed, although most of the interviewees considered the criticisms leveled at European bureaucrats unfair [3:5:8-12], [7:5:15-19],

[10:6:22-24]. At the practical level of developing draft proposals, differences in style between different Commission services were noted as important in affecting the behaviour of Commission officials i.e. for a Commission service like DGXV that prioritises the generation of directive proposals, officials are aware that their career development partly relies on producing such proposals. It was however acknowledged that producing proposals is a risky undertaking especially if a proposal is rejected or stalled in the policy-making process [6:5:23-33], [8:6:38-41], [9:6:27-28]. In this regard, the importance of a good relationship with the internal hierarchy of the Commission was also noted as important for a Commission official, not just in getting a proposal adopted by the Commission but also throughout the 2-3 year formal negotiation process. While the Council ultimately takes the executive decision in a negotiation, the responses indicated that the Commission's ability to shape a proposal relied on its over-arching strategy, understanding of the Council's internal hierarchy, the personality of the Commission rapporteur and sometimes even their nationality [1:9:46-57], [2:5:5-19], [5:5:52-57], [7:5:21-36], [8:6:31-36]. The Commission also uses commissioned research (sometimes even re-writing its conclusions) as part of its strategy to substantiate the need for particular policy proposals [6:5:35-49].

Aside from the ability of the Commission and its officials to shape copyright discussions, other factors identified were focused around the role of the Council. In particular the determination of a particular Presidency to achieve a directive's adoption was noted as often being driven by a desire to be seen by other Member States as having conducted a successful Presidency rather than by the merits of particular issues [9:6:29-36]. Aligned to this was a difference of opinion on the bargains struck between Member States; while one interviewee suggested that Member States were often willing to strike bargains across different proposals, another suggested that any 'horse-trading' tended to be restricted to within a particular proposal [3:5:14-34], [9:6:38-42]. However, traditional alliances between Member States along the droit d'auteur/copyright divide were also mentioned as important, as was the role of QMV and the number of votes of a particular Member State in terms of its ability to shape a proposal [3:5:29-34], [10:6:22-45]. The political role of the COREPER for finally resolving issues outstanding from the Council working group was also mentioned [9:7:1-11].

**Amongst the European policy-makers** interviewed while most responses identified a number of factors focused around the role of the Council, one interviewee identified the Commission as the most important institution in shaping how copyright issues are framed and discussed at the European level. In terms of the Commission, the factors identified were the degree of freedom given to lower level civil servants in deciding on the orientation of particular proposals and the degree of communication between Commission services i.e. during the database directive there was often a lack of communication between DGXV and DGXIII officials [17:6:4-14]. In terms of the Council, the determination of a Presidency was noted as a factor in how quickly a proposal was pushed forward, although it was also noted that sometimes this determination was driven more by wanting to be seen as having had a successful Presidency, than by the issues [15:4:51-54], [17:6:16-27]. Personality was also identified as an important factor in shaping the discussions of copyright issues, particularly where dislike or spite amongst negotiators or the spreading of gossip and misinformation led to discussions being held up [15:4:53-56]. At a broader level, it was noted that copyright discussions in the Council working group tend to be divided between those who adopt a pragmatic approach to the issues (e.g. the British) and those who adopt a more philosophical approach (e.g. the French). In this regard, the dispute between part of the French delegation and the French Presidency during the database discussions was identified as having been the result of this kind of difference [16:4:8-24], [15:4:44-46]. Noticeably the Parliamentarians and ECOSOC representatives interviewed had no additional comments to make [11:5:35], [12:4:29], [13:3:20], [14:3:10].

**Amongst the interested parties** interviewed, while a number of interviewees had no additional comments, for example [22:3:16], [23:6:33], [27:4:46], [31:4:33] of those who did

respond a similar range of factors were identified as important in affecting how copyright issues are framed and discussed. On the role of the Commission and its officials, most responses noted that the Commission (in comparison to Member State bureaucracies), is very transparent and accessible [19:5:43-46], [21:5:50-55], [32:5:4]. The Commission was also noted is relatively small, which excentuates the importance of individual officials and the role of personality in the discussion of copyright issues, such that lobbyists wishing to exert influence must ensure the delivery of clear and succinct information to these individuals [35:4:58 and 35:5:2-26], [36:5:4-10]. Developing proposals was also acknowledged as one of the best ways for these Commission officials to ensure their career development [36:5:19-23]. On the role of the Council alongside the division between copyright and droit d'auteur countries one interviewee highlighted that on internal market directives there was also a division between integrationist Member States (e.g. Benelux countries, France, Germany) and neo-liberal Member States (e.g. The UK) that sometimes influenced negotiations[35:5:28-35]. This interviewee also noted that the Parliament could influence the copyright discussions but so much depended on the individual parliamentarians that there was a real democratic deficit in the European policy process [35:5:37-43]. On the role of interested parties one interviewee highlighted that there was often a tendency for particular interests to stick together and to be hostile towards other groups, which inhibited the building of consensus and polarised the debates on copyright [21:5:34-48]. Although another response highlighted that compromises were possible when industry felt that the solutions that had been developed were professional and well thought out [30:5:4-10]. In terms of copyright issues, the information society initiatives were viewed as having dramatically raised the profile of the debates [20:6:35-37]. Debates that were viewed as revolving around the complex issues of copyright versus droit d'auteur, analogue versus digital and questions over permissible exceptions [25:5:57-59], [32:5:25-29]. However, one interviewee suggested that copyright debates were being inhibited by a lack of a proper conceptualisation of these issues and of the newly emerging production cycle for information products in digital environments [29:5:35-59].

## 7. 5. Information policy-making and copyright in the digital age

- *Question 12. What threats and opportunities would you identify from the extension of copyright concepts into the digital realm ?*

This question aims to examine policy actors views on the implications of extending copyright into the digital environment. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed there was a clear division in the responses between those actors who adopted a protectionist stance towards the extension of copyright concepts into digital environments and who were strongly in favour of reinforcing this protection with technical systems, for example [1:10:5-27], [2:5:26-42], [3:5:41-58], [4:5:11-30] and those actors who questioned whether copyright was the best way to protect digital works and expressed concerns over the potentially harmful effects of over-strong protection on the rest of the emerging information society, for example [5:6:6-23], [6:6:1-24], [8:6:48-57]. More specifically, whilst all the interviewees recognised that ICTs make it easier to copy, manipulate and transmit information around the world, the threats and opportunities identified depended on the attitude adopted towards the notion of a balance of rights between rights holders, authors and users. Amongst those policy actors advocating a protectionist stance the main threat identified was that of copyright piracy which they considered was best handled by deploying technical systems to enable rights holders to retain control over the use

of their works. While the danger that these systems could be abused to create information monopolies was recognised, the need to reward industry for its investment was considered paramount. Overall the digital environment was considered to offer European content providers with a tremendous opportunity for the exploitation of their works in the global marketplace. On the question of copyright exceptions one interviewee anticipated that most, if not all, would not remain in the digital environment as the technical systems would enable payment to be demanded each time a work was used [4:5:22-26]. Amongst the policy actors concerned over the extension of copyright into the digital environment, there was also a general recognition of the importance of copyright for providing protection. However, these actors expressed the view that there was a danger of over-protection with detrimental effects on access to information, on the public domain and privacy, as all information is commoditised and made available only at a price. At the most abstract level the continued expansion of property concepts suggested to one interviewee a fundamental misconceptualisation of the role of information in society disregarding notions of freedom of speech, data protection and access to information [8:6:52-57]. Others highlighted the tensions between the expansion of these near monopoly rights and the rules of competition in the internal market, as well as the inherent tendency of industry to seek protection when and wherever possible [5:6:10-23]. There was also a suggestion that more effort should be put into developing soft law solutions by encouraging dialogue between publishers, authors, libraries and users [6:6:17-24].

**Amongst the European policy-makers** interviewed there was a general consensus in the responses that European copyright had an important role to play in providing protection to rights holders works in digital environments and that copyright piracy was the biggest threat faced. The need for technical systems to aid in the enforcement of these rights was also recognised as was the need for European and international harmonisation [11:5:42-44], [13:3:27-31], [14:3:17-18], [15:5:9-14], [16:4:31-32]. More specifically, a number of key issues were identified as central to discussions of copyright in digital environments including the scope of the reproduction right, the liability question for on-line service providers and user exceptions [17:6:41-56], while at a broader level there was recognition of the need to discuss these copyright issues in the context of a range of other issues affecting digital environments including pornography, the protection of minors and the evolution of electronic commerce [18:5:54-59]. One interviewee also acknowledged the serious danger of over-protection particularly as copyright is combined with other protections i.e. sui generis type rights, technical systems and contracts [12:4:36-54].

**Amongst the interested parties** interviewed most acknowledged both the dangers of piracy and the potential of the digital environment to open up global business opportunities [21:6:6-17] [25:6:8-10], [26:4:4-5], [31:4:40-47], [36:5:30-33]. However, beyond these general comments there was a strong division of opinion between on the one hand, rights holders and authors advocating the need for stronger copyright protection backed-up by technical systems and on the other, library and user representatives expressing concerns about the dangers of over-protection both for the balance of rights in copyright and more generally. Amongst the *rights holders* the key concern was for protection of their products in digital environments regardless of whether that protection ultimately came from copyright. A number highlighting contracts and technical systems combined with effective rights clearance as potentially offering the best solutions [19:5:53-59 and 19:6:1-9], [20:6:44-49], [27:4:53-55], [30:5:35-42], especially if the technical systems were themselves protected adequately by the law [32:5:40-57]. Other views included that the scope of the reproduction right should extend to transient copies and that copyright exceptions, if permissible at all, should be kept to an absolute minimum in digital environments [19:6:11-17], [22:3:30-34], [30:5:21-55], [31:4:49-54], [32:6:1-15]. Amongst *authors* there was also support for stronger authors rights combined with technical systems (including identifiers for digital products) to enforce these rights. However there was also some concern over the dominance of large publishers and information providers both in terms of their apparent reluctance to respect authors rights and

because of the potentially negative impacts they might have on information pluralism [33:4:34-53], [34:5:55-58 and 34:6:1-12] [20:6:48-55].

*Library and user representatives* expressed concerns over the highly protectionist approach of DGXV and the worrying extension and strengthening of copyright in digital environments. The fear being that over-protection would permanently damage information access, itself an integral part of democracy [37:4:34-44], [38:4:4-18]. Aligned to these perspectives was a recognition of the tension between expanding copyright and EU competition rules [27:5:15-26] while others acknowledged that there had been a tendency to over-emphasize the dangers of the digital environment to rights holders [24:5:46-49], [39:3:41-52]. A number of responses also expressed concern over EU policy-making on these issues. The Commission (DGXV) was criticized for its over-eagerness to legislate, tendency to always push for the highest level of copyright protection and general reluctance to study the economic impacts of its legislative proposals. The EU policy process was also criticized as not conducive to a healthy debate, particularly when compared to the US. This was due in part to the fragmentation of competence amongst the Commission services and imbalance amongst lobbyists with large well resourced rights holder organisations dominating [40:5:54-59 and 40:6:1-10], [29:6:9-24]. One interviewee highlighted that there was also a lack of user representation in debates of these issues at the Member State level (e.g. the UK) which he contrasted this with the WIPO discussions where users were well organised and where for example a database proposal similar to the European directive was rejected [23:6:54-59 and 23:7:1-22].

• ***Question 13. How would you characterize the relationships in digital environments between copyright policy and other areas of information policy such as Privacy ?***

This question aims to reveal how policy actors view the impact of the extension and enforcement of copyright type rights in digital environments on other information policies including privacy. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed there were a range of opinions on the relationships between copyright and other areas of information policy in digital environments. Some policy actors did not see any connections[1:10:32-37] and emphasized copyright as a regime that rewarded creativity rather than protected information per se [4:5:35-37], [9:7:28-31]. Other policy actors acknowledged an awareness of concerns being expressed about the potentially negative impacts of copyright protection and technical enforcement in digital environments on information access, privacy and other legal regimes but felt that these issues were already being addressed, particularly through work conducted by Commissioner Bangemann [2:5:47-52], [3:6:4-11], [4:5:37-58], [10:7:12-24]. While a number of responses expressed serious concerns over the negative impacts of over-strong copyright protection and technical enforcement in digital environments on other areas of information policy including data protection and public sector information. At the most basic level these responses viewed the continued expansion of the property model as raising challenges to citizens basic rights to freedom of speech and information access both integral parts of the democratic order. More specifically it was pointed out that while the object of copyright was not to protect underlying information and ideas, at a practical level in digital environments this was what was occurring and that there was a real need to protect information users [5:6:36-37], [6:6:29-45], [7:5:51-59], [8:7:4-5].

**Amongst the European policy-makers** interviewed a similar range of opinions were expressed. A number of policy actors did not recognise any relationships between copyright and other areas of information policy, commented that it was still too early in the development of on-line environments to tell what these relationships were [11:5:49-50],

[13:3:36-37], [14:3:23-24], [15:5:19-20] or felt that adequate legislation was already in place to protect these other areas [18:6:4-8]. Other interviewees acknowledged an awareness of concerns about the negative impacts of copyright protection and technical enforcement in digital environments on both the balance of rights in copyright and on other information policies [16:4:37-40]. It was however highlighted that this awareness of the interrelationships between issues was not widespread because of the tendency at Member State and European levels for these issues to be dealt with separately [17:7:4-16]. One interviewee also argued that this question illustrated that in digital environments what was important was not the existence of rights per se but how those rights were enforced because this was where the conflicts with other areas of information policy were most visible [12:5:7-18].

**Amongst the interested parties** interviewed the responses were basically divided between on the one hand policy actors who, whilst aware of the concerns being expressed rejected the view that copyright protection and technical enforcement impacted negatively on other information policies in digital environments, and on the other, policy actors who felt that the continued expansion of copyright type rights had already begun to adversely effect both the balance of rights in copyright and other information policies. Amongst those interviewees rejecting the view that copyright was impacting negatively on other information policies a number of arguments were put forward. On information access these rights holders argued that they were in the business of selling information not restricting access to it and that as the advertising model proved it was often in their interests to give information away for free. On technical systems for copyright protection it was argued that these systems were necessary to enforce rights holders legitimate rights and that although they could be abused to the detriment of individuals privacy, similar technologies could be used to counter these dangers [20:7:7-28], [31:5:2-27], [34:6:23-29] It was also argued that in general people were not that worried about the volumes of data that could be collected on them and most Internet users were probably willing to lose a degree of privacy to gain access to the services provided [25:6:15-55], [27:5:40-42], [33:5:1-7]. On the abuse of these technical systems in protecting public domain materials it was argued that this was not a major problem and that rights holders were already developing site licenses to overcome any such difficulties [22:3:44-54], [32:6:20-28], [33:5:9-21]. At a more general level, the property model was also suggested as a potentially useful model for approaching issues like privacy in digital environments [36:5:38-41]. While the view that rights holders were over-represented in policy debates on these issues was strongly rejected [32:6:30-35]. Another interviewee complained that the introduction of debates on freedom of speech and privacy had little to do with the real problems faced in the use of copyright in digital environments and had just added confusion to these discussions [30:6:4-6].

*In contrast* to these views, a number of interviewees expressed concerns over the relationships between copyright and other areas of information policy in digital environments [40:6:23-52]. More particularly concerns were expressed over the impact of stronger copyright protection aligned to technical systems for its protection on both the balance of rights and on other information policies. At the most general level, it was highlighted that the relationships between different areas of information policy were becoming increasingly evident as more and more information is held in digital formats [38:4:23-29] and, that there was a danger of creating a division between the information rich and information poor because of the narrow focus of most current discussions on the digital environment [21:6:22-28]. In this regard, while the need for a global solution with possibly a single set of rules for digital environments was acknowledged [26:4:14-17] the narrow copyright approach of the European Commission was criticised, while the US government was identified as better at developing solutions quickly [24:6:25-33], [21:6:30-35]. On technical systems for copyright management and enforcement it was acknowledged that while they certainly had a role to play in digital environments there were real dangers that they would be abused by rights holders [40:6:33-41]. Particularly there were dangers that such systems would adversely effect individuals privacy, lead to public domain information being unfairly protected and inhibit the exercise of



legitimate copyright exceptions[23:7:32-56], [29:6:36-54], although one responses anticipated that some of these problems would be solved by technology itself [37:4:49-54]. Indeed, one interviewee pointed out that as these systems facilitated micro-payments for every bit or byte of information all uses would fall within the rights holders exclusive rights especially as the reproduction right was pushed to cover even temporary reproductions [40:6:23-38]. More specifically, on the database directive, the sui generis right was identified as allowing public domain information to be protected in databases with harmful effects forecast for the scientific community and creativity more generally due to the increased cost of research as more data are captured in ever-expanding private sector databases[19:6:22-29], [29:6:356-58], [37:4:56-59].

- *Question 14. How adequately do you think current European Information policy processes handle these interrelationships?*

This question aims to reveal policy actors assessments of how adequate existing European policy structures and processes are for handling the interrelationships developing particularly in digital environments between copyright and other policies concerned with information and its transfer. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed most highlighted that consideration of information policy issues arising in digital environments was a relatively new phenomenon that had only really gained a high public profile as a result of Europe's information society initiatives led by Commissioner Bangemann. However, while some felt optimistic that at a European level existing policy structures and processes (including the increasing use of QMV in Council) put the EU in a strong position to be able to coordinate its policy solutions on these issues [2:5:57-59 and 2:6:1-2], [4:6:7-19], [9:7:36-44], [10:7:29-35], other policy actors identified a range of factors inhibiting such coordination. Among these inhibiting factors it was acknowledged that the structure of the Commission encouraged officials to develop proposals that expanded their policy competence (and kept them in work) rather than to examine links between issues. As a result there is a considerable degree of overlap in work between Commission services and a duplication of effort, while communication between services is often poor. Even within the college of Commissioners the requirement for a simple majority before proposals are adopted was highlighted as encouraging wheeling and dealing rather than rational policy-making [5:6:42-59 and 5:7:1-7]. Within a single Commission service the time constraints, political influence and practical difficulties of creating a coherent proposal also encouraged the maintenance of demarcations between information policy issues, as did the tendency for different policy areas to be associated with different nationalities e.g. French for Agriculture, British for Telecommunications. On policy-making more general Member States and lobbyists were also criticized for their increased tendency to block Commission proposals, thereby wasting the efforts and work of the Commission [3:6:16-54]. Specifically on European copyright discussions it was argued that there was little consideration of these other information policy issues and that in fact the property model was now entering into discussions of other information issues like data protection which was strongly criticized [6:6:50-52], [8:7:10-24]. In this context, concerns were also expressed at the speed with which the EU was legislating, particularly in the field of copyright, which it was argued had further inhibited the consideration of other wider information issues [7:6:8-14].

**Amongst the European policy-makers** interviewed the majority view expressed was that while current policy approaches had tended not to address the interrelationships between for example copyright and other policies concerned with information and its transfer, the EU's work on the information society suggested that a more coherent policy response was

emerging [11:5:55-56], [12:5:23-25], [15:5:25-26],[16:4:49-52], [18:6:13-14]. One interviewee however, highlighted a number of factors inhibiting the consideration of the relationships between these information policy issues including antagonisms between different Commission services, a lack of appropriate forums in which to discuss these issues and administrative and time-tabling difficulties that sometimes made discussion impossible[17:7:21-49]. The view was also expressed that policy proposals on copyright exceptions in digital environments would almost certainly bring other information policy issues into sharper focus because of the cultural sensitivity of this discussion [17:7:51-58].

**Amongst the interested parties** interviewed a majority of the responses expressed the view that although current policy approaches had not tended to examine the interrelationships between for example copyright and other information policies, there was an expectation from debates on the information society and from Commission funded projects like IMPRIMATUR (intellectual multimedia property rights model and terminology for universal reference) that a more coherent policy response would emerge [19:6:37-39], [23:8:4-7], [26:4:22-25], [33:5:26-32], [34:7:7-19], [36:5:46-49], [37:5:4-13], [38:4:34-36]. One interviewee anticipated that as these issues became more widely discussed there would be a backlash from the general public, particularly on the issue of privacy over the way that new ICTs were being used to collect information on them [29:7:6-18] A number of interviewees were however less positive about the ability of European policy-making to address these interrelationships [24:6:55-56], [25:7:7-8], [40:6:57]. Specifically on European copyright policy it was highlighted that there was a tendency on the part of the Commission and Council to push for compromises that traded issues off against one another. This approach was criticised as a method of policy-making because it inhibited consideration of linkages between issues, the building of consensus on these complex problems and ended up with lots of optional provisions For Member States [21:6:52-59 and 21:7:1-19]

- *Question 15. In what ways might policy formulation at a European Level be improved ? Do you have any concerns over the issues of democratic participation and accountability ?*

This question aims to reveal policy actors perspectives on any existing problems with European policy-making and to obtain their assessments of how democratic the policy-making process is both in specific areas like copyright and more generally. Responses to the question are examined within the three categories of policy actors identified and can be summarised as follows;

**Amongst the European civil servants** interviewed a range of views were expressed; from interviewees who felt that European policy-making was generally open and accountable [4:6:24-28] to those who doubted that this was the case [7:6:19-20]. At the most general level it was highlighted that following the Maastricht treaty there had been a recognition amongst the European institutions of the need to improve transparency in the decision-making process. This had resulted in; a lower profile for the Commission (following the departure of President Jacques Delors), the introduction of the co-decision procedure to enhance the European Parliament's powers and a general change in policy emphasis towards consolidation and enlargement [9:7:48-51], [10:7:40-58]. More specifically, a number of responses identified the role of lobby groups as problematic in the European policy-process not only because of the over-representation of powerful and articulate industrial lobbyists but also because of the difficulty of getting users/consumer participation in technical fields like copyright [6:6:57-59 and 6:7:1-2], [8:7:47-50], [9:7:54-56], [10:8:1-13]. Although some interviewees anticipated that ICTs would assist in enhancing public awareness of these issues and participation in European consultations [3:7:13-15], [7:6:20-23], [8:7:52-55]. For one interviewee the European Parliament was also identified as problematic because of the difference between its theoretical role as the guardian of European democracy, and the practical reality that the

working practices of many Parliamentarians still left a lot to be desired [10:8:10-13]. Euro-scepticism, the dogmatic approach of many Member States in Council and the UK's often awkward 'wait and see' policy were also highlighted as impacting negatively on EU policy-making [2:6:7-21], [3:7:4-5], [9:7:58-59 and 9:8:1-2]. Two responses also commented on problems in European copyright policy-making including the fact that in reality European copyright policy was ultimately formulated by a very small group of copyright experts (between 25-60 individuals) and in the case of the database directive that it had been these experts who had made decisions about the sui generis right even though it was clear at the outset of the negotiations that it was outside the scope of their expertise [8:7:29-36], [5:7:14-17]. Looking to the future, the need to further reform the EU's main institutions as enlargement took place was also noted [1:10:54-55].

**Amongst the European policy-makers** interviewed while there was a general awareness of the Euro-sceptic argument few expressed any real concerns about the level of democratic participation and accountability in European policy-making. A number however did advocate and anticipate that the powers of the European Parliament (and perhaps the ECOSOC) would be increased as part of the reforms of the European institutions that would take place to facilitate the further enlargement of the EU [11:6:4-8], [12:5:30-36], [14:3:34-36]. One interviewee however expressed the hope that the internal working practices of the Parliament would improve before it was given more powers in the decision-making process [17:8:31-33]. On the role of the Council one response highlighted how in reality Member State Ministers who attend Council meetings are rarely experts and therefore tend to rely heavily on their civil servants for taking decisions, begging the question as to who the real policy-makers were [16:5:1-22]. Aligned to this perspective was an acknowledgment that in the case of the Council's copyright working group many of the Member State civil servants were not formally legally trained in intellectual property issues and that there were often few specific criteria for evaluating their success as negotiators, which it was also acknowledged did raise questions over their accountability [15:5:31-41].

**Amongst the interested parties** interviewed there were no major concerns expressed over democratic participation and accountability in the EU, for example [29:6:28-31], [40:7:4-5] although a range of views were expressed about existing problems with EU policy-making. At the most general level a number of responses noted that the Maastricht treaty had marked a turning point in the role of the Commission both in terms of a lowering of its profile and in increasing its accountability [23:8:15-18], [24:7:20-22]. More specifically one interviewee was highly critical of structural factors within the Commission that encouraged its officials to identify themselves with the success of particular legislative proposals as a means of career advancement. This approach made the primary goal of negotiations the adoption of a proposal by Council rather than a focus on its contents [24:7:4-18]. There was also general support for increasing the powers of the European Parliament and it was anticipated that this would happen as part of the EU's preparations for enlargement [19:6:44-47], [32:6:54-57], [33:5:337-40], [35:6:45-50]. Although a view was expressed that EU policy-making in general would be enhanced if the quality of MEPs could also be improved [31:5:45-47]. The Council was identified as the most powerful and problematic institution in European policy-making and a number of responses saw the need for increased transparency in its decision-making processes [23:8:20-26], [36:5:54-58], [37:5:18-23]. More specifically on copyright policy, the fundamental differences between information suppliers and users were acknowledged as at the centre of the policy debate and the need for participants in these discussions to work towards genuine consensus (as was being attempted in the IMPRIMATUR program) and not compromise that often left all parties dissatisfied was advocated as the way forward [20:7:38-44], [21:7:31-47]. In this regard, the hope was expressed that as these wider information policy debates evolved more information professionals would participate. Finally, on the database directive itself, one interviewee expressed the view that regardless of the claims made by the Commission that it was a policy developed to encourage the European database industry, it was actually part of a much wider

game concerning competition with the US in the trade of information goods [24:7:24-28].

At the broadest level this interview analysis corroborates the description of the main issues and events provided by the documentary analysis. However, it also provides considerable detail on the role and beliefs of policy actors involved in the formulation process and identifies the key human, organisational and contextual factors that shaped the directive as finally adopted. The next chapter discusses these findings and considers how the casestudy can be used in a more generalisable manner to enhance analysis of complex (European) information policy environments and improve information policy studies.

## 8. Discussion and interpretation

“Policy analysis is not an exact science. It involves trying to understand and explain events in situations in which we never have complete information about what happened and why it happened, and our interpretations are influenced by our frames of reference and our ideologies” (M.J.Hill:1997:160).

### 8. 1. Introduction

This chapter discusses and interprets the casestudy research findings and considers how at a more general level they can be used to improve analysis of complex (European) information policy environments and enhance academic information policy studies. The first section examines how the interview analysis relates to the documentary evidence. The second section deploys the two phase model of the formulation process and examines how the interview analysis adds to our understanding of the range of human, organisational and contextual factors that shaped the formulation of the database directive. This section also examines the broader links between casestudy and European copyright and information policy-making in the digital age. The final section examines the insights that the casestudy provides for improving academic understanding of information policy and for the analysis of European information policies.

#### 8. 1. 1. Corroborating the documentary evidence

This casestudy has examined in detail the formulation of the European database directive and has highlighted a range of human, organisational and contextual factors that shaped it during the policy-making process. Before discussing in detail what the interview analysis adds to the casestudy it is useful to consider how it relates to the documentary evidence.

The interview analysis corroborates the documentary evidence in its identification of the main policy issues and events during the formulation of the database directive. In this respect, the interview analysis affirms the utility of the ‘rational actor’ re-interpretation for providing a coherent timetable within which to examine the role of different policy actors and contextual factors in the formulation process. Deploying the two phase model of the formulation process the interview analysis in particular corroborates the documentary evidence in the following ways:

##### Phase One of the formulation process

- European level discussions on the legal protection of databases first emerged in the mid-1980’s stimulated both by Commission policies aimed at encouraging investment in the European information market (DGXIII) and Commission (DGIII) efforts to harmonise Member State copyright regimes (in response to the impact of ICTs) as part of the wider European internal market project.
- In the comparison with other European policy initiatives arising out of the 1988 copyright Green Paper database protection was initially a low priority issue for the Commission. It also aroused little interest from lobby groups, although in part this was because the database industry had little experience of the European policy process. Most lobby groups were generally in favour of European copyright protection for databases but did not support the introduction of any form of sui generis protection.
- The draft database proposal was an initiative prepared by civil servants in DGIII/F/4 of the Commission. The sui generis right protection it proposed proved to be the most

difficult and controversial issue throughout the entire formulation process. The sui generis right was introduced mainly to resolve differences between the copyright and droit d'auteur traditions and to respond to US and European case law (i.e. Feist, Van Daele) highlighting the limits of copyright for protecting 'non-original' databases. Its reciprocity provision was a clear attempt to alleviate competitive pressure on the European database industry from US operators.

- Prior to the formal adoption of the database proposal by the Commission in January 1992, draft versions of the proposal were already being 'leaked' by DGIII officials to particular industry representatives. This enabled these industry groups to be better prepared for the formal policy process following the adoption of the directive proposal.

### Phase Two of the formulation process

- The key policy issues during the formulation process were; the scope and duration of the sui generis right; the extension in the scope of the directive to cover non-electronic databases; definition of the term database; the compulsory license provisions; the reciprocity clause; and, the permissible exceptions under both copyright and sui generis rights.
- The most influential institutions in the formulation of the directive were the Council (in particular representatives from France, Germany and the UK in the Council working group) and the Commission (in particular officials from DGIII/F/4 and DGXV/E/4). The European Parliament's only major contribution to the formulation of the directive was to extend the duration of sui generis protection from 10 to 15 years during its first reading. The Parliament made no significant changes to the common position during its second reading. The ECOSOC had little influence over the formulation of the directive.
- Most of the major changes that transformed the database proposal into the adopted text occurred during the Council negotiations and in particular under the French and German Presidencies. The negotiations under these Presidencies were also influenced by a range of external events and policy developments including the completion of the TRIPS agreement, the Commission's second copyright Green Paper, the Magill case and discussions on the information society (e.g. 'Bangemann' report)
- The database directive in comparison with other European copyright directives was not a heavily lobbied proposal during the second phase of the formulation process up to its adoption. However, following its adoption its sui generis provisions in particular became the focus for criticisms from user groups and legal experts.

## **8. 2. Interview analysis and the formulation of the database directive**

"The essence of ultimate decision remains impenetrable to the observer, often indeed to the decider himself....There will always be the dark and tangled stretches in the decision-making process, mysterious even to those who may be most intimately involved" (President John F. Kennedy cited in Allison:1971).

In addition to corroborating the documentary evidence the interview analysis provides considerable detail on the role and motivations of different policy actors in the formulation process. It highlights the different strategies and tactics policy actors used in trying to influence the form and content of the directive and the range of organisational and contextual factors that impacted on its negotiation. Importantly the analysis reveals the

varying degrees of involvement, influence and power that different policy actors had during the directive's formulation.

In this context, the interview analysis contributes to a deeper understanding of the directive's formulation and affirms the utility of the 'rational actor', 'bureaucratic imperative' and 'garbage can' re-interpretations for sensitising research to a range of human, organisational and contextual factors (Section 5.1.1.). Significantly, the re-interpreted process model highlights how a number of key factors influenced the transformation of an innovative and reasonably well balanced initial Commission proposal into a directive under which "the most borderline and suspect of all the objects of protection ever to enter the universe of intellectual property discourse - raw data, scientific or otherwise - paradoxically obtain[ed] the strongest scope of protection available from any intellectual property regime" (Reichman & Samuelson:1997:94). More specifically, each re-interpretation illuminates these key factors to different degrees. In this regard, all three re-interpretations proved useful in drawing particular attention to different key factors that impacted on the definition and development of the directive as adopted (Section 2.4.). These can be summarised as follows:

The 'rational actor' re-interpretation in particular highlighted;

- Existing EU legislation (the 'acquis communautaire' )e.g. the software directive;
- Case law and international policy developments including 'Feist', 'Magill' and TRIPS;
- The emergence of European and international policy discussions on the information society;

The 'bureaucratic imperative' re-interpretation in particular highlighted;

- Tensions within and between the European institutions;
- The determination of a particular Council Presidency;

The 'garbage can' re-interpretation in particular highlighted;

- Individual personalities;
- The dominance of a 'copyright lens' during negotiation of the sui generis right;
- Differentials in access to information amongst interested parties, particularly during the Council negotiations;

The discussion below interprets the key factors that emerge from the interview analysis as having influenced the database directive. These factors are examined within the two phase model of the formulation process.

### **8. 2. 1. Phase one: agenda setting and European protection for databases.**

Within the context of internal market pressures, the challenge of ICTs and efforts to encourage the European information market<sup>1</sup> it is clear from the interview analysis that policy action on databases was an initiative developed solely by particular officials within the Commission and was not for example the result of pressure exerted by a strong industry lobby as was the case with the software directive.

In this regard, during the initial phase of the formulation process the interview analysis highlights:

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<sup>1</sup> As detailed in the documentary evidence(chapter 6) and literature review (chapter 3).

- The importance of the role, motivations and attitudes of two Commission officials in DGIII/F/4 (Mr.Verstrygne and Mrs.Czarnota)<sup>2</sup> in setting the policy agenda and ensuring that the Commission adopted the initial proposal with its dual system of protection.

These two officials had previously worked closely together on the software directive. They both had considerable experience of the negotiation process with the other European institutions and close contacts with many of the interested parties in the copyright field. As *the 'mother of the directive'* Mrs. Czarnota prepared the innovative draft proposal and together with Mr. Verstrygne formed a 'formidable team' that was able to ensure the proposal's adoption by the Commission and to push the directive proposal into the formal policy process. From the interview analysis it emerges that both these officials had strong and forceful personalities and that their actions in the copyright field were underpinned by:

- A strong determination to provide the European database industry with as much protection as it was possible to achieve within the context of the European harmonisation process.
- Personal career ambitions to show themselves as highly effective Commission civil servants capable of generating workable policy proposals.

This combination of factors led to an approach by these two officials that created tensions and conflict with officials from other Commission services. In particular tensions arose with officials from DGXIII over which directorate-general should lead the directive proposal i.e. DGIII or DGXIII. These tensions were further heightened when Mrs.Czarnota proceeded to develop the initial database proposal without communicating this to DGXIII officials working on the same issue. This *competitive* rather than cooperative approach between the two Commission services was directly linked to the personalities involved. The DGIII officials involved were clearly eager to generate another 'copyright' proposal and saw the database proposal as another important opportunity to expand their Commission service's competence in the copyright field.

In drafting the proposal Mrs.Czarnota was constrained by two important organisational/procedural factors:

- The Commission in proposing another 'copyright' directive had to justify its initiative in terms of the needs of the internal market. However, given the structure of the European database market (and the dominance of the UK industry within that market) the internal market justification was relatively weak. This increased the difficulties faced by DGIII officials in being able to ensure that the proposal would be adopted by the Commission and enter the formal policy process.
- Under the terms of the 'acquis communautaire'<sup>3</sup> the software directive had already harmonised the originality criterion between Member States copyright and *droit d'auteur* systems (i.e. *the author's own intellectual creation*). As a result, it was clear that many databases protected under the 'sweat of brow' concept in the UK (and other countries with a copyright tradition) would become ineligible for copyright protection in a European proposal harmonising protection between the Member States.

In addressing the protection of these 'non-original' databases, Mrs.Czarnota proceeded to develop the dual copyright/*sui generis* right system of protection. This was despite being

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<sup>2</sup> Head of Unit DGIII/F/4 and Draughtsman/proposal rapporteur respectively

<sup>3</sup> This is the concept that new Community legislation in any particular policy area should not conflict with the existing body of European legislation.



aware of opposition to any sui generis type protection from interested parties and the UK government. The confidence to proceed despite this opposition was due at least in part to:

- Mrs.Czarnota's confidence in the support of her superiors within the Commission and in the ability of Mr.Verstrygne to use his contacts in the cabinets of the Commissioners to generate enough support for the proposal to be adopted by the Commission. Mr.Verstrygne having previously worked in the cabinet of President Jacques Delors had excellent contacts in the senior levels of the Commission including with Commissioner Bangemann. From within DGIII/F/4 Mr.Verstrygne had already generated four other copyright directive proposals which also strengthened his position to push the database proposal forward.
- Mrs.Czarnota's knowledge of Council negotiations on copyright issues and her awareness of the fact that that under the rules of QMV(qualified majority voting) it is only ultimately necessary to obtain support for a directive from a majority of the Member States. i.e. if the proposal satisfied the droit d'auteur majority in Council she was aware that there would be enough support for its adoption.

This stated, in preparing the proposal Mrs.Czarnota was careful to justify it in terms of the needs of the 'internal market'. As well as tying the development of the sui generis right to existing legislative rules in some of the Member States e.g. the Danish catalogue rule and to emerging database case law e.g. Feist and Van Daele. It is however, clear that the sui generis right was introduced at least partly to alleviate some of the competitive pressure from US database operators (i.e. the directive's reciprocity clause) and a personal desire to prevent a future Magill type judgement.

In anticipation of opposition to the directive proposal Mrs.Czarnota and Mr. Verstrygne adopted a number of tactics in this initial phase of the formulation process. Two of the most important being:

- Deliberately writing the proposal in such a manner that the two rights (copyright/sui generis) were tied tightly together into a single database protection package. While this tactic produced an over-complicated initial proposal text it inhibited the Parliament and/or Council from dropping the sui generis right and proceeding only with the copyright elements of the directive proposal.
- Leaking versions of the draft proposal prior to its adoption by the Commission to industry contacts (e.g. Reuters) to galvanise general support for the database proposal. Even though DGIII was aware of opposition to the sui generis right amongst some of these rights holders e.g. FEP, they were confident that they would be able to generate general support for a proposal offering European wide database protection. This tactic of leaking documents early to particular rights holders was a clear attempt by DGIII to create a positive environment into which to release the directive proposal. It also provided the chance to identify any serious opposition early on.

The close contacts between particular industry representatives and particular Commission officials were maintained throughout the formulation process. They provide a clear indication of the differentials that existed amongst interested parties in terms of access to information in the policy process. The interview analysis also indicates that although the volume of lobbying in this initial phase was fairly limited, it did involve a select group of rights holder representatives who had direct contacts with the key DGIII officials. It also highlights that Mrs.Czarnota and Mr.Verstrygne were basically sympathetic to the goal of ensuring as much European protection as possible for the database industry under the directive.

Among the other policy actors involved in the initial phase of the formulation process it is evident that officials from DGXIII (as an associated service) contributed to balancing the initial proposal (i.e. the interests of authors and users with those of rights holders in the Commission proposal). However, because of the limited importance attached to the database proposal by the DGXIII hierarchy and tensions with particular DGIII officials, the ability of DGXIII officials to influence the directive proposal became increasingly limited after the formal policy process began. Amongst other interested parties who were involved during this initial phase most only attended the 1990 public hearing as 'a direct roll-over from discussions on the software directive' and subsequently dropped out of the formulation process. Authors groups and user groups who had attended the 1990 hearing did not become involved again until after the publication of formal proposal, partly because they were not consulted by DGIII officials but mainly because the issue of database protection was not considered by them to be a high priority.

The interview analysis reveals that by the end of this initial phase the database proposal was considered by most policy actors as:

- A Commission led 'copyright' initiative of low priority concerned with a 'technical' proposal aimed at the needs of the 'niche' electronic database market.

### **8. 2. 2. Phase two: database protection and the formal policy process**

Following the adoption of the directive proposal by the Commission in January 1992 its formal publication and presentation to the Council was delayed until April 1992. During this period DGIII officials released 'unofficial' copies of the proposal to their industry contacts as a means of identifying issues of potential conflict. In this regard the sui generis right emerged as clearly the most complex and controversial issue.

While Mr. Verstrynge and Mrs. Czarnota were able to ensure the database proposal's adoption by the Commission, ultimately their power relied on gaining the support of their superiors in the Commission hierarchy. Indeed, as the interview analysis highlights preparing a directive proposal can be a 'risky undertaking' for Commission officials especially if a proposal is rejected or stalled in its negotiations by the other European institutions. In this regard, the interview analysis reveals that the database directive proposal was itself almost dropped completely by the Council just weeks after its formal publication as a result of the actions of the UK government:

- Following the UK government's accession to the Council Presidency in the second semester of 1992 the UK delegation in the Council working group tabled a motion that the database directive proposal be rejected.

This move by the UK delegation was partly motivated by the fact that the UK government did not want to give up its 'sweat of brow' defence and/or to replace it with (what was at the time) a lesser sui generis right protection. It was also partly because the UK's representatives in the Council working group were the same UK civil servants who had been instrumental in preparing the UK's 1988 Copyright Designs and Patents Act. These officials clearly felt that they had adequately addressed the issue of protection for electronic databases in the UK Act and were consequently opposed to further change. The motion for the rejection of the proposal failed because Mrs. Czarnota was able to obtain sufficient support from amongst the other Member States delegations 'to keep the proposal on the table'. This support from the droit d'auteur majority in the Council working group was partly due to:

- Greater awareness of the limits of copyright for protecting electronic databases as illustrated by 'Feist' and other database case law;
- Awareness that the issue of database protection was being discussed in the international context both in TRIPS and within a WIPO expert committee;
- Support for a proposal that would protect European database operators from competitive pressure from US operators.

In the aftermath of this failed attempt by the UK delegation to have the proposal rejected the UK Presidency stalled discussion of the proposal by placing the issue low down in its list of policy priorities during its six month term in office. In this environment the relationship between the Commission and the UK delegation in the Council working group became strained, with one UK delegate describing Mrs. Czarnota as 'a worthy opponent'.

In parallel with these events in the Council working group, the formal policy-making structure provided by the co-decision procedure<sup>4</sup> ensured that the other European institutions i.e. the ECOSOC and the European Parliament had already begun to prepare to formally discuss the database proposal. Similarly interested parties were busy preparing policy submissions and lobbying positions on the directive proposal and were arranging meetings with particular DGIII officials, Parliamentarians and Council delegations<sup>5</sup>.

In this context the interview analysis highlights that despite a creditable opinion on the database proposal produced by the ECOSOC rapporteur overall this institution had almost no impact on the formulation process. This results mainly from the organisational/procedural fact that:

- Under the co-decision procedure the ECOSOC has no powers to force changes to the proposal text, which in turn leads to;
- Commission officials and Council delegates treating the ECOSOC opinion simply as a formality that has to be endured rather than as a useful contribution to the policy formulation process;
- Interested parties also did not consider it a worthwhile use of their resources to lobby the ECOSOC.

In the European Parliament the interview analysis reveals that during the first reading of the proposal, discussion remained low key and was not hampered by any party political differences. Indeed overall the Parliament was ascribed a relatively unimportant role in the formulation process making only a few changes to the Commission's proposal e.g. extending the term of protection for the sui generis right from 10 to 15 years. Given that under the co-decision procedure the Parliament had stronger powers in the policy process, its limited role and influence can be explained in a number of ways:

- When the database proposal entered the European Parliament for its first reading it was still perceived to be a low profile technical policy issue developed by the Commission for the emerging electronic database market. As a result it aroused little interest amongst MEPs;

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<sup>4</sup> Initially the database directive was negotiated under the co-operation procedure, however the coming into force of the TEU forced a change to the co-decision procedure.

<sup>5</sup> While the events at the Member State level are outside the scope of the casestudy it is evident that depending on the political tradition of consultation in each Member State and the size of the database industry, discussions and consultations were also taking place between Member State civil servants (from the Council working group) and interested parties.

- The Commission was therefore able to ‘keep control’ of the discussions as they developed in the legal affairs committee. The Commission also felt confident in this context in preparing the amended proposal and in rejecting particular Parliamentary amendments it did not agree with;
- Given the general lack of interest in, and, understanding of the Commission’s proposal amongst MEPs interested parties were also inhibited from lobbying effectively.

Of course, part of the explanation for the Parliament’s limited role is that, its role was only limited *in comparison* with the subsequent major changes that took place during the Council negotiations. Indeed, even though the amended proposal had generally increased the protection available to rights holders, the directive proposal after the first reading remained fairly balanced and did not generate undue alarm amongst user groups or legal experts.

In this context the interview analysis highlights a number of factors concerning the involvement of interested parties in the formulation process;

- Overall the formulation of the directive did not generate a great deal of lobbying from interested parties. Most of the lobbying that did occur was concentrated on the Commission and on particular Member State delegations in the Council working group;
- The most active lobbyists throughout the formulation process were UK-based database companies and European publishing and information associations i.e. Reuters, Dun & Bradstreet, FEP, EIIA, Reed-Elsevier. These rights holder organisations concentrated their lobbying efforts on the Commission via direct contacts with DGIII/DGXV officials and on the Council working group delegations at the European and Member State levels;
- Authors groups focused their lobbying efforts on a single issue i.e. for the deletion of Article 3(4) in the original Commission proposal concerning employees economic rights. This Article was deleted;
- User groups did very little lobbying during the formulation process. However, after the Common position was published they began to express their negative opinions on the directive but at a practical level it was ‘too late’ in the formal policy process to effect the changes that had been made to the directive text by the Council.

Drawing conclusions about the ability of these different lobbyists to influence the policy process simply on the basis of their involvement is problematic. However, the interview analysis does reveal a number of other factors that impacted on the ability of interested parties to influence the formulation process:

- Mrs.Czarnota and other DGIII/DGXV officials had regular contacts with these rights holder representatives and were basically sympathetic to their demands for stronger protection. Their lobbying activities were also aided by warm personal relations with Mrs.Czarnota partly assisted by a shared nationality. These rights holders were also aware of the limited information resources available to these DGIII/DGXV officials and ensured a steady supply of information, documents and analysis to support their arguments;
- These lobbyists also maintained close contacts with representatives in the Council working group, particularly with the UK delegation, who because of the dominance of the UK database industry in the European market, were very involved in the negotiations on the directive. Unsurprisingly after the UK’s initial opposition to the directive per se, the UK delegation was keen to maximise the protection given to the database industry by the directive as a balance to the loss of the UK’s sweat of brow defence. This meant that the UK delegation was also receptive to the petitions of rights holder lobbyists;
- Following on from these contacts rights holder lobbyists were able to maintain a detailed knowledge of the development of the Council working group discussions and certainly

had access to the Council consolidated texts detailing the Member States different positions during the negotiations. This information enabled these lobbyists to direct their efforts in particular directions and to prioritise the issues of most concern;

- These rights holders also had considerable resources available to sustain an effective lobbying campaign throughout the formulation process.

From the analysis rights holders emerge as generally reluctant to claim direct influence over the directive. They did however feel confident to claim that their opinions had mostly been taken on board in the policy-making process. This they based on a comparison between their lobbying positions and the final text as adopted. While ultimately it is extremely difficult to quantify the exact degree of influence this lobbying had on the directive's formulation, it does emerge as an important contributory factor in shaping the environment in which Commission and Council officials negotiated changes to the database proposal text.

By contrast, given the criticisms made of the directive by user groups and legal experts following its adoption the interview analysis also reveals why these groups were not more actively involved during the formulation process:

- Initially the database proposal was not considered to be a policy initiative with any major implications for users. Following the amended proposal user group representatives began to focus their attention on other issues because they assumed that the proposal would not undergo any major changes during its negotiation in Council;
- During these Council negotiations user group representatives also suffered from a lack of information about how the negotiations were proceeding and what agreements were being made by the Presidency and Commission with particular Member State delegations to overcome obstacles to the directive's adoption. This lack of information was mainly because the DGXIII official attending the Council working group meetings (a potential source of such information for user groups) was not herself being kept fully informed by Mrs.Czarnota of policy changes and developments;
- While relations between DGXV and DGXIII improved dramatically with the arrival of Mr.Gaster, the DGXIII official who had attended most of the Council working group meetings went on maternity leave just as the most frantic period of negotiations under the French Presidency began. Her replacement had few contacts with user group representatives and was not sufficiently familiar with the issues to have been able to give an assessment of the implications of the changes taking place;
- At a more general level, apart from having fewer resources available for lobbying, user groups have a weaker position in the formulation process because they are more fragmented and less easy to identify than rights holders. They also tend to articulate a range of broad often ill defined concerns about Commission initiatives rather than the strong clear policy demands of rights holders.

During the Council negotiations the interview analysis reveals a number of factors that influenced the directive's formulation. In particular the analysis draws attention to the role and tactics of DGXV officials, internal conflicts within the French delegation, the dominance of 'copyright lens', the determination of the French Presidency and the emergence of European copyright policy and information society initiatives.

On the role of the Commission officials; Mrs.Czarnota is revealed as having been very eager to push the directive proposal towards a common position whilst ensuring that the dual system of protection at the core of the proposal remained as unchanged as possible. In trying to achieve this goal Mrs.Czarnota adopted a number of tactics:

- Working as closely as possible with each Council Presidency to maintain control of the agenda and timetable of working group meetings;
- Assessing as quickly as possible the personalities of Member State delegates (i.e. susceptibility to persuasion/ flexibility) and the main priorities of each Member State for the directive;
- Outside of the Council meetings contacting 'floating voters' on particular issues to persuade them of the merits of the Commission approach. Especially where these were representatives from larger Member States who under QMV had more votes;
- Inside the Council meetings variously sounding up-beat and positive about progress (even if none had been made) to being displeased and strident in opposition to particular Member State positions;
- Getting industry lobbyists to make presentations to the Council working group that supported the Commission's arguments;
- Being patient - to wait and see if Member States positions changed following national level consultations or as a result of other inputs.

While initially these tactics proved useful, it is evident from the interview analysis that by the middle of 1994 Mrs.Czarnota's strong personality and domineering negotiating style had begun to irritate many Member State delegations. Indeed, some of the delegations considered that she had become 'unprofessionally involved in the directive's negotiation' to the detriment of her impartiality as a Commission civil servant. This dissatisfaction with the Commission's approach contributed to a slowing down of the negotiations in the Council working group. However, two additional factors also impacted on the pace of the Council negotiations, so that by the time that the Germans took over the Council Presidency in the second semester of 1994 virtually no progress was being made in the negotiations. These additional factors were:

- During the first six months of 1994 under the Greek Presidency there was simply very little discussion of the database proposal. This was partly because for Greece, (which did not have a database industry), the directive proposal was low in its list of priorities for policy action. It was also partly because the Greek chairman of the Council working group meetings was not a copyright or database expert;
- The conceptual difficulties and confusions generated in discussions of the sui generis right. These resulted mainly because of the dominance of a 'copyright lens' within the Council working group. This lens, which was particularly strong amongst delegations from droit d'auteur Member States, led to discussions of the sui generis right in terms of copyright ideas and concepts. This lens obscured the basic reason for the introduction of the sui generis right i.e. to compensate for the limits of copyright for protecting non-original database products.

With the start of the German Presidency the Council negotiations received a new impetus, not least because of the determination on the part of the German chairman in the Council working group to try and push the directive to a common position. Further impetus was provided by a number of events that shaped the broader policy environment within which these discussions were taking place including:

- The release of the Bangemann report which specifically referred to the need for the database directive to be adopted;
- The release of DGXV consultations on possible future European copyright legislation in the developing information society;
- At the international level, the completion of the TRIPS agreement which included copyright protection for electronic and non-electronic databases i.e. Article 10(2).
- The developing discussions on database protection at WIPO.

While during the German Presidency the Council discussions were successful on reaching a high degree of consensus on the copyright section of the directive, the sui generis section remained problematic. Two main factors contributed to this lack of progress:

- Continued opposition to the sui generis right from among a number of delegations, most notably the Germans, who with the support of the Presidency favoured a wholly copyright based directive complemented by a system of unfair competition rules;
- The emergence of a strong divergence of opinion between members of the French delegation over proposed changes to the directive proposal and in particular to the sui generis right. These disputes between civil servants from the French Ministries of Culture and Industry proved problematic for other Member State delegations because the French position on issues changed completely from one Council meeting to the next, depending on which Ministries officials attended.

At the end of the German Presidency Mrs.Czarnota left the negotiations of the Council working group and was replaced by Mr. Gaster. This change of Commission personnel clearly eased the tensions that had developed between Commission services (DGXV and DGXIII) and between the Commission and some of the Member State delegations. Mr. Gaster also quickly emerged as a official determined to facilitate the adoption of the directive as quickly as possible. This determination was shared by the French Presidency under the chairmanship of Mr.Dobelle who was appointed because of his negotiating skills rather than any specific copyright expertise. Working closely together the Commission and Presidency (with the assistance of the Council secretariat) increased the timetable of Council meetings and outside of these formal meetings worked hard with each Member State delegation to reach an overall agreement. During these negotiations three factors contributed to the ability of the French Presidency and the Commission to push the Council towards a common position:

- The French Presidency was able to resolve the disputes within its own delegation. It did this by making the representative from the French Ministry of Culture restrict her comments to the copyright section of the directive. As a result the French position on the sui generis right became one of broad support;
- The French Presidency was prepared to allow optionality in a number of the directive's provisions (e.g. permissible exceptions) to continue and also to place a number of other unresolved issues into the directive's non-binding recitals e.g. the coverage of CD's (see recitals 17 and 19). This was despite the fact that the result was to lessen the clarity of the directive and to weaken its overall harmonising effect;
- The Commission represented by Mr.Gaster became considerably more flexible in its approach to the negotiations and in what would be an acceptable final solution.

It emerges from the analysis that towards the end of the French Presidency the timetable of Council meetings dramatically increased as the Presidency and Commission tried to push the discussions forward to a conclusion. In this regard, it is also apparent that for the Presidency and the Commission the main priority became the achievement of a common position. A priority that marginalised the previous priority of achieving a balanced solution. However, despite these strenuous efforts, an agreement was still in doubt until the very end of the negotiations when the key sticking point became the compulsory licensing provisions. While both France and the Commission had been keen throughout the negotiations to maintain these provisions, in the end, in the interests of a common position they withdrew their opposition to the demands from Germany and the Scandinavian Member States for the provisions to be deleted. As a consequence, the positions of the other Member States who wanted to retain these provisions were, even under the rules of QMV substantially weakened (i.e. Belgium,

Italy, Ireland and Portugal). These Member States finally decided in the interests of the 'global package' not to prevent the deletion of these provisions, which in turn enabled the common position to be agreed. The analysis draws attention to a number of aspects of these Council negotiations:

- No single Member State delegation or Presidency was able to exert total control over the formulation of the directive;
- The major changes to the amended directive proposal were made within a very short period of time at the end of negotiations. The final decisions on these changes were taken by non-copyright experts in the Council COREPER. These changes were facilitated by the political priorities of the French Presidency and the Commission to reach a common position;
- Discussion of the sui generis right proved problematic for the Council working group's copyright specialists. There was a distinct lack of database industry expertise and/or economic assessment of the impact of the database directive.

Following discussion of the common position within the Commission the directive proposal was transferred for its second reading to the European Parliament. Initially there was some concern both in the Council and amongst rights holder lobbyists that the Parliament would attempt to re-introduce the compulsory license provisions. However, it quickly became apparent that the Parliament, and in particular the legal affairs committee rapporteur and shadow rapporteur were content to recommend the directive be adopted on the basis of the Council's common position subject to a few very minor editorial amendments. The limited input from the European Parliament during the second reading was affected by a number of factors:

- Rights holder lobbyists mounted a very effective campaign at the Parliament confirming their general satisfaction with the Council's common position;
- The Parliamentary rapporteur and shadow-rapporteur were aware from the Commission of the difficulties that had been overcome in reaching the common position. As a result, given the general industry support for the directive they were unwilling to demand changes that would force the proposal into conciliation under the terms of the co-decision procedure;
- External events including the release of the Commission's second copyright Green Paper and on-going WIPO discussions on database protection encouraged the Parliament to adopt the directive quickly.

### 8. 2. 3. Databases, European copyright and information policy

"The global compromise package of the database directive aims to balance the interests of database makers, database operators, users, authors, competitors, SMEs [small and medium sized enterprises] and the public at large. Taking the complexity of the issue into account and considering the diverging interests at stake *an astonishing consensus* was achieved in the European Parliament and the Council of Ministers. This gives hope for a fast application of this watershed in European legislation" (Gaster:1996a) (emphasis added).

The final executive decision taken on the database directive by European Parliamentarians and Member State representatives in Council indicates that at a formal level a high degree of consensus was reached on its adoption. However, from the interview analysis it is evident that describing the formulation of the database directive as a 'consensus' obscures more than it reveals about the complex interaction of factors that impacted on the directive's form and content during the formulation process. This is partly because terms like 'consensus' and 'compromise' imply that the formulation of the directive resulted from negotiations between



participants with equal power, knowledge and validity. As this analysis has illustrated important differentials amongst policy actors do exist both within and between the European institutions and interested parties. Differentials that enabled the directive to be shaped in ways that had more to do with civil servant career ambitions, political expediency in the Council and the dominance of rights holder lobbyists than any form of consensus.

In this context, as the European Commission continues to develop copyright initiatives for the digital realm its professed aim of maintaining a “fair balance of rights and interests between the different categories of rightsholders and between rightsholders and rightsusers”(CEC:1996:2) is recontextualised. The casestudy highlights how problematic this concept of a ‘balance of rights’ can be in the formulation of European copyright policy. The casestudy reveals how this concept masks the fact that particular interested parties involved in the copyright balance were not, at a practical level, involved in the formulation process. In this sense, the casestudy supports the view that “the language of balance is perhaps best seen as a metaphor for the political processes of responding to lobbying and interest group representation” (Bently & Burrell:1997:1216).

At this broader level, by asking policy actors about how they understood the links between the database directive and wider policy context the interview analysis revealed a range of contrasting views on European copyright and information policy-making in the digital age. These contrasting views highlight the different ways in which policy actors justified their actions during the formulation of the database directive and positioned themselves in this wider context. Significantly, this broader analysis revealed a number of common characteristics that shape European copyright policy and contribute to the continued fragmentation of approaches to information policy issues. The most prominent of these characteristics can be summarised as follows:

- Within the European Commission different directorate-generals exhibit important differences in their approaches to policy formulation;

Beyond the personality and negotiating style of particular Commission officials the interview analysis highlights strong differences in approach between DGXIII and DGIII/DGXV to copyright and information policy issues in the digital realm. DGXIII officials consistently questioned the appropriateness of copyright for protecting digital works and expressed concerns over the potentially harmful effects of over-strong copyright protection on other information policies. They also acknowledged the need for better coordination between policies on information in the digital realm. In contrast, DGIII & DGXV officials consistently supported the further strengthening of copyright in digital environments and either saw no relationships between copyright and other information policy issues or felt that they were already being dealt with adequately.

In European copyright policy DGXV emerges as the dominant Commission service. Its bureaucratic ethos encourages its officials to develop and identify themselves with particular proposals as a means of career advancement. It emerges as a service with a strong ‘pro-industry’ and ‘pro-property rights’ stance which has, by adopting a ‘salami slice’ approach to copyright harmonisation, proved highly competent in pushing directive proposals through the formal policy process to adoption. This ethos influences the differential access to information that different interested parties experience in the policy formulation process. While DGXV’s formal consultation procedures were generally viewed as very open and well conducted, it is clear that rights holder groups consistently remain better informed about the progress of particular policy proposals and the content and timetable of DGXV copyright initiatives.

- Amongst interested parties strong differences are evident in their participation in the formulation process.

The interview analysis highlights a link between the consistently high proportion of rights holder lobby groups in the formulation of European copyright policy and the continued expansion in the strength and scope of intellectual property protection. These groups emerge as better resourced, better informed and better organised than user groups in conducting their lobbying activities. They also emerge as inherently in favour of stronger protection especially in the digital realm. In this context even where user groups do actively participate there is a tendency for their views to be 'drowned out' in the consultation and lobbying process.

- The role of the European Parliament remains unpredictable in the policy process

The interview analysis highlights that the role of the European Parliament in the policy process is unpredictable and relies heavily on the approach and attitude of the Parliamentary rapporteur and the level of public debate on an issue. This is particularly the case in a relatively technical area like copyright where party politics tend not to play a major role. Indeed, despite the committee system, MEPs involved in the formulation process often exhibit a lack of interest in and understanding of copyright and information policy issues.

- Decision-making in the Council lacks transparency

The interview analysis highlights that there is a lack of transparency in the decision-making that takes place in the Council. The analysis also reveals the central role of Member State civil servants in the Council copyright working group. Within the Council working group differences between the *droit d'auteur* and copyright traditions are always evident, as are a number of common ad hoc alliances between particular Member States e.g. (UK and Ireland), (France and Belgium), (Denmark, Sweden and Finland). The relationship between the Commission and the Council Presidency is also very important in the facilitation of progress in negotiations.

In this context, it can perhaps be legitimately argued that the outcome of the formulation process on the EU database directive would have been substantially different had user groups been more actively consulted. This argument is supported by the fact that when a similar proposal for database protection was presented at the WIPO diplomatic conference in December 1996 it was rejected following strong lobbying from an ad hoc alliance of user groups<sup>6</sup>. In the US too, the more active and visible participation of user groups reframed legislative debates on database protection and have continued to act as a valuable counter to the protectionist stance of government officials and rights holder groups (Jordan:1996).

From the casestudy it is evident that the formulation of European copyright policy does not take place on a level playing field. A range of human, organisational and contextual factors do impact on the form and content of the legislative proposals and have led to a general expansion in the scope and strength of copyright protection. In responding to the challenges posed by ICTs, it is also evident that these factors have inhibited a proper consideration of the implications of expanding copyright protection on the 'balance of rights' and on other information policies including free speech and privacy. "...to concentrate on copyright in isolation involves ignoring the political implications of modifying copyright in the information society. In this respect, there is much more at stake than potential clashes with

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<sup>6</sup> For a detailed discussion of the rejection of the database proposal at the WIPO discussions, See, Samuelson, P.(1997) The US Digital Agenda at WIPO, Virginia Journal of International Law Vol.37 no.2 Winter pp.418-427.

established rights such as free speech and privacy....the whole way in which we decide to regulate the Internet has political implications, so that copyright regulation cannot be separated out from politics” (Bently & Burrell:1997).

As preparations continue on more European copyright legislation for the digital environment, the casestudy provides strong evidence of the need for a new approach. In particular, the European Commission and Member State governments should be more cautious in generating legislation for this environment, not least because it remains unclear what legal responses are necessary as ICTs change the roles of rights holders, authors and users. In this regard, the casestudy highlights that the formulation process would be improved by:

- The involvement of a wider range of interested parties and by increasing the transparency and openness of the legislative process. In particular, in the digital context there is a need to more actively involve users in the policy process. Aside from having extensive knowledge of the on-line environment that might prove valuable, it is clear that legislation generated with the active participation of these groups will be more comprehensible to the public at large and easier to implement and enforce;
- Policy-makers need to exhibit less susceptibility to rightsholder claims on the need for more protection in the digital environment. As the history of copyright illustrates every new technology has led to demands for more protection from rightsholders. Yet there are examples of where giving into such pressure would have prevented the development of new information markets<sup>7</sup>.

In the digital context, there is a need for copyright policy-makers to counter the tendency to treat predictions as realities or to allow policy decisions to be swayed in any manner by the slogans of the copyright industry. This is especially the case as the availability of increasingly large amounts of information only in electronic formats is linked to the use of technical systems for their protection. A situation which begins to threaten users fundamental right to information access<sup>8</sup>.

In this context it is important to remember that copyright is a legal invention (Section 3.1.1.). It is a man-made monopoly, not one based on some deep underlying immutable truth. Just as copyright rules have been strengthened so they can, if we choose, be weakened or even abolished ! Copyright crystallises the debate over what it is legitimate to commodify, over how we define the boundary between information as private property or as public resource. As the incorporation of pseudo-intellectual products like software and databases within the intellectual property paradigm illustrates, this boundary has been redefined in the interests of investors to a point detrimental not only to the public’s right to receive information and ideas but also to the interests of industry itself. “The continuous spread of intellectual property concepts, plus their ever deepening layer of protection, will combine to hamper industry and initiative by closing off an increasing number of avenues of possibility”(Phillips:1996). While it can be argued that the precedence of competition law within the European Union may prevent the ‘most gross abuses of rightsholders monopoly powers over protected works’, the global nature of the information society highlights the limits of such a safeguard (Porter:1995).

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<sup>7</sup> See, Chapter 3 (section 3.2.3.)

<sup>8</sup>Commenting on Article 10 (Freedom of expression) of the European Convention on Human Rights Professor Poullet states: “At first understood as the freedom to have access to information, communication and broadcast media, its scope was later broadened to the acknowledgement of a positive duty from the state to ensure that the necessary information is available to the public in order to enable it to take a free decision in a democratic society” (1994).

At a broader level, the success of the information society will depend on the ability of the legislative process to better coordinate policies concerned with information and to focus attention on *citizens* rather than simply on their social roles as investors, authors, and consumers. In digital environments, policy-makers need to acknowledge the interrelatedness of information issues and to be more explicit about the overall aims of policy proposals, not least because alternative potentially better solutions to the problems faced may already have been developed in response to other information policy problems (Reidenberg:1996). Ultimately, it is imperative for the development of the information society that policy-makers are made aware of the social consequences of the continued expansion of intellectual property paradigm. “Transforming information into a saleable good, available only to those with the ability to pay for it, changes the goal of information access from an egalitarian to a privileged condition. The consequence of this is that the essential underpinning of a democratic order is seriously damaged. This is the ultimate outcome of commercializing information throughout the social sphere” (Schiller & Schiller:1988).

### **8. 3. Re-locating the casestudy: the study of information policy environments**

From an academic perspective this casestudy has illustrated how a systematic attempt can be made to study the complex interaction of issues, actors and events that characterise large scale public information policies. The re-interpreted process model has proven useful as a heuristic device with which to sensitise research to the range of human, organisational and contextual factors that influenced the formulation of the database directive. As a result this research has provided a preliminary response to the challenge laid out by Rowlands (1997) on the need for the development within information policy studies of “a body of knowledge and research tools that can provide value-critical and paradigm critical approaches”.

More explicitly, returning to the points raised in the research strategy (Section 5.1.1.), the deployment of the re-interpreted process model in this information policy casestudy has illustrated the benefits for analysis of linking three contrasting but complementary perspectives on the policy process. Each perspective illuminated different aspects of the formulation process and combined to produce a deeper and more comprehensive analysis (Table 2.6.):

- By opening up an examination of the policy issues, policy documents, the role of policy actors and the policy context the re-interpreted process model enabled detailed description and analysis of the complex interaction of factors involved in the formulation of the database directive (Section 5.2. and section 8.2.);
- By deploying a simple tripartite model of the policy process (formulation, implementation, evaluation) it was possible to meaningfully scope the casestudy by restricting it to an examination of the formulation process (Section 5.2.1.);
- By drawing out the links between the role and beliefs of policy actors involved in the database directive and their understanding of the wider policy context the re-interpreted process model provided a basis for addressing the problem of generalisability in the casestudy (Section 5.1.2.);
- By providing a meso-level theoretical category the re-interpreted process model has highlighted the possible utility for future IP research of other theoretical categories at macro- and micro- levels of analysis, including in particular a range of policy based approaches to European integration (Section 4.2.) and the advocacy coalition framework developed by Sabatier and others (Section 5.1.1.).

As a consequence, the thesis has generated a number of insights useful for enhancing academic understanding of information policy and for improving analysis of complex (European) information policy environments. These insights can be summarised as follows:

- Defining information in the policy environment

Information is difficult to define and as a concept exhibits theoretical pluralism. Policy actors attach different meanings to the concept on different occasions e.g. ranging from (an object/commodity) through to (a process involving the generation of meaning in context). From the casestudy it is evident that the choice of definition utilised by policy actors is ultimately a political one tied to their attitudes, aims and intentions. To examine the basis for and implications of particular definitional choices made by policy actors it is essential that researchers adopt as broad a definition of information as possible. Following Braman (1989) this enables analysis to re-contextualise the use of narrower definitions in the policy environment and to examine their influence on the policy debate. A broader definition also highlights that information is both, the focus for policy action and an active agent in the policy process. Policy actors tend to use information in different ways at different times. For the research community this has implications for studies on information needs and information seeking behaviour (Strachan & Rowlands:1997).

- Defining information policy

Information policies are inherently complex and problematic to define. They involve a diverse range of policy actors at varying levels of social structure (e.g. organisational, regional, national, supra-national) and operate in dynamic social contexts. However, information policies are almost always linked with the emergence and use of technology and always involve policy actors making value judgements about what information is and how best it can or should be addressed. Crucially information policies also involve conflict and competition between a common set of core information values. As a result information policies form a jig-saw of fragmented and partly overlapping, often contradictory laws, regulations and controls. Following Overman and Cahill (1990) an important initial step for any analysis is to identify the dominant core values at stake in a particular policy as these will underpin debates on particular policy goals.

- Conducting information policy studies

Information policy is a new and distinctive field of study within information science<sup>9</sup>. It exhibits a wide variety of approaches that have given rise to a range of problems currently inhibiting the development of a strong theoretical and methodological base for academic information policy studies. At the methodological level in conducting information policy analysis researchers need to be sensitive to the power and influence of the social and political context; self-reflexive and explicit about the potential weaknesses of the approaches they adopt in relation to the results they produce; and, more critical about the basic presuppositions that underpin their interpretations. In conducting information policy analysis it is important to examine both policy contents and policy processes. This is because the intrinsic properties of information make it both a constituent of and agent in the value judgements and decisions made by policy actors. Crucially the inherent complexity of information policies must be addressed in research design.

In this regard, the casestudy highlights that while information policy processes are messy and their effects unpredictable they are not the result of purely random forces nor are they wholly

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<sup>9</sup> See, Rowlands, I.(1998) PhD thesis 'Mapping the knowledge base of information policy:clusters of documents, people and ideas' Information Policy Unit, Dept. Information Science, City University, London.

governed by over-arching structures. Rather they are the result of individuals actions in real contexts that develop over time;

- In analysing information policy it can usefully be conceptualised as a process. This process model draws attention to the temporal and dynamic aspects of policy-making. To how policy-making shapes and in turn is shaped by human, organisational and socio-political factors. The process model neatly divides policy-making into a series of stages which enable researchers to meaningfully scope their studies;
- This basic process model can be re-interpreted in a number of ways ('rational actor', 'bureaucratic imperative' and 'garbage can') to build a heuristic device capable of being deployed in the analysis of specific information policies. These overlapping interpretations draw attention to different aspects of the policy-making process and highlight different factors that may influence and shape it at different times;
- Deploying the re-interpreted process model in the context of an information policy casestudy focuses analysis on policy documents and formal policy-making procedures, the role of policy actors and the influence of the wider policy context. It also enables the study to be limited to a single stage in the policy-making process i.e. formulation, implementation or evaluation;
- Semi-structured interviews provide analysis with access to important information on the role, influence and motivations of key policy actors and on the way in which these factors are themselves effected by organisational and contextual factors;
- In attempting to overcome the lack of generalisability common to casestudies semi-structured interviews can also be used to ask policy actors broader questions about how they link the issues, actions and events during any particular policy to the wider context within which it was developed. This highlights the dominant factors at play in this broader environment likely to affect other information policies in the same field e.g. European copyright.
- At this broader level the casestudy highlights the importance of a more sophisticated approach to power. This approach acknowledges that power operates at a number of levels in the policy process. In particular the exercise of power is not simply about the ability of particular individuals or groups to make (or not make) executive decisions. It also involves the framing of the agendas in which such decisions are made, the ability to exclude or marginalise the participation and views of others and the ability to define the basic information values that are prioritised. Importantly the casestudy also highlights that while certain individuals and groups are more powerful in the policy process their control is never total and is always susceptible to change, not least because of the impact of unforeseen and unpredictable changes in the policy context (Lukes:1976, Foucault:1980).
- The casestudy and European policy studies

As chapter 4 highlighted the policy context in which European information policies are developed has undergone considerable transformation as the Member States have moved towards 'an ever closer union'. This has not only changed the formal procedures under which policy decisions are made, but has also influenced the participation of policy actors from within and external to the European institutions. At the most general level it is evident that the casestudy concurs with many of the insights generated by in particular the *policy based* approach to the study of European policy-making (Cram:1997). Including the fact that alongside the formal executive powers of Member State governments, the European Commission and interest groups have a strong influence on the type and content of the decisions that are made. This suggests that future analyses of European information policies may benefit from a closer examination of the tools and techniques developed in the context of studies aimed at explaining different aspects of the European integration process.

## Chapter 9. Conclusions

“A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives” (Madison:1822).

### 9. 1. Introduction

This chapter considers the casestudy findings in terms of the research aims set out in chapter one. It indicates the limits of the study and highlights a number of areas worthy of future research.

### 9. 2. Developing information policy studies

This thesis contributes to a new approach emerging within the IS literature to the study of complex information policy environments. By developing and deploying a re-interpreted process model this study has illustrated that a systematic attempt can be made to describe and explain the complex interaction of human, organisational and contextual factors in the formulation of the database directive. The research has also highlighted that a comprehensive understanding of the formulation of any information policy relies on a consideration, not just of the policy issues but also the policy processes and social contexts that impact on its development.

In contributing to a more sophisticated approach to the analysis of information policy environments it is however, also important to be clear about the limitations of the casestudy:

- *Limited to the formulation process* - The adoption of the database directive at the European level did not mark the end of the policy process. Indeed, the optionality of some of the directive’s provisions and the extensive use of recitals, weakened the harmonising effect of the directive as the implementation of the directive in the Member States gave rise to a variety of interpretations of the text. Although outside of the scope of this casestudy, the policy processes following the formal adoption of the directive and leading up to its implementation in the 15 Member States may have had a impact on the final balance of rights in individual Member States;
- *Limited to the European level* - During the formulation process, focusing analysis on the European level obscured the role of national level consultations and policy processes on the development of particular Member State’s positions during the Council negotiations. Changing political priorities in the Member States during the formulation process and the variety of different traditions among the Member States for conducting consultations with their national constituencies of interested parties may have had implications for the negotiating positions of national delegations in the Council and for the access that different interested parties had to information about the progress of the negotiations. Equally the role of international influences on these processes was not explored in-depth;
- *Limited by interviewee access* - In conducting semi-structured interviews at the European level access to particular policy actors remained an issue. In particular, it was not possible to interview certain policy actors from the Parliament and the Council. At a practical level, the European Parliament’s rapporteurs both refused to be interviewed, while members of the Council’s COREPER had little recollection of the database proposal or their role in its formulation. This limited the inferences that could be made

about the involvement of these actors in the formulation process and highlighted that access to policy actors will recur as an issue in future European information policy studies.

Despite these limitations, by engaging directly with policy complexity surrounding the formulation the European database directive this thesis has been able to make a number of contributions to the theory and practice of conducting information policy studies:

- **At the substantive level:**

The documentary and interview analysis provide considerable detail on the formulation of the database directive in terms of the policy issues, policy processes and the policy context. *On the policy issues* the thesis examined in detail the development of the European directive and its innovative copyright/*sui generis* system of protection. At a broader level it also highlighted the potential negative implications of the adopted directive on the copyright balance of rights and, in the digital environment, on other areas of information policy. Significantly, the European 'acquis communautaire' means that aspects of the directive have already become a basis for further European copyright legislation in the digital environment. *On the policy processes* the thesis highlighted the formal and informal roles of policy actors from both within and external to the European institutions during the formulation of the database directive. The casestudy drew attention to the important role played by both middle ranking civil servants in the Commission and Member States representatives in the Council working group in shaping the directive. Significantly, the casestudy also highlighted the role of different interested parties and noted the large differentials in both lobbying resources and access to information that they exhibited during the formulation process. *On the policy context* the thesis highlighted that together with the software directive, the database directive has become an important platform for European copyright policy for the digital environment. The casestudy also highlighted the prevalence of a 'copyright lens' during the directive's formulation and at a broader level noted the influence of discussions on the information society that changed the environment in which the directive was negotiated.

- **At the methodological level:**

The re-interpreted process model proved useful both for providing a coherent framework within which to scope the casestudy on the database directive and for sensitising analysis to a range of human, organisational and contextual factors that influenced the policy-making process. Importantly, the model drew attention to the utility of employing a variety of frames of reference ('rational actor', 'bureaucratic imperative' and 'garbage can') to develop a heuristic device with which to conduct analysis of complex information policy environments: the first interpretation generated a focus of analysis on policy documents; the second interpretation generated a focus of analysis on bureaucratic policy procedures and the role of civil servants in the policy-making process; and, the third interpretation generated a focus of analysis on the range of other policy actors involved in political game-playing in the policy-making process. Significantly, this model promotes a flexible approach to the analysis of information policy environments that grounds itself in observable practices and does not tie itself to any single idealised interpretation of the policy-making process. It also alerts researchers to the need to consider how the wider policy context shapes and is shaped by individual policy-making processes.

- **At the theoretical level:**

At the theoretical level by examining the links between the database directive and wider developments in European copyright and information policy it became possible to re-locate



the casestudy findings to provide insights to improve academic understanding of European information policy-making and techniques for the analysis of complex (European) information policy environments. The thesis illustrated that analysis of policy actors actions and beliefs is especially important in studies of information policy where multiple interpretations, definitions and meanings abound. The casestudy highlighted the need for analysis to engage directly with the detail of what policy actors say and to make explicit the links between their actions in the formulation process and their perspectives on the wider policy context within which those actions took place. Significantly, by being rigorous at every stage of data collection, collation and analysis and by tying the discussion and interpretation of the research findings directly to the data this casestudy has set out an approach that may be used in future casestudies on complex information policy problems.

### 9. 3. Areas for future research

In this context, the thesis highlights that information science (IS) with its vast experience of dealing with information, with information users and with information technology is uniquely placed to be able to enhance the analysis of information policies. The unique characteristics of information and its pervasiveness throughout the social sphere mean that policies concerned with information and its transfer cut across other policy sectors. Furthermore, as the casestudy has highlighted narrowly defined policy responses developed for digital environments increasingly have implications for other information policies that need to be addressed.

In this regard, the thesis indicates a number of areas in need of further investigation and analysis:

#### *Information policies*

- As more European copyright legislation is developed for the digital environment there is a real need for further investigation of the relationships between this expanding intellectual property paradigm and other information policies in the emerging information society.
- More generally there is a need for further case-studies of the formulation, implementation and evaluation of information policies at organisational, national and supra-national levels to develop a broad base of knowledge in the information policy field.

#### *Information policy studies*

- Further investigations are required into the theoretical and methodological foundations of information policy studies. There is a need for more critical analysis of the definitions, frameworks and techniques that are used to aid in the continued development of value and paradigm critical approaches.
- There is a need to investigate further the utility of frameworks and methodologies from other disciplines that may be appropriate for conducting information policy studies. At the European level, the utility of the policy-based approaches developed for analysing the processes of European integration may prove useful for future European information policy studies.

- As well as conducting analysis *of* information policies academic researchers must also be willing to conduct analysis *for* information policies i.e. to engage in policy prescription alongside its explanations and descriptions.

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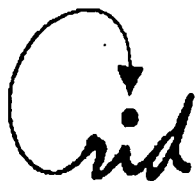
## Appendix 1: List of 50 Preliminary Investigative Telephone Interviews

- Telephone interviews with European Level Civil Servants
  1. European Commission Mr. Pedro Aznare (formerly DGI/D/3)
  2. European Commission Mr. Guttuso (DGIV/A/4)
  3. European Commission Mrs. Nimenski (DGX/D/3)
  4. European Commission Mr. Emanuel Burks (DGXXIII/A/1)
  5. European Commission (Legal Service) Office of Mr. Van Nuffel
  6. European Commission (Secretariat General) Office of Mr. Ebermann (Directorate C)
  7. European Commission Mr. LeBrun (DGIII)
  8. European Commission Mr. Allix (DGXXIV)
  9. European Commission Mr. Waterschoot (Head DGXV/E)
  10. European Parliament Mr. Kaverliakis (EPP)
  11. European Parliament (Secretariat DG2) Mrs. Mercedes Costi
  12. European Parliament (Secretariat DG2) Mr. Aidan Feeney
  13. European Parliament Mr. Fraser Clarke (PES)
  14. European Commission Office of Mr. Vandoren
  15. ECOSOC (Secretariat DG A industry) Mr. Andersen
  16. Council Secretariat Library Mr. Goebel
  
- Telephone interviews with European Level Policy-makers
  17. Member of the European Parliament Office of Mr. Barzanti
  18. Member of the European Parliament Office of Mr. Cot
  19. Member of the European Parliament Office of Mrs. Palacio-Vallerlersundi
  20. ECOSOC Mr. Carroll (Group 1)
  21. ECOSOC Mr. Bell (Group 2)
  22. COREPER Mr. Piers Baker (UK)
  23. COREPER Mr. Kramer (Germany)
  24. COREPER Mr. Scharff (Denmark)
  25. COREPER Mrs. Vanessa Glynn (UK)
  26. Council working group (UK- Patent Office) Mr. Stuart Booth/ Mr. Brian Simpson
  
- Telephone interviews with representatives of interested parties
  27. REED-Elsevier (Holland) Mr. Erik Ekker
  28. Bertelsmann Miss Mattioli
  29. SONY Madame Isabelle Roudard
  30. DMA (UK) Mr. Colin Fricker
  31. CRID Madame Michele Ledger (IPR Lawyer)
  32. OECD Mr. Jeremy Beale
  33. EIA Mr. Lennart Scharf
  34. STM Publishers Mr. Lex Lefebvre
  35. Legal Counsel (AMCHAM) Mr. George Metaxas
  36. ISI (EUSIDIC) Mr. Robert Kimberley
  37. NFAIS Mr. Dick Kaysa
  38. Legal Counsel Reuters Mr. John Stevens
  39. Legal Counsel Reuters Mrs. Catherine Stewart
  40. Telepathic-IMPRIMATUR Mr. Alistair Kelman
  41. BEUC Mr. Carolyn Hayat
  42. GESAC Madame Brussan

Appendix 1: List of 50 Preliminary Investigative Telephone Interviews

|                        |                      |
|------------------------|----------------------|
| 43. FID                | Mr. Ben Goedegeburre |
| 44. REED-Elsevier (UK) | Mrs. Anne Joseph     |
| 45. AIPPI              | Madame Vogt          |
| 46. EUROBIT            | Mr. Andreas Rowold   |
| 47. ESA                | Mrs. Balsano         |
| 48. FAEP               | Mr. Julius Waller    |
| 49. IEE                | Mrs. Diane Richards  |
| 50. IFRRO              | Mr. Paul Greenwood   |

**Appendix 2:**  
**Interview question frame**



**Centre de Recherches Informatique et Droit**  
**FACULTES UNIVERSITAIRES NOTRE - DAME DE LA PAIX**

Tél. n° (32) 81/72.47.62  
Fax. n° (32) 81/72.52.02  
E-mail: paul.turner@fundp.ac.be

**Interview Confirmation: Database and Copyright Research**

**A / To:**

**De la part de / from: Paul TURNER**

**Dear Sir/Madam,**

Further to our telephone conversation, I am writing to confirm the time and date of our appointment on ..... to interview you in the context of my doctoral research into "European Information Policy in the Digital Age". This research is using the passage of the **Directive on the Legal Protection of Databases** from its inception up to its adoption in March 1996 as a vehicle to explore the ways in which copyright issues are framed and solutions shaped by the process of formulating policy responses to them at the European Level.

The research analyses the role of policy actors, their understandings of the copyright issues and policy processes and the linkages they make between these factors and wider socio-economic and political discourses which set the frame within which the directive was filtered and defined. I anticipate that the interview will require 1 hour and 15 minutes.

As part of my data collection I would also be grateful for:

- Copies of any documents you may have prepared in relation to the passage of this directive and on-going European copyright discussions.
- Suggestions of other individuals active and knowledgeable about these issues.

I attach a question frame which is structured around **four** major topics;

- A.** Information on the interviewee and organisation;
- B.** Policy formulation for the database directive: the issues and processes;
- C.** European policy for copyright;
- D.** Information policy-making and copyright in the digital age

Thank you for your co-operation in my research.

Yours Sincerely

Paul Turner

CRID, Rempart de la Vierge, 5 Namur B-5000, Belgium

## **Information Policy Formulation in the Digital Age: A case-study on the Database Directive**

### **A. Information on the interviewee and organisation**

This section gathers background information on you and your organisation. Please provide a short biography, copies of any policy documents/submissions made during the passage of the database directive and any other documents that are relevant to your involvement in on-going European copyright discussions. *Please prepare this information before the formal interview.*

### **B. Policy formulation for the Database Directive: the issues and processes**

1. When was your first contact with European discussions on Databases ? What factors led to Databases becoming a focus for European public policy discussions ?
2. What was your involvement in the Database discussions both formally and informally ? Which factors would you identify as the most important in leading to the Directive's adoption?
3. Did your opinions change during your involvement with these discussions ?
4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?
5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?
6. Did any international policy developments impact on the outcome of the Directive?
7. How do you account for higher public profile of the Database directive ? Do you agree with the characterisation of the Directive as the Cornerstone of the Multimedia society ?
8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

### **C. European policy for Copyright**

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?
10. As the global Information Society develops what role will copyright harmonisation play in the process of European integration ?
11. Which other factors, if any, would you identify as being significant in affecting how copyright issues are framed and discussed at the European level ?

**D. Information policy-making and Copyright in the digital age**

12. What threats and opportunities would you identify from the extension of copyright concepts into the digital realm ?
13. How would you characterise the relationships in digital environments between copyright policy and other areas of information policy such as Privacy ?
14. How adequately do you think current European Information policy processes handle these interrelationships?
15. In what ways might policy formulation at a European Level be improved ? Do you have any concerns over the issues of democratic participation and accountability ?

**Appendix 3:**  
**Commission questionnaire for the public hearing on copyright and databases**  
**April 26-27, 1990.**

**Definitions**

1. What do you understand by the term 'Database' ?
2. What do you understand by the term 'Databank' ?

**Type of Protection**

3. a) Can some databases be protected under copyright ?  
b) Can all databases be protected under copyright ?  
c) If so, should it be as compilations ?
4. Should some/all databases be protected under copyright and/or some other sui generis kind of protection ?
5. Do you consider that databases are currently protected by existing legal regimes and if so which types of protection are clearly available either by statute or case law ?
6. Do you consider that the same types of legal protection discussed in Questions 3-5 should apply to real time/non static databases and those which contain personal data?

**Scope of Protection**

7. Who should be the owner of the rights in a database ?
8. a) How should such rights be exercised in the case of joint authors ?  
b) How should such rights be exercised in the case of salaried authors ?  
c) How should such rights be exercised in the case of an author having a legal personality
9. What should be the duration of the rights given to the author ?
10. According to what criteria should a database be eligible for protection ?
11. Which acts should be subject to the right holder's control ?
12. What exception to those rights should be provided ?

**Particular Aspects of Databases**

13. Should databases which are made available on CD-ROM or other similar media be subject to the same provisions as databases licensed for use on-line ?
14. To what extent are aspects of a database determined by the computer program which controls its management ? Does this affect the question of the legal protection of the database itself ?
15. Should rightholders be free to avail themselves of technical means to prevent unauthorised access to and reproduction of their works ?

## **Appendix 4:**

### **Conclusions to public hearing on copyright and databases, April 26-27, 1990.**

1. As regards the first question on the questionnaire, a large majority spoke against making any distinction between 'database' and 'databank'. Both terms are used equally at present. However, there is a growing tendency to use the general term 'database'.
2. As regards a definition of database, several participants proposed a broad definition which includes the following elements:
  - a) Collection, organisation and storage of data;
  - b) Information in a digital form in which it can be processed by means of a computer;

In the course of the discussion it became clear that the fact that the information is stored digitally means that the definition of database can include all media e.g. text, image, sound, whether protected as such by copyright or not
3. All speakers indicated that databases are in their view protected by copyright. This view was shared by the representative of WIPO.
4. Copyright should apply to databases without prejudice to the application of other forms of legal protection such as patents, unfair competition, penal law, contract, etc.
5. As to the applicability of an alternative form of protection instead of copyright (neighbouring rights or sui generis right) a large majority of participants rejected this approach.
6. As to the categorization of databases, speakers did not indicate a desire to limit this to 'compilations' given that some databases are 'literary works' in their own right.
7. As far as the protection of personal data is concerned, this problem was considered to be outside the scope of the hearing.
8. As to the distinction which could be made between real time and static databases, the majority of participants believed no distinction should be made. Copyright could apply to and resolve legal problems arising in respect of all databases regardless of the technique used to create them.
9. Regarding the ownership of rights in the database itself, there was unanimity in saying that the author, in the sense of the person creating the database, should be the first right-holder.
10. As regards databases created by joint authors or under a contract of employment, in the absence of contractual provisions to the contrary the Berne Convention would provide the appropriate legal framework.
11. The question of the inclusion in a database of protected works was raised. A large majority believed that normal copyright rules should apply. All participants agreed that indexation (inclusion of bibliographical information) of protected works without authorization of the right-holder should not be an infringement of copyright. The same rule could apply to abstracts of protected works provided that they did not substitute for the original protected works themselves. Normal copyright rules should apply in this instance.



12. As regards the term of protection, Article 7 of the Berne Convention was referred to on a number of occasions. The term of protection should be compatible with the provisions of the Berne Convention. The possibility of increasing the term of protection to 70 years met with no particular resistance. Some participants however reserved their position on this issue.
13. As to the originality issue, most participants expressed a desire to see a criterion of originality compatible with the requirements of the Berne Convention and which would impose no special requirements on the authors of databases.
14. As regards the restricted acts, there was general agreement that classic copyright principles as laid down in the Berne Convention should apply. These restricted acts should cover: displaying, in-putting, loading, transmission, storage, down-loading.
15. The need to provide for the collective administration of rights in works in-put into databases was indicated by some participants.
16. On the question of a distinction between databases on CD-ROM and on-line databases, participants advocated making no distinction. It was felt that the physical medium on which the database was stored was irrelevant to this issue.
17. It was said that the use of the same software to create different databases did not affect their protectability: sufficient variations of choice were available to make differing databases using the same software.
18. As regards technical measures to protect databases. several participants indicated that in their view right-holders should use all available means to control access and use of their works.

## Appendix 5:

### List of interested parties who attended the public hearing on databases, April 26-27, 1990.

|        |  |
|--------|--|
| AFI    | Arbeitsgemeinschaft Fachinformation e.V.<br>Martin HACKEMANN   |
| AIDAA  | Association Internationale des Auteurs de l'Audiovisuel<br>Françoise HAVELANGE                                     |
| AIPPI  | Association Internationale pour la Protection de la Propriété Industrielle<br>M.F. de VISSCHER                     |
| AMCHAM | EC-Committee of the American Chamber of Commerce in Belgium<br>Oliver GRAY -Tim HOLLINS                            |
| APP    | Agence pour la Protection des Programmes<br>Sylive ROZENFELD   |
| BEUC   | Bureau Européen des Union de Consommateurs<br>Monique GOYENS   |
| BSA    | Business Software Association<br>Brad SMITH  |
| CDE    | Comité pour le Développement Européen des Nouvelles Technologies et des<br>PME-PMI<br>Jerome PERE - Catherine PARA |
| CECUA  | Confederation of European Computer User Associations<br>J.R. MORRIS  |
| CEPT   | Conférence Européenne des Postes et Télécommunications<br>Robert WILCOX  |
| CERCO  | European National Mapping Organisations<br>David TOFT  |
| CICI   | Confederation of Information Communication Industries<br>Charles CLARKE  |
| CISAC  | Confédération Internationale des Sociétés d'Auteurs et de Compositeurs<br>Peter GYERTYANFY                         |
| EAPA   | European Alliance of Press Agencies<br>R.V. de CEUSTER   |
| ECA    | European Computers Association<br>Astrid ARNOLD - Alistair GORRIE  |
| ECTEL  | European Telecommunications and Professional Electronic Industry<br>F.BACKOUCHE                                    |

|         |   |
|---------|---|
| EIIA    | European Information Industry Association<br>Marcel van DIJK  |
| ETSI    | European Telecommunications Standards Institute<br>Hubert LEA   |
| EUROBIT | European Association of Manufacturers of Business Machines and Data<br>Processing Equipment<br>Manfred KINDERMAN - Andreas ROWOLD |
| EUSIDIC | European Association of Information Services<br>Patrick GIBBONS   |
| FAST    | Federation Against Software Theft<br>M.S. ELSOM   |
| FERA    | Fédération Européene des Réalisateur de l'Audiovisuel<br>Barbara SCHILD   |
| FICPI   | Fédération Internationale des Conseils en Propriété Industrielle<br>Clifford STURT  |
| FID     | International Federation for Information and Documentation<br>Ben GOEDEGEBUURE  |
| GCB     | General Council of the Bar<br>George METAXAS - M.J.RATCLIFF   |
| IEE     | Institute of Electrical Engineers<br>R.A.JONES - P.CLAGUE   |
| IFJ     | International Federation of Journalists<br>Tove Hygum JAKOBSEN  |
| IFLA    | International Federation of Library Associations<br>Winston ROBERTS   |
| IFRRO   | International Federation of Reproduction Rights Organisations<br>Ferdinand MELICHAR   |
| IIA     | Information Industry Association<br>Morton David GOLDBERG - Steven METALITZ - Joseph BREMNER                                      |
| INTERGU | International Copyright Society<br>Vera MOVSESIAN   |
| MCRG    | Music Copyright Reform Group<br>Colin FRASER - Godfrey RUST   |
| REUTERS | Charles OPPENHEIM- Thierry MABILLE de PONCHEVILLE   |

Appendix 5: List of interested parties who attended the public hearing on databases, April 26-27, 1990.

SCEAH        Sous-Comité Européen des Autorités Hippiques  
                 Jean ROMANET- Bruno CHAIN

UNICE        Union of Industrial and Employers' Confeerations of Europe  
                 Hugo SAKKERS - Violaine MARCQ

**Appendix 6:**  
**Commission proposal for a Council Directive on the legal protection of databases -**  
**COM(92) 24 final - SYN 393, O.J. No.C156 June 23, 1992**

**COMMISSION**

Proposal for a Council Directive on the legal protection of databases

(92/C 156/03)

COM(92) 24 final — SYN 393

*(Submitted by the Commission on 15 April 1992)*

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2), 66, and 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

1. Whereas databases are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

2. Whereas such differences in the legal protection offered by the legislation of the Member States have direct and negative effects on the establishment and functioning of the internal market as regards databases and in particular on the freedom of individuals and companies to provide on-line database goods and services on an equal legal basis throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation on this subject, which is now taking on an increasingly international dimension.

3. Whereas existing differences having a distortive effect on the establishment and functioning of the internal market need to be removed and new ones prevented from arising, while differences not at the

present time adversely affecting the establishment and functioning of the internal market or the development of an information market within the Community need not be addressed in this Directive;

4. Whereas copyright protection for databases exists in varying forms in a number of Member States according to legislation or case-law and such unharmonized intellectual property rights, being territorial in nature, can have the effect of preventing the free movement of goods or services within the Community if differences in the scope, conditions, derogations or term of protection remain between the legislation of the Member States;

5. Whereas although copyright remains an appropriate form of exclusive right for the legal protection of databases and in particular an appropriate means to secure the remuneration of the author who has created a database, in addition to copyright protection, and in the absence as yet of a harmonized system of unfair competition legislation or of case-law in the Member States, other measures are required to prevent unfair extraction and re-utilization of the contents of a database;

6. Whereas database development requires the investment of considerable human, technical and financial resources while such databases can be copied at a fraction of the cost needed to develop them independently;

7. Whereas unauthorized access to a database and removal of its contents constitute acts which can have the gravest economic and technical consequences;

8. Whereas databases are a vital tool in the development of an information market within the

Community; whereas this tool will be of use to a large variety of other activities and industries;

9. Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry requires investment in all the Member States in advanced information management systems;
10. Whereas a correspondingly high rate of increase in publications of literary, artistic, musical and other works necessitates the creation of modern archiving, bibliographic and accessing techniques, to enable consumers to have at their disposal the most comprehensive collection of the Community's heritage;
11. Whereas there is at the present time a 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;
12. Whereas such an investment in modern information storage and retrieval systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of authors of databases and the repression of acts of piracy and unfair competition;
13. Whereas this Directive protects collections, sometimes called compilations, of works or other materials whose arrangement, storage and access is performed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;
14. Whereas the criteria by which such collections shall be eligible for protection by copyright should be that the author, in effecting the selection or the arrangement of the contents of the database, has made an intellectual creation;
15. Whereas no criteria other than originality in the sense of intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;
16. Whereas the term database should be understood to include collections of works, whether literary, artistic, musical or other, or of other material such as texts, sounds, images, numbers, facts, data or combinations of any of these;
17. Whereas the protection of a database should extend to the electronic materials without which the contents selected and arranged by the maker of the database cannot be used, such as, for example, the system made to obtain information and present information to the user in electronic or non-electronic form, and the indexation and thesaurus used in the construction or operation of the database;
18. Whereas the term database should not be taken to extend to any computer programme used in the construction or operation of a database, which accordingly remain protected by Council Directive 91/250/EEC (1);
19. Whereas the Directive should be taken as applying only to collections which are made by electronic means, but is without prejudice to the protection under copyright as collections, within the meaning of Article 2 (5) of the Berne Convention for the Protection of Literary and Artistic Works (text of Paris Act of 1971) and under the legislation of the Member States, of collections made by other means;
20. Whereas works protected by copyright or by any other rights, which are incorporated into a database, remain the object of their author's exclusive rights and may not therefore be incorporated into or reproduced from the database without the permission of the author or his successors in title;
21. Whereas the rights of the author of such works incorporated into a database are not in any way affected by the existence of a separate right in the original selection or arrangement of these works in a database;
22. Whereas the moral rights of the natural person who has created the database should be owned and exercised according to the provisions of the legislation of the Member States consistent with the provisions of the Berne Convention, and remain therefore outside the scope of this Directive;
23. Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the availability of his work to unauthorized persons;

(1) OJ No L 122, 17. 5. 1991, p. 42.

24. Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database, for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;

as an extension of copyright protection to mere facts or data;
25. Whereas if the user and the rightholder have not concluded an agreement regulating the use which may be made of the database, the lawful user should be presumed to be able to perform any of the restricted acts which are necessary for access to and use of the database;
26. Whereas in respect of reproduction in the limited circumstances provided for in the Berne Convention, of the contents of the database by the lawful user, whether in electronic or non-electronic form, the same restrictions and exceptions should apply to the reproduction of such works from a database as would apply to the reproduction of the same works made available to the public by other forms of exploitation or distribution;
27. Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be downloaded and re-arranged electronically without his authorization to produce a database of identical content but which does not infringe any copyright in the arrangement of his database;
28. Whereas in addition to protecting the copyright in the original selection or arrangement of the contents of a database this Directive seeks 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 by providing that certain acts done in relation to the contents of a database are subject to restriction even when such contents are not themselves protected by copyright or other rights;
29. Whereas such protection of the contents of a database is to be achieved by a special right by which the maker of a database can prevent the unauthorized extraction or re-utilization of the contents of that database for commercial purposes; whereas this special right (hereafter called 'a right to prevent unfair extraction') is not to be considered in any way
30. Whereas the existence of a right to prevent the extraction and re-utilization for commercial purposes of works or materials from a given database should not give rise to the creation of any independent right in the works or materials themselves;
31. Whereas, in the interests of competition between suppliers of information products and services, the maker of a database which is commercially distributed, whose database is the sole possible source of a given work or material, should make that work or material available under licence for use by others, providing that the works or materials so licensed are used in the independent creation of new works, and providing that no prior rights in or obligations incurred in respect of those works or materials are infringed;
32. Whereas licences granted in such circumstances should be fair and non-discriminatory under conditions to be agreed with the rightholder;
33. Whereas such licences should not be requested for reasons of commercial expediency such as economy of time, effort or financial investment;
34. Whereas in the event that licences are refused or the parties cannot reach agreement on the terms to be concluded, a system of arbitration should be provided for by the Member States;
35. Whereas licences may not be refused in respect of the extraction and re-utilization of works or materials from a publicly available database created by a public body providing that such acts do not infringe the legislation or international obligations of Member States or the Community in respect of matters such as personal data protection, privacy, security or confidentiality;
36. Whereas the objective of the provisions of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means of securing the remuneration of the author who has created the database, is different from the aims of the proposal for a Council Directive concerning the protection of individuals in relation to the processing

of personal data<sup>(1)</sup>, which are to guarantee free circulation of personal data on the basis of a harmonized standard of rules designed to protect the fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to the data protection legislation;

37. Whereas, notwithstanding the right to prevent unfair extraction from a database, it should still be possible for the lawful user to quote from or otherwise use, for commercial and private purposes, the contents of the database which he is authorized to use, providing that this exception is subject to narrow limitations and is not used in a way which would conflict with the author's normal exploitation of his work or which would unreasonably prejudice his legitimate interests;
38. Whereas the right to prevent unfair extraction from a database may only be extended to databases whose authors or makers are nationals or habitual residents of third countries and to those produced by companies or firms not established in a Member State within the meaning of the Treaty if such third countries offer comparable protection to databases produced by nationals of the Member States or habitual residents of the Community;
39. Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unfair extraction from a database;
40. Whereas in addition to the protection given under this Directive to the database by copyright, and to its contents against unfair extraction, other legal provisions existing in the law of the Member States relevant to the supply of database goods and services should continue to apply,

HAS ADOPTED THIS DIRECTIVE:

#### Article 1

##### Definitions

For the purposes of this Directive:

- 'database' means a collection of works or materials arranged, stored and accessed by electronic means, and the electronic materials necessary for the

operation of the database such as its thesaurus, index or system for obtaining or presenting information; it shall not apply to any computer programme used in the making or operation of the database;

- 'right to prevent unfair extraction' means the right of the maker of a database to prevent acts of extraction and re-utilization of material from that database for commercial purposes;
- 'insubstantial part' means parts of a database whose reproduction, evaluated quantitatively and qualitatively in relation to the database from which they are copied, can be considered not to prejudice the exclusive rights of the maker of that database to exploit the database;
- 'insubstantial change' means additions, deletions or alterations to the selection or arrangement of the contents of a database which are necessary for the database to continue to function in the way it was intended by its maker to function.

#### Article 2

Object of protection: copyright and right to prevent unfair extraction from a database

- In accordance with the provisions of this Directive, Member States shall protect databases by copyright as collections within the meaning of Article 2 (5) of the Berne Convention for the Protection of Literary and Artistic Works (text of the Paris Act of 1971).
- The definition of database in point 1 of Article 1 is without prejudice to the protection by copyright of collections of works or materials arranged, stored or accessed by non-electronic means, which accordingly remain protected to the extent provided for by Article 2 (5) of the Berne Convention.
- A database shall be protected by copyright if it is original in the sense that it is a collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied to determine the eligibility of a database for this protection.
- The copyright protection of a database given by this Directive shall not extend to the works or materials contained therein, irrespective of whether or not they are themselves protected by copyright; the protection of a database shall be without prejudice to any rights subsisting in those works or materials themselves.
- Member States shall provide for a right for the maker of a database to prevent the unauthorized extraction or re-utilization, from that database, of its

<sup>(1)</sup> OJ No C 277, 5. 11. 1990, p. 3.



contents, in whole or in substantial part, for commercial purposes. This right to prevent unfair extraction of the contents of a database shall apply irrespective of the eligibility of that database for protection under copyright. It shall not apply to the contents of a database where these are works already protected by copyright or neighbouring rights.

### Article 3

#### Authorship: copyright

1. The author of a database shall be the natural person or group of natural persons who created the database or, where the legislation of the Member States permits, the legal person designated as the rightholder by that legislation.

2. Where collective works are recognized by the legislation of a Member State, the person considered by that legislation to have created the database shall be deemed to be its author.

3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

4. Where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract.

### Article 4

#### Incorporation of works or materials into a database

1. The incorporation into a database of bibliographical material or brief abstracts, quotations or summaries which do not substitute for the original works themselves shall not require the authorization of the rightholder in those works.

2. The incorporation into a database of other works or materials remains subject to any copyright or other rights acquired or obligations incurred therein.

### Article 5

#### Restricted acts: copyright

The author shall have, in respect of:

— the selection or arrangement of the contents of the database, and

— the electronic material referred to in point 1 of Article 1 used in the creation or operation of the database,

the exclusive right within the meaning of Article 2 (1) to do or to authorize:

(a) the temporary or permanent reproduction of the database by any means and in any form, in whole or in part;

(b) the translation, adaptation, arrangement and any other alteration of the database;

(c) the reproduction of the results of any of acts listed in (a) or (b);

(d) any form of distribution to the public, including rental, of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the database or a copy thereof;

(e) any communication, display or performance of the database to the public.

### Article 6

Exceptions to the restricted acts enumerated in Article 5: copyright in the selection or arrangement

1. The lawful user of a database may perform any of the acts listed in Article 5 which is necessary in order to use that database in the manner determined by contractual arrangements with the rightholder.

2. In the absence of any contractual arrangements between the rightholder and the user of a database in respect of its use, the performance by the lawful acquirer of a database of any of the acts listed in Article 5 which is necessary in order to gain access to the contents of the database and use thereof shall not require the authorization of the rightholder.

3. The exceptions referred to in paragraphs 1 and 2 relate to the subject matter listed in Article 5 and are without prejudice to any rights subsisting in the works or materials contained in the database.

#### *Article 7*

Exceptions to the restricted acts in relation to the copyright in the contents

1. Member States shall apply the same exceptions to any exclusive copyright or other rights in respect of the contents of the database as those which apply in the legislation of the Member States to the works or materials themselves contained therein, in respect of brief quotations, and illustrations for the purposes of teaching, provided that such utilization is compatible with fair practice.

2. Where the legislation of the Member States or contractual arrangements concluded with the rightholder permit the user of a database to carry out acts which are permitted as derogations to any exclusive rights in the contents of the database, performance of such acts shall not be taken to infringe the copyright in the database itself provided for in Article 5.

#### *Article 8*

Acts performed in relation to the contents of a database  
— unfair extraction of the contents

1. Notwithstanding the right provided for in Article 2 (5) to prevent the unauthorized extraction and re-utilization of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilize, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms.

2. The right to extract and re-utilize the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or

disclose information pursuant to legislation, or is under a general duty to do so.

3. Member States shall provide appropriate measures for arbitration between the parties in respect of such licences.

4. The lawful user of a database may, without authorization of the database maker, extract and re-utilize insubstantial parts of works or materials from a database for commercial purposes provided that acknowledgement is made of the source.

5. The lawful user of a database may, without authorization of the database maker, and without acknowledgement of the source, extract and re-utilize insubstantial parts of works or materials from that database for personal private use only.

6. The provisions of this Article shall apply only to the extent that such extraction and re-utilization does not conflict with any other prior rights or obligations, including the legislation or international obligations of the Member States or of the Community in respect of matters such as personal data protection, privacy, security or confidentiality.

#### *Article 9*

Terms of protection

1. The duration of the period of copyright protection of the database shall be the same as that provided for literary works, without prejudice to any future Community harmonization of the term of protection of copyright and related rights.

2. Insubstantial changes to the selection or arrangement of the contents of a database shall not extend the original period of copyright protection of that database.

3. The right to prevent unfair extraction shall run from the date of creation of the database and shall expire at the end of a period of 10 years from the date when the database is first lawfully made available to the public. The term of protection given in this paragraph shall be deemed to begin on 1 January of the year following the date when the database was first made available.

4. Insubstantial changes to the contents of a database shall not extend the original period of protection of that database by the right to prevent unfair extraction.

*Article 10*

Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

*Article 11*

Beneficiaries of protection under right to prevent unfair extraction from a database

1. Protection granted pursuant to this Directive to the contents of a database against unfair extraction or re-utilization shall apply to databases whose makers are nationals of the Member State or who have their habitual residence on the territory of the Community.

2. Where databases are created under the provisions of Article 3 (4), paragraph 1 above shall also apply to companies and firms formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community. Should the company or firm formed in accordance with the legislation of a Member State have only its registered office in the territory of the Community, its operations must possess an effective and continuous link with the economy of one of the Member States.

3. Agreements extending the right to prevent unfair extraction to databases produced in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of this procedure shall not exceed that available pursuant to Article 9 (3).

*Article 12*

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to copyright or any other right subsisting in the works or materials incorporated into a database as well as to other 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:

2. Protection pursuant to the provisions of this Directive shall also be available in respect of databases created prior to the date of publication of the Directive without prejudice to any contracts concluded and rights acquired before that date.

*Article 13*

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

*Article 14*

This Directive is addressed to the Member States.

**Appendix 7:**  
**Opinion of the Economic and Social Committee (ECOSOC) on Commission proposal,**  
**OJ. No. C19/3 January 25, 1993**

On 18 June 1992, the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Economic Community, on the

*Proposal for a Council Directive on the legal protection of data bases  
(COM(92) 24 final - SYN 393).*

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 6 November 1992. The Rapporteur was Mr MORELAND.

At its 301st Plenary Session (meeting of 24 November 1992), the Economic and Social Committee adopted the following Opinion unanimously.

**1. Summary of the Commission's Proposal**

1.1. This Draft Directive is designed to protect electronic databases through the medium partly of the law of copyright and partly through a specific new right to prevent "unfair extraction" from a database.

1.2. Existing legislation in the Member States varies. The United Kingdom which has the largest share of the Community market<sup>1</sup>, provides comprehensive copyright protection for databases and most databases qualify for protection. In Spain, databases are protected as such and there is an elaborate definition of precisely what qualifies as a database. In other Member States the level of protection is less and in some cases in need of clarification.

1.3. In this proposal, a database must be electronic to be protected at all. To enjoy copyright protection it must also be "original", that is, its "selection or arrangement" must constitute the author's own intellectual creation. It is the selection or arrangement which must be original, not the contents of the database.

1.4. The Commission does provide some protection for databases that are not "intellectual creation" (i.e. often referred to as "sweat of the brow"). As regards the contents of a database, there is an unfair extraction right which permits the maker of a database to prevent others from making extracts from the database for commercial purposes without the maker's consent. This applies whether or not the database itself is protected by copyright but does not apply if the contents of the database are themselves protected by copyright.

1.5. For example, white pages telephone directories are protected under the law of copyright in some Member States. If, as frequently happens, these white pages directories are made

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<sup>1</sup> Estimates vary but the UK share may be a high 60% with 37% of UK production being used elsewhere in the Community (see speech by D.R. Warlock, London 7 May 1992)

available on CD-ROM as databases, the databases themselves would not be protected as "original" databases (because there would be no intellectual creation in transposing them from paper to the electronic medium) and would not be the subject of the unfair extraction right because, at least in some Member States, there would be copyright in the underlying materials.

1.6. Where the contents of a database which is made publicly available are either:

- a) unobtainable from any other source; or
- b) made available by a public body under a duty to gather and disclose information,

extraction of such contents must be licensed on fair and reasonable terms, but the proposal does not state how the "fair and reasonable terms" should be determined.

1.7. The unfair extraction right lasts for ten years (in contrast to the copyright in a database which qualifies for copyright protection, which lasts for at least 50 years pma).

## 2. General Comments

2.1. Although the Committee advocates changes in the Directive, it welcomes the Commission's initiative on this subject in order to ensure that the Community has a strong database industry, able to compete against its competitors in third countries. The Committee believes that in assessing this proposal the Council should keep as its paramount objective the need for a strong database industry. Consequently, examination should focus on ensuring that the legal protection envisaged leads to this objective and, equally, on the extent to which it does not hinder new entrants to the market. The Council should resist being sidetracked into a debate on legal philosophies which underlie the Directive, particularly on the subject of "originality".

2.2. The experience of the United Kingdom in attracting a substantial database industry (particularly vis-à-vis the United States) indicates that the development of a strong local database industry correlates with a high level of intellectual property protection. Any effective weakening of existing intellectual property protection may cause the Community to run the risk that potential database creators will look to third countries (e.g. Canada) where protection may be stronger, to create databases in future.

2.3. In this context the proposed "unfair extraction" protection does have limitations in ensuring that the database industry is strong.

- a) First, only if the contents themselves of a database are not protected by copyright do EC nationals have the benefit of protection.

- b) Secondly, the term of the right is too short. More importantly, it is unclear as to when the term of either the unfair extraction right or the copyright begins. Databases are constantly being updated. The extent to which the term has been "restarted" depends on whether a change is "insubstantial", because an "insubstantial" change does not start the term of protection running again. It will be difficult to judge objectively the concept of insubstantiality.
- c) Thirdly, the borderline between a database from intellectual creativity or "sweat of the brow" will be difficult to define giving rise to the risk of extensive (and expensive) legal action. This begs the question as to whether a distinction is important. Databases, which others would like to copy commercially may have involved much effort and expense without meeting the originality criteria. Yet, they would only be protected by the limited unfair extraction right.

2.4. Consequently, the Committee believes that the unfair extraction right may prove inadequate in providing the protection needed for a strong Community database industry and for those whose efforts need protection against copying.

2.5. The Committee believes that the Council should consider the following alternatives.

2.6. One choice would be for the unfair extraction right to be removed from the draft Directive as a separate right and that a right to prevent unfair extraction be inserted as one of the restricted acts under the copyright in a database. The Committee's reasons for this recommendation are as follows.

2.6.1. The unfair extraction right is a *sui generis* right. So far, in its proposals on the harmonization of intellectual property questions, the Commission has rejected the concept of new *sui generis* rights and the Council has followed this approach in its decision-making. It should be noted in particular that the Council followed this approach in respect of the recent Directive on the Protection of Computer Programs (the "Software Directive"). This approach has also been endorsed by this Committee in the past.

2.6.2. It would be wrong to compromise on the question of whether or not something should be protected by allowing a measure of short-term intellectual property protection with a compulsory licence. It is preferable to take a decision on whether something qualifies for protection and, if so, then to grant intellectual property protection of a high standard.

2.6.3. It may be said that to include the unfair extraction right as one of the rights of the copyright owner is inconsistent with the philosophy that copyright protects the rights of authors. However, the concept of copyright as an economic right which is important in an industrial context has already been accepted in the Software Directive and the approach to copyright set out in the Software Directive has been widely welcomed throughout the Community.

2.7. The second choice is to accept the unfair extraction right as a sui generis right, but should ensure that it is as effective a right as it would be if it were a restricted act under the copyright in the database. In other words, the unfair extraction right should not be as limited as it is in Article 2.5. in respect of its term and the compulsory licensing provisions in Article 8.1. should be curtailed. Granted the increasing sophistication of the Community's laws ensuring fair competition, any misuse by its proprietors of this exclusionary right can be dealt with by the application of those laws.

### 3. Specific Comments

#### 3.1. Preamble

The Committee welcomes the practice of numbering paragraphs in the Preamble but wonders if it is really necessary to have 40 paragraphs of often repetitious wording.

#### 3.2. Article 1.1.

The draft is confined to "electronic" databases. The Committee is concerned that this will mean that different legal regimes will apply to the same database if it is stored both electronically and otherwise. This would not only complicate the law but could lead to undesirable practical consequences.

#### 3.3. Article 1.4.

The use of the phrase "insubstantial changes" as a means of defining when a database becomes a new "original" database for the purposes of the term of protection (Article 9.2.) is unsatisfactory. It is difficult to imagine changes made to the selection or arrangement of the contents (as opposed to the contents themselves) which would be insubstantial.

#### 3.4. Article 2.1.

The significance of the reference to the Berne Convention is that by protecting databases in this way Member States will be obliged to protect databases emanating from other countries of the Convention (in particular, the USA). The same would also be true of the unfair extraction right if it were made a restricted act under the copyright in the database. However, that is not, in the opinion of the Committee, a serious obstacle: this dichotomy between the rights granted in the USA and the rights granted in certain Member States already exists to no significant detriment to the database industry in the Member States concerned.

3.5. Article 2.5

If the unfair extraction right survives as a sui generis right it should be made clear that it applies to unauthorised access as well as to extraction and re-utilisation.

3.6. Article 3.1.

As in the case of the Software Directive, the draft does not oblige Member States to protect computer-generated databases (i.e. databases which have no human author). This is an issue which will have to be addressed at some time.

3.7. Article 4.1.

This appears to require an alteration to the laws of the Member States relating to the copyright in the underlying works which make up a database, rather than relating to rights in databases themselves. In the opinion of the Committee this is something which should await the harmonization of the general law of copyright.

3.8. Article 5

The exclusive rights are substantially the same as in the Directive on the protection of computer programs. This is the correct approach.

3.9. Article 7

It may be appropriate to extend the exceptions referred to in Article 7.1. to cover the reporting of, for example, current affairs and other exceptions normally made to the exclusive rights of the copyright owner in the laws of most Member States.

3.10. Article 8.1.

It may be appropriate to make it clear that the compulsory licensing provisions under the unfair extraction right (if it is considered appropriate to have compulsory licensing at all, which would not be permissible if the unfair extraction right were part of the general law of copyright) only apply to the right created by Article 2.5. and not to the copyright (if any) in the database or its contents.

3.11. Article 8.2.

The definition of "public body" needs to be made more precise, bearing in mind in particular the need to ensure consistency in the type of activity which is to be the subject of these provisions throughout the EC.



3.12. Article 8.3.

This is very vague. Is it intended that all Member States should be required to set up (if they do not have it already) a body equivalent to the UK Copyright Tribunal? If so, the powers and duties of such a tribunal, and the principles upon which it is to operate, should be specified in much greater detail.

3.13. Article 9.3.

It is not clear why the specific term of ten years for this right was selected. As stated in section 3.4. above, it does not appear that existence of the equivalent of an unfair extraction right as part of the copyright in some Member States has impeded the growth of the industry.

3.14. Article 9.4.

The definition of "insubstantial changes" in Article 1.4. refers to changes to the selection or arrangement of the contents of a database. As currently drafted, this is not an appropriate phrase to use in relation to the contents themselves for the purposes of determining when the unfair extraction right begins to run. Further, the Committee would repeat its criticisms of this Article as set out in section 2.3.b) above. The Committee suggests that a more practical means of determining the start of a fresh term of protection would be for each item of data in the database to be electronically or otherwise "date-stamped" on its incorporation into the database. Each piece of data would be protected for the appropriate term from the date of its date-stamp.

3.15. Article 10

The Council should consider whether it is appropriate to include a provision similar to Article 7.1. (c) of the Software Directive, namely a requirement that devices designed to circumvent technical protection of databases are unlawful.

3.16. Article 11.3.

This will mean that the Commission would negotiate on this issue with third countries.

3.17. Article 13

The date specified of 1 January 1993 is wholly unrealistic. This issue is not one that was covered in the 1985 Single Market White Paper.

3.18. The Committee notes that the Council has, in previous Directives, asked for regular reports on aspects of copyright to be produced by the Commission. If similar action is incorporated in the final Council Decision on this proposal, the Committee looks forward to being an official recipient of such a report.

Done at Brussels, 24 November 1992.

The Chairman  
of the  
Economic and Social Committee

The Secretary-General  
of the  
Economic and Social Committee

Susanne TIEMANN

Simon-Pierre NOTHOMB

**Appendix 8:**  
**Letter to, and reply from Professor Garcia Amigos on the database directive**



Centre de Recherches Informatique et Droit  
FACULTES UNIVERSITAIRES NOTRE - DAME DE LA PAIX

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**MESSAGE TELEFAX**

Namur, 6 Juin 1997

**A/To: Professor Garcia Amigos**

**De la part de/From: Paul TURNER**

Estimado Dr. García Amigo;

En el marco de un proyecto de investigación sobre los trabajos legislativos preparatorios que dieron lugar a la adopción de la Directiva sobre protección jurídica de bases de datos, estoy llevando a cabo una serie de entrevistas que puedan aportarme un poco de luz sobre el tema.

Como resultado de los interviús ya realizados hasta el momento presente, se ha puesto claramente de manifiesto que usted jugó un papel muy importante, como *rapporteur* del Parlamento Europeo, en la redacción final del texto de la Directiva.

En consecuencia, para mi sería un gran placer y constituiría una gran ayuda si usted me concediera una entrevista telefónica para conversar sobre esta materia. Desafortunadamente, yo no hablo español (un colega de trabajo me ha traducido esta carta), con lo cual me pregunto si para usted sería posible hablar en inglés (preferentemente), o bien, en francés.

A fin de anticiparle cuál es el ámbito de investigación que me interesa y de la que precisaría su ayuda, con esta carta le adjunto un cuestionario en el que, en su caso, me basaría para conducir la entrevista telefónica.

Agradeciéndole de antemano su colaboración, reciba un cordial saludo,

Paul Turner  
Investigador



## Appendix 9:

### Amended Proposal for a Council Directive on the legal protection of databases – (COM(93)464 final - SYN 393) OJ.No. C308/1) November 15, 1993.

#### INITIAL COMMISSION PROPOSAL

#### AMENDED PROPOSAL SUBSEQUENT TO THE EUROPEAN PARLIAMENT OPINION OF 23 JUNE 1993

#### CHAPTER I: DEFINITIONS

##### Article 1

##### Definitions

1. For the purposes of this Directive,

'database' means a collection of works or materials arranged, stored and accessed by electronic means, and the electronic materials necessary for the operation of the database such as its thesaurus, index or system for obtaining or presenting information; it shall not apply to any computer program used in the making or operation of the database;

2. 'right to prevent unfair extraction' means the right of the maker of a database to prevent acts of extraction and re-utilization of material from that database for commercial purposes;

3. 'insubstantial part' means parts of a database whose reproduction, evaluated quantitatively and qualitatively in relation to the database from which they are copied can be considered not to prejudice the exclusive rights of the maker of that database to exploit the database;

4. 'insubstantial change' means additions, deletions or alterations to the selection or arrangement of the contents of a database which are necessary for the database to continue to function in the way it was intended by its maker to function.

##### Article 1

##### Definitions

1. For the purposes of this Directive,

'database' means a collection of data, works or other materials arranged, stored and accessed by electronic means, and the materials necessary for the operation of the database such as its thesaurus, index or system for obtaining or presenting information; it shall not apply to any computer program used in the making or operation of the database;

Deleted

[re-inserted 10(1)]

Deleted

[re-inserted 11(8)]

Deleted

[re-inserted 12(3)]

2. "Owner of the rights in a database means:

(a) the author of a database or

(b) the natural or legal person to whom the author has lawfully granted the right to prevent unauthorized extraction of material from a database, or

(c) where the database is not eligible for protection by copyright the maker of the database.

**CHAPTER II : COPYRIGHT**

**Article 2**

**Object of Protection:**

**Copyright and Right to Prevent Unfair**

**Extraction from a Database**

1. In accordance with the provisions of this Directive, Member States shall protect databases by copyright as collections within the meaning of Article 2(5) of the Berne Convention for the protection of Literary and Artistic works (text of the Paris Act of 1971).
2. The definition of database in point 1 of Article 1 is without prejudice to the protection by copyright of collections of works or materials arranged, stored or accessed by non-electronic means, which accordingly remain protected to the extent provided for by Article 2(5) of the Berne Convention.
3. A database shall be protected by copyright if it is original in the sense that it is a collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied to determine the eligibility of a database for this protection.
4. The copyright protection of a database given by this Directive shall not extend to the works or materials contained therein, irrespective of whether or not they are themselves protected by copyright; the protection of a database shall be without prejudice to any rights subsisting in those works or materials themselves.

**Article 2**

**Object of Protection:**

Unchanged

Unchanged

Unchanged

Unchanged

5. Member States shall provide for a right for the maker of a database to prevent the unauthorised extraction or re-utilisation, from that database, of its contents, in whole or in substantial part, for commercial purposes. This right to prevent unfair extraction of the contents of a database shall apply irrespective of the eligibility of that database for protection under copyright. It shall not apply to the contents of a database where these are works already protected by copyright or neighbouring rights.

Deleted

[re-inserted 10(2)]

**Article 3**

**Authorship : Copyright**

**Article 3**

**Authorship**

1. The author of a database shall be the natural person or group of natural persons who created the database, or where the legislation of the Member States permits, the legal person designated as the rightholder by that legislation.

Unchanged

2. Where collective works are recognized by the legislation of a Member State, the person considered by that legislation to have created the database shall be deemed to be its author.

Unchanged

3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Unchanged

4. Where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract.

Unchanged

Article 4

Entitlement to protection under copyright

Protection under copyright shall be granted to all owners of rights, whether natural or legal persons, who fulfil the requirements laid down in national legislation or international agreements on copyright applicable to literary works.

Article 4

Incorporation of Works or Materials into a Database

1. The incorporation into a database of bibliographical material or brief abstracts, quotations or summaries which do not substitute for the original works themselves, shall not require the authorisation of the right owner in those works.
2. The incorporation into a database of other works or materials remains subject to any copyright or other rights acquired or obligations incurred therein.

Article 5

Incorporation of Works or Materials into a Database

1. The incorporation into a database of any works or materials shall remain subject to the authorisation of the owner of any copyright or other rights acquired or obligations incurred therein.
2. The incorporation into a database of bibliographical references, abstracts (with the exception of substantial descriptions or summaries of the content or the form of existing works) or brief quotations, shall not require the authorisation of the owners of rights in those works, provided the name of the author and the source of the quotation are clearly indicated in accordance with Article 10(3) of the Berne Convention.



Article 5

Restricted Acts: Copyright

The author shall have, in respect of:

- the selection or arrangement of the contents of the database, and
- the electronic material referred to in point 1 of Article 1 used in the creation or operation of the database,

the exclusive right within the meaning of Article 2(1) to do or to authorize:

- a) the temporary or permanent reproduction of the database by any means and in any form, in whole or in part,
- b) the translation, adaptation, arrangement and any other alteration of the database,
- c) the reproduction of the results of any of the acts listed in (a) or (b),
- d) any form of distribution to the public, including the rental, of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the database or a copy thereof.
- e) any communication, display or performance of the database to the public.

Article 6

Exceptions to the Restricted Acts Enumerated in

Article 5:

Copyright in the Selection or Arrangement

- 1. The lawful user of a database may perform any of the acts listed in Article 5 which is necessary in order to use that database in the manner determined by contractual arrangements with the rightholder.

Article 6

Restricted Acts

The owner of the rights in a database shall have, in respect of:

Unchanged

Unchanged

Unchanged

Unchanged

Unchanged

Unchanged

Unchanged

Unchanged

Article 7

Exceptions to the Restricted Acts

Copyright in the Selection or Arrangement

Unchanged

2. In the absence of any contractual arrangements between the rightholder and the user of a database in respect of its use, the performance by the lawful acquirer of a database of any of the acts listed in Article 5 which is necessary in order to gain access to the contents of the database and use thereof shall not require the authorization of the rightholder.

Unchanged

3. The exceptions referred to in paragraphs 1 and 2 relate to the subject matter listed in Article 5 and are without prejudice to any rights subsisting in the works or materials contained in the database.

Unchanged

#### Article 7

##### Exceptions to the Restricted Acts in Relation to the Copyright in the Contents

1. Member States shall apply the same exceptions to any exclusive copyright or other rights in respect of the contents of the database as those which apply in the legislation of the Member States to the works or materials themselves contained therein, in respect of brief quotations, and illustrations for the purposes of teaching, provided that such utilisation is compatible with fair practice.
2. Where the legislation of the Member States or contractual arrangements concluded with the rightholder permit the user of a database to carry out acts which are permitted as derogations to any exclusive rights in the contents of the database, performance of such acts shall not be taken to infringe the copyright in the database itself provided for in Article 5.

#### Article 8

##### Exceptions to the Restricted Acts in Relation to the Copyright in the Contents

1. Member States shall apply the same exceptions to any copyright or other rights of the author of a work contained in a database as those which apply in the legislation of the Member States to that work, in respect of brief quotations, and illustrations for the purposes of teaching, provided that such utilisation is compatible with fair practice, in accordance with Article 10(3) of the Berne Convention.
2. Where the legislation of the Member States or contractual arrangements concluded with the author of a work contained in a database permit the user of that database to carry out acts which are permitted as derogations to any exclusive rights of the author of the work, performance of such acts shall not be taken to infringe the rights of the author of the database laid down in Article 6.
3. The provisions of paragraphs (1) and (2) above shall also apply in respect of owners of neighbouring rights attaching to materials contained in a database.

Article 8

Acts Performed in Relation to the Contents of  
a Database - Unfair Extraction of the Contents

1. Notwithstanding the right provided for in Article 2(5) to prevent the unauthorised extraction and re-utilization of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilise, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms. Deleted  
[re-inserted 11(1)]
2. The right to extract and re-utilise the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so. Deleted  
[re-inserted 11(2)]
3. Member States shall provide appropriate measures for arbitration between the parties in respect of such licences. Deleted  
[re-inserted 11(4)]
4. The lawful user of a database may, without authorization of the database maker, extract and re-utilize insubstantial parts of works or materials from a database for commercial purposes provided that acknowledgement is made of the source. Deleted  
[re-inserted 11(5)]
5. The lawful user of a database may, without authorisation of the database maker, and without acknowledgement of the source, extract and re-utilise insubstantial parts of works or materials from that database for personal private use only. Deleted  
[re-inserted 11(6)]

6. The provisions of this Article shall apply only to the extent that such extraction and re-utilization does not conflict with any other prior rights or obligations, including the legislation or international obligations of the Member States or of the Community in respect of matters such as personal data protection, privacy, security or confidentiality.

Deleted

[re-inserted 11(9)]

#### Article 9

##### Terms of Protection

1. The duration of the period of copyright protection of the database shall be the same as that provided for literary works, without prejudice to any future Community harmonization of the term of protection of copyright and related rights.
2. Insubstantial changes to the selection or arrangement of the contents of a database shall not extend the original period of copyright protection of that database.

#### Article 9

##### Terms of Protection

1. The duration of the period of copyright protection of the database shall be the same as that provided for literary works.
- 2.(a) A substantial change to the selection or arrangement of the contents of a database shall give rise to the creation of a new database, which shall be protected from that moment for the period recognised in paragraph 1 of this Article. Such protection shall not prejudice existing rights in respect of the original database.  
  
(b) For the purposes of the term of protection provided for in this Article 'substantial change' means:  
  
additions, deletions or alterations, which involve substantial modification to the selection or arrangement of the contents of a database, resulting in a new edition of that database.
- 3.(a) Insubstantial changes to the selection or arrangement of the contents of a database shall not entail a fresh period of copyright protection of that database.

3. The right to prevent unfair extraction shall run as of the date of creation of the database and shall expire at the end of a period of 10 years from the date when the database is first lawfully made available to the public. The term of protection given in this paragraph shall be deemed to begin on the first of January of the year following the date when the database was first made available.

Deleted

[re-inserted 12(1)]

(b) For the purposes of the term of protection provided for in this Article, 'insubstantial change' means :

additions, deletions or alterations to the selection or arrangement of the contents of a database which are necessary for the database to continue to function in the way it was intended by its maker to function.

4. Insubstantial changes to the contents of a database shall not extend the original period of protection of that database by the right to prevent unfair extraction.

Deleted

[re-inserted 12(3)]

#### Article 10

##### Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

Deleted

[re-inserted 14]

**CHAPTER III : SUI GENERIS RIGHT**

**Article 10**

**Object of Protection:**

**Right to Prevent Unauthorized Extraction from a Database**

1. For the purposes of this Directive "right to prevent unauthorized extraction" means the right of the owner of the rights in a database to prevent acts of extraction and re-utilization of part or all of the material from that database.
  
2. Member States shall provide for a right for the owner of the rights in a database to prevent the unauthorised extraction or re-utilisation, from that database, of its contents, in whole or in substantial part, for commercial purposes. This right to prevent unauthorised extraction of the contents of a database shall apply irrespective of the eligibility of that database for protection under copyright. It shall not apply to the contents of a database where these are works already protected by copyright or neighbouring rights.

**Article 11**

**Acts Performed in Relation to the Contents of  
a Database - Unauthorized Extraction of the  
Contents**

1. Notwithstanding the right provided for in Article 10 (2) to prevent the unauthorised extraction and re-utilisation of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilise, in whole or substantial part, works or materials from that database for commercial purposes that are not for reasons such as economy of time, effort or financial investment, shall be licensed on fair and non-discriminatory terms. A declaration shall be submitted clearly setting out the justification of the commercial purposes pursued and requiring the issue of a licence.
2. The right to extract and re-utilise the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by :
  - (a) public authorities or public corporations or bodies which are either established or authorised to assemble or to disclose information pursuant to legislation, or are under a general duty to do so;
  - (b) firms or entities enjoying a monopoly status by virtue of an exclusive concession by a public body.
3. For the purposes of this Article, databases shall not be deemed to have been made publicly available unless they may be freely interrogated.
4. Member States shall provide appropriate measures for arbitration between the parties in respect of such licences.

[previous 8(3) Unchanged]

5. The lawful user of a database may, without authorization of the database maker, extract and re-utilize insubstantial parts of works or materials from a database for commercial purposes provided that acknowledgement is made of the source.

[previous 8(4)] Unchanged

6. The lawful user of a database may, without authorisation of the database maker, and without acknowledgement of the source, extract and re-utilise insubstantial parts of works or materials from that database for personal private use only.

[previous 8(5)] Unchanged

7. For the purposes of this Article, commercial purposes' means any use, which is not :

- (a) private, personal, and
- (b) for non-profit making purposes.

8.(a) For the purposes of paragraphs 4 and 5 of this Article, 'insubstantial parts' means parts of a database made available to the public whose reproduction, evaluated quantitatively and qualitatively in relation to the database from which they are copied, can be considered not to prejudice the exclusive rights of the owner of that database to exploit the database.

(b) In both instances, it shall likewise be incumbent on the lawful user to demonstrate that the extraction and re-utilisation 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.

9. The provisions of this Article shall apply only to the extent that such extraction and re-utilization does not conflict with any other prior rights or obligations, including the legislation or international obligations of the Member States or of the Community in respect of matters such as personal data protection, privacy, security or confidentiality.

[previous 8(6)] Unchanged



**Article 12**

**Term of Protection**

1. The right to prevent unauthorised extraction shall run from the date of creation of the database for 15 years, starting on 1 January of the year following :
  - (a) the date when the database was first made available to the public, or
  - (b) any substantial change to the database.
  
2. (a) Any substantial change to the contents of a database shall give rise to a fresh period of protection by the right to prevent unauthorised extraction.
  - (b) For the purposes of the term of protection provided for in this Article "substantial change" means the successive accumulation of insubstantial additions, deletions or alterations in respect of the contents of a database resulting in substantial modification to all or part of a database.
  
- 3.(a) Insubstantial changes to the contents of a database shall not entail a fresh period of protection of that database by the right to prevent unauthorised extraction.
  - (b) For the purpose of the term of protection provided for in this Article "insubstantial change" means insubstantial additions, deletions or alterations which, taken together, do not substantially modify the contents of a database.

Article 11

Beneficiaries of Protection under Right to Prevent  
Unfair Extraction from a Database

1. Protection granted under this Directive to the contents of a database against unfair extraction or re-utilization shall apply to databases whose makers are nationals of the Member State or who have their habitual residence on the territory of the Community.
2. Where databases are created under the provisions of Article 3(4), paragraph 1 above shall also apply to companies and firms formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community. Should the company or firm formed in accordance with the legislation of a Member State have only its registered office in the territory of the Community, its operations must possess an effective and continuous link with the economy of one of the Member States.
3. Agreements extending the right to prevent unfair extraction to databases produced in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of this procedure shall not exceed that available under Article 9(3).

Article 13

Beneficiaries of Protection under Right to Prevent  
Unauthorized Extraction from a Database

1. Protection granted pursuant to this Directive to the contents of a database against unauthorized extraction or re-utilisation shall apply to databases whose makers are nationals of a Member State or who have their habitual residence on the territory of the Community.

Unchanged

3. Agreements extending the right to prevent unauthorized extraction to databases produced in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of this procedure shall not exceed that available pursuant to Article 12(1).

CHAPTER IV : COMMON PROVISIONS

Article 14

Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

[old Article 10] Unchanged

**Article 12**

**Continued Application of other Legal Provisions**

1. The provisions of this Directive shall be without prejudice to copyright or any other right subsisting in the works or materials incorporated into a database as well as to other 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.
2. Protection under the provisions of this Directive shall also be available in respect of databases created prior to the date of publication of the Directive without prejudice to any contracts concluded and rights acquired before that date.

**Article 13**

**Final Provisions**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

**Article 15**

**Continued Application of other Legal Provisions**

Unchanged

2. Protection pursuant to the provisions of this Directive as regards copyright and the right to prevent unauthorized extraction and re-utilization of the contents of the database shall also be available in respect of databases created prior to the date of publication of the Directive which on that date fulfilled the requirements laid down therein as regards the protection of databases. Such protection shall be without prejudice to any contracts concluded and rights acquired before that date.

**Article 16**

**Final Provisions**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1995.

Unchanged

Unchanged

3. Not later than at the end of the fifth year of implementation of this Directive and every two years thereafter the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive and, where necessary, shall submit proposals for its adjustment in line with developments in the area of databases.

**Article 14**

This Directive is addressed to the Member States.

**Article 17**

Unchanged.

**Appendix 10:**  
**Commission Questionnaire on Copyright and Related Rights in the Information Society**



**COMMISSION OF THE EUROPEAN COMMUNITIES**

DIRECTORATE GENERAL XV  
Internal Market and Financial Services

XV/E4

Brussels, 2 June 1994

**COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY**

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**QUESTIONNAIRE**

1) **Evolution of the "superhighways"**

In order to evaluate the significance of any changes to the current application of copyright and related rights which might occur as a result of the development of "superhighways", it is necessary to analyse the probable development of the technology. Such an analysis can identify which new products and services are most likely to be successful in the short, medium and long term. It can also identify whether changes will occur in the ways in which products and services protected by copyright and related rights are distributed and exploited.

This analysis is without prejudice to any comments you may make under points 2-6 relating to intellectual property rights.

- a) Are developments of products and services on the "superhighways" to be considered as a process of radical change or of evolution?
- b) If the changes are radical, are they quantitative, qualitative or some other form of change?
- c) If the changes are evolutionary, what direction are they likely to take and for which products and services?
- d) Do the changes relate to new ways to distribute and use products/services or to new products/services per se?
- e) What time scale do you anticipate for such changes to take effect?
- f) Do you consider that one sector of users more than another is likely to make the greatest use of "superhighways"? If so, which sector (ex. government, business, education, entertainment)?

2) Scope of subject :

In order to understand the nature of any potential development of the "superhighways", some parameters should be given to the concept. It could be capable of a narrow definition, covering only digital transmission. It could equally be given a wider definition, encompassing all digital storage, transmission and retrieval. It could even be given an extensive meaning including all forms of fixation, storage, transmission and retrieval, whether analogue or digital, and whether by means of physical copies of the fixation or by on-line transmission. Multimedia products and services (in the sense that "multimedia" means the bringing together of different types of work into a single product or service) also have to be defined, either as a part of the information infrastructure, or in a wider sense, irrespective of whether the fixation is digital or analogue or whether the multimedia product is distributed in "hard copy" form or on-line.

- a) Should the concept of information infrastructure be limited to digital fixations and transmission ?
- b) If so, will the possible existence of different legal regimes for analogue and digital versions of the same products and services create problems ?
- c) If not, should all products and services be considered as an integral part of the information "superhighway" regardless of the technology used for their fixation/transmission ?
- d) Should the same rules apply to products and services which are distributed in the form of physical copies and those which are distributed on-line ?
- e) Are there any issues specific to the creation of "multimedia" products and services which justify a wider treatment of "multimedia" going beyond the context of the information infrastructure ?

3) Identification and clearance of rights

One of the issues raised by the development of "superhighways" is the ability of the rightholder to identify and control exploitations of his work and the ability of the user/competitor to obtain authorisation to reproduce the work. It has been suggested in some circles that a voluntary marking system for digitalised fixations and transmissions, together with a voluntary registration system, would facilitate the identification and clearance of rights.

- a) Do you consider that products and services should carry some identification of intellectual property rights ?
- b) Should such an identification system be accompanied by a voluntary deposit or registration system ?
- c) Should any identification/registration system be part of an "automated" copyright clearance system ?
- d) Should non-voluntary collective administration of rights be used to facilitate the clearance of rights for digital multimedia products ?
- e) Is there a need to review the function of collecting societies in the information infrastructure environment ?

4) Choice of legal regime

Some aspects of the products and services which will flow around the information infrastructure are not currently protected by copyright or neighbouring rights in many jurisdictions. This is notably the case for the protection of the effort and investment required in making collections of works or information available to the public. Unless the scope of protection currently given by copyright/related rights were to be radically changed, investment in providing information services would remain unprotected or would require new specific sui generis legislation.

- a) Do you consider that existing copyright/neighbouring rights regimes alone can regulate the information infrastructure environment ?
- b) If not, what elements require protection which fall outside copyright/neighbouring rights (e.g. investment, security of systems) ?
- c) If you do not favour the creation of sui generis regimes are you in favour of extending the category "neighbouring rights" ad infinitum ?
- d) Are there limits to the notions of "copyright" and "neighbouring" or "related" rights which would prevent the inclusion of new subject matter into existing categories or the granting of new rights ?

5) Review of existing regimes

Even if the development of the superhighways is gradual and follows the direction already taken in a number of respects, an analysis of current copyright/related rights concepts and definitions might be appropriate. Concepts such as distribution, sale, communication to the public, rental, as well as the exclusive or non-exclusive nature of some rights could be discussed. Moral rights are sometimes mentioned in this context. Any adjustments which are thought necessary could be brought about in a variety of ways within the European context. The question of the need to keep an equilibrium with the regulatory environment provided by our major trading partners could be examined.

- a) Which aspects of either the principles or definitions of existing copyright and neighbouring rights would require to be adjusted to fit the new information society environment ?
- b) Should any such changes be brought about piecemeal by amending existing texts or by new laws regulating IPRs throughout the entire information infrastructure ?
- c) Which aspects of any adjustment or regulation do you regard as most urgent ?
- d) Is an international regulation of any of these issues desirable ?

6) Other issues

You may wish to develop any other matter which you consider to be relevant.

## Appendix 11: Council common position adopted July 10, 1995, (OJ. No.C288/14 – 30/10/95).

COMMON POSITION (EC) No 20/95

adopted by the Council on 10 July 1995

with a view to adopting Directive 95/ /EC of the European Parliament and of the Council of  
... on the legal protection of databases

(95/C 288/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF  
THE EUROPEAN UNION,

Having regard to the Treaty establishing the European  
Community, and in particular Articles 57 (2), 66 and  
100a thereof,

Having regard to the proposal from the Commission<sup>(1)</sup>,

Having regard to the opinion of the Economic and Social  
Committee<sup>(2)</sup>,

Acting in accordance with the procedure referred to in  
Article 189b of the Treaty<sup>(3)</sup>,

1. Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;
2. Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on a equal legal basis throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation on this subject, which is now taking on an increasingly international dimension;
3. Whereas existing differences having a distortive effect on the functioning of the internal market need to be removed and new ones prevented from arising, while differences not at the present time adversely affecting the functioning of the internal market or the development of an information market within the Community need not be dealt with in this Directive;
4. Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community if differences in the scope and conditions of protection remain between the legislation of the Member States;
5. Whereas copyright remains an appropriate form of exclusive right for authors who have created databases;
6. Whereas, nevertheless, in the absence of a harmonized system of unfair competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;
7. Whereas database manufacture requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to develop them independently;
8. Whereas the unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences;
9. Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;
10. Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry requires investment in all the Member States in advanced information management systems;
11. Whereas there is at present a great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries;

<sup>(1)</sup> OJ No C 156, 23. 6. 1992, p. 4 and OJ No C 308, 15. 11. 1993, p. 1.

<sup>(2)</sup> OJ No C 19, 25. 1. 1993, p. 3.

<sup>(3)</sup> Opinion of the European Parliament of 23 June 1993 (OJ No C 194, 19. 7. 1993, p. 144), Council common position of ... (not yet published in the Official Journal) and Decision of the European Parliament of ... (not yet published in the Official Journal).



12. Whereas such an investment in modern information storage and retrieval systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of database manufacturers;
13. Whereas this Directive protects collections, sometimes called compilations, of works, of data or other materials whose arrangement, storage and access is performed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;
14. Whereas protection under this Directive should be extended to cover non-electronic databases;
15. Whereas the criteria by which a database should be eligible for protection by copyright should be confined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;
16. Whereas no other criterion than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;
17. Whereas the term database should be understood to include collections of works, whether literary, artistic, musical or other, or of other material such as texts, sounds, images, numbers, facts, and data; whereas it should cover collections of works, data or other independent materials which are systematically or methodically arranged and can be individually accessed; whereas this means that the recording of audiovisual, cinematographic, literary or musical works as such does not fall within the scope of this Directive;
18. Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; whereas the protection of databases by the *sui generis* right is without prejudice to existing rights over their contents, and whereas in particular where an author or the holder of a related right permits some of his works or services to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or services subject to the required consent of the author or of the holder of the related right without the *sui generis* right of the maker of the database being invoked to prevent him doing so, on condition that those works or services are neither extracted from the database nor re-utilized on the basis thereof;
19. Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for protection under copyright and because it does not represent a substantial enough investment to be eligible under the *sui generis* right;
20. Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as the thesaurus and indexation systems;
21. Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner;
22. Whereas electronic databases within the meaning of this Directive also include devices such as CD-ROM and CD-i;
23. Whereas the term database should not be taken to extend to computer programs used in the construction or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes<sup>(1)</sup>;
24. Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property<sup>(2)</sup>;
25. Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights<sup>(3)</sup>;
26. Whereas works protected by copyright and services protected by related rights, which are incorporated into a database, remain nevertheless the object of the respective exclusive rights and may not be incorporated into, or reproduced from, the database without the permission of the rightholder or his successors in title;

(1) OJ No L 122, 17. 5. 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No L 290, 24. 11. 1993, p. 9).

(2) OJ No L 346, 27. 11. 1992, p. 61.

(3) OJ No L 290, 24. 11. 1993, p. 9.

27. Whereas copyright in such works and related rights in services thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and services in a database;
28. Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;
29. Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore, nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;
30. Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;
31. Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;
32. Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;
33. Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases in the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike the cases of CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides;
34. Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;
35. Whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangement of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and reproduction for private purposes, which concerns provisions under national legislation of some Member States on taxes on unused media or recording equipment;
36. Whereas the term 'scientific research' within the meaning of this Directive covers both the natural sciences and the human sciences;
37. Whereas Article 10 (1) of the Berne Convention is not affected by this Directive;
38. Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied 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;
39. Whereas, in addition to protecting the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment incurred in obtaining and collecting the contents by providing that certain acts done by the user or a competitor in relation to the whole or substantial parts of a database are subject to restriction;
40. Whereas the object of this *sui generis* right is to ensure protection of any investment in obtaining,

- verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist of the implementation of financial resources and/or the expending of time, effort and energy;
41. Whereas the objective of the *sui generis* right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;
42. Whereas the special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated quantitatively or qualitatively, to the investment;
43. Whereas, in cases of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;
44. Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder;
45. Whereas the right to prevent unauthorized extraction and/or re-utilization is not to be considered in any way as an extension of copyright protection to mere facts or data;
46. Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves;
47. Whereas, in the interests of competition between suppliers of information products and services, protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national rules of competition;
48. Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aims of Directive 95/ /EC of the European Parliament and of the Council of ... on the protection of individuals with regard to the processing of personal data and on the free movement of such data <sup>(1)</sup>, which are to guarantee free circulation of personal data on the basis of a harmonized standard of rules designed to protect the fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;
49. Whereas, notwithstanding the right to prevent extraction and/or re-utilization of all or a substantial part of a database, it should be laid down that the maker of a database or his successor in title may not prevent a lawful user of the database from extracting and re-utilizing insubstantial parts; whereas, however, such user may not unreasonably prejudice either the legitimate interests of the holder of the *sui generis* right or the holder of copyright or a related right in respect of the works or services contained in the database;
50. Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-utilization of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where there is extraction and/or re-utilization for the purposes of public security or the proper performance of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not have a commercial nature;
51. Whereas the Member States, where they avail themselves of the option to permit a lawful user of a

<sup>(1)</sup> OJ No L ...

- database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institution;
52. Whereas those Member States which already have specific national legislation providing for a right which is similar to the *sui generis* right provided for in this Directive may retain the exceptions to that right traditionally permitted by that legislation;
53. Whereas the burden of proof regarding the date of completion of manufacture of a database lies with the maker of the database;
54. Whereas the burden of proof that the criteria exist for concluding that a substantial amendment to the contents of a database is to be regarded as a substantial new investment lies with the maker of that database;
55. Whereas a substantial new investment involving a new term of protection may include a substantive verification of the contents of the database;
56. Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by companies or firms not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or who have their habitual residence in the territory of the Community;
57. Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database;
58. Whereas, in addition to the protection given under this Directive to the structure of the database by copyright, and to its contents against unauthorized extraction and/or re-utilization under the *sui generis* right, other legal provisions in the Member States relevant to the supply of database goods and services continue to apply;
59. Whereas this Directive is without prejudice to the application to databases composed of audiovisual works of any rules recognized by a Member State's legislation concerning the broadcasting of audiovisual programmes;
60. Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned,

HAVE ADOPTED THIS DIRECTIVE:

#### CHAPTER I

#### SCOPE

#### Article 1

#### Scope

1. This Directive concerns the legal protection of databases in any form.
2. For the purposes of this Directive, 'database' shall mean a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means.
3. Protection under this Directive shall not apply to computer programs used in the manufacture or operation of databases which can be accessed by electronic means.

#### Article 2

#### Limitations of the scope

This Directive shall apply without prejudice to Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) the term of protection of copyright and certain related rights.

## CHAPTER II

## COPYRIGHT

## Article 3

## Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

## Article 4

## Authorship

1. The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.

2. Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.

3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

## Article 5

## Restricted acts

The author of a database shall have the exclusive right to do or to authorize in respect of the expression of the database which is protectable by copyright:

- (a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;

(c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale within the Community of that copy;

(d) any communication, display or performance to the public;

(e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

## Article 6

## Exceptions to the restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the database and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

- (a) in the case of reproduction for private purposes of a non-electronic database;
- (b) where there is use for the sole purposes of illustration for teaching or scientific research, to the extent justified by the non-commercial purpose;
- (c) where there is use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure;
- (d) where other exceptions to copyright which are traditionally permitted by the Member State concerned are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the Protection of Literary and Artistic Works, this article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the database.

## CHAPTER III

## Article 8

## SUI GENERIS RIGHT

## Rights and obligations of legitimate users

## Article 7

## Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, to prevent acts of extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this chapter:

(a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale within the Community of that copy.

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of the eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right referred to in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database which would have the result of performing acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or services contained in the database.

## Article 9

Exceptions to the *sui generis* right

Member States shall have the option to lay down that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

(a) in the case of extraction for private purposes of the contents of a non-electronic database;

(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be attained;

(c) in the case of extraction and/or re-utilization for the purposes of public security or the proper performance of an administrative or judicial procedure.

## Article 10

## Term of protection

1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire 15 years from 1 January of the year following the date of completion.

2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire 15 years from 1 January of the year following the date when the database was first made available to the public.

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

#### Article 11

##### Beneficiaries of protection under the *sui generis* right

1. The right provided for in Article 7 shall apply to databases whose makers or successors in title are nationals of a Member State or who have their habitual residence in the territory of the Community.

2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must possess an effective and continuous link with the economy of one of the Member States.

3. Agreements extending the right provided for in Article 7 to databases manufactured in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

#### CHAPTER IV

#### COMMON PROVISIONS

#### Article 12

##### Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

#### Article 13

##### Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

#### Article 14

##### Application in time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to in Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.

2. Notwithstanding paragraph 1, where a database protected under a copyright system in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailment in that Member State of the remaining term of protection afforded under that system.

3. Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the manufacture of which was completed not more than 15 years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.

4. The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts accomplished and rights acquired before the date referred to in those paragraphs.

5. In the case of a database the manufacture of which was completed not more than 15 years prior to the date referred to in Article 16 (1), the term of protection by the right provided for in Article 7 shall expire 15 years from 1 January following that date.

#### Article 15

##### Binding nature of certain provisions

Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

Article 16

Final provisions

1: Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive,

in which, *inter alia* on the basis of specific information supplied by the Member States, it shall examine in particular the application of the *sui generis* right, including Articles 8 and 9, and especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, in particular the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.

Article 17

This Directive is addressed to the Member States.

Done at, ...

For the European Parliament  
The President

For the Council  
The President



## Appendix 12:

### Directive of the European Parliament and Council on the legal protection of databases (OJ No. L.77/20 - 27 march 1996)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF  
THE EUROPEAN UNION,

Having regard to the Treaty establishing the European  
Community, and in particular Article 57 (2), 66 and 100a  
thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the Economic and Social  
Committee <sup>(2)</sup>,

Acting in accordance with the procedure laid down in  
Article 189b of the Treaty <sup>(3)</sup>,

(1) Whereas databases are at present not sufficiently  
protected in all Member States by existing legisla-  
tion; whereas such protection, where it exists, has  
different attributes;

(2) Whereas such differences in the legal protection of  
databases offered by the legislation of the Member  
States have direct negative effects on the func-  
tioning of the internal market as regards databases  
and in particular on the freedom of natural and  
legal persons to provide on-line database goods and  
services on the basis of harmonized legal arrange-  
ments throughout the Community; whereas such  
differences could well become more pronounced as  
Member States introduce new legislation in this  
field, which is now taking on an increasingly inter-  
national dimension;

(3) Whereas existing differences distorting the func-  
tioning of the internal market need to be removed  
and new ones prevented from arising, while diffe-  
rences not adversely affecting the functioning of  
the internal market or the development of an infor-  
mation market within the Community need not be  
removed or prevented from arising;

(4) Whereas copyright protection for databases exists  
in varying forms in the Member States according to

legislation or case-law, and whereas, if differences  
in legislation in the scope and conditions of  
protection remain between the Member States, such  
unharmonized intellectual property rights can have  
the effect of preventing the free movement of  
goods or services within the Community;

(5) Whereas copyright remains an appropriate form of  
exclusive right for authors who have created data-  
bases;

(6) Whereas, nevertheless, in the absence of a harmo-  
nized system of unfair-competition legislation or of  
case-law, other measures are required in addition to  
prevent the unauthorized extraction and/or  
re-utilization of the contents of a database;

(7) Whereas the making of databases requires the  
investment of considerable human, technical and  
financial resources while such databases can be  
copied or accessed at a fraction of the cost needed  
to design them independently;

(8) Whereas the unauthorized extraction and/or  
re-utilization of the contents of a database consti-  
tute acts which can have serious economic and  
technical consequences;

(9) Whereas databases are a vital tool in the develop-  
ment of an information market within the  
Community; whereas this tool will also be of use in  
many other fields;

(10) Whereas the exponential growth, in the Commu-  
nity and worldwide, in the amount of information  
generated and processed annually in all sectors of  
commerce and industry calls for investment in all  
the Member States in advanced information proces-  
sing systems;

(11) Whereas there is at present a very great imbalance  
in the level of investment in the database sector  
both as between the Member States and between  
the Community and the world's largest database-  
producing third countries;

(12) Whereas such an investment in modern informa-  
tion storage and processing systems will not take  
place within the Community unless a stable and  
uniform legal protection regime is introduced for  
the protection of the rights of makers of databases;

<sup>(1)</sup> OJ No C 156, 23. 6. 1992, p. 4 and

OJ No C 308, 15. 11. 1993, p. 1.

<sup>(2)</sup> OJ No C 19, 25. 1. 1993, p. 3.

<sup>(3)</sup> Opinion of the European Parliament of 23 June 1993 (OJ No  
C 194, 19. 7. 1993, p. 144), Common Position of the Council  
of 10 July 1995 (OJ No C 288, 30. 10. 1995, p. 14), Decision  
of the European Parliament of 14 December 1995 (OJ No C  
17, 22. 1. 1996) and Council Decision of 26 February 1996.

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- (13) Whereas this Directive protects collections, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;
- (14) Whereas protection under this Directive should be extended to cover non-electronic databases;
- (15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;
- (16) Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;
- (17) Whereas the term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed; whereas this means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive;
- (18) Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; whereas the protection of databases by the *sui generis* right is without prejudice to existing rights over their contents, and whereas in particular where an author or the holder of a related right permits some of his works or subject matter to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or subject matter subject to the required consent of the author or of the holder of the related right without the *sui generis* right of the maker of the database being invoked to prevent him doing so, on condition that those works or subject matter are neither extracted from the database nor re-utilized on the basis thereof;
- (19) Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the *sui generis* right;
- (20) Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems;
- (21) Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically, whereas it is not necessary for those materials to have been physically stored in an organized manner;
- (22) Whereas electronic databases within the meaning of this Directive may also include devices such as CD-ROM and CD-i;
- (23) Whereas the term 'database' should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs<sup>(1)</sup>;
- (24) Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property<sup>(2)</sup>;
- (25) Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights<sup>(3)</sup>;
- (26) Whereas works protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the right-holder or his successors in title;
- (27) Whereas copyright in such works and related rights in subject matter thus incorporated into a database

<sup>(1)</sup> OJ No L 122, 17. 5. 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No L 290, 24. 11. 1993, p. 9)

<sup>(2)</sup> OJ No L 346, 27. 11. 1992, p. 6.

<sup>(3)</sup> OJ No L 290, 24. 11. 1993, p. 9.

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are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database;

- (28) Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;
- (29) Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;
- (30) Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;
- (31) Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;
- (32) Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;
- (33) Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides;
- (34) Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;
- (35) Whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment;
- (36) Whereas the term 'scientific research' within the meaning of this Directive covers both the natural sciences and the human sciences;
- (37) Whereas Article 10 (1) of the Berne Convention is not affected by this Directive;
- (38) Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorization, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;
- (39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;
- (40) Whereas the object of this *sui generis* right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;

- (41) Whereas the objective of the *sui generis* right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;
- (42) Whereas the special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment;
- (43) Whereas, in the case of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;
- (44) Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder;
- (45) Whereas the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data;
- (46) Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves;
- (47) Whereas, in the interests of competition between suppliers of information products and services, protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are
- without prejudice to the application of Community or national competition rules;
- (48) Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aim of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>(1)</sup>, which is to guarantee free circulation of personal data on the basis of harmonized rules designed to protect fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;
- (49) Whereas, notwithstanding the right to prevent extraction and/or re-utilization of all or a substantial part of a database, it should be laid down that the maker of a database or rightholder may not prevent a lawful user of the database from extracting and re-utilizing insubstantial parts; whereas, however, that user may not unreasonably prejudice either the legitimate interests of the holder of the *sui generis* right or the holder of copyright or a related right in respect of the works or subject matter contained in the database;
- (50) Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-utilization of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where extraction and/or re-utilization are/is carried out in the interests of public security or for the purposes of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not be commercial;
- (51) Whereas the Member States, where they avail themselves of the option to permit a lawful user of a database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institution;

(1) OJ No L 281, 23. 11. 1995, p. 31.

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- (52) Whereas those Member States which have specific rules providing for a right comparable to the *sui generis* right provided for in this Directive should be permitted to retain, as far as the new right is concerned, the exceptions traditionally specified by such rules;
- (53) Whereas the burden of proof regarding the date of completion of the making of a database lies with the maker of the database;
- (54) Whereas the burden of proof that the criteria exist for concluding that a substantial modification of the contents of a database is to be regarded as a substantial new investment lies with the maker of the database resulting from such investment;
- (55) Whereas a substantial new investment involving a new term of protection may include a substantial verification of the contents of the database;
- (56) Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by legal persons not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community;
- (57) Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database;
- (58) Whereas, in addition to the protection given under this Directive to the structure of the database by copyright, and to its contents against unauthorized extraction and/or re-utilization under the *sui generis* right, other legal provisions in the Member States relevant to the supply of database goods and services continue to apply;
- (59) Whereas this Directive is without prejudice to the application to databases composed of audiovisual works of any rules recognized by a Member State's legislation concerning the broadcasting of audiovisual programmes;
- (60) Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright

protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.
2. For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.
3. Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.

Article 2

Limitations on the scope

This Directive shall apply without prejudice to Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) the term of protection of copyright and certain related rights.

CHAPTER II

COPYRIGHT

Article 3

Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

Article 4

Database authorship

1. The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.

2. Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.

3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Article 5

Restricted acts

In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

- (a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;
- (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
- (d) any communication, display or performance to the public;

- (c) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

Article 6

Exceptions to restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

- (a) in the case of reproduction for private purposes of a non-electronic database;
- (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
- (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

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2. For the purposes of this Chapter:

- (a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;
- (b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

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

#### Article 8

##### Rights and obligations of lawful users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to

the holder of a copyright or related right in respect of the works or subject matter contained in the database.

#### Article 9

##### Exceptions to the *sui generis* right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

#### Article 10

##### Term of protection

1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.

2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

#### Article 11

##### Beneficiaries of protection under the *sui generis* right

1. The right provided for in Article 7 shall apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community.

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2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.

3. Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

### CHAPTER IV

#### COMMON PROVISIONS

##### Article 12

##### Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

##### Article 13

##### Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

##### Article 14

##### Application over time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to in Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.

2. Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any

curtailing in that Member State of the remaining term of protection afforded under those arrangements.

3. Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.

4. The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts concluded and rights acquired before the date referred to in those paragraphs.

5. In the case of a database the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1), the term of protection by the right provided for in Article 7 shall expire fifteen years from the first of January following that date.

##### Article 15

##### Binding nature of certain provisions

Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

##### Article 16

##### Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, *inter alia*, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the *sui generis* right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.



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*Article 17*

This Directive is addressed to the Member States.

Done at Strasbourg, 11 March 1996.

*For the European Parliament*

*The President*

K. HÄNSCH

*For the Council*

*The President*

L. DINI

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