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In the areas of I&T (Informatics & Telematics)
EURIM is a link between Commerce and Industry,
Parliamentarians, Whitehall and Brussels.

EUROPEAN INFORMATICS MARKET EURIM

THE DATABASE DIRECTIVE

1. Summary

The information industry is large and expanding. In 1993 the global value of electronic information services was £13.2 bn, of which £2.8 bn came from the European Union.

EURIM accepts the need for EU legislation for databases, and believes that the Database Directive provides an adequate basis for defining a database and setting out procedures for legal protection. However, there remain significant issues on which EURIM would like to see a wider and more informed debate. These are:

- *International Law*: Databases form only one element in the field of international intellectual property law. The protection proposed for databases under the Directive will not enjoy the benefits of national treatment, and reciprocal agreements may be hard to negotiate with key players such as the USA. A wider initiative to establish a common international framework for all aspects of intellectual property in the Information Society is urgently needed.

- *Sui Generis Right*: EURIM is concerned that the United Kingdom will be required to apply this new, unproven, protection to certain types of databases rather than the full copyright protection applicable under present UK law. EURIM construes the Directive to diminish existing UK copyright protection to producers of new databases, compiled after the effective date of the Directive, and to substitute the new lesser *sui generis* right instead if, and where, they do not qualify for copyright. The definition of the rights and obligations established by the new Directive need clarification.

- *Freedom of contract*: EURIM is concerned that the Directive restricts free negotiation between the database owner and user on contracting out of some rights and obligations

- *Duration*: The method of calculating the duration of the *sui generis* right is unsatisfactory for some types of archival database.

- *Multimedia*: There is a grey area where databases incorporating sound and images merge into audio or video products. Hybrid products could fall under conflicting legislation.

This Brief summarises the main terms of the Directive and reviews issues of EURIM concern.

2. What is a Database?

The basic product traded within the electronic information services industry is the database. A database is designed, manufactured and sold - just like any other product of commercial endeavour. The database market links producers and consumers, just like any other market. Why does this product require the special attention of EU legislators?

A database is a compilation of discrete pieces of information which share a common set of characteristics, and whose volume is such that information technology is generally required to assemble the collection and to provide the user a means of access to the information it contains. A database has at least these basic characteristics:

- *Content:* the information held in the database;
- *Compilation:* the selection and assembly of the database contents;
- *Structure:* the organisation of the database contents (alphabetic; chronological; by subject);
- *Access system:* the method of finding and extracting database content (full text index; Boolean searching; hierarchical searching);
- *Medium:* the method or methods by which the database will be delivered to the user (paper; online; CD-ROM).

3. The Database Directive

The Database Directive has a number of objectives:

- To provide a common legal framework for the protection and exploitation of databases within the European Union;
- To provide an agreed definition of what constitutes a database;
- To identify the elements of a database that are not or cannot be adequately protected by copyright;
- To set out how such elements should be protected;
- To establish the duration of such protection;
- To ensure that legal protection for the intellectual property owner does not inhibit reasonable use and exploitation of information by the authorised user;
- To prevent the unfair exploitation of exclusive ownership of information sources.

Reaching agreement on the text of a directive that fulfils these objectives has proved a lengthy and tortuous process. The first draft emerged in 1992 and has gone through many amendments. The latest (fourth) April 1995 draft has, with amendments, received general approval by the Council of Ministers Working Group and should go to the European Parliament for second reading in the Autumn of 1995. The present draft was reviewed in some detail at a meeting held under the auspices of Graham Jenkins of the Patent Office, who is steering the UK's position through the corridors of Brussels on behalf of the DTI. This meeting was attended by over 60 representatives of all interested parties. The overall consensus of the meeting was that the objectives of the Directive are appropriate and the present draft generally achieves the objectives. There was however concern that protection periods under the new *sui generis* right are not as extensive as is desirable. The April 1995 draft also contained 'compulsory licensing' provisions, and the meeting was concerned that these should be carefully defined and balanced. In the event the compulsory licensing provisions were dropped by the Council.

The main provisions of the Directive can be summarised as follows:

> *Definition*: The Directive defines a database as "a collection of independent works, data or other materials individually accessible in a systematic or methodical way by electronic or other means." It should be noted that the Working Part has confined its attention to the issues raised by electronically held databases. The definition in the present draft of the Directive goes on to

exclude certain items from the scope of the Directive, including computer programs used in the making or operation of databases, 'phonograms' and 'music CDs'.

Copyright: A database is protected by copyright if it is 'original' in terms of the selection and/or arrangement of the contents (criteria stricter than current UK legislation). The Directive does not seek to extend its scope to the contents themselves, as these continue to be covered by existing copyright protection.

Sui Generis Right: Where the method of selection and arrangement of a database does not exhibit sufficient 'originality' for copyright protection then, irrespective of whether or not the contents themselves are eligible for copyright protection a new *sui generis* right (i.e. a similar but free standing right) is created for the producer (or manufacturer) of that database in the following circumstances. The database must show that there has been a substantial investment (in quality and/or quantity) in either: a) obtaining, verifying or presenting the contents by the producer (through the sweat of the brow), to prevent acts of extraction; and/or b) re-utilisation of the whole or of a substantial part (in quality and/or quantity) of the contents of that database. It should be noted that in the latest text there is no requirement for any 'originality' in the selection process for a database to acquire a *sui generis* right.

Protection: Protection provided by copyright legislation for those contents of a database that are subject to copyright is unaffected. Protection of the new *sui generis* right is provided for by prohibiting "the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database amounting to acts which conflict with a normal exploitation of that base or which unreasonably prejudice the legitimate interests of the maker of the base". At the recent meeting at the Patent Office a view was expressed that the expression 'extraction and/or re-utilisation' was a sufficient definition of what constitute restricted acts; alternatively, the only identifiable restricted act should be that of copying.

Duration: The proposed duration of the *sui generis* right is 15 years; copyright duration is unaffected. The duration date is renewed for a further 15 years if, after a series of additions and deletions substantial changes to the database are such that it can be considered to be 'new'.

Use: The user of a database may not perform any of the restricted acts that protect a database owner's rights. Other than restricted acts, the 'lawful user' can, without authorisation, extract and utilise 'insubstantial parts'. Where the use is for other than private purposes any extracts must acknowledge the source. The latest text introduces a restriction on free negotiation between the database owner and user on contracting out of these rights.

4. Issues of EURIM Concern

Many of the issues are complex and deal with the fine tuning of legal definitions. The majority of EURIM members are not lawyers, and attention has been concentrated on the commercial and practical issues faced by the Informatics industry rather than the more detailed points involved in drafting watertight law.

EURIM accepts the need for legislation to provide legal protection to databases. The Database Directive in general provides an adequate basis for defining a database and setting out procedures for legal protection.

The areas in which EURIM wishes to see a wider debate and to draw the attention of legislators include the following:

International law: The Database Directive will protect databases within the European Union. There is some concern that while copyright is governed by international convention and subject to 'national treatment', the proposed *sui generis* right that protects the compilation of a database is not, and will be subject to the lesser provisions of reciprocity. This is of particular concern in relation to the USA. Unless a reciprocal agreement is reached between the EU and the USA,

US database creators will be competing on unequal ground with their European counterparts in the EU. Under the provisions of the *sui generis* right a European database producer would be able to copy data from a database created by a US national (so long as the selection and arrangement are not copied), but a US producer would not have the same right in the USA in relation to a database created by a EU national. Thus the right to prevent unfair extraction, which is intended to maintain fair competition, would in fact have the reverse effect and encourage unfair competition by EU producers against US producers. US law offers less protection than the proposed *sui generis* right, but it is unlikely that the US would be prepared to enact legislation to raise their level of protection in order to achieve reciprocity with the EU. The whole area of international law in relation to intellectual property is confused and fragmentary. GATT (now the World Trade Organisation) has made proposals for international harmonisation under the Trade Related Intellectual Property (TRIPS) agreement. EURIM would therefore support the extension of this European initiative into a wider international agreement on database protection.

Sui Generis right: United Kingdom law operates a minimalist attitude to the degree of 'originality' required for copyright protection. This means that the full weight of UK copyright protection is available for a database where there is a minimum of 'originality' or creativity in the compilation. There is concern that the untested *sui generis* rights within the Database Directive could in certain circumstances reduce the protection currently available in the UK to a database producer. In the UK, protection under copyright is generally wider than in some other EU Nation States and thus there may be fewer circumstances in which the *sui generis* right will add protection. EURIM believes that as the Directive currently stands, Databases in existence on the date that the Directive is enacted will still be able to apply copyright after that date, where that offers them wider protection. However, for Databases created in the UK after that date, Database Producers may have only the lesser *sui generis* rights to call upon. However, to some extent this is balanced by the fact that the *sui generis* right would be wider in geographical scope and could be more suitable for the Information Society. Nevertheless, there is also concern, shared by other countries, that the so-called restrictive acts of 'extraction and re-use' should be defined with some precision.

Freedom of contract: The text of the Directive explicitly prohibits agreement between database owner and user on the exclusion of certain restrictive acts. EURIM can see no reason why free negotiation should not be permitted, and believes this to be an unnecessary restriction on normal commercial practice.

Duration: The 15 year limit for the *sui generis* right may not be sufficient to protect some valuable archival databases that are not 'refreshed' (i.e. updated) and therefore do not have the duration of their protection extended automatically, nor for databases which may not meet the renewal criteria put forward. The United Kingdom would prefer the *sui generis* rights to endure for the same period as copyright. It is understood that the Commission has offered a compromise whereby all UK databases which benefit from UK copyright at the date of entry into force of the Directive will continue to enjoy copyright protection for the full copyright. EURIM welcomes the latest text, which appears to extend the duration of *sui generis* protection for 'refreshed' databases from the point at which refreshment ceases.

Multimedia: The intention of the Database Directive is that it should apply to multimedia products. However there is a grey area where a multimedia database containing sound and images overlaps with an audio or video CD. Such products are covered by other regulations involving public performance, rental and so on. There is concern that hybrid products would fall under conflicting legislation.

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APPENDIX 1. The Database Business

The information industry is by any yardstick a big one, and it is expanding. Publicly available online databases have grown from some 400 in 1980 to over 6,000 by 1994. The global value of revenues from electronic information services in 1993 was £13.2 bn, of which £2.8 bn came from the European Union.

The basic product traded within the industry is the database. A database is designed, manufactured and sold - just like any other product of commercial endeavour. The database market links producers and consumers, just like any other market. Why does this product require the special attention of EU legislators? A database is a compilation of discrete pieces of information which share a common set of characteristics, and whose volume is such that information technology is generally required to assemble the collection and to provide the user a means of access to the information it contains. A database has at least these basic characteristics:

- Content: the information held in the database
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- Structure: the organisation of the database contents (alphabetic; chronological; by subject);
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- Medium: the method or methods by which the database will be delivered to the user (paper; online; CD-ROM).

Databases may be produced for in-house use by the producing organisation, or may be published for commercial gain. The database business involves a number of players: content owner, database compiler, software supplier, database publisher and database user. An electronic database is intangible (although the medium upon which it is delivered to the user may have physical properties). This means that in order to trade, buyer and seller must agree what it is that is owned and traded. The trade in databases is governed by the general provisions of intellectual property.

There are many examples of intellectual property: printed works; pictures; music; patents; architectural designs; computer software; trade marks. All these are subject to formal definition and regulation. The main issues of intellectual property legislation involve:

- Definition of the property right
- Definition of legitimate use
- Rules under which the property can be traded
- Duration of the property rights

One vital issue is that of international agreement. Most intellectual property is traded internationally, and there exists a body of national and international law and conventions which define ownership rights and trading rules. International law recognises two types of cover, national treatment and reciprocity: National treatment is the norm for the international protection of intellectual property rights. Irrespective of the level of protection in a work's country of origin, the author of a work enjoys (in all countries which are parties to the agreement) the rights which those countries' laws grant to their own nationals. Reciprocity subjects the treatment of another nation's intellectual property to bilaterally agreed terms and conditions which may differ from the treatment given to the intellectual property owned by its own nationals.

APPENDIX 2. The Legal Protection of Databases

The objective of legal protection for intellectual property is to ensure that the property owner can enjoy value of the property and have the opportunity of recovering the investment involved in creating the property in the first place. On the other hand, it is often in the wider interest of the community that information should be widely available, and used with some freedom so as to stimulate economic activity and provide reasonable enjoyment of intellectual and creative material. A database is a compilation of information accessed through software. Copyright is owned by the creator of the work. In the case of a database, there may be several copyright owners: of the contents, the compilation, and the software. These are all potentially protected by copyright outside the scope of the Directive. The extent of this protection varies according to the laws of each country. In particular, there are significant differences in the criteria used for acquiring copyright, and in the extension of copyright protection to compilations. The United Kingdom adopts a minimalist view of the criteria for copyright protection, based on the concept of the effort ('sweat of the brow') needed to create a work, rather than the 'originality' or cultural value of the work. Other jurisdictions require a greater element of originality or cultural input.

In order to use a database, the user must copy extracts from the contents of the database, even if only to view the results on a screen. Any act of copying is a breach of copyright, and can only be lawfully done if the user has an explicit or implicit licence to make the copy. This licence can only be granted by the copyright owner. Legal protection of databases thus depends on the principle of defining what are lawful or restricted acts, and granting the user a licence to perform such acts. The legitimate use of a database can only be undertaken in accordance with what the law recognises as lawful.

The database producer is unlikely to be the owner of all the copyright works in the database, and will licence the use of third party copyright from the owners. There are three main risks for the database producer (and indirectly for the copyright owners who have licenced the producer to use their copyright material in the database):

Unauthorised copying: Since most databases exist in electronic form, it is possible for an electronic copy to be made of a database at far lower cost than the original investment needed to create the database. The copier can thus compete unfairly with the original producer, since lower costs need to be recovered before a profit is made.

Unauthorised use: The user of a database can give access to the information to someone else for a lower cost than the purchase price of the original database. The receiver of the information has no incentive to buy from the original producer, who thus loses revenue..

Incompatible national laws: Incompatible national laws may authorise acts in one jurisdiction that are prohibited in another

There are constraints on providing legal protection against these risks. Owners of intellectual property have the right to realise commercial opportunities arising from a database, but should not unfairly exploit a monopolistic position in the marketplace. Conditions of use should not be imposed that inhibit the reasonable use by the authorised user of information extracted from a database.