



**Response to the European Commission Staff Working Paper
on the Review of the EC legal framework in the field of
EBLIDA copyright and related rights**

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EBLIDA, the European Bureau of Library, Information and Documentation Associations, is an independent, non-profit umbrella organisation of national library, archive and information sectors associations and institutions in Europe. EBLIDA represents the interests of its members to the European Institutions with a focus on intellectual property rights, DRM, information society, education and culture matters.

EBLIDA promotes access to information and culture in the digital environment for the purposes of education, research and private study.

EBLIDA welcomes and greatly appreciates the European Commission work as regards the review of existing legislation in the field of copyright and related rights with a view to safeguarding and improving the coherence of the existing legislation and to assess whether any inconsistencies on the definitions or on rules on exceptions and limitations between different Directives hamper the operation of the *acquis* or have a harmful impact on the fair balance of rights and other interests such as those of users of information.

EBLIDA believes that there is a lack of coherence in the existing legislation and has expressed its concerns regarding the inconsistencies between the Database Directive and the Term Directive and between the Database Directive and the InfoSoc Directive to the Commission over the last few years.

EBLIDA disagrees with the Commission that several issues relating to the Database Directive should be dealt with in the separate report to be submitted by the Commission regarding the Database Directive pursuant to its Article 16 (3). There is a great need amongst the members of EBLIDA for immediate guidance from the Commission on the issues as set out below as they are causing unnecessary confusion and harm the legitimate interests of the users and of libraries and archives as producers of databases.

The first issue that we would like to raise concerns the Term Directive in relation to the Database Directive as this will be part of the first round of codification. The second issue is in respect of the relation between the Database Directive and the InfoSoc Directive.

1. Term Directive versus Database Directive

The Database Directive provides for two different terms of protection of databases. Databases that are eligible for copyright protection are protected until 70 years after the death of the author. Databases protected by the *sui generis* right are protected for 15 years from 1 January of the year following the date of completion. One of the characteristics of a database is that it can be updated. Many databases are updated frequently e.g. daily/hourly. According to Art. 10 (2) any substantial change to the content of the database shall qualify the database resulting from that investment for its own term of protection. This would potentially give such database owner perpetual protection. This is against the spirit of the Berne Convention and moreover it conflicts with the term of protection for author's rights as set out in the Term Directive.

EBLIDA believes that databases protected by the *sui generis* right should be granted a maximum protection in line with the Term Directive and should not exceed 70 years irrespective of how many times it was updated or the content was changed.

2. Database Directive versus the InfoSoc Directive

The Database Directive introduced the concept of a lawful user. This concept was not adopted in the InfoSoc Directive. The InfoSoc Directive refers to users. This has caused confusion for users and producers of databases. A contributing factor has been that the Database Directive does not provide for a clear definition of a lawful user. EBLIDA has always advocated that the lawful user is 'a user permitted to access and use a database on the basis of a statutory right or on the basis of a licence'. Unfortunately, most rights holders define a lawful user only as the user who has obtained a licence for access and use of such database and do not recognise access and use on the basis of a statutory right. The interpretation of Art. 6.1 and the effectiveness of Art. 15 hinge on the definition of lawful user. Therefore, EBLIDA urges the Commission to consider the inclusion of a definition of lawful user in the codification of the Database Directive. EBLIDA is firmly of the opinion that the concept of a lawful user must include a user making use of a statutory exception, which is by definition a lawful use.

Art. 6 of the Database Directive lists the exceptions to the restrictions provided for in Art. 5; Art. 6(1) contains the "normal use" exception and Art. 6(2) the limitations such as the use of a database for private purposes and research purposes. The "normal use" exception has caused great confusion because it is not clear what normal use is and why the limitations in Art. 6(2) do not qualify as "normal use". According to Art 15, only the normal use of the content of a database cannot be overridden by contract law. The codification of the Database Directive would be an opportunity to either make the distinction between normal use and the limitations clearer or to apply Art. 15 to Art. 6(2) as well.

This issue is especially important since the face of journal and book publishing has changed dramatically over the last years. Most publications are available in dual formats and an increasing number of journals, especially in the scientific, technical and medical fields, are only available electronically as part of a database. Journals therefore are increasingly available only as databases.

The question is which Directive prevails: the Database Directive or the InfoSoc Directive. According to Article 1 of the InfoSoc Directive, the InfoSoc Directive shall in no way effect existing Community provisions such as the Database Directive. Yet according to Recital 20 of the InfoSoc Directive, the InfoSoc Directive develops the principles and rules of the Database Directive and places them in the context of the Information Society.

These are contradictory statements and have caused a huge amount of confusion especially in cases where products purchased by libraries for use by their users simultaneously qualify as databases and as literary works of a different category.

The Commission's analysis of the issue in paragraph 2.2.4.1 of this working paper has caused even more confusion as it seems that neither the Database Directive nor the InfoSoc Directive prevails in such instances. According to the Commission the respective provisions of the InfoSoc Directive cannot be invoked to the Database Directive. EBLIDA urges the Commission to provide immediate guidance on this issue in this working paper.

Nevertheless, in this respect EBLIDA welcomes the conclusion of the Commission that an exception for the benefit of people with a disability under Article 5(3)(b) of the InfoSoc Directive should be included in the Database Directive and that it should apply with respect to databases protected by copyright as well as those covered by the *sui generis* right.

EBLIDA also welcomes the Commission's conclusion that a further exception to the reproduction right (similar to Art. 5(2)(c) under the copyright chapter of the Database Directive for the benefit of libraries should be considered. EBLIDA believes that the same should be considered for 5(3) (n) as both provisions are related. The adoption of Art. 5(3) (n) in the Database Directive would provide libraries and archives with the possibility to make the databases,

created as a result of the reproductions made on the basis of Art. 5(2) (c), accessible to the public on-site for private study and research purposes. This is extremely important for national libraries and research centres.

The archiving of cultural heritage is very expensive and it would be unreasonable if such institutions were to need additional permission from rights owners and have to pay an additional fee in order to provide access to the materials that they archived. This would be especially unfair since they would have already paid for the material included in the database and as well as incurring the cost of archiving of such material. It would be inequitable, and against the interests of the information society, if they were to have to pay for the same product again: they need to be authorised to make it accessible within their own institution.

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