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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.**

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Volume Two

***Submitted in partial fulfilment of the requirements for the degree of
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Volume 2

Interview Transcripts

1. Draughtsman and proposal rapporteur European Commission DGIII/F/4 and DGXV/E/4
2. Head of Unit European Commission DGIII/F/4
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
15. Head of UK Council Working Group Team
Department of Trade and Industry
16. UK Representative in Council Working Group
Department of Trade and Industry
17. Belgian Representative in Council Working Group Ministry of Justice
18. French Representative in Council Working Group Ministry of Culture
19. Legal Counsel for Federation of European Publishers (FEP)
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)
29. Professional EU lobby consultant B/W Partners
30. Legal Counsel for Phillips and Union of Industrial and Employers' Confederations
of Europe (UNICE)
31. EC Legal Counsel for Bertelsmann
32. EC Legal Counsel for the International Federation of the
Phonographic Industry (IFPI)
33. EC Representative for the International Federation of Journalists (IFJ)
34. EC representative for Association Internationale des Auteurs
de l'Audiovisuel (AIDAA)
35. Secretary-General for the European Alliance of Press Agencies (EAPA)
36. Director of Public Affairs for Federation of European Direct Marketing
Associations (FEDMA)
37. Director of European Bureau of Library, Information and Documentation
Associations (EBLIDA)

38. EC Representative for International Federation of Library Associations (IFLA) and UK Library Association
39. Intellectual Property Expert Centre de Recherches Informatique et Droit (CRID)
40. Senior Consultant Norall, Forrester & Sutton (Brussels Law Firm)

INTERVIEW no. 1

Draughtsman & proposal rapporteur DGIII/F/4 & DGXV/E/4 European Commission

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'long before the 1988 Green Paper, a chapter on Software and Databases had been prepared which was later split into the two chapters that appeared in the Green Paper'. She added 'the speed of Commission action on the issues outlined in the Green Paper gives an indication of how clear we were on the need to act on software but how much less certain we were of exactly what type of action to take on databases'

The interviewee commented 'as these issues developed we decided to let the database issue lie for a while, the decision to place action on databases into a different time frame to the work on software was taken early in the process'. The interviewee added 'This decision was partly practical (i.e. don't try to do everything at once) and partly in response to the very active lobbying from copyright holders in the audio-visual sector and from software producers who were pushing the Commission to provide a legal framework for software protection. At the same time there was very little urgency expressed about the need for action on databases from any sector'.

The interviewee also commented in explanation of the copyright environment at the European level 'it is important to realise that at this time there was very much a hierarchy amongst the copyright rightholder lobbyists, with Publishers of print, music and film at the very top, followed by software producers and with the information sector and database producers at the bottom'. The interviewee acknowledged that this was not a rigid structure and that it changed from issue to issue but added 'the lobbyists for software and databases were similar in as much as the lobbying activity was dominated by a few very large industry players and not by the individual creators'. This stated, the interviewee said that she did not 'want to give the impression that the agenda was in anyway set by these lobbyists, even with software which was lobbied on considerably more than the database directive'.

The interviewee commented 'as the Commission's approach to copyright harmonisation emerged after the Green Paper many traditional rightsholders argued against the selection of software as the first directive and called for action on more main stream copyright area as later occurred with the rental and lending directive and the duration directive'. The interviewee added 'protecting software under copyright really required some horse-shoeing of copyright concepts to get the appropriate level of protection e.g. the originality criterion'.

In contrast the interviewee commented 'the database directive was notable for a general lack of lobbying' The interviewee identified a number of reasons that she considered significant in this lack of lobbying and the development of the directive more generally: Firstly 'prior to the formal proposal there were a number of court cases that highlighted the need for some action and in this regard the US Feist decision was particularly influential' i.e. thus there was little opposition to the principle of some Commission in the field of databases. Secondly 'the European electronic database industry was still relatively small, concentrated in the UK and dominated by just a few large players for example like Reuters '. Thirdly, 'at the time there simply were not the professional associations or lobby groups established in the information sector' i.e. in other words the channels of communication through which to express views on the directive did not exist.

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 ?

The interviewee commented that during her initial time in the Commission from 1986 onwards 'no single European organisation lobbied the Commission consistently on copyright issues'. She also

1 refuted the suggestion that any organisations were intimately involved in the drafting of the database
2 directive although in her experience of other proposals some organisations did try to get involved.

3
4 The interviewee commented 'in 1989 I made my first trip to the USA where I had discussions with
5 representatives of the information industry (IIA-Information Industry Association), at the time Mr.
6 Morton Goldberg & Mr. Steven Metalitz and also Mr. Ron Plesser from the DMA(Direct Marketing
7 Association) and during this visit that I began my serious research into the legal protection of databases
8 that later assisted me in drafting of the database proposal'. The interviewee added 'during this trip I also
9 gained first hand experience of the range of types of databases across the spectrum from the highly
10 dynamic time dependent, through the advertising and direct marketing databases to the archival
11 databases, all of which I saw being operated, marketed and sold'.

12
13 The interviewee commented ' I can remember that lobbyists from companies like Reuters and Reed
14 made concerted efforts to express their points of view but their role was very much reactive to the
15 proposal itself rather than pro-active during the period prior to its release'. In this regard the
16 interviewee mentioned John Stevens and his team from Reuters, Quentin Rappoport at Reed and Barry
17 Wojcik from Dun & Bradstreet. The interviewee commented 'from my own experience with the
18 lobbying that took place over the Software directive it was a surprise how absent industry was on the
19 issue of database protection'.

20
21 On the Commission itself the interviewee commented 'I was involved in a number of professional
22 relationships both within DGIII (later DGXV) and with other Commission services, notably DGXIII.
23 Fortunately within my own service I had a good working relationship with my hierarchy'. She added
24 'there are however always bound to be differences of opinion between officials from different parts of
25 the Commission because some Directorate-generals are aligned more with industry while others
26 represent the interests of consumers, users and citizens'.

27
28 The interviewee added 'during the passage of the software directive relations became particularly
29 strained with DGXIII and this continued into the database directive until the particular individuals in
30 DGXIII moved on, after which relations improved'. The interviewee added 'the other directorate that
31 had been active on the software directive such as DGIV were for some unknown reason asleep during
32 the passage of the database directive'.

33
34 The interviewee commented 'it is not unusual for there to be a little friction between different
35 Commission services because in any policy proposal people are always keen to be able to make the
36 claim that they have made a valuable contribution'. The interviewee added ' in my opinion DGXIII did
37 not fight as hard as it could have for the public interest during the passage of the database directive,
38 although its role was generally constructive in the discussions in as much as it did not say a great deal,
39 which helped'. The interviewee added 'of course the aim of the directive was to provide a clearer and
40 more explicit legal framework for databases which maintained a balance of rights throughout'.

41
42 The interviewee commented 'in preparing the initial draft database proposal I was very aware of my
43 own disagreement with the Magill ruling and so I made a conscious effort through the proposal to
44 redress the balance in the relationship between information and competition rules and to codify in the
45 law explicit principles that would prevent a Magill type judgement in the future'. The interviewee
46 added 'I was also motivated by a desire to raise the whole issue of whose rights were at stake'.

47
48 The interviewee commented 'the biggest innovation in the proposal was undoubtedly the sui generis
49 right, although I can't claim to have invented the idea of a sui generis approach'. The interviewee added
50 'the copyright aspects of the database proposal had to a greater or lesser extent been determined by the
51 software discussions which really thrashed out the issues of copyright and its boundaries including the
52 originality criterion'. The interviewee added 'during the software discussions we all became aware of
53 the fact that because of the limits on copyright imposed by the constraints of European harmonisation it
54 was not exactly what we wanted for protecting computer programs, but at a practical level it was the
55 best solution available'. The interviewee added 'and even at the time of its adoption, I was still
56 unhappy about the overriding of contractual freedoms that it allowed'.

57
58 As a direct result of the interviewee's experiences with the negotiations over the software directive she
59 commented 'I was aware in approaching the protection of databases that it would not be possible to

1 achieve any further stretching of copyright per se'. The interviewee commented 'As a result in the
2 original draft proposal I bound the copyright and sui generis rights tightly together so that the directive
3 was seen as package solution because I feared that the Council might try to separate the two parts of the
4 directive and discard the sui generis leaving me holding a next to useless copyright proposal. However
5 once the Council had accepted the principle of the dual approach and separated the directive into two
6 parts I felt it was both diplomatic and politic to continue to treat them in two separate sections, although
7 personally I always viewed it as a total package'. She added 'At a practical level I also knew from
8 experience that whenever you legislate rarely if ever is anyone completely satisfied'.

10 The interviewee commented 'simplistically what I decided to do was to let copyright do what it was
11 designed for (i.e. not to try and stretch it) and thereby avoid the dissatisfaction of the copyright purists
12 who were against copyright being diluted in any manner, but I was surprised by the degree of confusion
13 and alarm that the sui generis right generated in some circles'. The interviewee added 'there seemed to
14 be a rather luddite approach adopted towards the sui generis right by many of the copyright gurus' and
15 she added 'I can remember thinking that these individuals should really leave the discussion of the sui
16 generis right alone because it wasn't within their particular field of expertise'. The interviewee added 'it
17 is however a curious trait of the large print, film and music publishers that they feel it is their
18 prerogative to get involved in any discussions to do with copyright and they also never come to these
19 discussions in an objective and unbiased way. On the database directive some were more interested in
20 trying to settle old scores than in the issues themselves'.

22 The interviewee further commented 'in my experience these large and powerful copyright organisations
23 always have an opinion or formal position on each and every copyright issue even when the issues are
24 not of direct concern to their members interests' (i.e. if they could exert any influence they did). The
25 interviewee added 'during the database negotiations these copyright purists prevented some debates and
26 coloured many others so that all the issues were dominated by copyright experts rather than database
27 industry specialists who knew the problems on the ground. As a consequence the debates were always
28 conducted through the lens of copyright including the sui generis right even though the whole point of
29 its introduction was to avoid the problems of using copyright to protect information products'.

31 The interviewee commented 'this copyright lens was particularly evident in the Council working group
32 and I spent a great deal of time trying to explain that most of the copyright concerns expressed by the
33 delegations were meaningless in terms of databases provided by companies like Reuters (e.g. real-time
34 stock market) where there are over 9 million changes to a database per day'. The interviewee added '
35 in my opinion the final text as adopted has gone quite some way to offering protection to these kind of
36 databases, but it would be wrong to think that by any means these issues have been perfectly solved'.

38 The interviewee commented 'in the initial period of the directive's presentation to the Council working
39 group in the first semester of 1992 I remember being very angry and surprised when the UK delegation
40 tabled a motion that the proposed directive be withdrawn, because this was the first inkling I had that
41 the UK was not going to support the proposal'. The interviewee commented 'fortunately sufficient
42 support was found amongst the other delegations for the proposal to be kept on the table and from then
43 on I became determined not to allow the UK to obstruct the adoption of the directive'.

45 The interviewee added 'during the UK Presidency (second semester 1992) the UK delegation simply
46 stalled the directive for 6 months with excuses that the legislative agenda was too busy, but in my
47 opinion these stalling tactics and the UK's general opposition to the directive was less to do with
48 specific provisions within the proposal itself and more to do with a desire to avoid a repeat of the
49 difficult times the UK had faced in the later stages of the software directive'. The interviewee added
50 'although the software directive was adopted before the database proposal was released many of the
51 lobbyists who had been extremely active during software negotiations viewed the database directive as
52 a further opportunity to establish their views and so lobbied on the database proposal at least in the
53 early stages e.g. Phillip Wacker (ECIS - European Committee for Interoperable Systems)'.

55 The interviewee commented 'Quite quickly after the release of the database proposal the ECOSOC
56 produced its opinion which was prepared by the ECOSOC's resident rapporteur Mr. Robert Moreland
57 with his expert Mr. Harry Small both of whom were also involved in the software directive'. The
58 interviewee added 'the ECOSOC report was OK as far as identifying some problems but it was

1 relatively poor on suggesting solutions and overall all I think it had a mildly negative impact on the
2 development of the proposal'.

3
4 In the Parliament the interviewee commented 'as far as I can remember in the first reading everything
5 went well with the Spanish rapporteur Mr. Garcia Amigos, and I felt that I had a good degree of
6 control over the discussions'. The interviewee added 'an industry hearing was also held at the
7 Parliament during this reading from which I got the impression that industry representatives felt
8 reasonably comfortable with my approach to the directive'. She added 'in the Parliament my main
9 concern was to prevent any mutations of the database discussions emerging or spiraling out of control
10 which from my experience was something that I knew could happen in Parliament if issues were
11 misinterpreted and misunderstood'.

12
13 The interviewee commented 'in the Council working group initially my over-riding concern was
14 whatever happened to keep the text on the table. I was even willing if necessary to chop it up into pieces
15 that were more palatable or at least more readily swallowed by the Member State delegations'. The
16 interviewee added 'following the UK's attempt to block and stall the directive, the Danes took over the
17 Presidency and the directive proposal began to be discussed properly. Part of the reason that the Danes
18 were so constructive and busy with the directive was that they mistakenly believed that the approach to
19 databases in the proposal had been modeled on their own catalogue right'.

20
21 The interviewee commented 'this mistaken belief was just like the UK's mistaken belief that the
22 compilation right in its 1988 Copyright, Designs and Patents Act gave the Commission the impetus for
23 the directive'. She added 'it took the Danes a long time to shake off this idea and it even led to some
24 confusion under their Presidency because they used their knowledge of their own catalogue right to
25 guide their responses and the discussions more generally. There were similar problems with the UK
26 officials in the Council working group because they were the same individuals who had drafted the
27 1988 Copyright Act and they were clearly very proud of their work and felt at least initially that the
28 protection that it offered was adequate for databases'. The interviewee added 'it also took them a very
29 long time to acknowledge that this was not the same at the European Level (i.e. it took them a long time
30 to admit that they wrong)'.

31
32 This stated, the interviewee added 'these mistaken beliefs were useful and necessary for the launch of
33 the database proposal because without a model among the Member States to point to, no Commission
34 official can possible argue the need for harmonisation. (i.e. if a problem is not already recognised in the
35 legislation of one of the Member States)'. The interviewee added that 'you always need an excuse for
36 an harmonisation initiative even where proposals are in fact ahead of the game in the Member States, as
37 in the case of the database directive'. The interviewee commenting on the Greek Presidency said 'other
38 than the UK approach to the directive the next worst kind of Presidency you can have was demonstrated
39 by the Greeks in the first semester of 1994. They simply didn't do anything, they didn't concentrate on
40 the proposal and the Greek chair of the Council meetings didn't even understand the issues being
41 discussed as he was neither a database nor a copyright expert'.

42
43 The interviewee added 'the only event that I can remember during the whole of the Greek Presidency
44 was a symposium in Athens on copyright issues in general'. The interviewee commented 'because of
45 the lack of progress in the negotiations some of the other Member States delegations became restless
46 and focused in on trivial arguments over wording in the proposal, so that definitions became a real area
47 of difficulty'. The interviewee added 'in any Council negotiations of a directive, but particularly in the
48 copyright field there tends to be three general positions that are articulated by Member State
49 delegations;

- 50
51 1. Countries have clear, strong and well articulated views
- 52 2. Countries have no views either way on a proposal
- 53 3. Countries have views but are muddled or confused over issues

54
55 The interviewee commented 'with the arrival of the German Presidency came action. But throughout
56 the negotiations the German delegation remained uneasy about the sui generis right'. The interviewee
57 commented 'as on other copyright issues the German delegation was very traditional in its approach to
58 the database directive and consequently viewed the sui generis right with scepticism, taking the view
59 that unfair competition rules could provide any additional protection that might be necessary'. The

interviewee added 'strong progress was however made by the Germans on the copyright sections of the directive during their Presidency'.

The interviewee commented 'the accession of Finland, Sweden and Austria to the EU late on in the discussions of the database directive proposal caused some disruption of the negotiations but this was almost entirely due to Finnish delegate Jukka Liedes who was at the time chairing a WIPO copyright committee in this area. As a result he had considerable stature in the working group and this combined with his strong personality and willingness to speak up caused some problems'.

The interviewee commented that 'For France the running of the Presidency was a complicated affair because the French delegation was itself divided between Madame de Montluc from the Ministry of Culture and other representatives from the Ministry of Industry. The differences of opinion between these representatives was difficult enough in itself but it also caused problems in the Council working group with the other delegations never being very sure of the French position'.

The interviewee added 'at some stages the differences of opinion within the French delegations produced diametrically opposed views, which started to become ridiculous and laughable. In the end after a considerable amount of discussion within the French delegation, Madame de Montluc (Ministry of Culture) began to restrict her comments to the copyright sections of the directive. This was a direct result of the influence of Mr. Dobelle who chaired the Council meetings for the French Presidency and basically told his squabbling delegation to shut up so that progress could be made'.

On the Belgians the interviewee commented 'on copyright issues they tend to stick like glue to the French but this proved a little difficult during the database directive because there was no single French position'. The interviewee added 'the Belgian delegation, because of the personalities involved, was very much the agent provocateur of the Council working group and always adopted a very droit d'auteur approach'. She added 'for a very small country with no database industry as such, it played a disproportionately large role in the discussions'.

On the Dutch the interviewee agreed that Dutch case law did seem to suggest that the Dutch delegation would have been very active during the Council negotiations and she acknowledged that certainly they did have opinions but overall she commented 'their contribution really was hampered by the fact that they were represented by two women who simply were not the world's most lucid contributors to a discussion'.

On the UK the interviewee commented 'it had far and away the largest database industry, but as is always the case in Council negotiations the UK delegation played devil's advocate over the issues under discussion'. The interviewee commented 'the UK delegation understood the issues very well but were quite prepared to play along by causing problems and raising issues as and when they saw fit'.

The interviewee added 'from its initial position of trying to stall the directive, the UK delegation was in a difficult position because as is often the case, once an official has staked out their position it becomes difficult for them to retreat gracefully and so often the individuals will stick to their guns regardless of the facts'. The interviewee commented 'the reality was that there was no way that the UK copyright approach could work at the European level or indeed provide UK database producers with adequate protection'. She added 'the UK position changed gradually as they realised that they were wrong and that there was a need for more database protection and also importantly as pressure from the information industry began to grow and to push for further protection'.

The interviewee also recalled 'the Portuguese had problems with the directive and were always banging on about educational exemptions but there was simply too much resistance from the rest of the Council working group to any of their proposals'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'while my views on the aims of the directive and the methods conceived to achieve them did not change it was clear that as the process of the directive's negotiation continued the opinions of others towards it certainly did'.

1 **4. During the discussions with whom did you form alliances ? How influential do you feel**
2 **perspectives like your own were in shaping the directive?**
3

4 The interviewee stated that as a representative of the Commission it was not her role to form alliances,
5 although she acknowledged that she was always willing to discuss the directive with the Presidency,
6 Member State delegations, MEPs or other interested parties.
7

8 In terms of influence on the directive the interviewee commented 'in making policy the Commission has
9 to use every weapon at its disposal and in particular in the Council there are two main approaches that it
10 can use: 1. Work closely with the Presidency to run the Council meetings themselves i.e. really try to
11 keep control of the meetings, the timetable and topics under discussion 2. Spend time discussing the
12 proposal with Member State delegations outside the Council meetings'.
13

14 The interviewee commented 'in the meetings themselves you try to organise them by adopting a
15 positive style towards the proposal, you cajole and claim progress has been made even if it hasn't, you
16 remain up beat and talk about the developing solution'. The interviewee added 'above all the language
17 you use is important because it can change positively the atmosphere of a meeting'. She added 'for
18 some officials this ability to talk up a proposal and remain positive and up beat even when a proposal is
19 in trouble really is an art form'.
20

21 The interviewee commented 'Of course, it is unrealistic to imagine that serious disagreements will not
22 sometimes occur and then the alternative negotiating approach involves anything from looking upset
23 and displeased to blustering and finding contrary arguments including saying that a delegations view is
24 contrary to the treaty, or it is inappropriate in the context of the text being discussed, or it is simply
25 unfair i.e. any argument that will get your point of view across or enable you to maintain the proposal
26 intact'.
27

28 The interviewee commented 'when the Presidency cooperates things can move quite quickly, for
29 example agreement can be reached with the Presidency prior to Council meetings that new versions of
30 working document (which often have already been prepared by the Commission) are introduced into the
31 Council working group by the Presidency with the explanation that this new text has been worked on
32 frantically over night and the Commission can then feign surprise at its introduction'.
33

34 The interviewee commented 'other basic negotiating tactics include dealing with floating voters in the
35 Council which as part of the Commission's common practice means that you expend more energy and
36 time with Member State delegations who are undecided about important aspects of a directive under
37 discussion and try to persuade them of the appropriateness of the Commission position. This is instead
38 of wasting valuable time talking to those delegations whose positions are very strongly against you'.
39 The interviewee added 'however, things deciding who to approach also depends on the size of the
40 Member State (i.e. its voting power), or the size of its industry or indeed any factors that can be
41 appealed to that might strengthen one's negotiating position or powers of persuasion with a particular
42 delegation'.
43

44 The interviewee commented 'there are a lot of different techniques that one uses both inside and
45 outside the meetings of the Council working group but the tactics that one employs also depend on the
46 particular delegates concerned, their personalities and their susceptibilities to different forms of
47 persuasion, their knowledge on the subject and your knowledge of them or friendship with them. All of
48 these factors have the potential to influence the negotiations'.
49

50 Outside of the Council meetings the interviewee commented 'a lot of time is spent talking to the
51 delegations separately' These meetings being most frequently organised by the Commission with the
52 Presidency's cooperation, the main purpose of which is to assess the positions of each delegation and
53 evaluate which issues they will give ground on and which are the most difficult issues to reach a
54 compromise on.
55

56 The interviewee commented 'some of the negotiating work is done with the permanent representatives
57 (COREPER) because it is they who can strike deals and swap issues'. The interviewee added
58 'depending on the Member State delegation the relationships with permanent representatives could
59 either be very close or very distant, which made a difference to your approach. The permanent

representatives operate in a more overtly political environment that is not usually not open to the members of the Council working group although it is open to the Commission which enables deals to be done'.

The interviewee commented 'alongside these aspects of the negotiation process, a lot of the time it is just a question of being patient, and waiting to see what happens, because the working group delegations are always receiving input from other areas including their own governments whose positions frequently change over time and lobbyists'.

On lobbying the interviewee commented 'lobby groups can also be manipulated to the Commission's advantage in pushing a proposal forward and I can remember on several occasions getting industry representatives to make some presentations to the Council working group, which was a good antidote to the accusation from some Member State delegations that I was making up all the problems faced by the database industry'. The interviewee recalled presentations to the working group by Bob Hart who talked about definitions and by Dun & Bradstreet and Reuters about the information industry more generally.

On the issue of the interviewee's departure from the negotiations towards the end of 1994 the interviewee commented 'Firstly there is in the Commission no such thing as staying to finish a directive, you are always a civil servant'. She added 'I am surprised that anyone was interested, but quite simply I left the negotiations because I got a good job offer and decided to take it and I can't say that after I left the negotiations I really gave them another thought'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to her previous answers and commented 'in copyright matters in the EU you always end up with a droit d'auteur as opposed to a common law approach to copyright and if harmonisation is to be achieved at all this will always be case given that the majority of Member States have droit d'auteur traditions'.

This stated, the interviewee commented 'However in the end on the sui generis section of the database directive the UK managed to have its cake and eat it, by negotiating away the compulsory licensing provisions'. The interviewee added 'if I had still been negotiating on the directive I would have held out to keep the licensing provisions and anyway I can imagine that if they had been dropped with me negotiating on behalf of the Commission there would have been accusations from some quarters that UK officials in the Commission were assisting UK delegations. Ultimately I think DGXV ended up conceding too much in the final directive'.

The interviewee commented 'Mr.Gaster clearly had a different approach to me but I personally don't agree with the approach of putting difficult issues into the recitals of a directive because it only ends up causing problems with its implementation'. The interviewee added 'because the recitals are not binding on Member States it also means that you open up the possibility of larger differences in the directive as implemented i.e. less harmonisation'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee referred to her previous answers and mentioned the Dutch Van Daele case, the US Feist case and the European Court of Justice Magill decisions - all as having had an impact on the database negotiations.

The interviewee added 'the TRIPS agreement and in particular Article 10(2) helped in a sense in the Council discussion'.

The Interviewee commented 'although in reality the TRIPS text did not mean that much, it was significant in that it raised the international profile of the discussions on databases, not least because the EU is a signatory to TRIPS while it is not to the Berne Convention'. The interviewee added 'although I wonder what the future of TRIPS will be now that the international copyright community is better equipped and more experienced for debates on the impact of technology on copyright regimes'.

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 ?

The interviewee said that she doubted that the database directive had a very high profile outside copyright circles but that if it did it was as a direct result of the generally higher profile of copyright discussions both in European and International arenas.

The interviewee commented 'the database directive as adopted is not anything so grand as the cornerstone of the multimedia society although it could have been, but this was hampered by the film and music industry lobbyists (e.g. IFPI, Sony) who did not want CD's within the scope of the directive and the software industry which did not fight the multimedia battle despite encouragement from the Commission' The interviewee said that the lack of action from the software industry was probably because they had just got through the software directive which proved a tough battle.

The interviewee commented 'the lack of a coherent information industry view is hardly surprising considering that many of the companies involved are actively in competition with one another'. (e.g. During the software directive Fujitsu was in conflict with IBM and at other times it the software industry was in conflict with the music industry or equipment manufacturers against content providers).

During the passage of the directive the interviewee commented 'the whole debate about multimedia and the information society impacted on the discussions but if anything rather than helping the database negotiations these debates started to create confusion as questions over the digital realm, transient copies etc. became muddled up with the very basic issue of the means by which something is stored versus the investment made in the information that is to be protected'.

The interviewee commented 'For me the directive was always at base a very simple idea: if someone invests time, money and effort in collecting, shaping and storing information do they or do they not deserve protection'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that in her opinion the database directive as adopted was a success but she acknowledged that a large number of difficult issues had been placed in the recitals of the directive which had the potential to cause some problems during its implementation. She added 'we will have to wait and see how it turns out during its implementation'.

In terms of consultation the interviewee commented ' I was surprised to find that I had to go and hunt for information and opinions from industry, which was rather odd and uncharacteristic of my previous experiences in the copyright field, although this was with the exception of the extensive contacts I had in the US and in particular with the Information Industry Association (IIA) who following the Feist decision were very willing to talk'.

The interviewee remembered 'a day spent at Harvard University Law school where the Americans threw the worst they had at me on the directive including from Professors Samuelson and Reichman and information industry representatives who were unhappy about the reciprocity clause in the directive'

In Europe the interviewee commented 'the European Information Industry Association (EIIA) under the direction of Mr. David Worlock seemed to go a bit off the rails as the directive proceeded, while Mr. Charles Clarke representing the interests of publishers was generally quite supportive'. The interviewee added 'I also spoke to a number of other industry representatives in the UK but generally the reaction was quite subdued after the initial proposal'.

The interviewee commented 'in my opinion the rightholder industries tend as a whole to come to their own deals, cutting up the issues in terms of their own specific interests, instead of seeing the wider picture and joining together. Each industry has its own axe to grind that keeps them sufficiently apart to prevent a single coherent industry view. As a result the information industry had one opinion and the

other copyright lobbyists including software, publishing, music and film had others even though many of them clearly overlapped'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'the whole subject of databases was very intellectually challenging, especially at a time when discussions of the convergence of digital technology and law were just beginning'. The interviewee added 'sometimes I felt that the Council working group was simply not up to the task of discussing the directive, particularly its sui generis aspects'.

The interviewee commented 'given the Commission's publications since the adoption of the database directive in the copyright field it is clear that the proposal along with the software directive set a trend that is going to be continued in relation to future initiatives'.

In terms of the history of European copyright policy the interviewee added 'the 1988 Green Paper was the Commission's tour de raison of what it saw as being required to facilitate harmonisation and its light motif was its concern to marry copyright systems with droit d'auteur systems'. She added 'the Commission adopted the salami slice approach (i.e. a single directive at a time) to harmonisation'.

Looking back to 1986 the interviewee commented 'one regret I have is that we did not at that time go for a single European Copyright Act'. Although she acknowledged that it was felt at the time within the Commission, probably rightly, that such a huge copyright Act would never have made it through Council and that the step by step approach was the only feasible option.

The interviewee commented 'unfortunately as a result of this approach the overall balance of copyright is not maintained across the directives i.e. there are clear inconsistencies in the harmonisation that has taken place'. The interviewee added 'with the exception of the database directive the UK has been unsuccessful in getting its ideas across and most directives clearly lean to the droit d'auteur tradition'. The interviewee added 'philosophically speaking this has not adversely affected the UK's thriving music/book publishing and burgeoning film industry, although this is less to do with copyright protection and more to do with the dominance of the English language'.

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

The interviewee commented that copyright harmonisation was set to continue but in terms of integration it was only likely to form a small part of initiatives aimed at introducing the former Eastern block countries into the EU, a process that had already begun with programs like TACIS and PHARE.

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 ?

The interviewee commented 'For me the database directive was more than two years of extremely hard work during which the Council working group proved to be unnecessarily difficult and on several occasions I felt like simply giving up and letting the directive drop'. The interviewee added 'in my experience you have to have a very strong personality to withstand not only pressure from the Council and external lobbyists but also from within your own hierarchy'. As an example the interviewee commented 'during the software directive Alan Sugar of Amstrad Computers told Commissioner Bangemann that he would withdraw the sale of his computers from the European market because of the directive. This threat led Commissioner Bangemann to start writing letters to me to confirm and to the rest of the DGIII hierarchy to ask if we all knew what we were doing. Under such pressure you have to be strong to stick to your guns. It is not like academia where you can just write a paper that blames Commission officials for a poor directive, it is much more serious with you directly laying your reputation on the line, which is very hard'.

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 ?

The interviewee commented 'in general in Europe's harmonisation initiatives I am happy with how rights have been centred in the copyright balance but clearly in the future there will an increasing need to utilise the technology available to enforce those rights'. The interviewee added 'At base copyright protection remains a simple question of one's opinion on whether if you expend the time and energy in collecting information you have a right to be protected by the law'.

This stated, the interviewee acknowledged 'of course, you need to have rules so that you do not get abuses of the system by industry in terms of unfairly dominating a market or abusing their rights'. The interviewee added the 'European harmonisation has been necessary otherwise in each and every Member State, as in the case of the software directive IBM and Fujitsu would be fighting one another, which would be bad for the market-place'.

The interviewee commented 'while copyright is a balance, with the rise of digital technologies to quote Charles Clarke the answer to the machine is in the machine a cliché that does have some validity up to a point. This highlights that there is nothing inherent in the digital operation itself but that rather it is the nature of the control that it offers that requires our attention, this in turn is nothing to do specifically with copyright per se but rather the whole principle of property in whatever form'.

In summary, for the interviewee 'the nub of the issue is simply the extent to which you reward industry for its investment and at the same time the extent to which you keep information access free'. The interviewee commented 'an intriguing idea is that of a real-time stock-market for information where competitive forces would act on the buying and selling of information, i.e. when you wanted a pop song for a commercial you would go off and buy it'.

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

The interviewee did not articulate any views on questions of the interrelationships between copyright policy and other areas of information policy and she did not consider there to be any relationship between copyright and privacy.

The interviewee did not respond to suggestions that copyright is being over-stretched in the digital environment.

The interviewee did however comment 'in many respects my approach towards database protection was for the time too sophisticated for the policy-making environment in which I found myself'. The interviewee added 'I was keen to legislate against another Magill and I was also aware that a key concern from some quarters was always the impact of further copyright legislation on access to information which in essence is always a discussion over Articles 85 and 86 of the EU treaty i.e. competition versus copyright'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee referred to her previous answers.

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 ?

The interviewee commented that clearly as the EU expanded there would be a need to reform the EU's major institutions.

The interviewee added 'copyright is in the scale of things a discussion amongst rich men (countries) where making policy is always really hard'.

INTERVIEW no. 2

Head of Unit DGIII/F/4 European Commission

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'First it is important to be aware that the notion of harmonisation as being necessary for the internal market was recognised as far back as 1957-58 at the time of the Treaty of Rome. But it has always been difficult to balance the internal market goals with national copyright regimes'. He added 'This said, copyright and IPRs more generally have been an acknowledged part of the Community and the internal market for a long time and are referred to in Article 36 of the Treaty of Rome'.

The interviewee commented 'The specific background that led up to the database directive is relatively clear in that the directive proposal came during a period of concerted Commission action in the field of IPRs which followed on directly from the 1985 White Paper on completing the Internal Market. In this White Paper the need for IPR harmonisation was specifically mentioned (see from line 149) although at the time it did not provide a clear idea of what was to be done. This was due in part to the fact that copyright is a rather complex and technical area of the law especially at the European level'. He added 'Personally I knew very little about copyright prior to my arrival as head of unit DGIII/F/4 in 1990, although I did learn fast after that'.

The interviewee commented 'In my view at this time I would characterise the Commission's approach to IPRs and in particular to copyright as a real mess'. He added 'in the area of software for example it was still not clear what action was to be taken and the situation was being further complicated by a growing awareness in Europe of the on-going conflicts between Japan and the USA over these issues'.

The interviewee added 'Towards the end of the first Delor Presidency the President remained convinced of the need for something to be done about copyright. This was partly due to calls from France and Spain who were both eager for more protection following several judgements in the European Court of Justice (e.g. SACEM case) and partly because of other developments including the advancement of the GATT negotiations, moves in WIPO and developments in Eastern Europe in this field'. He added 'it was at this time that I left the cabinet of President Delor to join DGIII'.

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 ?

The interviewee commented 'Before I arrived in DGIII it had released a Green Paper in 1988 which was very much a scanning exercise highlighting issues in need of European action. It had been put together from questionnaires sent out to interested parties that enabled the identification of copyright issues including software and databases (chapters 5 & 6 in the Green paper). In 1989 the Commission took the first of these actions by releasing its copyright directive proposals on software which gave rise to the most amazing amount of lobbying'. He added 'In fact in my experience within the Commission the Software directive is the most heavily lobbied directive of all time on any subject that I am aware of'.

The interviewee added 'Although on the software directive the amount of lobbying was enormous the need for legal protection was reasonably clear, however with the discussions on databases the lobbying was limited and it was also unclear what exactly was to be done. This was still the case after the public hearing held on databases in 1990 at which the industry came down in support of a copyright solution'.

The interviewee commented 'while we pushed forward with the other directive proposals we were aware that the question of database protection was different from other areas of copyright and a clear

1 concern was how to prevent any stifling of academic research and development, for example if data on
2 soil temperatures in some vineyards were to be placed in a database, while we were aware that the
3 information might be commercially valuable we also knew that it should not be excluded from use in
4 further scientific research. It was to overcome these sorts of problems and to facilitate harmonisation at
5 a European level that we devised our innovative dual system of protection (copyright/sui generis)'.
6

7 The interviewee added 'the basic approach we adopted towards the database directive was that it was
8 needed for two reasons: Firstly, to harmonise the internal market so as to facilitate the development of
9 the European electronic information market, and secondly, to provide legal protection for these
10 information products against piracy'.
11

12 **3. Did your opinions change during your involvement with these discussions ?**
13

14 The interviewee commented 'No, they didn't change'. He added 'more generally we did however at one
15 stage early on consider the possibility of a single European Copyright Act but in the end because of the
16 difficulties involved in harmonising on the originality criterion and on other major differences between
17 the Copyright and Droit d'auteur traditions we decided against this approach'.
18

19 The interviewee added 'the database directive was a more complicated proposal than the software
20 directive because although much of the copyright section was borrowed from the software directive
21 there was also the sui generis right. The dual approach was conceived as two nets at differing levels that
22 together offered powerful protection. Where protection was lacking in one net, the other net provided
23 the additional protection required. Quite simply the sui generis right was introduced to offer protection
24 to those databases that would not meet the level of originality required to obtain copyright protection at
25 the European level. Our real strategy in DGIII was to be clear about the core of the directive and to
26 ensure that it remained regardless of what other changes were made'.
27

28 **4. During the discussions with whom did you form alliances ? How influential do you feel**
29 **perspectives like your own were in shaping the directive?**
30

31 The interviewee commented 'the software directive was the first directive to be proposed because of the
32 on-going dispute between the US Industry and Japan on the issue of software protection. I can
33 remember that before the release of the proposal we asked the software industry what it wanted but all
34 we got back was the noise from the fierce quarreling taking place. The US industry also involved itself
35 heavily in the software discussions and when we released the database proposal we were conscious of
36 an initial roll-over effect as the rights holders tried to carry on the debates through databases'. He added
37 'While we didn't want a repeat performance of the software directive we knew that ultimately it is the
38 Council who would take the executive decision so we didn't care what these lobby groups tried to push
39 for'.
40

41 The interviewee commented 'the basic idea for introducing harmonisation in database protection came
42 from Mrs. Czarnota who was the brains behind the proposal and as her boss I found that her ideas and
43 proposal were something I could both understand and support, although I did widen the compulsory
44 license provisions. We then worked towards getting the proposal adopted by the Commission which we
45 successfully achieved in January 1992 after a period of discussion with other Commission services,
46 most notably DGXIII with whom there was a healthy debate'.
47

48 The interviewee added 'At the time we were aware that in most Member States database protection
49 varied considerably and was rarely specific with only the Danes having a catalogue right and they
50 became delighted at the prospect that an aspect of the legal regime was going to give rise to an
51 important piece of European copyright legislation. At the same time the US information industry was
52 going around saying that it was protected and that there was no need for further legislation. However
53 the Feist case changed all that and shortly after the US industry began to support the idea of a higher
54 degree of protection for databases although they continued to reject the inclusion of a reciprocity
55 clause'.
56

57 The interviewee added 'then in February 1993 I left DGIII to take a another job and so was not directly
58 involved with the first reading of the directive in Parliament, although by this stage the directive was on
59 track for adoption'.
60

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented 'It is always the Council who take the executive decisions and so consequently have the most power. As a result in preparing and pushing for the adoption of copyright proposals you always know that if you can satisfy the droit d'auteur Member states you will get a majority in the Council. In the database directive the Anglo-saxons being practical recognised that their sweat of brow protection with its very low originality criteria would not be retained at a European level and so accepted and worked with the sui generis right as the best that they would get because of droit d'auteur dominance'.

The interviewee added ' I remember that at the beginning France, Germany, Spain and a majority of the other Member States were basically happy with the copyright section of the directive and did not reject the sui generis right just because it did not have any international agreement as most of them took on board the argument that if a directive was adopted the Community could then turn its attention to getting international harmonisation'. He added 'on the principal of copyright law I knew that France and Germany with their more theoretical concerns and desires about the originality criterion would not vote against a proposal if these were fulfilled, while the UK with its very pragmatic approach would go along with any proposal if it could be persuaded of the sense of it' He added 'often the UK has very good ideas but the practicalities of the Council mean that you can't ignore the other Member States regardless of the merits of a particular approach'.

The interviewee commented 'However at the beginning the UK which had the largest industry was initially hostile to the directive because they considered it would reduce the protection available to databases in the UK. Although the UK industry itself did not do a great deal of lobbying in the beginning on the directive and I can only recall attending a couple of presentations by Reuters and the Publishers around the end of 1991. At this time the industry was less aware of European discussions, although from what I later heard there was some industry involvement later on in the negotiation of the directive'.

On the role of the Parliament the interviewee commented 'I don't think that the aims of the database directive registered at all with Mr.Garcia-Amigos(rapporteur)but then this is always the problem with the Parliament where non-experts are required to deal with and respond to a range of complex issues in one proposal in a very short space of time before moving onto the a different set of issues in the next. I can remember hearing later on that the Parliament became more enthusiastic about the directive during its second reading but there were certainly no problems during the first'.

He added 'the problems the Parliament faces in dealing with proposals is partly to do with the whole structure of the European Institutions because unlike any national Parliaments the EP(European Parliament) is not the executive decision-making body and even under the co-decision procedure its powers have not been substantially increased'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee re-iterated that the Feist case was important and added that the inclusion of IPRs in the GATT was also important.

In this context the interviewee commented 'Bruce Lehman's attempts at the WIPO conference to improve the protection of databases in the US indicates that the issue is by no means dead and personally I think that the issue of international database protection will re-emerge in future WIPO or GATT meetings'.

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 ?

The interviewee commented that he was aware that some Commission officials had described the

directive in this way but he was not sure what they were trying to get across other than that this directive like the other copyright directives formed the basis for future Commission action in the field.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'In my experience of consultation on proposals criticism is normal. By the very act of producing any proposal the Commission automatically lays itself open to attack from all sides and so above all you must have a strategy and you must not worry about a little disagreement or criticism.

The interviewee added 'In the series of directives in the field of copyright in which I was involved the database directive was certainly the least lobbied and much less so than either the Cable and Satellite or the Rental and Lending right directives'. He added 'Naturally every proposal has to be dealt with individually and each brings together a different formation of concerns and alliances in Council. But in the field of copyright the division between droit d'auteur countries and copyright countries was always visible'.

In explaining the lack of lobbying the interviewee added 'In the database proposal the Commission was really ahead of its time because as you look around now with the development of the internet and the debates on the information society the need for the directive is truly obvious but at the time few industry groups could see that these developments were coming. Although some of the copyright experts in the Council working group were aware such as Mr. Jukka Liedes (who at the time was in EFTA(European Free Trade Area) and later in the Council working group after the accession of Finland into the EU and who is now Chairman of the IPR committee in WIPO) was immediately aware of the significance of the directive and supported it'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to his previous answer but added 'Looking to the future, a system of additional rights like the sui generis may prove an important top up for copyright which is basically an old system that has been adapted to each new technological development. As with the software directive there were many saying that copyright was inappropriate to protect it and even now there are some academics who would argue that we got it wrong but I think given the lack of cases that have occurred since the directive was adopted we have been proved right'.

The interviewee added 'After 26 years in the Commission even if I say so myself I know how to negotiate which is why Jacques Delor placed me in DGIII with copyright where I became involved both at the European level and internationally. In a short period of time we generated five directive proposals all of which were subsequently adopted and laid out an approach which is still being used by DGXV today'.

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

The interviewee commented 'At a practical there are likely to be a number of further copyright directive proposals released by DGXV in the near future but increasingly there will be a need for the Commission to begin to push for greater international harmonisation like at the recent WIPO conference because the digital environment is truly global'.

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 ?

The interviewee commented 'after the software directive and the rental and lending right directives those groups involved in copyright discussions knew me and my negotiating style. From the outset of any negotiation you need to take a basic decision about the strategy you will use to sell a particular

directive, even though you must accept at the outset that it may take 2-3 years to be achieved, although of course to some extent with experience you can anticipate and pre-empt certain types of problems with proposals'.

The interviewee added 'With the database directive we needed to think things out very carefully in advance because we wanted to avoid a repeat of the software directive where the Council in an unprecedented move sent the proposal back to the Commission for re-examination saying the reverse engineering provisions were poorly thought out. This as I recall made Commissioner Bangemann very furious'.

The interviewee commented 'of course the Council takes the final decision and it is important to be aware of its internal hierarchy; from Ministers at the top through the COREPER down to the working group. At the top Member States Ministers will vote in favour of a proposal even if they don't agree with it as long as it is good for their Member States standing to do so or at least they will not attempt to block the wishes of other Member States and so they will often abstain. At the bottom the Council working group do the real work of the negotiation and where they reach an impasse they give it to the COREPER to make a political decision. Above all it is a calculation at the beginning by the Commission as to what will be acceptable to the Member States because it is they who take the decision as to whether a proposal is accepted or rejected'.

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 ?

The interviewee commented 'copyright is obviously in a difficult position because it is rapidly becoming outdated in the sense that to enforce it in a digital environment we need to use electronic systems. While these systems overcome the threat of piracy they still leave the problem of how to collect payment for the use of copyright works and there may be other problems in their use such as the possibility that they will lead to the creation of information monopolies which would be totally against the Commission's approach'.

The interviewee added 'in the digital world these technical systems are however necessary because they enable rights holders to retain control over the use of their works. When rights holders begin to lose this control due to the challenge of technology serious problems begin, as for example in the case of the Book industry with photo-copying, in the phonographic industry with home taping and in the Broadcasting industry with video taping'.

He added 'In my opinion the dual approach of the database directive opens doors in this area which I expect will be investigated in the near future. While I don't think a sui generis right will be used again the idea of linking copyright with other legal approaches e.g. contracts may well become more common'.

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

The interviewee commented 'It is obvious that technologies like the internet create problems not just for copyright but also for other legal regimes like data protection/privacy and present old threats in new ways e.g. pornography, terrorism etc. The new digital environment also means that policy moves in one direction may impact in previously unconsidered ways on other policies. In this context I am aware of the work by Commissioner Bangemann who is examining the idea of a single set of regulations for the internet environment to cover all aspects of information use'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented 'These issues are still developing but I think the EU has a good chance to get things right because it is unlike other international forum where policy-making often requires unanimity and where there are many more countries participating. In the EU that there are 15 Member

1 States and the system of QMV is for example the main reason that it has been possible to get so far so
2 fast with copyright in Europe’.

3
4 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
5 **concerns over the issues of democratic participation and accountability ?**

6
7 The interviewee commented ‘One improvement would be to remove the rubbish that is talked about the
8 role of the Commission by the Eurosceptics. In the end it is always the Member States who ratify the
9 treaties and agree the policies not the Commission. It is therefore up to the Member States to decide
10 how the EU develops. Using a golf club as an analogy - if you join a club you have to accept its rules
11 but this does not mean that you can’t propose new rules or changes to the old ones. But you do have to
12 sit down every Wednesday to discuss it instead of just shouting about it from the outside’.

13
14 The interviewee added ‘ the UK’s wait and see attitude that worked so well for it during the British
15 Empire doesn’t work in the EU because in Europe you must be on the inside if you want to influence
16 anything. This is something that the French realised early on and then a little later was realised by the
17 Germans, both of whom send their very best people to Brussels. This is not true of the UK, although it
18 is an important lesson that Tony Blair may learn’. He added ‘the UK’s wait and see policy has as
19 Douglas Hurd, Lord Howe and Nigel Lawson have said always been the UK’s position in Europe
20 except for three times in history when the continent looked set to move against it: Napoleon, the Kaiser
21 and Hitler when it acted decisively’.

INTERVIEW no. 3

Proposal rapporteur DGXV/E/4 European Commission

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that he formally became involved in the database directive in the second half of 1993 just after the amended proposal. Initially this involved attending meetings both in Council and with interested parties in the company of Commission officials including Mrs. Czarnota.

The interviewee commented that discussions on copyright harmonisation and as part of those the database discussions arose from 'ground breaking work that was done during the late 1970's on copyright (e.g. Professor Adolf Dietz) as part of work undertaken at the request of the European Commission into investigating the barriers to the completion of the then Common Market, a market which was originally anticipated to have been completed in 1969'. (a date which the interviewee commented was 'obviously very pre-mature' but he added 'the Community had to start somewhere and it is a tactic that has been used repeatedly as in the goal with the introduction of the Euro (monetary Union) i.e. if you do not have a date nothing gets done.

The interviewee commented that 'these studies were needed to clarify the general obstacles to what became the internal market and in the case of copyright to establish that there were marked differences between copyright systems and droit d'auteur systems and that these differences were a barrier to the completion of that market and that therefore harmonisation was necessary'. He added that this was 'especially needed in the case of copyright because it was not specifically mentioned in the EC Treaty'.

The interviewee further commented that 'by the late 1980's there was a growing awareness of the challenges that new technologies were posing to copyright regimes and how this was leading to an increasing need for harmonisation of these regimes to enable the internal market to be completed. After the 1985 White paper on this issue the Commission quickly turned its attention to copyright issues which led to the Commission 1988 Green paper on copyright and the challenge of technology which indicated the need for policy actions on Software, Databases and a range of other issues'.

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 ?

The interviewee commented that when he was first confronted with the database directive in 1993 he felt along with others he spoke to including the UK delegate in Council Graham Jenkins that 'the directive was all rather a mess'. Although he said that 'it was a great assistance that Mrs.Czarnota had managed to successfully get the proposal through the College of Commissioners in the Commission but the proposal text clearly had a number of problems', in particular he said that 'the sui generis right was ambiguous and was leading to considerable confusion and disagreement the line between what would be deemed unfair extraction and what legitimate competition'. The interviewee commented that from this period on it became his responsibility to steer the proposal to a successful adoption as quickly as was possible.

The interviewee commented that he was aware that 'after discussion of the legal protection of databases in chapter 6 of the copyright Green paper and following a public hearing in April 1990 at which 60 organisations were given the opportunity to present their views, the Commission moved forward to the preparation of its proposal'. He added that 'initially the database proposal was released under the cooperation procedure but later as a result of Maastricht all legislation concerned with the internal market was placed under the co-decision procedure'. The interviewee commented that this shift of policy procedure mid-way through the negotiation of the directive was 'confusing not just for the

Commission itself but more especially for Lobbyists and the Parliament whose powers were extended under the new procedure'.

The interviewee commented that by 1994/1995 he became aware that 'the time was ripe for concluding the directive' not only because 'the issues themselves had matured but crucially because Multimedia and the information society had raised the profile of discussions on electronic information and had given the negotiations increased impetus to generate a solution'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that during the passage of the directive his views did change 'from a position of limited to comprehensive knowledge of the directive and of where the problems lay that were preventing the adoption of the directive and of which changes needed to be made to satisfy as many interests as possible'.

The interviewee added that by the time of its adoption he was '85% satisfied with the directive, although in the end the need for political resolution forced certain changes to the text that were not ideal'. This was compounded by the fact that by the end of the negotiations 'the work load was extreme and the lobbying burdensome leaving little or no time to make amendments and to get the policy adopted in the time limits imposed by the co-decision procedure'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that in his position it was not his role to form alliances. This stated, the interviewee could recall that 'at the beginning of the negotiations in Council the German delegation could not see the need for the directive and felt that unfair competition rules provided sufficient protection'. He added that this was partly due to 'the high originality criterion for copyright protection and strong unfair competition rules in Germany'.

The interviewee also recalled that 'Denmark and later Finland and Sweden in line with the tradition in the Nordic countries had expressed reservations about the directive proposal on the issue of exceptions particularly with regard to the sui generis right'. He added that 'the compulsory licensing provisions were a Trojan horse in this regard as a way of introducing the new right but highlighting that its scope did not conflict with copyright or other IPRs'. This said the interviewee commented that he would have preferred 'considerably more harmony between the exceptions under both rights and wanted them not to be optional because this was not the best solution for the internal market to have different exceptions being applied across Member States'. In this regard, the interviewee also commented that he was aware 'many other controversial issues ended up in the recitals of the directive rather than in the main text because they were blocked by Member States and the Parliament'. This he commented raised the issue of whether the recitals had to be implemented by Member States along with the directive text, which he argued they must.

In terms of influence the interviewee was very clear and commented 'it is not an exaggeration to say that without my efforts there would have been no database directive'. He recalled that towards the end of the negotiations in the Council working group 'preparing the draft documents to take to these meetings left little time for lunch with barely time for a sandwich and tea'. He added that 'things became so frantic towards the end that the rhythm of the Council working party was changed with sessions sometimes lasting 2 or 3 days at a time and consisting of very long days of 10 hours or more'. The interviewee commented that this was possible 'thanks to the French Presidency who had the responsibility to set the calendar and timetable for these meetings'.

In the opinion of the interviewee 'the most crucial meeting of the negotiations on the directive was the penultimate Council working party meeting at the end of May 1995 during which a political deal was struck between the Member states that led to an agreement to abandon the issue of compulsory licensing in return for checks and balances on the scope of the sui generis right'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to his previous answer and added 'in the early stages of the directive Mrs.Czarnota as the original draughtsman was important in getting the proposal adopted by the Commission and later the Parliament in extending the term of sui generis protection to 15 years'. He added 'in the latter stages of the directive apart from my own involvement the chair of the French Presidency Mr.Dobelle also played an important role especially in France in his work with the SGCE (Secrétaire Générale pour les relations avec la Communauté Européenne) which coordinated disputes between the different French Ministries - in the case of the database directive between the Ministries of Culture and Industry'. The interviewee commented that in the negotiations the 'representative from the French Cultural Ministry finally gave ground on her very stubborn droit d'auteur position following pressure from the Presidency'.

The interviewee commented that in his experience in negotiations 'human relations are of vital importance because solutions are always possible if people are willing to be open about their positions'.

The interviewee also mentioned Mrs.Palacio as Parliamentary rapporteur during the second reading but when asked about the organisations involved he became very vague and said he could not recall specific organisations and downplayed their influence. The interviewee also commented that suggestion that DGXV was too closely aligned with the right-holder industries was simply not true.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that prior to the release of the database proposal the US Feist case and the Dutch case Van Dale had been instrumental in raising awareness of 'the large loop-holes that existed in the law for protecting compilations and by association databases'.

But from that point on in the international context the interviewee commented that he had the impression that the 'US and Japan were a little sleepy over the issue, partly because they doubted that Europe would adopt the database directive and there was clear surprise when the directive reached a common position'.

He added that 'the US information industry supported the Directive in general but did not like the idea of reciprocity although when they understood that the Commission intended to push for an international instrument protecting databases along the same lines as the directive they became less obstructive'. This was he said because they 'realised the benefits of trading in the global village where no frontiers would block their international trade'. This said, the interviewee recalled that many critics of the reciprocity clause in the directive 'accused the Commission of a Fortress Europe mentality' this he felt was unjustified and was based on 'the misconception that copyright offered sufficient protection to databases and a dogmatic aversion to a sui generis type solution'.

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 ?

The interviewee commented that 'the higher profile of the directive was directly related to the development of initiatives on the Information Society and the buzzwords like multimedia which have come to mean any and everything in the discussions of the impact of digital technologies'.

In this context, the interviewee commented that 'it is too early to be able to fully assess how the multimedia society will develop but the database directive is now part of the 'acquis communautaire' and will have an important and direct influence on future copyright policy for the digital environment'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that 'the task of policy consultation is enormously difficult and disproportionate to the resources available with many of the activities undertaken in the interests of transparency being burdensome and detrimental to the passage of policy'. He added that often 'the

1 volume of submissions is enormous and requires a good deal of filtering which takes time and resources
2 and on top of this there is a need to meet up with interested parties to listen to their views'.

3
4 The interviewee commented that in his experience 'in recent years the volume of lobbying has increased
5 greatly' He added that the process of lobbying tended 'to lurch from periods of complete inactivity
6 when lobbyists believed that little was happening with a proposal to periods of dramatic action when
7 they thought things were happening' he commented that 'often this activity is inappropriate and founded
8 on incorrect information but it still holds the process up because the Commission feels obliged to
9 respond to requests for information or face-to-face meetings'. As an example of this the interviewee
10 pointed out that after the penultimate Council working group meeting 'lobbyists were unaware that a
11 deal had been struck and issued various statements which completely misrepresented the actual
12 situation'.

13
14 The interviewee also commented that 'a key area of note is leaks and misinformation which occurs in
15 the negotiation process and is often a tactic deployed by groups involved to increase pressure on
16 particular issues or for other reasons'. Aligned to this the interviewee added that 'information security
17 has also become increasingly difficult to maintain as lobbyists telephone any and everyone involved and
18 frequently play Commission officials off against one another in a game of Ping-Pong to try and obtain
19 some information'. In his opinion the Commission particularly was facing an increased problem of
20 'being under siege from lobbyists which made the job of consultation and ultimately policy-making that
21 much more difficult'.

22 23 **C. European policy for Copyright**

24 25 **9. How would you assess the significance of the Database directive for current and future** 26 **European copyright policy formulation ?**

27
28 The interviewee referred to his previous comments and added that 'the database directive is already
29 being used as an example of the guiding principles upon which the Commission is basing its future
30 copyright proposals and it will be very important for the future processes of harmonising copyright in
31 the digital age'.

32
33 The interviewee also commented that 'in situations where policy-making is not always be able to keep
34 pace with technology in the field of copyright legislation the dual approach of the database directive is a
35 good example of how to adapt an existing set of laws to the new challenges that have presented
36 themselves'.

37 38 **10. As the global Information Society develops what role will copyright harmonisation play** 39 **in the process of European integration ?**

40
41 The interviewee commented that copyright harmonisation is 'quite simply one of the most important
42 issues for the EU economy given that trading in IPRs constitutes more than 5% of the EU's GDP'.

43
44 He added 'clearly harmonisation must continue not just at the European level but also at the
45 international level to facilitate the operation of the market in the global economy' In his opinion these
46 issues are 'growing in importance as more and more services go on-line'. In this context he re-iterated
47 the database directive's importance in setting out 'a new approach to the challenges faced by copyright
48 regimes from new technologies'..

49
50 This stated, the interviewee acknowledged that the WIPO diplomatic conference made little progress on
51 the issue of databases and he doubted that over the next few years closer integration would occur as
52 more effort was put into the expansion of the EU to include countries from Eastern Europe. In his
53 opinion this was quite 'typical of the ebb and flow of European Politics which is related to the
54 economic situation across the Member States such that in times of recession, political integration
55 becomes blocked or slowed down'. In this regard, he commented that given 'its Eurosceptics and its
56 history the UK is a special case but I doubt that the British people themselves are more or less
57 Eurosceptic than their fellow Europeans'. He added that the UK press were an important factor in
58 Euroscepticism as was the UK's physical geography, whereas continental Europeans had considerably
59 more experience of one another's traditions and were not as a consequence as threatened by further

1 integration. He did however contextualise these comments by pointing out that in the mid-1960's it had
 2 been the French who were Eurosceptics with De Gaulle's 'empty chair' policy. Ultimately he doubted
 3 that Euroscepticism would prevent an ever closer union.

4
 5 **11. Which other factors, if any, would you identify as being significant in affecting how**
 6 **copyright issues are framed and discussed at the European level ?**

7
 8 The interviewee commented that this question could be responded to in a number of ways. Firstly in the
 9 Commission itself, the role of the College of Commissioners was very important because it was here
 10 that 'the technical and political forces at the top of the Commission meet head on' for the interviewee it
 11 was always curious to see how 'Member State governments who appoint the Commissioners can so
 12 frequently complain about the bureaucracy of the Commission to their electorates'.

13
 14 Secondly in terms of the Member States during the database directive and earlier in the software
 15 directive the interviewee commented that 'it was very much a common law approach that was more
 16 dominant whereas for the rental and lending right directive it was a droit d'auteur approach'. He added
 17 'this difference of regime is always a factor in discussions of the harmonisation of copyright at the
 18 European level and almost always is a point of conflict and was one of the main reasons that the
 19 Commission decided on the sui generis right in the database directive'. Often it is the UK, Ireland and
 20 sometimes Holland versus France, Belgium and Italy.

21
 22 Another factor affecting how copyright issues were discussed was the shifting alliances between
 23 Member States, which could have a dramatic impact on the policy process. In this regard the
 24 interviewee commented that there were a large number of reasons for these changing alliances including
 25 'cultural factors are often the basis of alliances between Member States'. In his experience 'there are
 26 traditional alliances between Nordic countries and between Mediterranean countries as well as often
 27 between France and Belgium and the UK and Ireland'.

28
 29 The interviewee commented that specifically in the copyright field 'alliances were also formed on the
 30 basis of the Member States that were net importers or net exporters of IPRs. He added that Member
 31 States also frequently engage in non-issue related bargaining 'particularly where there is recourse to
 32 QMV, although this did not happen in the case of the database directive'. The interviewee commented
 33 that 'the policy process is often far from rational with personality and nationality playing a key role as
 34 to how a policy proceeds'.

35 36 **D. Information policy-making and Copyright in the digital age**

37
 38 **12. What threats and opportunities would you identify from the extension of copyright concepts**
 39 **into the digital realm ?**

40
 41 The interviewee commented that ICTs provide unique opportunities for the exploitation of copyright
 42 materials and of presenting and distributing them throughout the developing global market place'. He
 43 added that 'it is a real revolution that will benefit not just our economies but also our creativity'.

44
 45 In the context of the information society initiatives the interviewee said he was 'surprised that
 46 Commissioner Bangemann, who has been so active in pushing the building of the information infra-
 47 structure has not also focused on content creation because in the end no matter how good the motor-
 48 way you build it is ultimately a waste of time if you do not have any cars to put on it'.

49
 50 The interviewee identified a range of risks to electronic works including 'the ease with which they can
 51 be manipulated, the difficult of maintaining their integrity and of course piracy'. However he added
 52 that with 'it will be possible to overcome these problems and technology will provide part of the
 53 answer'

54
 55 The interviewee also said however that 'the sheer quantity of information that can now at the touch of a
 56 few keystrokes be transported right around the world will continue to pose problems in itself and not
 57 just in terms of information overload for the individual'. He also raised the danger of the creation of
 58 'copyright havens where no protection exists'.

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

The interviewee was not sure about the interrelationships between different areas of information policy.

He did comment that there are 'indirect concerns for issues such as privacy, media ownership, encryption and culture as more copyright material is put on-line but these can be adequately addressed by other legislation such as the data protection directive'.

The interviewee commented that the question itself 'comes from a very Anglo-Saxon perspective towards information'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee referred to his previous comments but added that in many respects he was 'unhappy with the extent to which in recent years initiatives have been started on just about everything all with the sole purpose of incorporating the phrase information society and getting in on the act. This 'living and dying in the information society' only ends up wasting paper'.

The interviewee made the point that 'co-ordination even within a single Commission services is often difficult and it is simply not possible given the time constraints, influence of politics, and organisational goals to address the whole of range of relationships we have with information in a single policy. The practical constraints of having to make a manageable document also mean that demarcations between policy areas have to be maintained or else it becomes impossible to scope the aims and objectives of any particular policy'.

The interviewee acknowledged that as a result of these constraints 'in the Commission there has been a sectoralisation of policy areas by nationality' As an example the interviewee commented that 'while the French have a strong hold on agriculture the British run telecommunications'. This was compounded by the fact that at the technical level of middle management while different nationalities do work together they all tend to form networks of fellow nationals.

The interviewee also commented that policy-making was also problematised by a tactic used by some Member States or powerful lobby groups to block Commission proposals. This he referred to as actionism whereby 'Commission officials end up working on proposals that will almost certainly never become formal directive proposals'. In the interviewee's experience 'almost 50% of the work being done by the Commission is in some way part of this process'. The interviewee added that 'most problems of this type have arisen or been excentuated since Maastricht and the agreement on subsidiarity, as Member States have repeatedly blocked European policy by exerting these new powers'.

For the interviewee further commented that 'Member states can start initiatives and then turn around and blame the Commission if they do not proceed quickly enough or in a manner that they like when often these proposals have little or no chance because they are deliberately misconceived as a blocking tactic on other policy initiatives'. In terms of the use of these tactics the interviewee commented that 'the larger Member States such as Germany and the UK are particularly active'.

In the copyright field the interviewee commented that 'the Dutch have recently become less supportive of harmonisation initiatives while the Benelux countries and Italians have remained steadfastly Eurofiles along with the French'. The interviewee commented that in trying to understand European policy-making 'the simplistic division between neo-Liberals and dirigistes is useful for grasping the notion of difference but is not sufficient to encapsulate the range of alliances and views on Europe and the way that these views change over time and affect policy stances in particular areas'.

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

3
4 The interviewee commented that policy-making would be improved overall if Member States were 'less
5 dogmatic and more pragmatic in their positions particularly in the copyright field'.

6
7 The interviewee said before answering the second part of the question it was important to determine
8 what one meant by democratic. Although he readily acknowledged that there is a marked difference
9 between the theory and practice of democracy he said 'at the European level with all its multi-
10 culturalism, the huge range of agendas and political spectrums there is a stronger sense of democracy,
11 of keeping people aware of what is going on than is sometimes seen within Member States'.

12
13 The interviewee also commented that he anticipated that 'the use of ICTs could enhance not only the
14 delivery of services to the consumer but also access to information for the citizen, which would be
15 beneficial for democracy as a whole'.
16
17

INTERVIEW no. 4
Representative from DGIII/F/4 European Commission

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I first became aware of the database discussions in May 1991 shortly after joining the Copyright Section of DGIII (European Commission) headed at the time by Jean-Francoise Verstrygne, where I worked until October 1993'. The interviewee added 'after this I joined a Brussels law firm to work on Audio-visual law until I took up my present position in IFPI(International Federation of the Phonographic Industry) in October 1996'.

The interviewee described Mrs. Czarnota as 'the mother of the database directive' and recalled that whilst 'at the time of my arrival in the Commission there was not a great deal of internal discussion taking place on the databases directive, although Mrs.Czarnota was definitely the official in charge of pushing it through to adoption'. This stated, the interviewee added that 'Mrs. Czarnota spent a lot of time discussing and explaining the directive to Mr. Verstrygne and ended up requesting more assistance at around the time that Bob Hart, with whom Mrs. Czarnota had been working, left the Commission'. (Mr. Hart worked as a national expert at the Commission during the Software directive). 'it was at this time that I became directly involved in the database directive up until just after the first reading in the Parliament. My involvement included attending discussions in the Council working group, at the Parliament and within the Commission'. This stated, the interviewee commented that 'overall my involvement in the directive was relatively limited and during this same time I was also involved in the rather dead issue of trying to get Member States to become signatories of the Berne & Rome Conventions'.

The interviewee commented that 'in DGIII the work on the directive was basically organised by Mrs.Czarnota who led the meetings in the Parliament and in the Council, while Mr.Verstrygne who ensured continued support for the directive from within the Commission hierarchy'.

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 ?

The interviewee referred to her previous answer and added that her main involvement was 'to attend several meetings in the Parliament where my role was to gather the views of the different committees involved in discussing the proposal including the legal affairs committee and the economic and monetary affairs committee. Even at this stage there was already a lot of confusion and misunderstanding amongst Parliamentarians, especially about the scope of the directive and the relationship between the copyright and sui generis rights in the text'. She added 'I remember finding it difficult to understand why there was so much confusion about the directive because as I recall Mrs. Czarnota had explained the proposal and its purpose extremely clearly. I remember thinking that if I as a young lawyer could understand it why can't the Parliamentarians'.

This stated, the interviewee commented that 'some of the confusion was certainly to do with the style of the original proposal, which many found rather over complex. This was the main reason that the Commission suggested the document be split into two separate chapters (copyright/sui generis) to facilitate easier understanding'. She added that after her dealings with the Parliament she came away with the strong impression that they did not understand the directive or the issues underlying it.

The interviewee commented that in the Commission (by this stage DGXV) 'we were surprised by the type and number of minor amendments that were contributed to the directive proposal by the Parliament at the first reading. In our estimation while there were a large number of minor changes requested, overall, apart from an extension in the term of protection to 15 years for the sui generis right, all were to

1 little effect. I can recall that, if anything, we felt that far from clarifying the proposal most of the
2 Parliament's amendments had only succeeded in making it more complex and difficult to read'.
3

4 The interviewee further commented that 'During the first reading in Parliament the rapporteur Mr.
5 Garcia Amigos was very dedicated to the proposal and I had the strong impression that he had the issue
6 under control and that there was not likely to be any major opposition from the Parliament to the
7 directive'.
8

9 This stated, the interviewee commented that the lack of difficult in Parliament 'must be mainly
10 attributed to the negotiating skills of Mrs.Czarnota who from the very beginning was very clear about
11 what she wanted to achieve and what strategy to adopt to achieve it'. She added that in her view 'Mrs.
12 Czarnota is a truly brilliant negotiator with a great ability to express herself in a very clear and capable
13 manner'.
14

15 In terms of the key factors that led to the adoption of the directive the interviewee mentioned 'the
16 extension of the term of protection for the sui generis right to 15 years by the Parliament and the
17 extension of the scope of the directive to include all databases as well as the removal of the compulsory
18 license provisions by the Council'.
19

20 **3. Did your opinions change during your involvement with these discussions ?**
21

22 The Interviewee commented 'No, they didn't'. This stated, the interviewee added that after she left the
23 Commission she 'only followed the directive from afar and so retained the views I formed during my
24 time in the Commission'.
25

26 The interviewee commented 'Overall there was clearly a need for the legislation and I was glad when
27 the directive was finally adopted'.
28

29 **4. During the discussions with whom did you form alliances ? How influential do you feel**
30 **perspectives like your own were in shaping the directive?**
31

32 The interviewee commented that in her role as a Commission official it would have been 'inappropriate
33 to have formed any alliances with interested parties'. This stated, the interviewee added that having
34 made some comments on the role of the Commission and the Parliament she could comment on the role
35 of the Council.
36

37 The interviewee recalled that 'in the Council as in the Parliament there was considerable discussion
38 over the scope of the directive and more particularly whether the sui generis right was in fact
39 introducing the protection of data per se. The experts of the working group and in particular the
40 representative from the French Ministry of Culture were very much against allowing this to happen.
41 This opposition was foreseen by the Commission and was the main reason that the compulsory license
42 provisions were introduced as a counter-balance'.
43

44 The interviewee added 'that the compulsory license provisions were ultimately dropped from the final
45 adopted text was a disappointment to me, because I felt that after the experience of the potential
46 dangers of abuse of a dominant position illustrated by the Magill case these provisions should have
47 been retained to clarify the legal position. If there had already been an existing legal remedy to Magill
48 then the courts judgement would not have been laid down as it was'.
49

50 The interviewee also recalled that 'a lot of the discussion in the Council working group focused on the
51 coverage of the directive and in particular whether or not it should be extended to cover non-electronic
52 databases'. The interviewee added that 'In the end I was left with the impression that a lot of time in
53 Council working group was spent on issues that were really peripheral to the core of the directive which
54 was quite simply to provide legal protection to database producers who had invested time, effort and
55 finances into creating their databases'.
56

57 The interviewee also recalled that 'there was also a good deal of discussion on whether and at what
58 level on-going investment would constitute substantial change to a database and thus the rolling 15 year
59 sui generis protection. On this point I remember that Reuters lobbied hard for perpetual protection for

1 their dynamic databases on the basis that they were continually changing and receiving on-going
2 investment'.

3
4 The interviewee also commented that 'surprisingly there was little discussion of the likely economic
5 impact or otherwise of the directive'. She added that after attending 3-4 Council meetings prior to the
6 Parliament's first reading of the proposal 'the Council working group still did not seem to understand
7 the directive. I mean, of course they could understand the directive intellectually, but there was a clear
8 tendency on the part of many delegations to adopt a very dogmatic and copyright purist position that
9 viewed only those works with a high level of originality as eligible for copyright protection. They were
10 dogmatic in as much as initially they refused to acknowledge that because of the huge investments
11 required to create databases they also deserved protection even if they did not meet the necessary level
12 of originality required to attract copyright'. She added 'one of the main concerns of these individuals in
13 the Council was that they did not want to end up providing for a monopoly on facts'.

14
15 In this regard, the interviewee recalled a particularly example that was discussed in the Council working
16 group. The example and question that arose was as follows - 'if a list of the names of all the UK's train
17 stations were collected and placed in a database would this place a monopoly over the names of the
18 UK's stations?' the interviewee recalled that Mrs.Czarnota gave a two-fold response which was:
19 'Firstly, even if you were to give the list protection on the basis of the time and effort invested in
20 collecting the names, this would not prevent some-one else going around and making the same list again
21 (i.e. Primary collection of the data could not be prevented), and Secondly, in order to prevent just such
22 monopolies on data the directive contains the counter-balance of the compulsory license provisions'.

23
24 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
25 **Database directive ? How was this influence exerted during the policy process ?**

26
27 The interviewee referred to her previous answer and commented that 'in some senses, as a member of
28 the Commission at the time, it seems inappropriate to talk of influence over the directive but certainly
29 the Commission as represented by Mrs. Czarnota in particular was instrumental in both producing the
30 proposal and in pushing it forward towards its adoption'. She added that 'in my experience the
31 Commission naturally has a very important role in any piece of legislation not only in terms of the role
32 established for it in the treaty but also at a practical level on the ground in being able to propel a
33 proposal forward'.

34
35 The interviewee commented that in terms of interested parties she was only aware of the involvement
36 of; 'Reuters, who were represented by Catherine Stewart and John Stevens and Reed (now Reed-
37 Elsevier) represented by Quentin Rappoport'. She added that 'it was only relatively late on in the
38 discussions of the proposal that IFPI(International Federation of the Phonographic Industry) became
39 interested in the discussions as a possible means to provide protection for musical compilations. While,
40 at the time, Mr.Verstrygne had good contacts with IFPI and received their deputations with a smile it
41 was clear that protection was not going to be extended to include phonograms'.

42
43 She added 'Alessandra Silvestro(who later joined Time Warner) represented IFPI's interests at the time
44 and did a lot of work on the directive, but I can't recall the music industry being represented by an
45 individual companies such as Polygram or Sony. Companies like the Film industry only later became
46 active on copyright issues with the release of the Commission's 1995 Green Paper'.

47
48 **6. Did any international policy developments impact on the outcome of the Directive?**

49
50 The interviewee commented that 'the US Feist case which occurred prior to the proposal was a
51 significant factor in shaping the approach adopted in the directive proposal, as was the Magill case
52 which was a major part of the reason for the introduction of the compulsory license provisions which
53 were a kind of pre-emptive strike against it'.

54
55 The interviewee commented that as far as she could remember 'at the beginning of the discussions the
56 information industry was generally in favour of the proposal while the UK government in particular
57 remained unconvinced of the need for a directive. Some of this was certainly attributable to the fact that
58 the same UK officials who wrote the UK's Copyright Act in 1988 were those representing the UK in
59 the Council working group discussing the database proposal'. In other words 'these individuals were

unconvinced of the need for the database proposal because they felt that the issue had already been dealt with adequately in their own legislation on compilations and so wanted to resist any new legislation which would alter the balance of protection of databases in the UK'.

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 ?

The interviewee commented 'I don't think that the database directive is the cornerstone of the multimedia society but by excluding the right of private copying in electronic databases, the directive took a significant step forward for Commission policy on copyright in the digital realm'.

She added 'the issue of a different approach to the digital environment is interesting and likely to prove the main and most significant aspect of the directive outside of the protection it offers'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'in my experience the Commission makes every effort to ensure that the full range of interests are given the opportunity to express their views. As the Commission has repeatedly stated it is eager to maintain a balance of rights in copyright'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that it was a difficult question to answer in relation to the future because 'we will just have to wait and see how significant the directive turns out to be. However for the present it is already clear that the directive along with software[directive] is an important building block for the Commission's approach to copyright legislation in the digital environment'.

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

The interviewee referred to her previous answer but added that 'as the EU expands conformity to the existing level of copyright harmonisation will be expected of any new Member States'. She added that she was aware that in a number of prospective new Member States efforts were already being made to harmonise their copyright legislation to the level in the EU.

The interviewee also commented that 'while the Commission's follow-up communication indicates that there will shortly be further copyright directive proposals, for example, on the issue of copyright exemptions, in terms of harmonisation proposals will only continue as long as the internal market necessities can be used to justify action and in reality the internal market must be considered to have almost been completed'.

She added 'at the same time because of the global dimensions of the information society I think that there will be increasing efforts to further harmonise copyright at the international level where I think the Commission will become more active as indicated most recently by its efforts at the WIPO diplomatic conference. However, as the WIPO discussions proved there is still considerable disagreement over how far copyright can be pushed in the digital environment'.

She also commented 'the very effective lobbying by telecommunications operators and equipment manufacturers over the transient copy and liability issues at WIPO came as a shock and surprise to all the traditional copyright holders'.

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 ?

The interviewee said that she had nothing further to add in response to this question.

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 ?

The interviewee commented that 'the main threat to copyright from digital technologies is simply the increased capabilities for piracy, while the opportunities range from new ways to communicate through to development of new forms of products and services that can be delivered on a global scale at the touch of a button'.

In dealing with the threats the interviewee commented that part of the answer would certainly come from the technology itself. She added that 'In my opinion, these new technologies such as ECMS(electronic copyright management systems) are not fundamentally new ways for protecting copyright material, rather they are part of the long history of attempts by rights holders to legitimately protect their investments'.

The interviewee commented that in her opinion 'there has never been a right to copy as such rather rights holders have under special circumstances given permission for such exemptions to their rights. As technology has advanced many of these anomalies which have been the basis for justifying some of these exemptions have been removed and I think we are rapidly moving towards a situation where payment will be able to be legitimately demanded each time a work is used'.

The interviewee further commented that 'it is interesting to see how exceptions evolved because put simply many of the existing exceptions in analogue environments are the result of the rational decision that you make it legal to copy because you can't stop it for example, photocopying'.

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

The interviewee commented that 'firstly it is important to acknowledge that copyright does not regulate information as such, rather it provides protection for creativity. So, in my opinion copyright is linked not to information but rather to creativity'. She added 'Of course, there is some slippage along this line such that copyright can and is used to protect information (i.e. non-copyright works in the legislation of a number of Member States), but this is more to do with an economic approach to copyright as in the UK's sweat of brow'. The main point is not to confuse the issue of copyright protection with debates about censorship and restricted access'.

This stated, the interviewee commented that 'the use of ECMS does raise the potential danger that they could be used to protect non-copyright works including public domain information but this is a political problem and does not change the fact that approaches such as the sui generis right employed in the database directive are fair. Perhaps the best way to overcome this problem is to distinguish between access to a work and obtaining a copy of a work , for example, a public domain film can be made accessible without allowing copies to be taken. however, if investors have expended time and money into bringing such a film back into use (as publishers) then they should be able to get protection, just like the various book publishers who publish versions of the works of Shakespeare'.

The interviewee commented that she was aware 'of concerns expressed by some that there is a potential danger the greater control that can be exerted over information in the digital realm might lead in some instances to more restricted access but it will be up to the Member States and the Commission to ensure that this does not occur'.

On the issues of privacy and data protection, the interviewee commented that she did not see direct connections between them and copyright. 'In principle the protection offered by the data protection

1 directive is a good thing, although there may be a need for further steps to address the problems of
2 customer profiling on-line'.
3

4 **14. How adequately do you think current European Information policy processes handle these**
5 **interrelationships?**
6

7 The interviewee commented that she was not sure how to answer the question but basically she thought
8 that the Commission was addressing a whole range of information issues quite well and any overlap
9 between issues were recognised.
10

11 The interviewee rejected that ideas that there had been an expansion in the use of copyright and
12 commented that 'copyright has not and will not be extended beyond its real territory and I don't think
13 that there has been any stretching of the regime at all especially not in the European directives where
14 for example in the case of the database directive the sui generis right was introduced so that copyright
15 remained true to its tradition'.
16

17 This stated, she commented 'alternative protections will however complement copyright, for example
18 the draft directive on conditional access systems, which are another way of protecting information and
19 copyright works'.
20

21 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
22 **concerns over the issues of democratic participation and accountability ?**
23

24 The interviewee commented that in general she thought that policy-making at the European level was
25 good and in many instances considerably more open than at the Member State level.
26

27 She added that on the question of democracy in principle she did not have any concerns [lack of time
28 was a factor in her answer].
29
30

INTERVIEW no. 5

Representative from DGXIII/B/1 European Commission

Preliminary Comments by Interviewee

None.

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 ?

The interviewee said 'I was involved in the database discussions from joining the Commission in March 1991 until October 1993 when I handed the file over to Maria Olivan'. He commented that before transferring to another Commission service he 'passed on advice and articulated my concerns to Maria on the directive'.

The interviewee commented that at the time of his arrival in the Commission the public hearing on databases had already taken place and DGXIII with its LAB had already concluded that copyright alone would not be able to provide adequate legal protection for electronic databases at a European level.

The interviewee also commented that by this stage it was already clear that 'there was no chance of DGXIII being 'chef de file' on the directive because the hierarchy at the time led by Director-General Carpentier were not overly interested in the proposal'. The interviewee commented that DGXIII later 'became more interested in the proposal but by this stage the portfolio was being led by DGIII'.

The interviewee went on to say that in DGIII 'Mr. Verstrynge was a key player and was part of a dominant coalition within the Commission at the time'. The interviewee explained that Mr. Verstrynge had previously worked in the Cabinet of the then President Jacques Delors and was as a result a powerful individual who knew all the Commissioners cabinet teams and so could relatively easily push directive proposals through the College of Commissioners to adoption by the Commission as official proposals. The interviewee further explained that Mr. Verstrynge's position in this regard was further strengthened because at the time he was the head of the unit responsible for copyright proposals in DGIII and had built up a good working relationship both with Mrs. Czarnota and with Mr. Mogg (his boss) during the passage of the software directive which had been lobbied extremely heavily. On top of these good contacts the interviewee commented that Mr. Verstrynge had 'a very strong character and forceful personality' - 'a corpulent German with a can do attitude'. The interviewee accredited Mr. Verstrynge with having shaped the initial character of DGIII's copyright division and its knowledge and contacts with copyright lobbyists pushing for further protection and why it managed to produce so many successful copyright proposals.

The interviewee also mentioned Charles Clarke who represented publishers interests throughout the database directive and who had 'a close relationship with Mrs. Czarnota'. The interviewee also repeatedly mentioned the involvement of Reuters as having been influential on the directive and as also having 'a close relationship with Mrs. Czarnota during the passage of the Directive'.

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 ?

The interviewee said that his role was to represent DGXIII as an associated service during the passage of the directive. This involved liaising directly with Mrs. Czarnota, participating in consultations, attending meetings in the parliament and Council and meeting with interested parties. The interviewee did however comment that 'it was DGIII that was lobbied the most, especially by Reuters who had direct contacts with Mrs. Czarnota'. He said that DGXIII did not have 'the same face-to-face lobbying as DGIII except from librarians'.

The interviewee commented that 'in simple terms once DGXIII failed to become chef de file it concentrated on trying to ensure that the database directive did not end up adversely affecting the free circulation of information, particularly for users'. In the interviewee's opinion that the ethos of DGIII

1 and the approach of Mrs. Czarnota 'was less sensitive to users and more concerned with the interests
2 of the industry'. As an example of this approach the interviewee recalled that on a number of occasions
3 during private meetings with Mrs.Czarnota on the directive proposal her response to suggested changes
4 to the text had been 'no that won't be acceptable to Reuters'.

5
6 The interviewee did acknowledged that sometimes his working relationship with Mrs. Czarnota was
7 strained because of their different approaches on the directive. This stated, the interviewee commented
8 that DGIII was ultimately in charge of the directive especially in the context of the dominant coalition
9 that had been built up during the software directive with Mrs.Czarnota(UK), Mr.Vestrygne(Germany),
10 Mr.Mogg(UK) and Mr.Niebels(Germany) who worked in the cabinet of Mr.Bangemann. The
11 interviewee recalled that when the Cabinets of the Commissioners met to discuss the proposal it was
12 only as a result of a telephone call from Commissioner Pandolfi's assistant, Mr. Montservisi to Mr.
13 Carpentier (DGXIII) that the interviewee attended the meeting where Mrs.Czarnota and Mr.Verstrygne
14 supported the Bangemann Cabinet for the adoption by the Commission of the proposal.

15
16 **3. Did your opinions change during your involvement with these discussions ?**

17
18 The interviewee commented that during his involvement with the discussions his opinions did not
19 change that much. In general he commented that in line with his directorate his role was to try 'to
20 prevent the over-strengthening of the sui generis right and ensure it was balanced by compulsory license
21 provisions' - This was because in the initial period of intra-service consultation the sui generis right was
22 strengthened following the 'Feist decision in the USA and the Van Daele/Romme case in the
23 Netherlands both of which illustrated problems with existing copyright protection for databases'.

24
25 The interviewee recalled that as far as he could remember it was at a meeting of the LAB in
26 Luxembourg just a few weeks after the Feist decisions during which Professor Michel Vivant of
27 Montpellier University presented the findings of his PROPINTELL report on the legal protection of
28 compilations that DGIII (represented by Mrs.Czarnota) first referred to a sui generis type solution. The
29 interviewee also recalled that even at those meetings few of the LAB members were aware of the Feist
30 case.

31
32 The interviewee also commented that his overall impression of DGIII's presence at these meetings with
33 DGXIII was that 'they saw these visits as simply a piece of diplomacy to smooth relations between the
34 directorates but not as an opportunity to exchange opinions or get new ideas'. Indeed in his opinion on
35 the issue of databases Mrs.Czarnota had by this stage 'already made up her mind on the issue'.

36
37 Following the release of the proposal he recall that Mrs.Czarnota had expressed some concern over the
38 opinion of the ECOSOC and that it had appeared that its Rapporteur Mr. Moreland had been 'very well
39 informed and had clearly done his homework'.

40
41 **4. During the discussions with whom did you form alliances ? How influential do you feel
42 perspectives like your own were in shaping the directive?**

43
44 The interviewee commented that although as a civil servant his role was to be neutral it was clear that
45 there were differences of opinion over the emphasis required in the directive between DGIII and
46 DGXIII. As he had previously mentioned he felt that his role was to ensure that the directive did not
47 end up having a negative impact on information access.

48
49 The interviewee recalled that during the first reading of the proposal in Parliament and initial
50 discussions in the Council working group Mrs.Czarnota had 'politely told me to keep my views to
51 myself'. In this regard the interviewee commented that he felt that he had little power to influence the
52 directive other than as a safeguard and he had the impression that 'any deputations from libraries or
53 users sent to DGIII received little if any attention'. The interviewee did however mention that an
54 important factor in being able to express his opinion over the proposal or defend a particular point of
55 view came from the fact that he was 'confident in support from my hierarchy and knew that my
56 position would not be undermined at a later date'.

57
58 This stated the interviewee said that 'Mrs.Czarnota as the draughtsman of the proposal knew the text
59 better than anyone else including those in the Council working group' and furthermore that 'she was

also a very knowledgeable and articulate Commission representative'. Although it was clear from the proposal that 'she was not as familiar with droit d'auteur systems as copyright'. During the discussions in the Parliament he recalled having the impression that Mrs. Czarnota viewed discussion of the proposal with the Parliamentarians as 'a rather tiresome formality that had to be undergone rather than a useful check on the passage of a directive'. Although he acknowledged that 'not all of the Parliamentarians were very familiar with the proposal being discussed'.

The interviewee recalled that during this period because of the personalities involved the relationship between the DGIII and DGXIII services involved did become strained. This he recalled was particularly the case prior to the release of the proposal. e.g. he recalled that when DGXIII proposed a second PROPINTELL report he received an a telephone call from Mr. Verstrygne demanding that the study proposal be stopped on the grounds that it was unnecessary. As it turned out this second PROPINTELL study did not take place but the interviewee commented that 'this was nothing to do with DGXIII bowing to pressure from DGIII but simply because other events including the surprise release of the database proposal by DGIII made the study obsolete'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

In terms of individuals the interviewee reiterated that during his involvement in the discussions, within the Commission it was Mr. Verstrygne and Mrs. Czarnota who were the 'formidable team driving the directive forward'. The interviewee commented that 'Mr. Verstrygne took a keen interest in the directive and did not need to be briefed on the text because he really knew it'. These two officials kept up a range of contacts both within their hierarchy and with copyright lobbyists that they had met during the negotiations that led to the software directive. He also commented that the type of personalities and their personal ambitions, visions and goals was also significant in their approach.

In this regard the interviewee commented that Mrs. Czarnota's personality and negotiating style also had its problematic side. As he recalled on several occasions he had the impression that 'many people involved in the database discussions were irritated by Mrs. Czarnota style which was often condescending' e.g. Mr. Moreland (ECOSOC) certainly felt this way. The interviewee commented that in his own experience Mrs. Czarnota could be 'extremely sarcastic or terse in her replies to questions that she felt were stupid or had already been well explained and she frequently let her impatience show even in the Council working group' While the interviewee was quick to acknowledge that there were indeed often many stupid and repetitious questions he commented that 'it was inappropriate for her to show her impatience and frustration' not least because 'she exhibited too much of 'the all knowing commission' that has been so strongly criticised by the Eurosceptics'. He said that he was aware that her style had certainly irritated the UK delegation on a number of occasions even though they were actually in favour of the directive.

This stated, in the Council working group the interviewee commented that the Member State representatives never knew the text as well as Mrs. Czarnota. He also said that Mrs. Czarnota herself 'only appeared really interested in ensuring support for the directive from the larger Member States (Germany, France and UK) because she knew that under QMV she could with their support get the proposal adopted'. However progress in many of the meetings was inhibited because 'the delegates from a number of the Member States changed from meeting to meeting which led to a lot of repetition in the discussions'

In the interviewee's experience of these meetings 'progress depended greatly on who came and how much they had invested into the discussion of the directive'. As an example he commented that 'at some of the meetings Member States were represented solely by their permanent representative who were rarely if ever copyright experts so they tended to say very little unless they had been specifically instructed to do so on a particular point and did not really engage in negotiation'. The interviewee however went onto to say that 'this was not always the case because depending on the individuals and their personalities some spoke up' he went onto say that 'this was often problematic for other delegations because it left them unsure of the position of a Member States on a particular point'. The interviewee said that in Council 'it is often far from a rational process but it is also not simply a bargaining game between interested parties. Not only do Member States vary in size, power, and their

interest in a proposal but the personality of the officials involved all combine to make it an extremely complex situation'.

As for the Member States he recalled that 'the UK was in favour of the directive after it overcame its initial doubts and even pushed for a strengthening of the term of protection of the sui generis right to 50 years'. Although the interviewee also commented that 'Given the size of the UK database industry and power of its lobby in the UK this position was perhaps hardly surprising'. The interviewee also recalled that 'the Dutch delegations expressed concerns that the proposal was over-balanced in favour of database producers' although he said that this was more 'a philosophically motivated position rather than one directed by politics and as such was less influential'.

In terms of organisations the interviewee repeated that 'representatives from Reuters and Charles Clarke both from the UK like Czarnota were very instrumental in shaping the directive'. He recalled that from a very early stage Mrs.Czarnota approached amendments to the proposal 'on the basis of whether or not they would be acceptable to the industry most clearly represented by Reuters'. The interviewee said that in his opinion there was 'little following of one's conscience in maintaining a balance of rights in the directive' but rather 'what will be most politically acceptable and at the same time obtain industry support to enable the directive to be adopted'. In this regard the interviewee commented that 'it is always beneficial to your career in the Commission if you can get directives adopted'

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee referred to his previous comments and mentioned the Feist and Van Daele cases.

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 ?

The interviewee said that this was difficult for him to answer because he had lost touch with the database discussions after he transferred to another unrelated Commission service in late 1993. As a consequence he preferred not to comment.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee referred to his previous comments. He also commented that the basic approach that had been adopted by the Commission of Green Paper, questionnaire, public hearing, proposal was overtly sensible but it would always face a key problem in the copyright field.

The interviewee identified this problem as the fact that 'whilst rightholders are very often a united, monolithic and powerful group who have strong, clear and legitimate claims to protection, users remain highly fragmented, difficult to identify and have a wide range of often ill defined concerns'. As a consequence he commented 'it is not surprising that users have considerably less power in influencing proposals' The interviewee also commented that 'perhaps given their investments it is not unreasonable that rightholders should have a greater degree of influence over a proposal' although he agreed that this influence should not be allowed to adversely affect the balance of rights which was part of the reason for his approach during his participation in the discussions.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee said that this was also difficult to answer because of when he had left the database discussions. This stated the interviewee commented that aside from the issues themselves the mechanics of actually making policy in this field would probably remain similarly.

In this context the interviewee said that ' the Commission remains uniquely and very powerfully placed to push policy forward' and 'it clearly does more than simply draft proposals by anticipating what will be acceptable to industry who can lobby at both European and Member State levels'. He went onto

comment that in his experience 'though the Commission always claims to act independently usually they tend to form a coalition with those Member States that want any particular directive to be adopted'. The interviewee added that this was not a criticism but rather an observation of how on the ground pragmatically things operate. i.e. "The Commission wants to get its proposals adopted and in these circumstances those Member States that are willing to support it are of great and necessary assistance".

The interviewee also commented that similar forces dictate that 'even at the beginning a proposal is rarely an objective assessment of needs and is usually already slanted towards industry to ensure support' he further commented that 'this reflects the power and influence of industry lobbyists but it is very difficult to prove scientifically'.

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

The interviewee referred to his previous answers and commented that this was difficult to answer given that there were such a large number of visions of Europe even beyond those linked to on-going information society discussions. As an example the interviewee said that while he thought the whole idea of 1992 was to mark the completion of the internal market he had heard Commissioner Monti just the other day announcing that 'much remained to be done to complete the internal market'.

The interviewee further commented that talking about integration had become even more problematic after Maastricht e.g. 'like the fact that the European Union as such has no official personality (legally speaking)'. In his own opinion regardless of the development of particular policy areas like copyright there 'is an urgent and pressing need for a serious re-think of the EU of 15 members. We need to adopt a management approach so that it is clear who is to decide what'. He went on to say that at the moment 'competencies are all too diffuse, the Parliament is not the executive body which is strange for a democracy and there is a clear need to consider removing the Council of Ministers as Europe's executive body'.

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 ?

The interviewee referred to his previous comments and said that it was a complex interaction of a lot of factors that affected the choice of copyright issues and how they were discussed.

However in his experience he detected 'a strong tendency throughout all Intellectual Property Rights (IPRs) towards an expansion in the scope and strengthen of protection' and from his experiences with the database directive he saw the danger of 'moving very rapidly towards a situation where ideas and information would be brought within rightholders exclusive rights'. This trend he described as 'bad for the copyright balance of rights and for competition'.

In the interviewee's opinion this trend to more protection was at the most general level linked to the 'rise of market economics and individualisation of society'. He was not in favour of any further extensions of copyright protection and felt that 'we are already pretty close to protecting information itself'. He also commented that 'in the last 10 years copyright protection, particularly at the European level has grown dramatically, and we have also seen an accumulation of protection as new creations resulting from the development of ICTs have been horse-shoed into being protected by concepts that are at best inappropriate'. He commented that the database directive was a good example of where a new concept had been deployed to address some of these difficulties i.e. sui generis, although he added that 'how successful it will prove to be is a different question'.

The interviewee commented that one factor he had neglected to mention was the role of nationality. He said that it was not necessary to over-emphasize its importance but that 'it is clearly an assistance in drafting a proposal if the official in charge of a directive proposal is of the same nationality as the Government and industry with the biggest stake in the directive' (i.e. as in the database directive). He added that this was particularly significant in the copyright field where 'there are such strong differences between Common law and Civil law systems'.

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 ?

The interviewee reiterated the point that he felt copyright protection was already in danger of protecting information itself and acknowledged that in academic circles there was already debate on the extent to which this might actually be the way forward in the digital society, though he did not think that it was.

Regardless of these points the interviewee commented that in his opinion a more general threat from the expansion of IPRs 'is the tendency of the Courts to be more often sensitive to protection than to competition rules' in the interviewee's view this highlighted a fundamental tension between 'discourses on competition and the internal market versus those on expanding copyright protection which is in effect a monopoly'. One consequence of Europe's IPR policy has been to 'over-sensitise us to the need to seek out IPR protections to the detriment of other solutions in the law or through professional ethics or codes of practice'.

In business circles this has generated a 'phenomenon whereby companies are happy to try protection under one IPR and if that fails to seek protection under another' e.g. Chicago Blues (baseball team) whose trademark on products bearing their name was revoked in Europe because they did not utilise it and so now the Bulls are seeking copyright protection. The interviewee commented that 'such industry practices illustrate that there is no logic or sense to the protection sort, rather the approach adopted is protect, protect at all costs any and everything that you can'.

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

The interviewee commented that in his opinion 'there is very clear link between access to government information and copyright' He acknowledged the existence of the UK's crown copyright but said that in France copyright had already been used to prevent access to government information e.g. Meteo France case access to Government weather information was refused to a private company on the grounds of copyright, although the case gave rise to conflicting judgements between the court de cassation and court of appeal. In this regard the interviewee commented that the 'ultimate rule is Magill in the respect that if you have a monopoly position competition takes priority over copyright.

In the interviewee's opinion these sort of discussions quickly move into fundamental questions over citizens basic rights to access to information which is an essential element for any democracy'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that he found this a difficult question to answer because he was not involved in these policy areas but he said that he was aware that certain structural factors did inhibit links between policy areas being developed. These he described as 'a natural tendency amongst officials in the Commission as in any bureaucracy to not put themselves out of work'. He added that 'the nature of the job is to continue to develop proposals' and he speculated that 'there will probably still be an IMPACT program or ESPRIT project in 20 years'. Thus as a policy-making mechanism it has a predisposition to expand each policy competence rather than look for links between them.

The interviewee further commented that this 'self-preservation is partly due to the history of the Commission which started with 6 Directorate-Generals(DGs) none of which had functional links between them and a lack of management structures'. He added 'this lack of management continues and is illustrated by the considerable overlap between directorates in work, the duplication of effort, and lack of communication between DG's '. These difficulties have been excentuated as the Commission has grown

The interviewee also commented that the Commission 'is not a very dynamic institution, although this is perhaps partly due to the heavy decision-making procedures' indeed he questioned 'how can anything can be achieved when you have to work with 20 Commissioners and the need for a simple

majority for policy to be adopted'. The interviewee commented that a consequence of these procedures is that 'there is a constant wheeling and dealing and conflicts of competence between Commissioners'. In his opinion 'it is no longer a good way to make decisions'. As an example, the interviewee commented that 'while Karel van Miert as Competition Commissioner has the power to act without the Member States approval, he must still seek majority support in the College of Commissioners'. He added that this means 'those not competent can interfere and prevent those in the know from making decisions which is hardly a rational way to make policy'.

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 ?

The interviewee referred to his previous comments.

The interviewee added that in terms of the database directive 'its most significant innovation was not in the field of copyright at all and yet the sui generis right was still negotiated by copyright experts' for whom it had throughout been 'a sticking point not in principle but in understanding'. As a result he questioned whether this was a good way to make policy ?

In terms of policy formulation there was a need to examine the process by which 'ownership and control of copyright directives within the Commission is decided'. Ultimately in terms of the database directive DGIII and later DGXV had competence for it because of their different approach. 'They are more dynamic and come from a completely different tradition with staff continuing to be recruited for their experienced in making and negotiating directives, an area that DGXIII Luxembourg had little experience'.

This stated, the interviewee commented that 'from an external viewpoint all Commission officials can be satisfied that the policy mechanisms in place facilitated the valorisation and use of the studies that contributed to the directive even if they were not deployed by the same directorate that commissioned them'. But in his opinion this just highlighted the different approaches evident between the different directorates.

INTERVIEW no. 6
Legal Counsel from DGXIII/B/1 European Commission

Preliminary Comments by Interviewee

The interviewee acknowledged that whilst he was not directly involved in the negotiation process on the database directive he had kept up with the issue through other Commission officials particularly Paul Ceunick who had attended the Council working group meetings.

The interviewee commented that overall the database directive was not very controversial if compared to other copyright directives (e.g. software, rental right) or other directives addressing information issues such as the data protection directive. He added that on the data protection directive there was controversy even before the Commission proposal was released over which directorate should lead the directive. 'In the end Commissioners Pandolfi(DGXIII) and Bangemann(DGIII & DGXV) made the political choice of appointing DGXIII and DGXV as co-leaders of the directive. But the practical reality of this decision was a nonsense, as you can't have members of each directorate representing the Commission in the policy process alternately'.

The interviewee commented 'on the database directive DGXIII was an associated service which gave it the power to block the directive in intra-service discussion, although directorates don't have to be associated services to block proposals, but more weight is attached to any amendments or objections to a proposal presented by them. He added 'by the time the database proposal was formally adopted by the Commission in early 1992 it had already been discussed extensively and the proposal had been through a lot of re-working'.

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 ?

The interviewee commented 'After joining the Commission in 1985 I established a group of external legal experts to advise the Commission(DGXIII)on areas of policy in need of action. In early 1986 I asked this group, which is now the LAB (Legal Advisory Board) to draw up a list of key issues affecting the development of the European information market. One of the issues that it identified was IPRs (intellectual property rights) and so in late 1987 DGXIII/E commissioned a study by Prof. Michel Vivant(Montpellier University) on IPRs called PROPINTELL. By this time DGIII was already working on what became the Commission's 1988 Green Paper on copyright and as part of these discussions DGIII's official in charge of the Green Paper Mr.Posner sent a questionnaire to, and held a meeting with LAB members on the need for action on databases. This led to the inclusion of chapter 6 on databases in the copyright Green paper'.

The interviewee added 'Following the PROPINTELL study there was some discussion within DGXIII as to whether it should prepare a proposal on databases. During this period (1989/90) the LAB and representatives from DGXIII and DGIII including Mrs.Czarnota had a meeting in Luxembourg on these issues at which the idea of a sui generis right was discussed. The Commission also held a public hearing on databases at which interested parties came down in favour of a copyright solution. Unfortunately during this period relations between some officials in DGXIII and DGIII were strained and there was a lack of communication between the two services over what each was doing. As a result while DGXIII was considering a second PROPINTELL study, DGIII(Mrs.Czarnota - with the support of Mr.Verstrygne) prepared and released within the Commission a draft database proposal which made the DGXIII study obsolete'. He added 'this draft proposal was very much a DGIII led initiative and did not arise following pressure from industry lobbying like the software directive, although there industry representatives in the LAB and also in the industry expert group set up under the IMPACT(Information Market) programme.

The interviewee also commented 'both Mrs.Czarnota and Mr.Verstrygne had very strong personalities which sometimes made it difficult to co-operate with them, they were both very special individuals'.

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 ?

The interviewee commented 'my own involvement was restricted to viewing and commenting on mission reports from other Commission staff including Paul Ceunick and later Maria Olivan and Pierre Bischoff who represented DGXIII in the Parliament and Council. At the beginning I did not have a lot of contact with the discussions but I stayed in touch with it as the debate grew'.

The interviewee commented 'In my opinion two of the most important events in the passage of the directive occurred at either end of the policy process: Firstly, there was the defining of the sui generis approach before the draft was adopted by the Commission, and secondly, there was the dropping of the compulsory license provisions immediately before the Council reached its common position in 1995'.

The interviewee added 'DGXIII was very keen for the clause on compulsory licenses to be kept in the directive because it would have been an important contribution to the debate on access to public information and a first step in assisting the way for a future directive on the commercialisation of public sector information'.

The interviewee commented 'towards the end of the Council negotiations strong industry lobbying against licensing for commercial activities had raised doubts in some Member States positions and it clearly would not then have been logical to restrict the licensing only to the public sector as this would have led to the possibility of concerns being raised about democracy. In the end the DGXV officials negotiating for the Commission in the Council were less concerned with these wider issues and more concentrated on simply getting the directive adopted. Also to some extent they didn't any problem with dropping the licenses because they felt that the introduction of the review clause was a sufficient safeguard against the development of any information monopolies'.

The interviewee added 'the notion that DGXV officials used the compulsory license clause as a tool in their bargaining strategy to get the directive adopted seems unlikely, as they were in favour of keeping the clause until late on in the negotiations. It is more likely in my opinion that DGXV was so eager to force an agreement under the French Presidency that they were willing to drop the clause because it was proving controversial for the Member States'. He added 'when drafting a directive proposal it is sensible to put things into it that can be dropped by the other institutions without damaging the ultimate objective of the proposal'.

The interviewee added 'another factor that affected the final dropping of this clause was the general policy climate in Europe in 1995. With a background of on-going telecommunications liberalisation and information society initiatives led by business, the idea of compulsory licenses had become unfashionable but as the WIPO conference showed the issues they address i.e. information monopolies have not gone away and are likely to form part of future discussions'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'in general terms my views on the directive didn't change over the duration of the directive's negotiation. Although I would have to admit that I have lost some of my conviction in the sui generis right being the best solution for addressing the protection of particularly electronic databases. This is not because it is a bad solution, but I would have preferred if it had been balanced better in the final directive'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented 'While it is not the role of the Commission to take sides during a negotiation obviously it usually has a preferred solution for a particular proposal. In this situation DGXIII/E has a rather unique and strange position in the copyright field in that it has direct involvement with both publishers and libraries, two groups whose interests and concerns are rarely the same. This position has both advantages and disadvantages. The advantages are that DGXIII is aware of

more than one perspective on any particular proposal. The disadvantages are clearly that hearing many sides of an argument makes it much more difficult to find solutions than when you are directed by a clear vision of what the answer should be'.

The interviewee added ' the LAB is a very useful forum bringing together representatives from industry and academia who present non-binding advice to DGXIII/E. It is extremely good at examining broader issues and their connections with specific proposals, as experience has taught me in this field (IPRs and Technology) you can never take anything for granted. Another aspect of DGXIII's unique position is that it doesn't have to start from the position of saying we need to protect more strongly and can instead step back a little to consider the question do we need to protect and if so, what will the implications of stronger protection be both within the narrow sphere of IPRs and more widely'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented 'In the Commission Mrs.Czarnota and Mr.Verstrygne were central to the database proposal although it was actually Mr.Gaster who was representing the Commission in Council at the time of the common position. In the Council itself I can't remember which Member States had the most important roles, though Germany, France and the UK were heavily involved, because Germany and France held the last two Presidencies before the common position and the UK because of the size of its database industry'.

The interviewee added 'In my experience at the European level personalities play a very important role in policy-making. As an example, during the database directive in the Council working group there was a senior French official from the Ministry of Culture who had been in the same job for 20 years and who unsurprisingly put forward arguments from a French droit d'auteur position. This proved relatively uncontroversial during negotiations of the copyright sections of the directive but caused a lot of problems on the sui generis sections of the directive where this individual had real philosophical objections to it. It is in these circumstances where personality can influence events and where ensuring mediation between individuals who have highly specialised national expertise and the goal of developing a European solution is so vital. Often a successful Presidency is one that can handle this kind of man-management'.

The interviewee commented 'I didn't follow the directive closely enough to know which lobby groups were most active on the directive but certainly groups like the FEP, the EIIA and database producers like Reuters actively participated in the discussions'.

The interviewee commented 'I also have the impression that at very beginning of the process while the draft directive was still being discussed within the Commission an instrumental factor in pushing it forward was the Feist case in the USA because it raised doubts in the database industry and among the Member States about whether a copyright solution alone would provide the level of protection required'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee re-iterated the importance of the Feist case at the very beginning of the policy process and added 'the TRIPS agreement was also discussed within the Council working group during the database directive but I am not sure how significant it was overall'.

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 ?

The interviewee commented ' most people think of the database directive as a copyright directive but in my opinion it is really the sui generis right directive because as a solution it remains untried and so is at least theoretically very important for legislation in this field. However, I doubt that it is the cornerstone of the information society, just as I remain skeptical that there is such a thing as the information society'.

1 The interviewee added ' While that is probably too easy an answer, I think that the key to the success of
2 any information society will be a broader understanding amongst on the one hand, its citizens of the
3 general need to respect the basic rights of authors and rightsholders to copyright protection and on the
4 other, a greater understanding on the part of rightsholders and policy-makers that their success will rely
5 strongly on sharing information'.
6

7 He added 'obviously at the centre of this is the idea of a balance between protecting information and
8 providing access and use of it. A key factor will be the building up of trust between the different groups
9 involved, but a balance it must be because it is too easy to draw the nightmare scenarios at either end of
10 these scales if we get it wrong: i.e. no respect for copyright and total piracy versus total protection, no
11 access to information, and damage to democracy, freedom of expression and innovation'.
12

13 The interviewee commented 'In trying to prevent either of these nightmare scenarios and to strike the
14 right balance laws can clearly play a very important role but they cannot be expected to do everything. I
15 hope that the needs of the wider society will be given increased consideration in future discussions of
16 IPRs and that more effort will be made to encourage creativity and provide the broadest access to
17 information possible'.
18

19 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
20 **with copyright were represented in the directive ?**
21

22 The interviewee commented 'My impression is that those lobbyists representing organisations with a
23 direct economic interest in databases were much more involved in the consultation than for example
24 user groups. Although perhaps this in itself is not surprising given that these lobbyists have the
25 resources to organise and structure themselves into European trade associations etc. It is also not the
26 fault of the Commission that in its consultations these interest groups are apparently over-presented. In
27 my own experience the Commission normally invites written submissions to a Green paper and often
28 follows this up with a public hearing in its efforts to try to get the full range of views'.
29

30 The interviewee added 'Unfortunately trying to get the opinions of end-users presents a number of
31 problems including that they are rarely organised into an identifiable group. Of course at a
32 philosophical level end users interests are not as well represented or heard because in an Economic
33 Community they are not the most important. But the user perspective is very often defended articulately
34 by academics and it is not automatically the case that just because there are a lot of rightholder
35 lobbyists you get a poor solution in terms of users interests'.
36

37 The interviewee commented 'the Parliament also has a role to play in representing users as the only
38 fully elected body amongst the European institutions, although the success with which it fulfills this role
39 depends heavily on the individual MEP's involved'.
40

41 In the Council the interviewee added 'I have also had experience chairing Council working group
42 meetings for the Greek Presidency and as a result I know that while some countries including the UK
43 conduct their own extensive consultations at the national level other countries including Greece conduct
44 no consultations. Clearly in these countries the personality and experience of individual negotiators can
45 have an even more dramatic impact on the approach of a Member State in a particular negotiation'.
46

47 **C. European policy for Copyright**
48

49 **9. How would you assess the significance of the Database directive for current and future**
50 **European copyright policy formulation ?**
51

52 The interviewee commented that taken on its own the database directive with its sui generis right might
53 prove to be a very important marker in the European harmonisation process but it was still too early to
54 tell before its implementation. However taken together with the software directive it was clearly an
55 example of European efforts to deal with the digital environment.
56

57 The interviewee commented 'in the harmonisation process there remains one key weakness which is
58 objectively that Member States copyright exceptions and limitations have not been harmonised. But it is

clear from DGXV's recent follow-up communication on copyright that they intend to move on this issue in the near future, although again we will have to wait and see'.

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

The interviewee commented that copyright harmonisation formed part of wider European moves aimed at completing the internal market and furthering economic integration which overall he thought a good thing especially as we awaited monetary union. But he added that another aspect of the copyright debate concerned its cultural dimension which had received little attention at the European level and about which he had some general concerns particularly arising from the deployment of new technologies.

The interviewee commented 'while greater access to information and education is generally a good thing there is the danger of the increasing dominance of Anglo-American culture which is in many respects leading to a cultural homogenisation not just in Europe but globally. The dominance of Anglo-American culture in the media especially TV programming and films and the dominance of the English language on mediums like the internet is also excentuating these trends which may be an area that requires detailed legislation in the future'.

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 ?

The interviewee commented 'Within the Commission there are different styles between services, for example in a directorate like DGXV which generates a large number of directive proposals an official knows that the successful adoption of a directive proposal is considered an important part of a C.V. I would not however say that the adoption of a directive automatically helps the career of an official partly because a directive is a risky venture especially if it is withdrawn, gets blocked or is stalled in the policy-making process'.

The interviewee added 'However, a clear benefit of being associated with a particular directive is that it gives an official the possibility of convincing and persuading his director-general and if possible his Commissioner of the importance of a proposal, which in turn gives him an opportunity for greater visibility within his service which can be good for his career'.

The interviewee commented that 'another factor that has an influence on how copyright issues are discussed concerns the production of reports for the Commission by outside organisations and institutions (i.e. the research input). While it is difficult to assess the role or influence these reports and studies have, I am sure that they are often used as political tools in the game of policy-making. Certainly in the context of private sector consultancies where the Commission pays high fees for work to be done there is the danger that apparently independent and autonomous studies end up proving or justifying exactly what a particular Commission service expect or want to find to justify their stance on a topic'.

The interviewee added 'I am aware of a number of occasions where the conclusions of studies have been re-written at the end of a study prior to final publication because they have not been considered appropriate or what was required. But the other side of this is that re-writing does not always necessarily imply the playing of politics with study findings as a means of justifying particular courses of action. But it is true to say that when an experienced official commissions research from particular research centres he usually has a pretty good idea of the tone and type of report it will produce'.

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 ?

The interviewee commented 'copyright will remain an important element in information policy in the digital realm as new opportunities emerge for businesses to provide services to a potentially global market but with these opportunities also come risks for example to privacy'.

The interviewee added 'copyright is not the perfect solution but it is by a long way the best currently available. In my opinion the main risk in extending copyright into the digital realm is over-protection and the diminution of the public domain as more and more data become included in private sector databases. This in turn may lead citizens to completely disregard the law because their practical experience in wanting to use works tells them that the level of protection is too high'.

The interviewee commented 'For the information society to be a success there is a need to ensure as much access to information as possible whilst at the same time avoiding solutions that seriously harm privacy. In this context it is noticeable how as yet there are two aspects that have not been looked at seriously by the Commission: Firstly, education on copyright where there is a real need to promote responsible information use and, secondly harmonisation where there is already widespread recognition that the process both takes time and will never be able to address all issues of concern. This indicates a need to move beyond it to try and find a wider consensus amongst interested parties. An example of moves in this direction is the IMPRIMATUR program, which I think needs to be done on an even larger scale'.

The interviewee added 'in this context the Commission has a key mediating role and in DGXIII we have already been working to facilitate contacts between publishers and libraries. This process of building consensus is really *soft law* in that it is much quicker and more flexible than the formal legislative process and even though it is also less effective it is useful because it builds understanding and trust between potentially conflicting interest groups. It also has the advantage of being able to tackle very specific and practical questions that are difficult or unsuitable to address in the context of a directive'. He added 'we need to maximise the contact between those groups involved in making copyright work i.e. publishers, rightsholders, authors, libraries and users'.

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

The interviewee commented 'At the most general level I think that it is by chance that aspects of information policy are linked together more in some Member States than in others for example a strong tradition of access or library privileges will impact directly on a countries approach to copyright protection and what is and or is not eligible for protection. In other areas of information policy links are much less acknowledged for example between data protection and copyright. The data protection authorities have not so far linked any of their concerns to copyright even though increasingly in the networked world technologies for copyright protection like ECMS(electronic copyright management systems) have direct implications for data protection'.

The interviewee commented 'at a more basic level information as such, is increasingly being seen only as a saleable commodity even though within Conventions such as the European Convention on Human Rights information access is an integral part of safeguarding democracy. This extension of property concepts combined with new ICTs (information and communication technologies) often makes me think that while the object of copyright is not to protect the information and ideas in works, at a practical level this appears to be the effect of the solutions being developed i.e. if the only way a piece of information exists is in electronic form accessible only through a private database it becomes impossible to get the original information as such (i.e. primary collection is removed as a possibility)'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that within the copyright community these wider issues were rarely if ever discussed although some of the discussion on the information society was increasingly recognising the links between issues in the digital environment.

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 ?

The interviewee commented 'I don't really have any concerns over democratic participation or accountability because I think the problems that exist are not to do with the policy procedures and processes but rather with the inability of some interests to get organised and to express themselves

- 1 articulately at the European level, although the copyright field as the WIPO conference showed things
- 2 are changing'.
- 3

INTERVIEW no. 7

Representative from DGXIII/E/1 European Commission

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I first became involved in the database directive discussions in October 1993 and remained involved until the adoption of the directive in March 1996, except for a period of maternity leave which began in April 1995 during which I was replaced by another DGXIII official, Pierre Bischoff '. The interviewee added 'But before this direct involvement I can remember being immediately aware of the database discussions on joining DGXIII in February 1992 because by that time DGXIII was already an associated service on the draft directive'.

The interviewee commented 'My understanding of the development of the discussions on databases is that they came out of LAB (Legal Advisory Board) commissioned research aimed at identifying changes needed in the legal framework to encourage and facilitate the development of the electronic information market, which was at the time still relatively undeveloped. In relation to databases the view taken by the LAB was that whilst the Berne Convention offered some protection to compilations, this was not sufficient in the context of the information market. It was also the LAB who first suggested the dual copyright/sui generis right approach that was later adopted by DGIII in the directive proposal'.

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 ?

The interviewee commented 'As part of my duties I formally attended the Council working group meetings on the database directive as well as meetings held by the COREPER and Internal Market Council. My main task was to write reports on each of these meetings for my superiors on how the negotiations on the directive were developing. I also liaised with the DGIII (later DGXV) Commission officials who led the Commission delegation in Council and attended intra-service discussions between the Directorates involved in the directive'.

The interviewee added 'These intra-service meetings are quite common amongst directorates during the passage of a directive and enable agreement to be reached on a common Commission position before Council working group meetings. Unfortunately during the passage of the database directive these meetings were not very pleasant for me because of the attitude adopted by Mrs.Czarnota (who wrote the directive proposal and represented the Commission in the Council). Most of the time there was either no communication between us or Mrs.Czarnota would agree in principle with a course of action or particular stance and then proceed to do something completely different when in the Council working group'.

The interviewee commented 'In the working group meetings themselves I was frequently not included in information briefings and Mrs.Czarnota didn't refer to me when discussing the Commission's position so that I ended up feeling that the Member State delegates were unsure of whether or not I was a Commission official or simply a stagier/observer. I should perhaps say that on a personal level Mrs.Czarnota was fine but on a professional level I think she was concerned to ensure that she had complete control over the Commission's negotiating position. She was certainly very ambitious and strong willed expressing her opinion to the Member State delegations in the Council working group in a very forceful manner'.

The interviewee added that 'some of these difficulties may have been to do with the fact that when I joined the negotiations, the DGIII department involved with copyright issues had just transferred to DGXV and had no official head of unit after the departure of Mr.Verstrygne, leaving Mrs.Czarnota with

the total responsibility for running the unit. Certainly after Mr.Vandoren was appointed and I began to have meetings with both of them communication improved'.

In terms of the directive itself the interviewee commented 'after the software directive the copyright section of the database directive was much less interesting than the more difficult sui generis right. In the Council working group and throughout the negotiation of the directive it was above all the sui generis right that caused the most problems and proved the most difficult to explain to the copyright experts in the working group'.

The interviewee added 'I can remember thinking that it would have been much more helpful to the negotiations if alongside the copyright experts there had been a group of database industry experts who understood the mechanics of databases and their operations who could have enlightened the copyright experts on the need for and clear purpose of the sui generis right'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that she became much more familiar with the directive during her involvement with the negotiations but that her basic views i.e. the views of DGXIII that she was representing remained basically the same with one of the key issues being compulsory licenses 'DGXIII wanted the compulsory license provisions to remain in the directive because of the positive impact they would have on the development of the information market, the prevention of information monopolies and the on-going debates on access to information, particularly government information'.

The interviewee added 'my impression during the negotiations was that there was some confusion in the working group over the licensing issue and how it would have worked in practice'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that as a Commission official she was in a neutral position. In terms of influence her role was clearly to liaise with DGXV officials and make the Commission's position in Council coherent. But as the interviewee had already mentioned during Mrs.Czarnota's period as the principle Commission negotiator, she was often not informed of changes in the Commission stance or arrangements made with a particularly Presidency until she heard them in the working group meetings themselves - so she had no influence. She added after Mr.Gaster's arrival communication improved.

This stated the interviewee commented 'in general the main impression I have of the working group negotiations is that they were very laborious and slow with every issue being discussed again and again. Frequently a delegation that had discussed a point in great detail and had reached a solution at one meeting would return to the same point at a later meeting and start again. This occurred so often that I began to feel that a deliberate attempt was being made to inhibit the negotiations'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee re-iterated that the negotiations were generally very slow and that in her opinion particular Commission officials were partly responsible for this lack of progress. She added 'following the departure of Mrs.Czarnota and Mr.Gaster taking over the Commission's negotiating on the proposal I sensed that there was a shift in the approach of many of the delegations, at least, from this period on in the negotiations things moved much more quickly and smoothly towards a common position'. The interviewee added 'the problem with Mrs.Czarnota was not in her views but the way that she chose to express them. She was extremely knowledgeable about the directive and a real professional but often she was too forceful in her approach and in trying to push delegations into agreement. I think that the delegations reacted negatively to her style and stalled the negotiations'.

The interviewee commented that outside of the Commission and Council she was not sure which groups were most influential in lobbying on the directive but she was aware of representations made to the Council by Publishing groups and database producers e.g. Reuters.

In terms of the decision-making process itself the interviewee commented 'it is Member State governments who make the choices and not particular Council Presidency's. Obviously a Presidency has some power in that it can place items it wants to push at the top of the agenda and it can work hard towards reaching a solution both inside and outside of working group meetings but in the end it will still depend on the individual Member State delegations'. As an example of this the interviewee commented that 'during the French Presidency there were conflicts between the Presidency chaired by Mr.Dobelle and the French delegation headed by Madame De Montluc (Ministry of Culture), while these differences are not that unusual in negotiations, in this instance the French delegation opinion was a minority view amongst the other delegations which made the problems more difficult'.

The interviewee commented that 'France was also represented at different times by different government departments - (sometimes by the Ministry of Culture, sometimes by the Ministry of Industry) which contributed to dramatic changes in the position articulated by the French delegation at different working group meetings'.

The interviewee commented 'during the negotiations I also remember that the French delegation was in conflict with the UK delegation over the sui generis right. The UK found it relatively easy to accept the idea of the sui generis right because UK copyright is concerned primarily with the protection of economic & financial investments in copyright works and lacks the system of moral rights that is central to the French droit d'auteur system which made the sui generis approach so much more difficult to accept'.

The interviewee added 'the UK was also, for part of the negotiations, pushing for a 50 year term of protection for the sui generis right just like copyright (until the term directive). Many of the differences between the droit d'auteur and copyright systems that are at the centre of debates on harmonisation were explicit in the conflict between France and the UK over the sui generis right'.

The interviewee commented 'the Germans on the other hand were not in favour of the sui generis approach and argued that copyright complemented by strong unfair competition rules would provide a more effective solution. During their Presidency the Germans pushed this solution and tried quite hard to persuade the other Member States to drop the sui generis right altogether'.

Of the other Member States the interviewee commented 'Greece was very poorly represented and sometimes its delegation did not attend the working group meetings, similarly Spain and Italy were variable in their involvement with the negotiations, although they did make some valuable contributions to the debates'.

More generally the interviewee commented 'in the copyright field there aren't any major players, although as you might expect the three largest Member States Germany, UK and France are normally quite active. For example, in the database directive the UK played an active role alongside the Presidencies of Germany and France'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented 'the TRIPS agreement completed in Marrakesh in 1994 affected the database negotiations because it required Member States to ensure an adequate level of IPR (intellectual property right) protection for all databases and was discussed in the Council working group'.

The interviewee commented 'the Feist case was also in the background of the negotiations and in some senses Mrs.Czarnota used these international cases as levers, as tools to emphasise the urgent need for 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 ?

The interviewee commented 'the directive has a higher profile now because of two factors: Firstly the emergence of discussions on the information society have raised awareness of IPRs in general, and secondly, the speed with which the electronic information market has developed has increased the

significance of the directive and particularly the sui generis right for providing protection to new information products'.

The interviewee added 'In many ways the directive showed the EU to be a pioneer in breaking new ground in intellectual property protection because whereas in the case of the software directive there was already quite a developed market which had a strong lobby base pushing for more protection, in the case of the database directive, the electronic information market was not very well developed at the time the proposal was first released and the internet and world-wide-web were not really been invented. As a result initially the database negotiations were not the focus of much attention, but as events particularly technical and wider political discussions changed, the database directive began to take on more importance'.

The interviewee added that she was still wary of calling the database directive the cornerstone of the multimedia society because that sounded like too much hype.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'I don't really know because during the discussions with interested parties Mrs.Czarnota controlled everything. In fact this was one of the difficulties that created tension between DGXIII and DGXV because Mrs.Czarnota did not communicate to me information about any of the lobbying positions that she received. Certainly my impression is that there was a small amount of lobbying from publishers and information groups but not as much as with the software directive and especially at the beginning some of the lobbying that occurred on the database directive came from lobbyists who were involved in the software directive and were still dissatisfied with the solution in that directive. Partly I felt that Mrs.Czarnota did not communicate this information with me because she used it in her arguments in the Council working group and did not want opposition from me'

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'in looking at copyright policy for the digital environment particularly, the database directive is interesting because the sui generis right shows the limits of copyright within the harmonisation process. Personally I come from a droit d'auteur background and so I am not sure that further strictly copyright harmonisation will necessarily be needed in an environment where other solutions like sui generis rights, unfair competition rules or technical systems for protecting works may be more appropriate. But harmonising these rules in turn may lead to other problems and there is always the danger of creating information monopolies. I therefore think that at least initially it might be better to wait and see what solutions emerge'.

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

The interviewee referred to her comments above and added that in her opinion ECMS(electronic copyright management systems) would probably play a major role in the information society but that it was too early to tell which of the existing proto-type systems would be the most effective and that it would only be sensible to introduce harmonisation measures after the market had decided.

The interviewee added 'in real terms as part of my work I see Europe moving closer together both in terms of economic integration and at a political level but now the question of enlargement has arisen things are more difficult because with the high level of integration that has been achieved (i.e. Acqui Communautaire) it is more difficult for other countries who want to join to meet the minimum standards, including in the copyright field'.

The interviewee added 'At a more practical level as the EU enlarges basic communication will become increasingly difficult and in my experience it is already proving problematic with so many languages and differing levels of language skill amongst the officials working in the European institutions. In the

Council this problem is particularly acute in technical or complex fields like IPRs where national translators are not familiar with the topics under discussion or the concepts being used. Of course the ideal situation would be to have IPR specialists who were also translators to avoid major problems of miscomprehension'.

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 ?

The interviewee commented 'bureaucratic factors such as the degree of direction/feedback you get from your hierarchy or the approach a particular directorate has to career advancement can be a factor in how a Commission official approaches the negotiation of a directive but these factors are much less important than the role of the Member States in Council where there are 15 Member States with 15 legal systems pushing for their preferred solution'.

The interviewee added ' the power of the Commission is greatly exaggerated by the media and since Maastricht (and the initial no vote by Denmark to further integration), the Commission has had its fervour for integration and internal market policies dampened. Personally I don't think that the Commission has deserved the amount of bad press that it has received because it is too often a scapegoat for tensions existing in many Member States on the issues arising from integration'.

The interviewee commented that ' in the policy-making process itself the Commission often assisted the Presidency and held meetings with it before the working group meetings, but I did not get to attend these meetings which created further tension between DGXIII and DGXV'. She added ' some of this tension however was because DGXIII had wanted to lead the directive in Council and I think if DGXIII had been the (chef de file) then the presentation and negotiation of the directive in Council would have been very different and I don't think that the compulsory license provisions would have been dropped'.

She added 'Just before the common position was reached in Council the license provisions became the final sticking point as some Member States pushed for their removal. At this point DGXV who had up until then wanted to keep the provisions decided that its main priority was to get the directive passed and to ensure the continuation of the copyright harmonisation process and so it did not object to the compromise that dropped the provisions for the benefit of a common position'.

Another factor that the interviewee identified as affecting copyright policy formulation was the role of personality, which she said was very important.

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 ?

The interviewee commented that the main danger for rights holders was obviously piracy and other unauthorised uses of their works whereas for users the danger was that access to information could potentially become more restricted.

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

The interviewee commented ' I don't see that copyright is necessarily linked to other areas of information policy but I can see how in the digital environment it could become linked particularly if for example personal information protected by data protection was part of a digital copyright work being transmitted over the internet'.

She added 'I think most of these sorts of problems will be solved by technical rather than legal means but at the centre of all these information policy problems are questions over the control of ownership and control of use of information. Personally, I think that there may be a need for the law to play an increasing role in helping to protect the interests of users of information almost as part of consumer

1 policy. Just as the origins of copyright show for example, it was never just about simply protecting
2 powerful rights holders but it was also about libraries and facilitating the better circulation of
3 information'.

4
5 **14. How adequately do you think current European Information policy processes handle these**
6 **interrelationships?**

7
8 The interviewee commented 'So far there isn't an overall community level policy on information
9 perhaps partly because such a policy would implicate cultural issues which the EU as an economic
10 community has tended not to make it a policy priority. Personally, however I do sometimes think that
11 the recent discussions on copyright, on the information society and telecomms liberalisation and de-
12 regulation have been moving a little too far too fast, or at least with not enough consideration of their
13 impacts and the widening gaps that have occurred across Europe. For example, in Spain there are still
14 many areas with no telephones let alone access to the Internet and computer revolution'.

15
16 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
17 **concerns over the issues of democratic participation and accountability ?**

18
19 The interviewee commented 'Overall I don't think that current European policy-making processes are
20 particularly democratic or accountable to European citizens but I do think that already, the use of new
21 information and communication technologies such as the internet, particularly by the Commission has
22 improved the dissemination of information on the European institutions and policy processes and I hope
23 that in the near future they will be increasingly used in the consultation process'.
24
25
26

INTERVIEW no. 8
Representative from DGXIII/E/1 European Commission

Preliminary Comments by Interviewee

The interviewee commented that on the basis of the question frame I had sent him he had prepared some of his answers. But felt that it might be useful if he made some preliminary comments from his experience on the process of formulating policy at the European level.

The interviewee commented 'in the field of copyright legislation the main Commission directorates involved are DGXV and DGXIII. DGXIII was an official associated service for the duration of the database discussions. DGXV became the principal Commission service in charge of the database directive and copyright legislation more generally following the transfer of some Commission services from DGIH early in 1993. As for other Commission services most were only involved briefly during intra-service discussions that took place prior to the draft database directive's release from the Commission in 1992'.

The interviewee added 'DGIV is a little different from the other Commission services in that my impression is that it is only concerned to speak when there are direct consequences for competition, otherwise it tends not to participate in consultations'.

On the Council the interviewee commented 'as an ad hoc rule there are 3 levels or hierarchies in the Council i.e. Council, COREPER and Working Groups such that only Commission officials of a certain rank can address these different groups. e.g. In the database discussions in the Working Groups Mr. Gaster or Mr. Vandoren had represented DGXV, in the COREPER Mr. Waterschoot (head of DGXV/E) or Mr. Mogg (DGXV Director General) and in Council Commissioner Monti'. The interviewee added 'in very simple terms the higher up the hierarchy you go the more simple the debates become and the more political. To some extent this is the purpose of the hierarchy, - to filter and reduce the complexity to allow decisions to be reached'. The interviewee added 'because of these mechanisms to enable decisions to be reached rarely is the end result of a directive exactly what those involved in the negotiations anticipated at its beginning'.

The interviewee commented 'this raises the whole issue of what it means to negotiate which I view at its most basic level as a process which allows people to discuss. But at the European level in Council it obviously involves people representing Member States which I have always found a rather odd idea i.e. that a Member State has a collective opinion and further what this implies about the individuality of the negotiator concerned, their role and responsibility for creating this collective intellectual position for the Member State they represent'.

On the Commission the interviewee commented 'low level bureaucrats are often very instrumental in pushing proposals forward, for example in the database discussions Mr. Gaster played a central role in pushing the directive forward to its adoption and made every attempt to identify himself directly with it'. The interviewee added 'a major advantage for the Commission in pushing a proposal through is that its officials are allowed to attend and observe Parliamentary and Council meetings at all levels.'

On the COREPER the interviewee commented 'unlike the working groups the COREPER is a committee formally established by the treaty as the means of representing Member States in the policy process, although in practice there are actually 2 COREPER's - COREPER 2 is for the Member States permanent representatives i.e. the ambassadors and usually concerns high level diplomacy, while COREPER 1 is for the Member States deputy representatives and usually concerns issues on the formation of the internal market.(i.e. The database directive was discussed in COREPER 1). The committee usually meets once per week on a Wednesday to organise the agenda of the Council and to act as a link between the Working Group and the Council. Although the executive body of European government is the Council, the COREPER digests the work done by the working groups and prepares the agenda and facilitates the discussion in Council'.

The interviewee commented 'In practice, when a Member State is holding the Presidency and wants a piece of legislation on the Council agenda, pressure sometimes direct but often informal is exerted on the COREPER to examine the issue. Although there are no hard or fast rules on how an issue is

1 examined normally members of the working group brief the COREPER but then do not attend the
2 COREPER's meetings with the Commission and Presidency. A lot depends on the tactics of the
3 Presidency which will vary depending on the issue and the level of expertise and resources of the
4 Member State which is in turn most frequently related to the size of the Member State (i.e. France,
5 Germany and UK almost always have many more experts and resources available on an issue than for
6 example Ireland or Portugal)'.
7

8 This stated, the interviewee added 'But even for the larger Member States there are usually only around
9 20 staff at its Brussels permanent representation office available to cover the whole range of issues
10 under discussion by the Council'. As a result members of the COREPER tend not to be experts in the
11 topics under discussion'.
12

13 The interviewee commented 'each week the COREPER has a large number of items to deal with in its
14 agenda and spends much of its time prioritising issues and organising them into manageable chunks for
15 the Council guided by the Presidency in consultation with the Commission. As a result the Commission
16 can be instrumental in pushing an issue up the list of priorities and experience shows that this
17 Commission ability tends to be greater when the countries holding the Presidency do not have strong
18 positions on a particular topic'.
19

20 On the Presidency, the interviewee commented 'the Presidency can also exert power over a proposal.
21 For example during the database discussions the French Presidency did a great deal of work prior to the
22 working group meetings both with their own delegations and with other Member States delegations.
23 The interviewee acknowledged that the amount of work undertaken in France was 'perhaps greater than
24 in other Member States because of the French centralised system'. Thus, 'the different government
25 agencies concerned with the database directive i.e. Ministry of Culture, Department of Industry in Paris
26 were requested to formally express their views and then to agree a common position which they would
27 stick to throughout the negotiations'. In Paris the co-ordination between these government services 'is
28 conducted by the SGCE (Secrétaire Générale pour les relations avec the Communauté Européenne) is
29 aimed at avoiding conflict'.
30

31 The interviewee also made the point that the success of a Presidency had a lot to do with the personality
32 of the Presidency's representative 'as this is crucial in being able to persuade other Member States
33 delegations to agree'. In this regard the interviewee recalled that the Mr. Dobelle who chaired the
34 meetings of the Council working group on behalf of the French Presidency was 'influential in
35 facilitating a common position to be reached even though he had no direct expertise in the copyright
36 field'. Aligned to this point was the selection of Member State representatives in the Council working
37 group. In the interviewee's experience 'this varies considerably between Member States with some
38 representatives having no direct ties to any particular government departments and thus a greater degree
39 of independence'. As an example the interviewee said that during the negotiation of the data protection
40 directive the German representative was the German data protection registrar who was not under any
41 direct ministerial control and had as a result considerably more independence than many other Member
42 States representatives. The interviewee commented that he could not imagine a similarly degree of
43 independence being 'sanctioned by the French or English in Council'. But despite Presidencies were
44 not always in total control of their delegations and there were examples of where the delegation
45 publicly disagreed with their Presidency. The interviewee commented that 'this occurred in the early
46 part of the French Presidency'. The interviewee qualified these comments by saying that while
47 disagreements could occur publicly in the working group in his experience he had never seen or heard
48 of these occurring in the more political domains of the COREPER or Council. Thus while in the
49 COREPER and Council a Member State's delegation is treated as a separate entity to their Presidency
50 in his experience this is an 'artificial distinction'.
51

52 In the Council itself the interviewee was of the opinion that the 'at the Ministerial level the aim of all
53 Presidencies is the result of getting legislation passed' in his experience even to the extent of 'getting a
54 proposal adopted even if it was not one that they particularly pleased them, especially where its
55 eventual adoption was inevitable under QMV (qualified majority voting)'. The interviewee
56 acknowledged that there was as a result of this an antagonism between 'on the one hand, a
57 Presidency's desire to be seen to have been a successful Presidency and on the other, to accept
58 legislation that may not be exactly what they wanted'.

The interviewee commented that within the Council there are other tensions that may arise because 'different parts of the Council are motivated by a range of different forces and objectives' For example while 'working groups allow for intellectual discussion, the COREPER is concerned to filter and organise the agenda for the Council which is itself motivated by a need to pass, stall or block legislation'. The interviewee commented that 'in the Council there are a range of personnel with different agendas and timetables facing a range of intellectual, administrative and political challenges with the content of specific issues somewhere in between'.

The interviewee then commented on the impact of lobbying on the policy process. Overall the interviewee said that he was 'not impressed by their role in European policy-making' but he did make a distinction between 'professional information brokers and Trade associations'. The interviewee was very critical about professional information brokers in relation to the policy process saying 'they do not have a useful role because they are only in the business of impressing their clients that they are doing something and know how to lobby successfully'.

In his experience the most successful lobbying was exercised at an early stage in the policy process on the Commission and to a lesser extent on the Parliament. He acknowledged that 'there is a lot of mystification that goes on around the policy formulation process for any particular proposal'. In his opinion 'the main object of this is for those involved to give the impression of having some influence or control over the policy outcome'. The interviewee reiterated the distinction between 'lobbying as a business where any power over policy is mostly illusory and lobbying by European trade associations and companies to whom the Commission has a responsibility to listen and where appropriate take on board their views'.

The interviewee also commented that the process of European policy-making involves 'an extremely complex set of interrelationships over which no single institution or group ever has total control'. This stated the interviewee was of the opinion that in the end 'policies result large numbers of relatively inconsequential decisions taken by little people for a variety of issue based, administrative or political reasons' The interviewee commented that policy-making 'is not simply a bargaining process even if that is how it is often described, because at the time few if any policy actors are aware of the whole process' This stated the interviewee commented that 'the way individuals describe the policy process is an important guide as to how individuals view themselves in the process and evaluate their own role, position and status'. The interviewee said that 'it is useful to remember that during the process of policy formulation the individuals involved are very conscious of their lack of control over other policy actors and lack of knowledge over what will happen next'.

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 ?

The interviewee commented that his formal and direct involvement with the discussions on the database began in April 1995. He did however acknowledge that he was familiar with European copyright policy from the 1988 Green Paper onwards and had begun to study the database discussions from early in 1995

As far as he could recall discussion on the legal protection of databases had originally started in DGXIII's Legal advisory Board (LAB) as 'the development and impact of information and communication technologies (ICTs) grew along with the use of electronic databases'. But the interviewee said that the formal proposal came from an initiative by DGIII in the Commission and was a surprise because there had not been any pressure from industry for such a proposal'.

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 ?

The interviewee said 'my formal and informal involvement in these negotiations consisted of attending the Council's intellectual property working group meetings and sometimes COREPER meetings and writing a report of them for my superiors'. The interviewee commented that 'my role was very much to report only'.

In terms of the most important points the interviewee said 'the sui generis was clearly the most significant and generated discussion on the object of protection, the exceptions that were to apply and the question of compulsory licensing'. The interviewee commented that by the time he joined the Council discussions there were 'no objections in principle from Member States to the sui generis right but concerns were still being raised about its implementation'.

The interviewee recalled that he was not surprised at these concerns about the implementation of the sui generis right 'not only from a practical point of view but also in terms of the nature of negotiation' i.e. European negotiations always tend to end with the most politically controversial points being discussed because this is the responsibility of Member States Ministers and not officials in the Council working Group. As an example the interviewee pointed out how in the database discussions the issues of the harmonisation of copyright on the structure of a database and the term of sui generis protection had been resolved without reference to the Council because whilst these were important substantive points they 'were not politically controversial'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee said 'my knowledge and views did change but my overall stance remained basically the same which was to try and ensure a fair balance of rights'

The interviewee went on to comment that at the beginning of his involvement in April/May 1995 it was already evident that the discussions were moving rapidly towards a common position and at this time he had real concerns that the directive could become 'a black-hole for the Information Society because of its broad wording' he also felt at the time that few of the Member States delegations viewed the directive in the same way'.

However, as the directive moved closer and closer to its adoption from mid-May onwards the interviewee said the Working Group became very active and he found many of his concerns were allayed as 'the scope of the directive became more narrowly defined'. The interviewee had the impression that this narrowing of the scope of the directive right at the end of the negotiations may well have been 'part of a strategy of some of the actors involved' because he felt that by this stage in the negotiations 'many of the actors had a very clear view of what the contents of the adopted directive would be and they had deliberately left things open to the last minute to see if they could gain any further advantage'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee said that this question was difficult to answer because 'both in my role as a reporter of the Council discussions and as a Commission official I should not really have a position other than as a neutral observer'

This stated, he commented that although he was not a copyright expert he had still had a personal opinion in relation to the directive and copyright legislation more generally, which was based on a 'desire to ensure the maintenance of rights and protections for endusers'. He accepted the need to provide database producers with adequate protection but was concerned about the potential dangers of negative impacts on user access to information.

In this regard the interviewee commented that even after the directive's adoption he had remained concerned over the issue of 'how copyright exceptions will be implemented under the directive'. Even though he acknowledged that in theory 'most traditional copyright exceptions are maintained or at least left optional for Member States, in practice there is a danger that the directive will be implemented in a manner that will have a negative impact on information users'.

In terms of his own role in shaping the directive the interviewee commented that he doubted that he had any impact at all, although he felt that his service had had some influence on the shape of the directive during an earlier part of its negotiation. He commented that some indication of the importance of the

1 database directive to his service by the time of his involvement was indicated by the fact that he rather
2 than a higher ranking official attended the COREPER meetings.
3

4 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
5 **Database directive ? How was this influence exerted during the policy process?**
6

7 The interviewee commented that this question was more difficult than it appeared because whilst 'it is
8 relatively easy to identify the main actors it is much more difficult to draw any definitive conclusions
9 thereafter about their power or ability to exert it over the directive'. The interviewee also commented
10 that the nature of the European policy process itself means that different individuals and groups have
11 power and/or influence at different times.
12

13 This stated, the interviewee identified in the Commission Mrs.Czarnota as the draughtsman of the
14 directive and Mr.Gaster as instrumental in pushing it through to its adoption. In terms of Member States
15 the interviewee identified France, Germany and the UK. As for organisations the interviewee said that
16 overall the lobbying had been relatively limited although he thought that considerably more had taken
17 place in the early period of the database discussions.
18

19 But the interviewee said that he felt 'uncomfortable with this representation of the actors and events
20 because it over-simplifies a very complex situation'. The interviewee referred here to some of his
21 preliminary comments and further stated that 'often significant influence over a proposal results from
22 inputs from individuals or groups who are not continuously involved in the discussions'. The
23 interviewee rejected the notion that it was possible simply to identify the key actors and say that their
24 actions controlled the discussions and the shape of the directive. 'Those who appear the most actively
25 cannot always be assumed to be the most powerful and those who are the most powerful are never
26 totally in control'. The interviewee commented that 'this does not prevent others from reconstructing an
27 account of events that suggests this is the case'.
28

29 **6. Did any international policy developments impact on the outcome of the Directive?**
30

31 The interviewee commented 'the US Feist case and Dutch Van Daele case were important at the
32 beginning but by the end of the negotiations no international developments were shaping the directive,
33 in fact it was the other way round with the database directive being one occasion when Europe was
34 leading the way'.
35

36 **7. How do you account for higher public profile of the Database directive ? Do you agree with the**
37 **characterisation of the Directive as the Cornerstone of the Multimedia society ?**
38

39 The interviewee commented that the definition of the Database directive as the 'cornerstone of the
40 Multimedia Society is clearly wrong and inappropriate'.
41

42 The interviewee said that he found that 'it is frustrating to continually see these buzzwords and other
43 slogans of the information society being attached to every new directive from the Commission'. In this
44 regard the interviewee said that he had heard similar comments being made about the data protection
45 directive and he expressed the view that 'in many ways this sloganism can often inhibit or obstruct a
46 more serious debate by making discussions too wide'.
47

48 As to the higher profile of the directive the interviewee was convinced that 'it is mostly due to
49 'coincidence' of the directive having been adopted at around the same time as the Information Society
50 discussions began'.
51

52 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
53 **with copyright were represented in the directive ?**
54

55 The interviewee commented that this was a difficult question for him to answer because he had come
56 relatively late to the discussions and had not been directly involved during the Commission's formal
57 consultations.
58

1 This stated, as a superficial response he commented that he did not 'have the impression that the
2 consultation had been able to represent the full range of views' and he went onto to comment that it was
3 important to distinguish between the 'how those involved in organising the consultations and those
4 participating in them viewed the process differently' from his own experience he felt that 'ultimately
5 these public consultations are not that important in directly impacting on the outcome of a policy
6 proposal but they do provide the opportunity to promote the impression that they are'.
7

8 **C. European policy for Copyright**

9

10 **9. How would you assess the significance of the Database directive for current and future** 11 **European copyright policy formulation ?**

12

13 The interviewee commented that as he had understood the database directive 'its main impact was not
14 strictly speaking on copyright but was rather the introduction of the sui generis right because it was an
15 important innovation in Europe's attempts to offer protection to information works in digital
16 environments'. The interviewee went onto comment that 'It is still a little too early to say definitely
17 how significant the directive will turn out to be'.
18

19 **10. As the global Information Society develops what role will copyright harmonisation play** 20 **in the process of European integration ?**

21

22 The interviewee said that an adequate answer to this question would involve an extremely lengthy
23 discussion.
24

25 This stated the interviewee commented that copyright issues would continued to be a focus for
26 Community action in the near future and as such would play a role in the internal market.
27

28 **11. Which other factors, if any, would you identify as being significant in affecting how copyright** 29 **issues are framed and discussed at the European level ?**

30

31 The interviewee commented that he had already mentioned a range of factors that affected how policy
32 was made but that some additional comments were relevant about the Commission because as the
33 European Union's civil service it has played a pivotal role in initiating policy proposals. The
34 interviewee identified the Commission's 'tendency to move in a step-by-step manner issuing one
35 directive at a time having consultation and then issuing another directive' as setting the pace of
36 copyright policy-making'.
37

38 Another factor he had briefly mentioned in his preliminary comments was the issue of bureaucratic
39 career development, which he said frequently relied on achieving 'higher positive visibility in relation
40 to one's Commission hierarchy' which could be achieved 'through identifying oneself with a particular
41 proposal'.
42

43 **D. Information policy-making and Copyright in the digital age**

44

45 **12. What threats and opportunities would you identify from the extension of copyright concepts** 46 **into the digital realm ?**

47

48 The interviewee referred to his previous comments and said that in his personal opinion there 'is a
49 worrying tendency to over-use copyright concepts in the information society which is creating an over-
50 reliance on notions of ownership of information to the detriment of other concepts'
51

52 The interviewee commented that 'the continued extension of property concepts into the digital domain
53 is of concern in itself but also because it suggests a fundamental misconceptualisation of what
54 information is about in a societal context'.
55

56 In this regard the interviewee referred to other important notions concerned with information including
57 data protection, freedom of speech and access to information.
58

1 **13. How would you characterise the relationships in digital environments between copyright**
2 **policy and other areas of information policy such as Privacy ?**
3

4 The interviewee referred to his previous answer and that there was a need to look at these
5 interrelationships more carefully.
6

7 **14. How adequately do you think current European Information policy processes handle these**
8 **interrelationships?**
9

10 Following on from his previous comments the interviewee said that increasingly information policies
11 were being dominated by the copyright model of ownership even in spheres such as data protection
12 where some writers had already begun to argue for the use of property models. i.e. 'individuals own
13 their own personal information'.
14

15 Such approaches the interviewee contrasted with conceptual approaches to information that are evident
16 in the European Convention of Human Rights Article 8 and 10 concerning the central role of privacy
17 and freedom of expression for a democratic society. The interviewee acknowledged that there 'is
18 clearly a role for notions of ownership in relation to information but it is dangerous to use this approach
19 in all our consideration of information policy issues'.
20

21 The interviewee was expressed concern that because copyright policy had been such a active area at the
22 European level that the 'whole debate about the information society is becoming focused on property
23 rights that rely on restricting access, what we need is an alternative debate about the best ways to open
24 communication and information sharing using the new technologies'.
25

26 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
27 **concerns over the issues of democratic participation and accountability ?**
28

29 The interviewee commented that while 'democracy relates to the power of people European copyright
30 policy is formulated and will continue to be formulated by a very small group of experts'
31

32 In the interviewee's estimation the number of key individuals involved in copyright legislation was
33 between 25-60 individuals with 'users' really only being represented by MEPs (in a minor way) and
34 academics. For the interviewee the question of copyright policy was 'not so much a question of
35 democracy as of the sovereignty of Member States' and that 'this is true of most European policy-
36 making because it relies on the assumption of the democratic systems in place in the Member States'
37

38 The interviewee challenged the assumption underpinning the question by saying that it 'is questionable
39 to assume that democracy is necessarily improved by more involvement of citizens or weakened by less
40 involvement because representation is central to the notion of democratic government' This stated the
41 interviewee acknowledged that 'the distancing from political representation that people may feel as a
42 result of decision-making taking place at a supra-national level may increasing lead to questions over
43 democracy'. Although in the interviewee's opinion 'globalisation is instrumental in requiring collective
44 international action and it has as a result led to a challenging of some of our conventional notions of
45 democratic representation'.
46

47 The interviewee commented that in policy-making, especially in fields where technical expertise is
48 required to find resolution he felt that it is particularly difficult to involve citizens or in the case of the
49 database directive to even 'locate users who unlike rightholders do not form an easily identifiable
50 group'.
51

52 In the interviewee's opinion one way to alleviate some of these problems ' is to improve European
53 citizens understanding of policy processes and to encourage the media to play a more active role in
54 generating public debate on a wider range of issues'. For the interviewee 'one of the great opportunities
55 offered by ICTs is their power to facilitate the dissemination of information'.
56

INTERVIEW no. 9
Principal Administrator Council Secretariat

Preliminary Comments by Interviewee

The interviewee presented me with several pages of short type written answers to the question-frame faxed to him prior to the 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 ?

The interviewee commented that 'I first formally came across the discussions for a database directive in the European Commission work program of 1991 that detailed the future directions of legislative proposals (*COM(90)584 final*). More than a year later I received a copy of the draft proposal as issued eventually in the Official Journal (*OJ No. C 156, 23.6.92, pp.4*). He added that he did not recall having received any early drafts of the proposal just the text as adopted by the Commission.

The interviewee commented that 'prior to this I was aware that databases had been covered in chapter 6 of the Commission's 1988 green Paper on Copyright and the Challenge of Technology (*COM(88)172 final*) and that in April 1990 the Commission held a public hearing for interested parties on the topic of databases which was referred to in the Commission's 1991 work program document'.

The interviewee commented that he was 'not sure what factors led the Commission to initiate discussions on the need for harmonising the legal protection available to databases. The Commission themselves argued on the grounds that different levels of protection across the Member States was problematic for the functioning of the internal market and so legislative action was required'..

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 ?

The interviewee commented that 'all my contact with the database directive was confined to my work within the Council Secretariat following the transfer of the proposal from the Commission to the Council'. He added 'the role of the Council Secretariat is to provide secretariat services to the Council and its preparatory bodies(working groups, COREPER) and in particular to assist successive Presidencies. By its very nature as an administrative service it is neutral'.

The interviewee confirmed that he 'followed the directive proposal at all stages and at all levels during its passage through the Council hierarchy: from the Council working group to the COREPER and on to the internal market Council'. He added that the working group that negotiated the database directive 'is a standing group on intellectual property issues in the Council, whose membership only changes periodically'. The interviewee commented that 'in terms of membership, the working group contains civil servants from the Member States, normally from their Ministries of Justice, Trade and Industry or Culture. Often Member States have more than one Ministry represented in the working group, although this tends not to relate to the size of the Member State but rather the way such issues are divided across their own ministerial responsibilities at home. For example: Germany - was represented just by the Ministry of Justice whilst Portugal was represented by the Ministry of Culture plus the Ministry of Industry'.

In terms of the substantive issues discussed during the negotiation of the database directive the interviewee identified the following four points of debate:

Firstly, the scope of the directive i.e. should it apply to all databases or just electronic ones. The interviewee recalled that 'the decision to extend the coverage of the directive to all databases emerged over a period of time. Underpinning the debate was the difficulty of defining clearly a distinction between wholly, partly or non-electronic databases and the different rules that would have applied to each'. The interviewee commented that as far as he could recall 'the extension to cover all databases was first proposed in the discussion of the directive in the European Parliament but the amendment was

1 rejected at the Parliament's plenary session during its first reading'. He added 'however by this stage
2 the Commission had become interested in the proposal to the extent that I had the impression that the
3 Commission officials involved were disappointed when it was rejected by Parliament. After this there
4 was a gradual push by a number of Member States for the extension which in an incremental process
5 finally led to its adoption by Council'..

6
7 Secondly, the scope of the sui generis right. The interviewee commented that 'this debate proved very
8 complicated both because the sui generis right was a new right which no-one had experience and
9 because of the aligned discussions on the limited nature of the exceptions which concerned a number of
10 delegations including Denmark, Portugal and Germany'. In this regard the interviewee expressed the
11 opinion that 'in examining the discussions over the sui generis right the traditional distinction between
12 Droit d'auteur and Copyright countries is not a useful way to distinguish between the positions or views
13 that different Member State delegations expressed'.

14
15 The interviewee recalled that 'the German delegation was active throughout the discussions and not just
16 when Germany held the Presidency'. He added that 'When Germany took over the Presidency they
17 were very eager to finish the directive and made strenuous efforts to complete the copyright chapter
18 quickly. However, the copyright chapter took so long to complete that they had no time left to deal with
19 the sui generis right'.

20
21 Thirdly, the issue of non-voluntary licenses. The interviewee commented that 'from the outset all the
22 delegations had problems with this aspect of the Commission's proposal. Some with the principle and
23 others with the manner of its formulation in terms of how they would be practically implemented'. He
24 re-iterated that 'the sui generis right was new for everybody and at the beginning a number of
25 delegations [including Germany] raised objections to it and the licensing provisions because they
26 viewed a copyright solution in conjunction with 'unfair competition' law as sufficient. Of course, it is
27 fair to say, that to a certain extent the initial Commission proposal was based on unfair competition
28 ideas anyway'.

29
30 In terms of the licensing provisions the interviewee recalled that 'for a long time there was a feeling in
31 the Council working group that most of the Member State delegations would go along with the
32 provisions if how they would work at a practical level could be worked out clearly and fairly'. He added
33 'an over-riding concern throughout from all the delegations was that the balance should be right
34 between the rights of rightsholders and users'.

35
36 The interviewee explained the removal of the non-voluntary licensing provisions just before the
37 common position in the following manner. 'the provisions were proving difficult to get final agreement
38 on in terms of an agreed text and at about this same time (more or less) in the negotiations there was a
39 shift in the scope of the directive to narrow the scope of the sui generis right. This narrowing was
40 significant because the Commission's original justification for the non-voluntary licenses was that they
41 were necessary as a strong counterbalance to the wide scope of the sui generis right. Once this had
42 changed this strengthened the arguments of those Member States pushing for the removal of the
43 licenses. Another factor was that it was apparent that the French Presidency was very keen to get the
44 directive adopted during its term as President which increased the impetus to find a solution and to
45 make final decisions on the sticking points. The licensing issue became the final obstacle to a common
46 position and so it was dropped'.

47
48 Fourthly, the issue of exceptions. The interviewee commented that 'the issue of exceptions were much
49 debated and were of particular concern to Denmark, Portugal and Ireland'.

50
51 The interviewee added that 'I did not have the impression that the Commission or anyone else had a
52 deliberate and over-arching strategy for achieving the adoption of the directive, although I am aware
53 that some individuals accounts of the passage of the directive probably tell a different story'. He added
54 'certainly the most crucial stage in the negotiations and the period during which most changes were
55 made to the directive text was under the French Presidency. Towards the end of this period was also
56 when the three new Member States joined the discussions (Finland, Sweden & Austria). These
57 Member States were in a sense jumping onto a moving train, but it is interesting to speculate how
58 differently the directive might have turned out had these Member States been involved from the
59 beginning'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that 'my knowledge of the issues clearly deepened throughout the policy process, although because of my role as a member of the Council secretariat I did not have a strong view or position in favour or against any aspect of the directive itself. Clearly if I did this would jeopardise the neutrality of the secretariat and put in doubt the trust Member States place in the secretariat during all policy negotiations'.

The interviewee commented 'because of the nature of my role I have considerable contact with both the successive Presidencies and the Commission both directly and indirectly'. He confirmed that 'during the negotiation of any policy it is quite normal practice for the Presidency, secretariat and Commission to meet on an Ad Hoc basis to prepare for the discussions at all levels of the Council'. He added that in his experience it was also not unusual 'for the Presidency and the Commission to be in conflict over issues under discussion and both parties try to sort out these conflicts prior to the formal meetings with the other Member States'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The Interviewee commented that given his neutral position he was not in a position to answer this question. 'It is clearly not the role of the secretariat to take sides and if it did it would lose all credibility with the Member States'.

This stated, on a personal level the interviewee acknowledged that 'sometimes it is easier to talk to some delegations than to others. For example, to the delegation of one's own nationality [English] but this is never done in an exclusive way. It is based on personal friendships rather than in terms of the processes of discussion themselves'.

On the issue of influence, again the interviewee commented that it was inappropriate for him to answer. This stated, the interviewee did acknowledge that 'the Council secretariat has a central role in ensuring that Council negotiations are facilitated in the smoothest way possible'. In terms of the procedural impact on the discussions the interviewee commented that 'It is normal practice when there is a legislative proposal to discuss for the Council working group to meet every 3 to 4 weeks for a two day meeting (i.e. this is the normal working rhythm). However towards the end of any negotiation, as with the database directive under the French Presidency the rhythm changes with longer meetings held more frequently until adoption'.

The interviewee also added that 'as well as working group meetings and COREPER meetings there is sometimes a common intermediate group used between the two levels which helps clarify positions. This intermediate group met twice during the negotiation of the database directive and contained both some national delegations and COREPER representatives'. In the interviewee's opinion this intermediate level 'often has a useful role to play in assisting in difficult negotiations'. The interviewee commented that 'the attaches from the COREPER frequently follow the progress of the working group and depending on the Member State often attend its meetings and liaise closely with their national delegations. If during the progress of the working group a stage is reached when an issue appears no longer soluble at working group level but remains too complicated for the COREPER then the intermediate group comes into play to see what solutions can be formulated. This intermediate stage is a semi-political level'.

The interviewee commented that in terms of procedures 'it is the Presidency that formally sets the timetable but the secretariat who assists in putting it into practice'. The interviewee acknowledged that because of the close relationship between the Presidency and the secretariat often the Presidency relied on it for information on how procedurally things could be most effectively achieved'.

The interviewee commented that 'another major step in the passage of the directive was the Parliament's reaction to the Council common position. If the Parliament had been less positive then the whole process could have taken considerably longer. In fact during the second reading the Parliament

1 proposed no major amendments. This was unexpected by some Member State delegations who thought
2 that given the large numbers of major changes in the Common position from the Parliament's first
3 reading there was bound to be some conflict. Indeed there was some relief in Council after the directive
4 was adopted by the Parliament that the conciliation process would not have to be invoked'.

5
6 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
7 **Database directive ? How was this influence exerted during the policy process ?**

8
9 The interviewee commented that 'of those individuals most powerful in the discussions the Commission
10 officials always have a central role and during the database directive they were very active. This is
11 partly because under the EC treaty the Commission is the essential policy proposing institutions. This
12 has resulted in an element of proposal defense and a desire on the part of the officials representing the
13 Commission to push for a final result that the Commission are in favour of, because they were the ones
14 who originally formulated the problem that needed a policy response'.

15
16 The interviewee added 'there is often also an individual or personal aspect to a policy proposal, in that
17 the Commission official who draughts a policy proposal clearly wants to have that proposal accepted.
18 For example, on the database directive Bridget Czarnota was very eager for her proposal to be
19 accepted'.

20
21 As to why Mrs. Czarnota did not negotiate the directive through to its adoption the interviewee
22 commented that he was unsure of the reasons but recalled the explanation at the time was that 'Mrs.
23 Czarnota's superiors (Mr. Waterschoot & Mr. Mogg) required her to work on another project'.

24
25 The interviewee also mentioned that the French and German Presidencies were very influential through
26 their representatives Mr. Jean-francois Dobelle and Mr. Kurt Kemper respectively. He added that 'a
27 Presidency can exert a considerable amount of pressure in pushing negotiations forward, although the
28 secretariat can also change the pace of discussions by advising a Presidency if delegations have not had
29 sufficient time to absorb the information'.

30
31 The interviewee commented that 'under the French Presidency things moved very quickly and many
32 delegations wanted more time to consider the new amended versions of the directive. A number of
33 delegations complained to the Presidency and to the secretariat about the lack of time. These complaints
34 were resolved through private meetings to discuss their concerns'. He added 'the main problem is that
35 when a policy proposal is changing rapidly many delegations are keen to have the time to consult with
36 superiors at home to confirm that what they are agreeing too conforms with their government's view'.

37
38 The interviewee commented that 'In the End Game the Presidency is in charge of the discussions and is
39 eager to resolve the unresolved and so will push things as far as they can to get a proposal adopted.
40 However there are only so many things that they can do'. He added that 'when a Member State takes
41 over the Presidency policy proposals can be at a number of stages which will affect whether they can be
42 pushed to adoption in the lifetime of the Presidency: sometimes issues are just not ripe and the
43 Presidency will fail to get a result, sometimes a Presidency will inherit a portfolio that is already very
44 far advanced and so will get it passed early on in its Presidency and other times, as in the case of the
45 database directive, a number of issues will remain unresolved that will require pressure from the
46 Presidency to force a determination of them'.

47
48 **6. Did any international policy developments impact on the outcome of the Directive?**
49

50 The interviewee commented that 'the US Feist case was discussed in connection with the database
51 directive and was the court decision that made it clear that something more than copyright was needed
52 to protect database producers' He added 'The case was specifically mentioned in the Commission's
53 preamble to its proposal and was as far as I can recall part of its justification for the introduction of the
54 sui generis right'.

55
56 On the sui generis right the interviewee added that he recalled 'initially some delegations asked the
57 Commission if it was not possible to develop or adapt some form of legal protection that was already
58 familiar instead of establishing a wholly new right. The Germans particularly were in favour of an
59 unfair competition rules solution, while the UK initially pushed for a form of neighbouring right'. The

interviewee speculated that the Commission may have linked the copyright and unfair extraction(sui generis) right so closely together in the original proposal as a defense against this initial resistance to its sui generis proposal. He added ' the Commission in presenting its original proposal was concerned to ensure that the Member States were not in a position to accept the copyright bit of the proposal and reject the sui generis bit'

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 ?

The interviewee commented 'my impression is that aside from the contribution of the discussions on the information society discourse which have raised the profile of any legislation that has any relation to new technologies or information, I am not sure that the database directive is particularly well known. You need to beware of the tendency to over-emphasise how well known the directive is, as I do not think the average man in the street is aware of the directive'. He added that 'the directive is certainly important for the Commission but how influential it will be for the future development of the information society we will have to wait and see'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that he did not feel in a position to be able to give an adequate answer to this question because he was not involved in the consultation process conducted by the Commission or in the Member States. As for the council itself he commented that 'there are no formal consultations in the Council as such, although clearly the ECOSOC and the activities of the Commission and Parliament are all integral parts of the legislative process'. He added that 'any lobbying deputations made by interested parties to the Council were passed on by the secretariat to the Presidency who then made them available to the other Member State delegations on an ad hoc basis'. He commented that his personal impression was that 'most lobbying takes place either at directly to the Commission or at the Member State or European Parliament'

The interviewee commented that during the passage of the database directive he was 'aware of some lobbying direct to the Council from both Database Producers (including Reuters)and Publishers. These deputations were written submissions which were made available to the other Member State delegations by placing them on display in the Council working group meeting room'. The interviewee contrasted 'the limited degree of lobbying at the Council over the Database directive with the enormous amount that took place over the software directive particularly on the issue of reverse engineering'

The interviewee commented that within the Council there was little space for lobbying. He added that 'while the Council hierarchy is basically: Council, COREPER and Working Groups how these operate in practice is effected by the approach of each Presidency and the nature of the proposal under discussion. For example, in discussing something as technical as the database directive it is not unusual for national experts from the working group (like Graham Jenkins - UK) to attend full Council meetings to ensure that their Ministers are well informed'.

The interviewee commented that 'the style of each Presidency varies but there is always the possibility for parallel meetings to the formal working group to be held between the Presidency, the Commission and secretariat to facilitate ironing out any problems. This is quite common practice under all Presidencies'. He added that in his experience 'it is also quite common for different Member State delegations to meet up informally behind the scenes outside the working group meetings to either to agree or to discuss disagreements'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that 'the directive has clearly set a precedent for adapting copyright legislation to take account of the digital environment such that any new legislation will build on what

has been done'. He added that 'following the TRIPS agreement and the WIPO diplomatic conference it is likely that further measures will also be taken on databases at the international level'.

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

The interviewee commented that copyright legislation was likely to continue to play an important role both in Europe and at the international level as the information society developed although whether this would further European integration was uncertain.

More generally the interviewee commented that his experience led him to think that 'Europe must be careful not to go too quickly down the path of further integration' and added that 'it is important that we get what we already have achieved working properly first before moving forward to further political integration'.

The interviewee commented that he could 'only conceive of a United States of Europe in the very distance future perhaps in 50 years. It is certainly not something possible in the next 10 to 20 years especially starting from the premise that there is like to be a continued expansion of the European Union as more States from Eastern Europe join In this context it is unlikely that everyone will be able to continue moving forward at the same pace and some sort of multi-track Europe seems almost inevitable. Of course whilst this is true of political integration, economic integration is continuing all the time'.

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 ?

The interviewee commented that 'while the desire for career development is potentially a factor in shaping how civil servants approach the negotiation of a particular piece of legislation, in the Council this is less likely because of the political/semi-political atmosphere where the major factor affecting how a policy develops is the determination of the Presidency to achieve its adoption and its ability to reach a solution with the other Member States that will provide it with at least QMV (qualified majority voting)'. He added that 'Presidencies tend always to be keen to be able to point to the successful passage of legislation during their term'. However when a Presidency is considering a particular solution 'the questions that arise are, is this the right solution ?, is it going to be acceptable to the Member States, the Commission and Parliament. In answering this questions a Presidency tends to view the most achievable solution even if it is not their preferred choice'.

The interviewee commented that in his opinion 'the relationships between Member States are not significant across issues'. From his experience he did not recognise the characterisation of Member States horse-trading one issue for another (e.g. fisheries for agriculture) although he did acknowledge that 'there is often bargaining internal to any particular policy issue amongst Member State delegations who find themselves largely in agreement over issues'. He added that sometimes the voting power of a Member State was significant in shaping the reaction of the Commission if it is in conflict with that Member State.

The interviewee commented that 'the co-decision procedure is a lengthy process for making legislation. During the database directive while the period of 18 months from the proposal to the amended proposal was normal the 2 years from amended proposal to common position was a little long. This was however because the sui generis right was something completely new'. He added that overall the passage of the database directive was reasonably smooth especially if it was compared to the passage of a text like the Bio-technology directive that had to go to conciliation.

The interviewee went onto explain that under the terms of the treaty after the common position the Parliament has 3 months to return the document to the Commission with any amendments. This can sometimes be extended by a further month usually for the non-month of August when every thing shuts down. The Commission then gives its opinion, this said if the Commission does not like the Parliamentary amendments then the Council has to adopt the text by unanimity. In effect the Council has to weigh up the Parliament's second reading which it either swallows whole or goes for conciliation.

The interviewee commented that 'in the Council consideration of the second reading and Commission opinion is an important process. Generally discussion starts with the working group who pass up their remarks on the amendments to the COREPER either as roman 1 points (where there is agreement and the working group expects the COREPER to rubber stamp them) or roman 2 points (where there is no agreement and the working group thinks higher level discussion is still required). Roman 1 points if rubber stamped by the COREPER become A points in the Council, Roman 2 points if they are not resolved by the COREPER become B points in the Council that require formal political resolution'

The interviewee added that 'there is a third category in the Council called Fosbery points (where there is agreement in the COREPER but Ministers are given an opportunity to express a usually very strong opinion in favour of them) (rarely a negative opinion)'.

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 ?

The interviewee commented that the digital realm posed a number of threats to copyright 'new information and communication technologies (ICTs) make it easy to copy, manipulate, and transmit around the world copyright works. Hence the restriction of the private copying exceptions to non-electronic databases Article 6(2)a and 9(a) and the clarification that exhaustion of the distribution right does not apply in the case of on-line databases (recital 33)'.

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

The interviewee did not see any relationships between copyright and other areas of information policy such as privacy. For the interviewee 'copyright is the reward for creativity in return for making it available to the public thus the balance is essentially protection from illegal copying because the work is made available'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee referred to his previous answer but added that he was 'confident that those working in copyright are aware of the interrelationships with other areas of information law and especially of the necessity to maintain a fair balance of rights'.

The interviewee questioned if it was role of the law to keep pace with technological change. In his opinion 'there is always some elapse of time between a new technological development and the adaptation of the law to take account of it, if only because the effects of the development have to be experienced before the need to adapt the law can be perceived. It may be easier for case law than for statute law to keep pace'.

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 ?

The interviewee commented that 'the co-decision procedure which enables more involvement of the Parliament in the decision-making process and in the Parliament's powers was originally driven by concerns over democratic accountability and participation and it seems likely that further increases in the Parliament's powers may follow in the future'.

The interviewee added 'one area where it is difficult to gauge the influence exerted on the policy process is lobbying. Certainly judging from the numbers of lobbyists in Brussels, industry at least thinks it is effective'.

The interviewee stated that 'in no way do the European institutions take decisions in ivory towers, even if this is the way that the media, especially in the UK portrays decision-making in Europe. The notion

1 that decisions are taken by civil servants is also simply a distortion of the truth, as every Member State
2 government is involved in practically every decision taken at the European level'.
3

INTERVIEW no. 10**Representative from Council Legal Service****Preliminary Comments by Interviewee**

The interviewee commented that to obtain reports of the Internal Market Council meetings during the passage of the database directive I would need to have the numbers of the meetings before I could make my request to the Council library, although she added that my request might be rejected. The interviewee commented that to obtain the numbers of the meetings I would have to start with the press releases from the Internal Market Council of June 6th 1995 when the directive reached a common position and work backwards to compile my list of document numbers which appear in these press releases. She added that I should then contact Mr. Goebel in the Council Library to make my formal request for documents.

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 ?**

The interviewee commented 'I started in the Council legal service in June 1991 and was from that date until Christmas 1994 in charge of intellectual and industrial property, after which I moved service'. She added that 'the legal service in the Council Secretariat is linked to the legal service in the Commission but collaboration has always very much depended on the personalities involved. During the database directive I had good contacts with Peter Van Uffer up until his departure when he was replaced Mr. Drijber'. The interviewee further explained that the Commission legal service tended to have a lot of work with the Court of Justice rather than being heavily involved in the work of the Council where they tend to appear only to defend a particular Commission position. This stated, the interviewee commented that 'in my experience if the personality mix is right then even very difficult issues can be resolved and solutions reached'.

The interviewee commented that 'In my memory at the time of my first contact with the database proposal I recall thinking that it was not very important'. She added that 'by the end of 1991 I think I was aware that DGIII was in the process of preparing a directive proposal on the legal protection of databases but it was not until May 1992 towards the end of the Portuguese Presidency that the proposal was formally presented at Council'. The interviewee commented that she later became aware that some the Member State delegations had been aware that a Commission proposal was likely to be produced up to 12 months before it reached Council.

The interviewee commented that 'I can't recall any specific clear explanations as to why the database proposal emerged but my impression is that it was generated from within the Commission and not by a clamour from industry. It is also important to realise that in general it was not as interesting or important a discussion as for example the rental and lending right directive which generated strong lobbying from rights holders and was an issue where the need for legislative action was acknowledged by the Commission and industry alike'.

The interviewee commented that the Member States holding the Presidency during the passage of the database directive were as far as she could recall the following:

Portugal 1992 (first semester)	United Kingdom 1992 (second semester)
Denmark 1993 (first semester)	Belgium 1993 (second semester)
Greece 1994 (first semester)	Germany 1994 (second semester)
France 1995 (first semester)	Spain 1995 (second semester)
Italy 1996 (first semester)	

The interviewee recalled that 'during the first semester of 1992 the Portuguese Presidency was very successful in the intellectual property sector especially over the Rental and Lending right directive where progress in the negotiations was truly astonishing. This progress was due to the efforts of Mr. Lemos Viera who was chairing the working group meetings for Portugal and those of Mr. Vestrygne(DGIII)'.

The interviewee commented that 'in the database negotiations most of the early work was done by the *very special* Mrs. Czarnota [the implication being she was difficult to work with]. From the outset of the negotiations she showed herself to be very knowledgeable about the directive and also as some-one with very strong and rigid views on it which proved to be not very helpful in enabling Member State delegations to move forward'.

The interviewee added that 'in my memory apart from the amendments from the first reading in the Parliament, throughout the whole of 1993 I can't recall any major discussions taking place at all on the database proposal and any work that was done was of a very routine nature'. She added 'in fact really from the beginning of the UK Presidency in the second half of 1992 until the later stages of the German Presidency in the second semester of 1994 the databases negotiations made practically no progress in the Council working group'.

The interviewee added 'thinking about it, it is astonishing that for nearly two and half years nothing was achieved and all the major questions remained open and unresolved'. The interviewee commented that 'in my opinion part of the reason for this lack of progress was Mrs. Czarnota's negotiating style which in the context of the Council working group was a psychological disaster. She was often so rigid about particularly points that delegations were pushed in to a corner where they were forced either to proceed as she wanted or to sit on their hands which is basically what they did until her departure from the negotiations late in 1994'.

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 ?

The interviewee commented 'my own involvement in the discussions was to verify that all the drafting of the various changes to the text remained compatible with European Law. I also attended all the Council meetings, although I can't recall during the database negotiations any major questions or indeed anything particularly unusual'.

The interviewee commented that the French Presidency became the crucial player in getting the directive through to a common position and added 'in view of the limited progress that had been made in the negotiations it was amazing to see how quickly things changed after the French took over the Presidency, especially in view of the fact that the directive was negotiated under the co-decision procedure which tends to make it difficult to move a proposal forward quickly to adoption. Fortunately there were no institutional delays, although I can recall that some delegations were concerned that the Parliament might object to some of the changes made to the directive during its second reading'.

The interviewee commented that 'the ability of the French Presidency to achieve so much was mainly due to timing which was itself related to a host of factors including that Mrs. Czarnota was no longer directly involved in the negotiations, the conclusion of the TRIPS agreement part of which covered databases and the skill of Mr. Dobelle who chaired the Council working group meetings during the French Presidency'.

The interviewee added that 'although it may have been a coincidence that dramatic progress in the negotiations followed quickly after the departure of Mrs. Czarnota, this is not my feeling. On many occasions I can recall Mrs. Czarnota being very negative in response to proposed changes to the proposal put forward by Member State delegations and on others her saying simply no that is impossible before proceeding with a detailed and lengthy explanation which put delegations onto the defensive. In my opinion Mrs. Czarnota's approach irritated many of the Member State delegations, some of whom considered her behaviour as inappropriate for a Commission official'.

This stated, the interviewee commented that the previous general lack of progress in the discussions was also related to the ability of the previous Presidencies to do other work including in relation to WIPO. She added 'As each Presidency took over the database portfolio the reality that the negotiations were not likely to be resolved had the effect of encouraging them to push the database further down their list of priorities in favour of more achievable progress on other issues. Following the efforts by the German Presidency, Mr. Dobelle arrived and was the right person, in the right place at the right time and the other delegations recognised the opportunity for progress'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'basically my own opinion of the directive changed very little during my three and half years in the legal service, although strictly speaking of course my job was to remain impartial'. She added 'however after I changed my post within the Council secretariat and the French took over the Presidency I followed with interest the rapid developments that occurred and I can recall being greatly surprised at the speed at which things happened'.

The interviewee commented 'by this stage the Commission official involved was Mr.Gaster'. She added 'I don't know exactly why Mrs. Czarnota left the negotiation of the database directive but my impression is that she was very highly thought of within the Commission hierarchy. Although her move was apparently horizontal in terms of rank really it was a promotion because the area of Community enlargement into which she moved is a 4 star activity as far as the Commission is concerned which means that she was transferred to these duties after having been specifically chosen'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that as an official within the Council her position relied on the fact that she was neutral with regard to any particular discussion and as such she felt it inappropriate to answer this question.

This stated, she acknowledged that she did have contact with a large number of individuals outside of the Council secretariat during the passage of the database directive most notably Commission officials. In this regard, the interviewee mentioned contacts with: Mr.Verstrygne and Mrs. Czarnota (DGIII later DGXV), Mr. Gaster and Mr.Vandoren (DGXV) and Mrs. Oliven-Aviles(DGXIII). The interviewee commented that 'during the negotiations the relationship between DGXV and DGXIII was not always very good, as a result officials from DGXIII (which was an associated service on the directive) were not always briefed as well as they could have been by DGXV'.

Commenting on the process of copyright harmonisation more generally the interviewee added that 'apart from the software directive and semiconductor directives all the work in the IPRs sector has been completed since after 1992. But in my opinion this does not fully highlight the very important role of Mr. Verstrygne in being the first to push the whole copyright harmonisation agenda forward in the Commission both with Commissioner Bangemann and Commissioner Monti. It was certainly Mr. Verstrygne's vision of the importance of the harmonisation of IPRs that has enabled so much legislation to be passed so quickly'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to her previous comments and said that in terms of those who exerted most influence on the database directive she would restrict her comments to the activities of the Council because in general she only had a relatively limited knowledge of what occurred in the other European institutions during the passage of the directive.

The interviewee commented that 'the Council working group that negotiated the database directive and for that matter most of the other European copyright directives was made up of the same Member State officials throughout. As a result these officials were able to build up strong personal relationships with one another as well as an intimate knowledge of the different negotiating styles, techniques and view points that different officials used' (i.e. the nuances and idiosyncrasies of individuals involved).

The interviewee reiterated that the French Presidency was the crucial period for the directive and added that 'as well as Mr.Dobelle there was also the French delegation led by Madame de Montluc who was nice but very formal' She added 'Mr. Kemper of the German permanent representation (who has since moved to work in Geneva for WIPO)and Mr. Jenkins for the UK were also both very active during the negotiations as were the Dutch delegation'.

On the Belgian Delegation the interviewee commented that 'my overall impression was that the Belgian delegation was not always very consistent in its views and tended to change position depending on the issue, as a general rule in the copyright sector as in all other policy areas they either follow the Commission or copy the French' The interviewee acknowledged that this was a bit of an over-generalisation but said that it did give an impression.

In terms of how influence is actually exerted within the Council the interviewee commented that in her experience 'during a good Presidency a large amount of work is conducted by the Presidency and other Member State delegations in parallel to the formal meetings of the working group. This enables the Presidency to get an understanding of the different positions of each Member State delegations and more explicitly, those aspects of a directive on which a delegation is prepared to compromise and the price it is asking to make that compromise'. (i.e. the extent to which each delegation is willing to be flexible)

The interviewee commented 'each Presidency has its own agenda that it is trying to push but it is never in exclusive control and must always aim to get a good equilibrium. If the issue under negotiation is a priority for the Presidency then the work timetable can be especially hard'. She added 'It certainly takes special skills to arrive at a consensus including being creative, political and gaining an intimate personal knowledge of the individuals that you are negotiating with'.

The interviewee commented that 'in my experience compromises and bargains tend to be reached internal to a particular proposal and do not normally involve delegations trading across policy sectors, although this does sometimes occur, but I have never heard of such trading in intellectual property policy'. She added 'of course it is not really the job of the Council working group to make these sort of political bargains and they tend to be left to the COREPER which has much more room for horizontal bargaining. Although even in the COREPER in my experience it is usually only the larger Member States like the UK, France and Germany who engage in this sort of cross policy sector bargaining'. (i.e. you support me on this, and I will support you on that).

The interviewee explained that it was only the larger Member States that engaged in this sort of bargaining because the smaller Member States ultimately had only a limited number of votes in Council and also because many of them lacked political sophistication and an understanding of the game which was partly due to the limited size of the delegations that they supported in Brussels as an example the interviewee referred to Greece.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented 'I can't recall any major discussions in the Council as a result of issues arising from international developments, although the Feist case did provide a background to the negotiations, particularly at the beginning when the need for the directive was still under discussion'.

This stated, the interviewee added 'of course the success of the French Presidency in getting the database directive adopted was partly due to the TRIPS agreement which contributed to creating the right kind of policy environment for the database negotiations'. She went on to explain that in her opinion the successful completion of the TRIPS agreement which covered a range of IPR issues including databases increased their significance as a trade item and in turn raised the profile of IPR discussions at the European level 'this contributed to the maturing of the database discussions, (even if not in a directly causal way), and gave new drive to moving the debate forward and to generating consensus and agreement'.

The interviewee also commented that 'in areas where the Commission is extending its existing competence, given the opportunity Member States often prefer to push for agreement at an international level where they have a whole vote rather than risk the QMV(qualified majority voting) system in the Council'. She added 'as a result after the TRIPS agreement had introduced a minimum level of protection for databases at an international level, most Member States became more interested in ensuring a higher level of protection within the EU and in completing the directive quickly'.

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 ?

The interviewee commented that she was sceptical about the notion that the database directive had gained a much higher public profile and commented that her impression was still that it was not a major discussion. She added that it would be the implementation stage of the directive that would highlight if it had a higher public profile. She was also sceptical of describing 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 ?

The interviewee commented 'in the Council, consultation per se is not a common activity, although I can recall on a number of occasions distributing or rather making available to the delegations deputations that were sent in by lobby groups. The normal practice was to inform the delegations of these deputations but I can't recall any of them ever having been discussed by the working group'.

The interviewee also commented that she did not really feel qualified to answer the question because she had little experience of the formal consultation procedures conducted by the other institutions. This stated she commented that she was aware that 'most of the lobbying that occurs is focused on the Commission, Parliament and directly to Member State governments'. In terms of her own position as part of the Council secretariat the interviewee confirmed that she had few if any direct contacts with lobbyists because the Secretariat as an aid to the Presidency had to retain its neutrality and confidentiality at all times.

This stated the interviewee recalled that on one occasion over an industrial property issue when all the Member State delegations were in agreement with the Commission's position that she attempted to get some alternative views from a range of interested parties to enable her to use them as a contrast to the Commission position. In this example the interviewee commented ' I found it very difficult to get any other alternative views, which highlighted for me the problems of identifying and locating those individuals or groups with minority opinions except where they are organised into a formal group which is not always the case'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to her answers to Q7 and added that along with the software directive the database directive will act as a basis for future Commission action in the digital environment.

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

The interviewee started by referring back to her previous comments about the crucial role of Mr.Verstrygne in pushing the harmonisation of copyright agenda at the beginning of the 1990's she commented that 'harmonisation began with an initial attempt by the Commission to get the Member States to ratify the latest versions of the Berne & Rome conventions because it was a means of automatically introducing a minimal level of harmonisation throughout the Community. This attempt was blocked by the Council and ended up with a resolution inviting rather than a directive forcing Member States to sign the conventions. As a policy solution this was almost useless'.

The interviewee added that 'as a result of this failed policy initiative by the Commission, the Council advised it to approach harmonisation in a more step by step manner with specific proposals taken in turn. This has since led to the recognisable copyright approach that has been used with all five copyright directives and which will be deployed in any future harmonisation initiatives'.

1 The interviewee commented that although she was aware that the Commission had released a further
2 Green Paper on copyright issues in 1995 and a follow-up communication late in 1996, she was not
3 familiar with what the next policy proposals would be although she commented that issues such as
4 moral rights and copyright exemptions had still not been addressed.

5
6 The interviewee added 'after five directives the approach of most Member States to the harmonisation
7 of copyright is basically favourable and countries such as France have come to understand that if they
8 want to maintain anything like the protection that they already have they must push for harmonisation at
9 the EU and international levels. In my opinion because the internal market is at least technically
10 completed and because the information society is global, the Commission will increasingly push its
11 harmonisation agenda at an international level'.

12
13 On the wider question of further European integration per se the interviewee commented that 'After
14 monetary union has begun my overall impression is that there will be a dramatic slow down in any
15 further integration partly because in reality as I mentioned before the internal market is already finished
16 and partly because the enlargement agenda that is the next big step for the EU will inevitably mean a
17 multi-track Europe as new Member States are given time to conform to existing European legislation'.

18
19 **11. Which other factors, if any, would you identify as being significant in affecting how copyright**
20 **issues are framed and discussed at the European level ?**

21
22 The interviewee commented that she was aware of criticisms of bureaucrats and technocrats within in
23 the European institutions but she felt that these were usually directed towards the Commission rather
24 than to officials in the Parliament or Council.

25
26 She added that 'although these factors certainly exist I don't believe that individual ambition on the part
27 of a Commission official is enough to be able to push a proposal through, even as in the case of Mr.
28 Verstrynge, where an official has a very good relationship with his hierarchy and the cabinets of the
29 Commissioners concerned. Unless a proposal is basically OK it will not be agreed in the Council.
30 However in overcoming the first obstacle to any proposal, which is getting it adopted by the
31 Commission, ensuring that your Director-general understands its main priorities is very important'.

32
33 The interviewee also commented on the role of different Member States in the Council when
34 negotiating on copyright issues. Referring back to her comments in Q1 about the success of the
35 Portuguese Presidency she commented 'that the Portuguese were successful in moving the negotiations
36 on should not be taken to imply that the Portuguese are themselves strong on IPRs because in fact
37 overall they have a very poor record on the implementation of copyright legislation and are still in
38 violation of international law on a number of issues'.

39
40 The interviewee commented that 'The Nordic countries in my experience tend, perhaps rather naturally
41 given the similarity of their copyright legislation, to have similar opinions and to stick together in
42 Council negotiations. For similar reasons the UK and Ireland stick together on copyright and in my
43 experience on everything else more and the French and Belgians (and to a lesser extent Luxembourg)
44 also do the same. Although I can recall that during the database directive on many points the French
45 delegation was in dispute with the French Presidency'.

46
47 The interviewee added that 'because of the role of personality and politics in any negotiations policy-
48 making is not rational in an objective sense but it does have a logic that can be explained'.

49
50
51 **D. Information policy-making and Copyright in the digital age**

52
53 **12. What threats and opportunities would you identify from the extension of copyright concepts**
54 **into the digital realm ?**

55
56 The interviewee commented that she was not completely up to date with the latest developments in
57 copyright law for the digital environment but recognised that the danger of piracy of works in digital
58 form meant that protection had to be provided. In this regard the database directive was interesting

1 because it had introduced a new concept into European intellectual property law i.e. the sui generis
2 right'.

3
4 The interviewee added that 'in my opinion I am not sure that there is a general need for new concepts
5 such as the sui generis right, although perhaps this is because I come from the droit d'auteur tradition.
6 As such I think copyright will prove itself to be able of evolving satisfactorily to the digital
7 environment'.

8
9 **13. How would you characterise the relationships in digital environments between copyright**
10 **policy and other areas of information policy such as Privacy ?**

11
12 The interviewee commented on the wider relationships of copyright policy with other areas of
13 information policy and said ' I am not sure that there is a community policy towards information per se
14 although the Bangemann report has certainly raised the profile of the whole issue of information policy
15 through its discussions of the information society'.

16
17 The interviewee added that she did not have any strong feelings about the relationships between
18 different areas of information policy and had not really considered the question of any specific links
19 between copyright policy and other information policies. This stated , the interviewee commented that
20 'Data protection is likely to become increasingly important in the digital environment and copyright
21 owners collecting data on users of their material will have to respect its principles. Also to some extent
22 the issue of access to information is implicit in discussions of copyright exemptions which are important
23 particularly to Nordic countries and the Netherlands where exemptions are strong and help to keep a
24 balance in copyright'.

25
26 **14. How adequately do you think current European Information policy processes handle these**
27 **interrelationships?**

28
29 The interviewee referred to her previous answer and commented that she was not sure that in a policy
30 context these interrelationships had been formally acknowledged, although as the information society
31 became more of a reality maybe these interrelationships would become more easily recognised and
32 would eventually be addressed in a European policy. She added 'in an area where things are changing
33 so fast it is very difficult to make appropriate legislation but the EU was showing itself to be pro-active.
34 In areas of information policy there is a need for an international framework of general principles that
35 can be complemented by case law'.

36
37 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
38 **concerns over the issues of democratic participation and accountability ?**

39
40 The interviewee began by reviewing the development of policy-making for the internal market from the
41 early 1990's onwards and commented ' before the completion of the Maastricht treaty, the Commission
42 was at the height of its powers and was very strong under the Presidency of Jacques Delors and was
43 pushing the integration agenda. However, since Maastricht a number of events changed the policy role
44 of the Commission to the extent that it started to adopt a much lower policy profile. These events
45 included the extension of Parliamentary powers with the introduction of the co-decision procedure and
46 the initial rejection by the Danish people of the treaty on the European Union and the narrow majority
47 in favour of it in France'.

48
49 The interviewee added ' since this period there has been a recognition amongst the European
50 institutions and Member States of the need to improve policy-making in general and certainly in my
51 experience things have improved with greater transparency an identifiable benefit even within the
52 Council'.

53
54 The interviewee commented 'there has also been a change in policy emphasis and an increasingly
55 common view is that there is a need for consolidation of what has already been achieved rather than
56 further harmonisation and a need to develop the role of the EU as a coherent integrated actor on the
57 international stage'. In this wider policy context the interviewee also said that 'reform of the European
58 common agricultural policy will also be an important policy goal for the near future'.

1 On the issue of democratic accountability the interviewee commented that 'the problem of democracy is
2 general to all European policy-making as is the over-representation of powerful lobby groups with
3 vested interests in particularly policy negotiations. Part of the problem is that it is practically very
4 difficult to represent the interests of individual users, consumers or citizens because they do not usually
5 form coherent groups or have a single set of views. It is also because in the intellectual property sector
6 for example rights holders have an economic interest whereas individuals usually have a personal or
7 cultural interest and therefore in an economic community there is some justification for treating more
8 seriously the views expressed by these rights holder groups'.

9
10 The interviewee added 'in reality the Parliament has a key role in safeguarding and ensuring
11 democratic participation but in my experience I doubt that it fulfills this role very well at present.
12 Although there is the hope that the Parliament will improve its working practices and take on more
13 responsibilities in the policy-making process'.

INTERVIEW no. 11
Rapporteur Economic and Social Committee (ECOSOC)

Preliminary Comments by Interviewee

The interviewee strongly recommended that I talk to Mr.Small of the law firm Baker and Mackenzie in London who had assisted him during the passage of the database directive.

The interviewee also commented that to help him remember the substantive issues in the directive he would refer to the opinion of the Economic and Social Committee which as rapporteur at the time he had been instrumental in preparing.

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 ?

The interviewee commented 'it is difficult to remember exactly when I first came into contact with the discussions on the legal protection of databases but I can recall that the topic was initially covered in the Commission's 1988 copyright Green paper along with computer software and a range of other copyright issues. As far as I can remember database protection was not considered to be an issue of great urgency, or at least not in relation to the preparations being made at the time for the discussions on the protection of computer software directive'. In this regard, the interviewee added that as a member of the ECOSOC, prior to the database proposal he had been rapporteur on the Software directive and the Rental and Lending Right directive.

From his own notes the interviewee commented 'I formally became involved in the database discussions in March 1992 when the proposal arrived at the ECOSOC and the decision was made to give the competence for the portfolio to the Section for Industry, Commerce and Crafts. Shortly afterwards I was appointed as the rapporteur, mainly because of my previous experience with copyright issues, of the study group that was formed from within the section to prepare an opinion on this proposal'.

The interviewee commented 'legislative action on databases was not originally deemed to be an official part of those directives prioritised as aiding the establishment of the internal market under EEC Article 100A, although this later became the case when the procedure under which it was being negotiated changed to the co-decision procedure'. The interviewee added that 'this change is an example of where the Commission attempted to exert greater influence on the issue by concocting an internal market reason for the proposal thereby increasing its importance and the attention that the other institutions had to pay to it'.

This stated the interviewee acknowledged that 'from the beginning of the 1990's there was a clear emphasis on intellectual property harmonisation across the Community as part of the Commission's efforts to remove barriers to trade but also as a recognition of the need for actions that could be developed further on the world stage' He added that 'because of the recognition of the need for global action on issues like intellectual property rights the US legal position always formed a background to any European legislative actions in this field'.

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 ?

The interviewee commented that 'as far as I can recall my own formal involvement in the database discussions followed the normal pattern of policy-making in as much as, after being appointed rapporteur, I prepared a draft opinion in conjunction with my legal adviser Mr. Harry Small which was then discussed and amended at the meetings of the ECOSOC working group. In total I think the study group met three or four times before the report was finished in early November 1992. After this it was adopted unanimously at the ECOSOC plenary session on November 24 to become the formal ECOSOC opinion which appeared in the O.J.(Official Journal)'.

The interviewee commented that 'because of my involvement as rapporteur on a number of other copyright directives and because I am based in the UK, by the time the database proposal was being discussed I had built up a reasonable network of contacts both with officials in the Department of Trade and Industry (DTi) such as Peter Brittan and Graham Jenkins and with interested parties. As a result I was invited to attend the public hearings conducted on the database proposal in the UK by the DTi and also conducted by the CBI(Confederation of British Industry)'.

The interviewee commented that he was not as familiar with the consultations in the other Member States on the database proposal and recommended that for this wider perspective I contact Mr. Hugo Sakkers from Philips who had participated in the discussions both as a UNICE (Union of Industrial and Employers' Confederations of Europe) representative and as legal adviser for Group 1(Employers) of the ECOSOC'. The interviewee added 'I can also remember attending a LAB(DGXIII Legal Advisory Board) meeting in Luxembourg in the summer of 1992 at which Mrs. Czarnota explained the database proposal. My impression at this meeting was that most of those present did not know a great deal about the issues involved, although Mrs.Czarnota appeared to be quite anxious about the sui generis right solution'.

On the rest of the policy formulation process the interviewee commented 'after the adoption of the ECOSOC opinion the directive proposal was as normal passed on to the Parliament for its first reading. As I recall the Parliament as part of its activities organised a hearing on databases before making its proposals for amendments to the Commission. Although I did not attend this hearing Mr.Small did and by all accounts it was a disaster. The main complaints from those lobbyists who were invited to make presentations to the Parliamentary Committee were that they simply were not given enough time to express their points of view and that very few MEPs actually bothered to attend the hearing'.

The interviewee added 'After the common position was reached in June 1995 I sat down again with Mr.Small and went through the directive as it stood at that time to see what in the end had been accepted. Our opinion was that whilst a number of significant changes had been made overall the ECOSOC could not complain. After this I can only remember hearing that the Parliament had not made any changes during its second reading and then later that the directive had been adopted'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that overall his perspectives on the directive changed very little from the time he had prepared the ECOSOC's opinion. He added that 'from quite early on in the discussions there was a general consensus of opinion, certainly within the UK that the Commission's draft proposal was overall pretty good subject to a bit of adjustment'.

The interviewee added that 'a useful distinction for understanding the different approaches adopted in relation to the directive is that there was a clear divide between droit d'auteur approaches and copyright approaches, the former tending to approach the directive from a pure authors right perspective and the latter who tended to take a more pragmatic view'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that 'in the ECOSOC the other members who were most active in the discussions were Mr. Jean Pardon who has sadly since died and Mr.Bell who has since left'. He added that 'apart from the Commission officials involved (Mrs.Czarnota and Mr.Verstrygne) I also had direct contacts with Mr.Brittan and Mr. Jenkins from the DTi, Mr. Charles Clarke from the Publishers Association, Mr. Hugo Sakkers from Philips (& UNICE) and Mr.Rappoport from Reed (& Chairman of the CBI committee on the directive)'.

The interviewee commented that he did 'not recall having formed any alliances during the negotiations or for that matter having had any major conflicts except perhaps with the Commission or more particularly with some of its officials' He added that in his experience this was not unusual because 'for Commission officials involved in drafting a directive proposal it is a major piece of work and a real expenditure of their own time and effort which almost inevitably leads to some personal attachment to the finished proposal such that they can become a bit defensive about it when they see others involved

in the policy process chipping away at it'. The interviewee added that 'in the case of both the Software and Database directives it was Mrs. Czarnota who was most intimately involved in their drafting'.

The interviewee commented that 'while during the software directive I mostly found myself in agreement with her (Mrs.Czarnota), during some of the database discussions I had sense of some antagonism between us over my opinion. Thinking about the discussions one of my main impressions is that she was very touchy and got very uptight about some of the database issues to the extent that many of those involved including myself felt that her behaviour went beyond that demanded of a neutral Commission official'. As an example he added that 'elements of the ECOSOC opinion were criticised so strongly by the Commission that I wrote a letter of complaint about their approach'.

As an example of others who felt that Mrs. Czarnota's behaviour was problematic the interviewee commented that 'there was no love lost between her and the Department of Trade and Industry (i.e., the UK Council delegation) official Mr. Jenkins' He added 'although I know that part of the friction between them arose during the software directive when Mrs. Czarnota's offer of assistance on its implementation was refused and complaints later emerged from some sections of industry that the UK government had not implemented it correctly'.

On the database directive itself the interviewee commented that 'the whole policy process was very slow partly because a number of the Presidencies had little or no interest in the issue and it was only really when two successive Presidencies (German and French) showed an interest and determination in the proposal that it moved forward rapidly to a common position. As I remember it the negotiations consisted of a grinding through rather than a series of great battles as in the software directive'.

In terms of influence the interviewee commented that 'under the Treaty the ECOSOC's role in the policy process is only to offer an opinion and while I would like to believe that our opinions are important and that clear links can be drawn between our views and the final texts of adopted directives this is very difficult to show, even when, as in the case of the database directive the final text proves satisfactory'.

The interviewee added that 'of course the degree of influence exerted by any individuals or groups at the European level is always the sixty-four thousand dollar question. But the reality is that despite representing more than three thousand organisations throughout Europe the ECOSOC has no direct power over policy discussions and as a result rarely has a major influence over directive proposals. The exception to this is when the ECOSOC delivers a very critical opinion of a proposal. When this happens it often acts as a very good early signal that the proposal will prove unacceptable to the Parliament and Council and so in this negative sense it can exert influence'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to his previous answers and commented that 'Under the treaty the executive decision-making body is the Council and during the database directive, being an internal market directive, the politics of the negotiations revolved around the positions of the UK, France and Germany although there was additional input from the Netherlands and Spain. Speaking from experience with internal market directives once the UK, France and Germany have reached their compromise positions a directive is as good as adopted'.

The interviewee added 'as a piece of legislation the directive proved to be more problematic for Member States with droit d'auteur systems but as in other copyright directives these systems proved more flexible than some might have imagined possible'. This stated, the interviewee commented that as far as he could remember 'the UK government and UK interested parties took the lead in the database discussions which is perhaps not surprising given that at the time the UK had something like a 60% market share of the European database market. Indeed, from early on I had the impression that the directive proposal itself had taken a leaf out of the UK's book as one of the few Member States with clear laws on the protection of databases'. (i.e. Compilations under the UK's 1988 Copyright , Designs and Patents Act and the UK's sweat of brow protection).

The interviewee also recalled that initially he sent out letters to a wide variety of interests asking for opinions on the directive most of which came back referring him to speak to UK experts for opinions on the discussions. This indicated two things to him which were that 'outside the UK there was little general interest in the directive proposal and the UK was the major driving force in the negotiations'.

The interviewee commented that in terms of interested parties 'the most active lobbyists involved in the discussions were Reuters, Reed, and the Publishers Association represented by Mr. Charles Clark, who was very active'.

The interviewee commented that the Commission also played a major role in the policy process not only in generating the proposal but also during the negotiations and he referred to his previous remarks about the officials involved. He added that he was aware of power struggles within the Commission both within and between the different Commission directorates involved notably DGXV and DGXIII.

In terms of the controversial issues during the passage of the directive the interviewee referred me to the ECOSOC's opinion and briefly mentioned: the extension of the scope of the directive to cover all databases, the clarification of the dual copyright/sui generis approach, the extension of the term of sui generis protection to 15 years and the removal of the licensing provisions.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that he could not recall any international developments that had impacted on the outcome of the directive although as he had previously mentioned the US situation always formed a background to copyright harmonisation legislation.

The interviewee added 'the database directive built on the work of the software directive and provided international leadership in this area of copyright legislation by developing the dual copyright/sui generis approach'.

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 ?

The interviewee disputed the assertion that the database directive had a higher public profile and said that outside copyright circles it is not known about. He also rejected the notion that the directive was the cornerstone of the multimedia society and said that this was just a lot of hype because of work by the Bangemann group on the information society, although he agreed the directive had become part of the 'acquis communautaire' and so was already a basis for further Commission initiatives in the copyright field.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that in general he thought that consultation at a European level was very good but as in the Member States its success relies on the individuals or groups concerned with an issue to speak up. He added that his impression was that 'in practice the very act of holding consultations encourages all sorts of views out of the woodwork'.

The interviewee commented that as well as public hearings held by the Commission for interested parties the whole European policy-making process involving the ECOSOC and Parliament was itself a form of consultation and on a procedural point he commented that 'after Maastricht 1992 the roles of the ECOSOC and particularly the Parliament were strengthened through the co-decision procedure which was the procedure under which the database directive was negotiated'.

C. European policy for Copyright

(From this point on - the interviewee said that he could only spare another 15 minutes for the interview)

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that he was unsure how to answer this question and that 'really only time will tell how significant the directive proves to be for other harmonisation policies'.

This stated, the interviewee added that taken together the software and database directives were the first attempts by the Commission to address the protection of copyright works in digital formats and therefore undoubtedly they would act as starting points for the proposals outlined in the Commission's most recent communication on copyright issues.

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

The interviewee commented that he really didn't know but he anticipated that there would be several more copyright directive proposals from DGXV in the near future.

The interviewee added that in an historical context 'the Commission's original 1988 Green paper was intended to signal a new area of Community action. But in my opinion the Commission radically underestimated the time that such a program would take. Ten years on, whilst a lot has been achieved there is a much wider recognition of the fact that intellectual property rights are a complex and difficult area in which to develop and pass legislation and this is will continue to be the case in the future'.

The interviewee added as an example of the Commission's over ambitious approach that 'the original database proposal started with an anticipated adoption date of the 1st January 1993. While even at the time, this was a little over-optimistic subsequent events make it seem ridiculous'.

The interviewee also added that in his opinion 'the major problem faced in copyright harmonisation is not the inherent philosophical differences between copyright and droit d'auteur systems but rather the very practical problem of how to operationalise the proposals made'.

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 ?

The interviewee had nothing further to add and referred to his previous comments.

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 ?

The interviewee commented that in his opinion the biggest threat posed to copyright laws as they are extended to cover digital works is the problem of enforcement but he added that as technology had caused the problems there was some hope that it might also provide some of the answers.

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

The interviewee commented that as yet it was too early to say what these relationships were and how they would develop.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that at this stage not very well, although things might change as a result of the information society debates.

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

3
4 The interviewee commented that this was a 'big question' but in brief he felt that policy-making could
5 be improved by enhancing the role of the Parliament in the decision-making process.

6
7 The interviewee commented that overall he did not have any major concerns about democratic basis of
8 EU decision-making and that he wasn't a Eurosceptic.
9

INTERVIEW no. 12
Legal Counsel for Economic and Social Committee (ECOSOC)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I was aware that the issue of database protection formed a chapter in the European Commission's 1988 Green Paper on copyright because I participated in the debate it started on extending copyright in the face of the challenges posed by technological advances such as software'.

The interviewee added 'the software directive proved to be very controversial and was very heavily lobbied although you should not be fooled by the claims of some lobbyists that they were instrumental in forcing the Commission to produce the directive proposal in the first place. As I recall the events, all the lobbying came after the proposal was released'. He added that 'But you can say the same for the whole of the harmonisation project which began with the Commission's 1985 internal market White Paper and the Single European Act in 1986. After these developments the Commission's directorates were all casting around for things to harmonise, perhaps cynically not least because it kept them employed'.

The interviewee commented that 'because of this it is important to be at least a little sceptical of Commission claims that it was pressure from industry that pushed them forward into copyright harmonisation or harmonisation of any other kind for that matter' He added 'of course this is not to say that industry never tries to exert pressure on the Commission or that once a proposal is out that industry does not lobby hard for the laws it wants, but it is important to be aware of the strong argument that says that harmonisation is not always good for industry and that often brand and market differentiation are better'. i.e. it is often preferable for industry to have a number of differentiated markets than one large single market while costs overall maybe higher risk can be managed more easily.

The interviewee added that in examining European policy processes his experience suggested that it was dangerous to assume too much with regard to how things actually occur because often things do not operate in the way that they appear to superficially.

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 ?

The interviewee commented 'Between 1988 and 1992 I was not heavily involved in the database discussions although I remained in touch with the topic and was aware that the Commission held a public hearing in 1990 because at the time I was assisting Robert Moreland (ECOSOC) with the software directive'. The interviewee added 'then in February or March 1992 Robert contacted me again and asked if I would assist him in the preparation of a draft ECOSOC opinion on the database proposal which he was expecting to receive very shortly at the time, which I agreed to do'.

The interviewee commented that as part of the process of assisting Mr. Moreland in the preparation of the ECOSOC's draft opinion he had several meetings with the Commission official most closely involved in the discussions - Mrs. Czarnota. He added 'my involvement in the discussions became quite limited shortly after the ECOSOC opinion was adopted', although he recalled that after the first reading and the release of the amended draft directive 'there was for a brief period talk of the ECOSOC providing a further response to the Commission but eventually nothing came of this'.

The interviewee commented that 'in general the response of the Commission to opinions from the ECOSOC on its proposals is not very warm and rarely if ever in my experience does the Commission take any notice of the ECOSOC view. In essence the ECOSOC's role is simply to consider draft

1 legislation prior to the European Parliament and to provide a kind of dry run for proposals that will
2 highlight any obvious problems before the Parliament sets about proposing its amendments'.

3
4 As an example of the Commission's normal response to ECOSOC opinions the interviewee showed me
5 a copy of the Commission's response to the ECOSOC's opinion on the Rental and Lending Right
6 Directive proposal - the page was filled with bold type: Not relevant, Not accepted, in relation to the
7 ECOSOC's suggested amendments. The interviewee described this response as a 'summary rebuttal of
8 the ECOSOC's opinion'.

9
10 **3. Did your opinions change during your involvement with these discussions ?**

11
12 The interviewee commented that on the database directive his opinions remained reasonably consistent
13 and that he was reasonably satisfied with the adopted text although he acknowledged that some difficult
14 issues had been put into the recitals rather than into the directive's articles which could prove
15 problematic at the implementation stage.

16
17 The interviewee was also quick to point out that as a lawyer 'the nature of my job means that there are
18 occasions on which I find myself in a position where I am not always necessarily whole-heartedly in
19 agreement with the views that I am being paid to articulate. While this did not occur in the case of the
20 database directive it has sometimes occurred in my work with ECOSOC'.

21
22 **4. During the discussions with whom did you form alliances ? How influential do you feel
23 perspectives like your own were in shaping the directive?**

24
25 The interviewee commented that 'During the database discussions my role was to provide legal advice
26 and not to make alliances, overall I was not that heavily involved at the European level, although I did
27 keep up with developments in the UK through my contacts with Graham Jenkins (Patent Office) and
28 attendance a number of the Patent Office's public consultations'.

29
30 From his files the interviewee noted that the Patent Office held four consultations during the passage of
31 the database directive up to its adoption on the following dates: 29 April 1993, 21 September 1993, 27
32 March 1995 and 13 July 1995. The interviewee added that he was also aware that the
33 CBI(Confederation of British Industry) had held a hearing on the directive although he had not
34 personally attended it.

35
36 In terms of other members of the ECOSOC study group that were involved the interviewee recalled '
37 Mr. Jean Pardon (now dead) was active and was the type of person who had an opinion on everything, I
38 can also recall discussing the issue with Mr. Bell who was from the UK'.

39
40 In terms of influence of the ECOSOC opinion he referred to his previous comments and added that in
41 his opinion 'the ECOSOC opinion often receives more attention from the Parliament and even the
42 Council than it does from the Commission'.

43
44 **5. Which (individuals, organisations, member states) were the most powerful in shaping the
45 Database directive ? How was this influence exerted during the policy process ?**

46
47 The interviewee commented that 'outside of the European institutions themselves of which the Council
48 in the shape of the UK, France and Germany and the Commission through Mrs.Czarnota were the most
49 powerful my overall impression of the EU policy-making process is that generally individuals and
50 organisations were slow to wake up to the draft directive and even when they did respond it was quite
51 half-hearted from most of them'. He added that 'in practice because of the ECOSOC's role early in the
52 policy-making process it tends to be quite well informed about what is going on and what future
53 proposals are in preparation'.

54
55 As an example of the lack of early involvement of industry lobbies the interviewee recalled 'even with
56 the software directive which later gave rise to very intense lobbying the proposal (including its
57 controversial reverse engineering provisions) passed through the ECOSOC reasonably smoothly, as did
58 the duration draft directive which sailed through'. (This stated, the interviewee acknowledged that this

1 might also indicate the lack of importance attributed by lobbyists to the role of the ECOSOC and that
2 the lobbying may have been taking place elsewhere)

3
4 In terms of the organisations involved in lobbying on the database directive the interviewee commented
5 that many of them just carried on as a direct rollover effect from the huge amount of lobbying that took
6 place with the software directive. In this regard the interviewee mentioned Philip Wacker from the
7 ECIS (European Committee for Interoperable Systems) and the BSA(Business Software Alliance). He
8 also mentioned Charles Clarke and Clive Bradley from the Publishers Association and but he could not
9 remember any lobbying from Reuters which on reflection he considered 'a little odd'.

10
11 **6. Did any international policy developments impact on the outcome of the Directive?**

12
13 The interviewee commented 'the Feist case cut the ground from under the level of previously perceived
14 protection in the USA and made things more difficult for the UK's defense of its sweat of brow
15 approach because it heightened the tension between the copyright and droit d'auteur traditions in the
16 context of the proposed directive'.

17
18 The interviewee commented that the TRIPS agreement and the Magill case were in the background
19 during the passage of the directive but that he was not sure the extent to which they were directly
20 relevant to the final outcome. On the Magill case this perspective was partly due to his own personal
21 view that the judgement was of much narrower significance than some experts like to make out. In his
22 opinion it was very much concerned with Article 86 of the EC treaty (abuse of a dominant position).

23
24 **7. How do you account for higher public profile of the Database directive ? Do you agree with the**
25 **characterisation of the Directive as the Cornerstone of the Multimedia society ?**

26
27 The interviewee commented 'the higher profile of the database directive is to some extent debatable and
28 I think that it will end up being much less significant in the UK than in other Member States because the
29 UK has in my opinion at least, a much more flexible legal system than most other Member states'. (the
30 Common law system with its reliance on case law is less rigid than the Civil Law system).

31
32 Adopting a UK perspective the interviewee commented 'it can be argued that UK protection of
33 databases has been weakened by the introduction of the database directive with its sui generis
34 protection. So while it is conceivable that the directive may well prove to be a cornerstone for future
35 copyright legislation in some droit d'auteur countries because it offers a way over the higher originality
36 criterion common to those systems , I don't think it will be so in the UK'.

37
38 This stated, the interviewee added that 'even so, in some senses the solution developed in the database
39 directive (copyright/ sui generis) is something of a triumph of the common law Anglo-Saxon approach
40 over the droit d'auteur approach. The UK was able to exert the pressure to achieve this partly because
41 of the size of the UK database industry in comparison to other Member States, which is itself due in
42 part to the dominance of the English language'.

43
44 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
45 **with copyright were represented in the directive ?**

46
47 The interviewee reiterated that he was not heavily involved in the policy process at the European level
48 but added that generally he thought the European consultations were conducted in a very open manner.

49
50 More generally the interviewee added ' the European Commission has been extremely active in this
51 field in the last 10 years and in that time it seems to have become common practice for want of a better
52 word that directive proposals are leaked out prior to their formal release (i.e. early pre-drafts are sent
53 out to a select few interested parties).

54
55 The interviewee added that he mentioned this not as a criticism indeed he commented 'this relatively
56 common practice does have its merits and is in some respects mildly sensible'. But he acknowledged
57 that 'inevitably however it does raise questions about policy-making in the copyright field and the
58 nature of relationships between officials and select interested parties, because this debate before the
59 debate may well be highly influential on what appears in proposals'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that in the Commission's follow-up communication on future proposals for copyright harmonisation the databases directive and software directives had both been referred to as forming a strong basis for future Commission action.

This stated, the interviewee felt that it was a little too early to tell what the significance of the directive would be especially after the lack of agreement at WIPO on database protection and the on-going debates about the issue in the USA.

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

The interviewee commented that he anticipated several new proposals from the Commission in the near future covering issues like copyright exceptions and the legal protection of copyright management systems.

The interviewee added 'the Commission is also keen to ensure that these topics are taken up at the international level'.

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 ?

The interviewee had nothing further to add and referred to his previous comments.

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 ?

The interviewee commented that 'while there are new threats and opportunities provided by the digital revolution, the basic rights covering literary and artistic works are already available not only in Member State laws, but also at the European Level and ultimately at the international level in the Berne Convention'.

The interviewee added 'of course if we were setting up a copyright system from scratch, as the saying goes, we wouldn't start from here and broadly speaking I am not convinced that the straight jacket of literary work or even the concept of copying is a particularly appropriate starting point for systems of protection in the digital context. However, this said it is clear that above all we need to achieve global harmonisation to deal with the networked environment and because we are not able to invent a new right that is as well understood internationally and as suitable as copyright we will almost certainly have to stick with it'.

The interviewee added that 'obviously there is a big risk (politically) that the protectionist majority will work in harmony with industry to split EU and US laws to the detriment of consumers'. He added that 'it seems clear that we are moving towards a copyright plus system of protection with additions including contracts, copyright management systems and extraction rights like the sui generis right, although there are many Berne countries who will not go for the extraction right type solutions as was indicated at WIPO's diplomatic conference'.

The interviewee commented that even prior to the recent wider public discussion of the use of copyright to protect digital works he was aware that many copyright experts had been concerned about the wider impact of copyright in these new environments. In particular the interviewee referred to recent PhD

1 thesis he had read which argued that copyright in these environments was a potential threat to the free
2 development of information.

3
4 **13. How would you characterise the relationships in digital environments between copyright**
5 **policy and other areas of information policy such as Privacy ?**

6
7 The interviewee commented that this question neatly highlighted the fact that 'the existence of rights is
8 too some extent less important in the digital environment than the question of how rights are to be
9 implemented and enforced. In principle we appear to make everything an offense (an infringing act)
10 without having the ability to enforce it, which not only brings the law itself into disrepute but is also
11 contrary to users common experience'.

12
13 The interviewee added 'the potential abuses that may arise with the expansion of copyright into the
14 digital world are clear. However, in my mind access should be assured and made analogous to browsing
15 a book in a book store where no copy is available. This said I would not advocate making this a
16 positive right rather I would suggest it should be made an exception. In essence we must learn to tie
17 debates about interrelationships with other areas of information policy to questions on copyright
18 enforcement'.

19
20 **14. How adequately do you think current European Information policy processes handle these**
21 **interrelationships?**

22
23 The interviewee commented that in his opinion the Commission had not yet got to grips with these
24 wider issues although vision statements by Bangemann and others on the information society suggested
25 that there might in the future be more willingness to consider these issues and impacts.

26
27 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
28 **concerns over the issues of democratic participation and accountability ?**

29
30 The interviewee commented that this was a big question but that clearly there would need to be reform
31 of the European institutions and policy-making practices as the EU prepared for the accession of new
32 Member States. He said that judging from past changes the powers of the European Parliament and
33 perhaps the ECOSOC would be enhanced.

34
35 The interviewee generally did not have any concerns about democratic participation although he said
36 that he was clearly well aware of the Eurosceptic argument.
37

INTERVIEW no. 13
Member of European Parliament (Legal Affairs Committee)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented ' I was involved with the database directive proposal briefly during both its readings in Parliament as a member of the Legal Affairs committee, but I must confess it all seems rather a long time ago now and I am not sure how much I remember of the events and the discussion surrounding it. During the first reading for example the only thing I can remember is that the Spanish rapporteur Mr.Garcia-Amigos had a serious personality clash with Mr. Geoff Hoon the shadow rapporteur to the degree that they argued all the time. I think the main reason for this was that Mr.Garcia-Amigos although he was a very eminent and knowledgeable civil law lawyer did not have a clear grasp of the common law system and also could not speak any language other than Spanish as a result he rub Mr.Hoon up the wrong way'.

The interviewee added ' By the time of the database directive I had already been an MEP for a number of years and had been involved in other IPR policy discussions. On copyright directives as far as I can remember most were first outlined in the Commission's Copyright Green Paper, which was published in 1988, including databases'.

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 ?

The interviewee commented 'because I was not a rapporteur or shadow rapporteur on the directive my involvement in the discussions was limited to going to the meetings of the legal affairs committee to discuss amendments and new versions of the text. The impression that I have of these meetings is that they did not give produce any controversial issues and apart from personal differences between some members they passed off quite smoothly. I also can't remember being contacted by any lobby groups about the directive, which would have made the discussions more memorable'

The interviewee added ' during the second reading Mrs.Palacio was the rapporteur and was shadowed by Mr.Medina-Ortega but the discussions proved even more quiet than the first reading. This was partly because the general feeling was that the directive should be adopted and partly because of the Parliamentary convention (rather than rule) that committees should not raise new amendments in the second reading to those that they had in the first reading. This means in effect despite the hype over the increased powers of the Parliament under the co-decision procedure that it is quite rare for directive proposals to go to conciliation'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that she hadn't really had sufficient involvement in the directive for her opinions to have changed that much during its negotiation.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that during the database discussions she did not remember any political alliances being formed except that during the second reading Mr.Medina-Ortega and Mrs.Palacio were clearly strongly in agreement of the need for the directive and for harmonisation of copyright more generally because of the question of subsidiarity over which she was not in agreement with them.

1 The interviewee said that she did not think that she had been influential in the database directive but
2 that the Parliament as a whole had contributed to its adoption.

3
4 In terms of this policy process the interviewee added 'normally a proposal will come from the
5 Commission to the office of the President of the Parliament and from there to the conference of
6 Presidents who discuss the proposal and decide which Parliamentary committees should discuss it and
7 which one should take the lead on it. Once a lead committee has been chosen it appoints (or has already
8 appointed) a rapporteur for the proposal. The system for selecting which political group will have its
9 rapporteur consider any particular proposal is decided through a system whereby each political group is
10 allocated a number of points according to its size and then each groups committee coordinator award
11 points to particular proposals which they then bid for. Basically the highest bidder gets to have its
12 rapporteur on the proposal. In the case of the database directive my political group committee
13 coordinator was Mr.Kot (PES) but the directive was not a priority issue so Mr.Garcia-Amigos(EPP)
14 became rapporteur'.

15
16 The interviewee added 'the decision as to which issues to bid for is itself decided by a range of factors
17 including the personality of the committee coordinator and her/his personal interests as well as the
18 Parliamentary priorities of the political grouping and the number of points available'.

19
20 She added 'within a legal committee meeting a range of issues will be discussed on the basis of a report
21 on the proposal which has been prepared by the rapporteur and the committee secretariat. A number of
22 factors affect the priority of the issues under discussion but mostly it is as a result of comments made by
23 the Commission's representative who attends the committee meetings and is often the official who
24 drafted the directive proposal in the first place'.

25
26 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
27 **Database directive ? How was this influence exerted during the policy process ?**

28
29 The interviewee commented that she simply could not remember who was most powerful in shaping the
30 directive but from her experience it is ultimately 'the Council who has the executive decision-making
31 powers over whether a directive is adopted or not. But in terms of the content of a directive the
32 Commission also has a very powerful role to play not least because it is the European institution
33 responsible for proposing European legislation'.

34
35 **6. Did any international policy developments impact on the outcome of the Directive?**

36
37 The interviewee commented that she simply could not remember the directive well enough to be able to
38 comment.

39
40 **7. How do you account for higher public profile of the Database directive ? Do you agree with the**
41 **characterisation of the Directive as the Cornerstone of the Multimedia society ?**

42
43 The interviewee commented ' the EU has been very busy harmonising IPRs over the last 10 years and at
44 the same time discussions of the importance of information and digital technologies have really come in
45 for public debate as the Internet and other technologies have emerged'.

46
47 She added 'I would however be wary of describing any piece of legislation as the cornerstone of the
48 information society until we learn what the information society means'.

49
50 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
51 **with copyright were represented in the directive ?**

52
53 The interviewee commented that in her opinion the consultation procedures were generally very good
54 'except for the Council, which tends to be a bit opaque with regards to how decisions are actually made
55 and who makes them'.

C. European policy for Copyright

(From this point - the interviewee said that she could only spare another 5 minutes for the interview)

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that she really did feel that she knew the directive well enough to be able to give a considered opinion.

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

The interviewee commented that she anticipated further copyright proposals from the Commission in the near future that would be focused on the digital environment and that would be used as a basis for discussions on further harmonisation internationally.

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 ?

The interviewee had nothing further to add.

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 ?

The interviewee commented 'in my opinion it is because of the threat posed to existing copyright regimes by technological developments such as the internet that the EU has been so active in the field of copyright harmonisation. As we know the internet is no respecter of national boundaries while copyright laws themselves have always been national in focus, which is why there is a need to cooperate at the European and international level on these issues'.

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

The interviewee did not recognise any relationships between copyright and other areas of information policy in the digital realm.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee referred to her previous answer.

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 ?

The interview ran out of time.

INTERVIEW no. 14

Shadow rapporteur in European Parliament (Legal Affairs Committee)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I think the database directive proposal came to the Parliament for its first reading in about September 1992 at which time it was given to the Legal Affairs Committee (of which I was a member) which had Mr.Garcia-Amigos (A Spanish MEP from the EPP-European Peoples Party political group) as its rapporteur and who has since left the Parliament'.

The interviewee added 'all I can remember from the meetings of the committee is that Mr.Garcia-Amigos was very opinionated and was in constant conflict with Geoff Hoon (A UK MEP from the PES - European Socialists political group, of which I am a member) who was responsible for acting as shadow-rapporteur'.

The interviewee commented 'the directive itself developed out of the Commission's work in the field of IPRs(intellectual property rights) and like the other EU directives was first identified in the 1988 Green Paper'.

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 ?

The interviewee commented 'I attended meetings of the Legal Affairs Committee during both readings of the directive proposal and also the Parliament's plenary sessions on it. During the first reading I can't remember any major problems other than those caused by the personality clash between Mr.Garcia-Amigos and Mr.Hoon. Then during the second reading Mrs.Anna Palacio-Vallelersundi(EPP - Spanish) was the rapporteur and I was her shadow (PES - Spanish). Speaking for Mrs.Palacio and myself we had a very good working relationship on the directive both in terms of our agreement on the issues and in sharing reports and information etc..'

The interviewee added ' At a practical level the legal affairs secretariat wrote the new versions of the proposal after discussions in the committee, following which Mrs.Palacio and myself would sit down and discuss the suggested amendments. That Mrs.Palacio has an easy going personality made it very simple to take this pragmatic approach and both of us were against the idea of confrontation with each other or with the Commission or Council on a directive we both felt should be adopted as quickly as possible'.

He added 'Both of us are strongly in favour of providing adequate protection to the copyright industries as we go into an information society where content will be so important. We also both against the principle of subsidiarity when it comes to issues like copyright so we were keen to see the directive adopted to further harmonisation of copyright regimes at a European level'.

He added he could not remember any of the key issues other than the directive's dual copyright/sui generis approach was an innovative approach the problem of protecting comprehensive factual databases which require so much investment to create'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'No basically my opinions remained the same. I thought the directive was needed and I was satisfied by the time of the second Reading that the Commission and Council with the Parliament's assistance had come up with a well balanced directive'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented 'because copyright is a relatively technical subject area there isn't usually a political line taken so committee members can take each issue on its own merits and approach proposals on a case-by-case basis. As a result the tendency within the legal affairs committee is to adopt a pragmatic approach because we do not want to block proposals or introduce unnecessary problems'.

The interviewee added ' by the second reading the concern of Mrs.Palacio and myself was to ensure that the appropriate protection was in place. I don't remember the database directive being particularly problematic and almost all the difficult issues had been dealt with in the Council and the first reading in Parliament so that by the second reading with a new rapporteur in a new Parliament it was too some extent a formality'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented ' I can't remember but the degree of lobbying on an issue usually helps to indicate how important it is and as far as I can remember there was not a great deal of lobbying on the database directive, although during the first reading I can remember that Mr.Garcia-Amigos organised at public hearing at which there were presentations from Publishers and database operators on the directive proposal, but I can't remember the specific issues they discussed'.

The interviewee added 'my impression is that the database directive was not controversial and I don't remember any major disagreements with Mrs. Palacio during the second reading'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that he could not remember any important international developments or case law that was significant to the database discussions.

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 ?

The interviewee commented that he was not aware that the directive was very well known and that if it was that was because IPRs generally had become more important at the European and international levels. He added that 'I haven't thought about whether the directive is a cornerstone of the multimedia society but I doubt it because the fact is that it is still too early in the development of the information society to say what will prove to be the most significant policy developments in the IPR field'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that with the introduction of the co-decision procedure the Parliament had acquired greater powers as part of the formal policy process, which he thought, was a good thing. More generally he thought that the Commission was very good in consulting widely on policy proposals and he tried to always make himself available to petitions from interested parties or citizens.

C. European policy for Copyright

(From this point on - the interviewee said that he could only spare another 5 minutes for the interview)

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that he thought it was still too early to tell and we would have to wait and see how the implementation of the directive took place in the Member States.

1 **10. As the global Information Society develops what role will copyright harmonisation play**
2 **in the process of European integration ?**
3

4 The interviewee commented he thought that copyright harmonisation would continue to be important
5 both in Europe and globally as the information society developed.
6

7 **11. Which other factors, if any, would you identify as being significant in affecting how**
8 **copyright issues are framed and discussed at the European level ?**
9

10 The interviewee referred to his previous answers and had nothing further to add.
11

12 **D. Information policy-making and Copyright in the digital age**
13

14 **12. What threats and opportunities would you identify from the extension of copyright concepts**
15 **into the digital realm ?**
16

17 The interviewee commented 'piracy is the biggest threat which is why I am in favour of ensuring that
18 rights owners have adequate protection for their products'.
19

20 **13. How would you characterise the relationships in digital environments between copyright**
21 **policy and other areas of information policy such as Privacy ?**
22

23 The interviewee commented that he did not see any relationships between copyright policy and other
24 areas of information policy.
25

26 **14. How adequately do you think current European Information policy processes handle these**
27 **interrelationships?**
28

29 The interviewee had nothing further to add.
30

31 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
32 **concerns over the issues of democratic participation and accountability ?**
33

34 The interviewee commented 'Giving the Parliament more power as in the introduction of the co-
35 decision procedure is a good thing and is a trend that I anticipate will continue as it is the best way to
36 ensure democratic participation and accountability'.
37
38
39

INTERVIEW no. 15

Head of UK Council Working Group Team - Department of Trade and Industry

Preliminary Comments by Interviewee

None.

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 ?

The interviewee said that he became aware of discussions on the issue of databases in the period just before the release of the Commission's Green Paper on Copyright in 1988. For a short period after that the interviewee could not recall any discussion of the topic until in the early 1990's he became aware that a proposal for a draft directive was being prepared by a 'UK person in DG III of the European Commission' (Mrs.Czarnota).

The interviewee commented that 'while in the UK as soon as the draft directive was released it was recognised as a highly controversial piece of legislation, other Member States actually failed to recognise its importance initially'. He went onto say that the database directive had followed the standard policy procedures used at the European level from Commission proposal through to adopted text which 'provides space for Member States to express any general reservations at an early stage'.

The interviewee also said that at the more detailed level of policy negotiations in Council, the database directive like other copyright proposals, involved the Council working group meeting 'approximately once a month to discuss a draft with meetings becoming more frequent when a common position is in prospect'. The interviewee commented that these meetings held in the Council building in Brussels 'are currently not open to the Public, although currently there is a lot of discussion on how best to make them more open with some Member States in favour of making the minutes of Council meetings available'.

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 ?

The interviewee said that he was mostly involved in the database directive at the national level in the UK although he did attend Council meetings in Brussels on several occasions.

The interviewee stated that 'there are no formal procedures for conducting consultations with interested parties on copyright issues and we tend to conduct them on an ad hoc 'as and when' manner based on experience'. In contacting interested parties in the UK the interviewee commented that the UK government worked on the assumption that it was aware of all the individuals and groups concerned with copyright issues because they had shown themselves during the high profile Whitford Committee Royal Commission that contributed to the 1988 UK Copyright, Designs and Patents Act(CDP). He went onto acknowledge that 'initially the UK government was not overtly in favour of a European directive on databases because it was felt that the issue had been adequately dealt with in the 1988 CDP and that the constraints imposed by harmonisation would result in a lower level of protection in the UK'.

The interviewee readily acknowledged that 'it is much easier to identify and locate those groups eager to support further copyright protection than those who tend to oppose it' and that he was frequently faced with people arriving at the end of a period of consultation on a copyright issue saying that they had not heard about or been invited to participate. While he could not recall if this had occurred in the consultations on the database directive, he commented that every effort was made to ensure consultations were inclusive.

1 The interviewee also said that while consultations took place in other Member States his
2 impression was that the UK did more consultation than other countries.

3
4 The interviewee also stated that 'personality played an important role during the negotiation of the
5 database directive' e.g. the Commission official who originally developed the proposal had a
6 strong personality that in the end many in the Council working group felt had become 'too rigid
7 and resistant to suggestions for the further development of the draft directive'. He went on to say
8 that after the official concerned moved to another position, negotiations in the Council 'moved
9 more smoothly' towards the directive's adoption. The interviewee also mentioned that differences
10 between different sections of the Commission and the 'interplay between large Member States and
11 smaller Member States who were often willing to make trade-offs over particular pieces of
12 legislation' in general had an influence on European policy-making.

13
14 **3. Did your opinions change during your involvement with these discussions ?**

15
16 The interviewee commented 'my opinions on the directive did not change to any large extent
17 during the passage of the database directive but this was partly because the UK government's
18 position remained reasonably constant throughout. Still although we would have preferred a wholly
19 copyright based solution rather than the dual approach finally adopted, it did make more sense
20 after the Commission's other initiatives on the information society emerged'.

21
22 **4. During the discussions with whom did you form alliances ? How influential do you feel**
23 **perspectives like your own were in shaping the directive?**

24
25 The interviewee commented that any alliances formed were ad hoc (tending to be restricted to
26 specific negotiating points e.g. an extension in the period of protection for the sui generis right,
27 although the UK would have preferred more than 15 years), and were with other Member States
28 delegations in Council. As to the alliances formed amongst interested parties he did not have any
29 comment.

30
31 The interviewee commented that the UK was an important player in the database directive not just
32 because it had the largest database industry but also because its copyright system was in sharp
33 contrast to most other Member States droit d'auteur systems and that these differences presented
34 many of the difficulties that inhibited copyright harmonisation at the European level.

35
36 The interviewee also commented that the UK system remains one of the most up-to-date
37 intellectual property regimes in the world and has often developed the most innovative solutions to
38 the problems posed by technological advances because of its system of case law.

39
40 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
41 **Database directive ? How was this influence exerted during the policy process ?**

42
43 The interviewee referred to his previous answer and added 'Aside from the UK, France had been
44 active on the Database Directive'. Indeed he accredited France with having 'put a brake on
45 proceedings early on in the negotiation process because of internal conflicts between two
46 Ministries at the French national level i.e. The Ministry of Culture and the Ministry of Justice'. He
47 added 'such internal conflicts are not uncommon in other Member States and often hold up the
48 process of European policy-making'.

49
50 The interviewee said he recalled having contacts with the following individuals during the passage
51 of the database directive; Mr. Robert Moreland, a Member of the Economic and Social Committee
52 who was the rapporteur on the directive and his legal advisor Mr. Harry Small from the London law
53 firm Baker and McKensie. Mr. Charles Clarke, who lobbied on behalf of publishers interests
54 during the directive's passage and who continues to be active on copyright issues. Within the
55 Council, Madame Helene de Montluc - from the Ministry of Culture Paris, Mr. Johan Norup-
56 Nielssen - from the Ministry of Justice Copenhagen, Mr. Pdraig Hennessy - from the
57 Department of Enterprise and Employment, Dublin, Mr. Jukka Liedes - Ministry of Justice,
58 Helsinki.

1
2 The interviewee also commented that in terms of government Ministers taking the initiative in the
3 process of policy-making, he personally had 'never had a Minister directly contribute anything or
4 overturn directly any advice given to him'. The interviewee went onto say that while ultimately it
5 was the Minister who actually decided policy during the passage of the database directive the UK
6 Minister at the time Mr. Ian Taylor (conservative) had shown little interest in the issues.

7
8 The interviewee also commented that in his experience 'research data has a very small role in the
9 negotiation process'. Although he acknowledged research was commissioned he said that a lack of
10 financial resources tended to inhibit the amount commissioned at the national level and he pointed
11 to the increasing role of the European Commission in instigating studies to which most Member
12 States contributed.

13
14 The interviewee did comment that 'frequently research is utilised to justify decisions rather than to
15 inform them' in this regard as an example the interviewee pointed to 'a recent DGXV study on the
16 effects of harmonisation conducted by the Max Planck Institute'.

17
18 The interviewee commented that if research was used it tended to be 'in policy formulation at a
19 very early stage to shape the actual proposal (where it is most influential) or to aid lower level
20 decisions, shape concepts or help decision makers choose between alternatives' In his experience
21 after this stage 'it is extremely rare for academics or their research to play any further role because
22 lobbying and politics quickly come to dominate' e.g. The intense lobbying that occurred during the
23 Software directive.

24
25 **6. Did any international policy developments impact on the outcome of the Directive?**

26
27 The interviewee commented that during the passage of the directive developments including the
28 Feist decision in the USA and the TRIPS agreement were discussed in the context of the database
29 directive.

30
31 The interviewee said he was not sure the extent to which such events influenced the final outcome
32 of the adopted text but he did say that they had been discussed and referred to during the Council
33 discussions on the database directive had had made these discussions more complex.

34
35 **7. How do you account for higher public profile of the Database directive ? Do you agree**
36 **with the characterisation of the Directive as the Cornerstone of the Multimedia society ?**

37
38 The interviewee commented that given the directive began as a rather technical discussion in the
39 late 1980's and that since 'we have seen the rise of such developments as the Internet etc. it is
40 perhaps not surprising that more attention has been focused on copyright issues' The interviewee
41 was not however sure that the directive per se was particularly well known about outside copyright
42 circles and that even within such circles he doubted that it was the most well known of the
43 European directives.

44
45 The interviewee went onto say 'the database directive is undoubtedly an important piece of
46 legislation in terms of Commission initiatives in the on-line world but it is debateable whether it is
47 a cornerstone of the Multimedia Society'.

48
49 **8. How Adequate was the consultation process for ensuring the full range of interests**
50 **concerned with copyright were represented in the directive ?**

51
52 The interviewee said in his personal opinion the European Commission's consultation process was
53 quite good but that ultimately it was up to the interested groups themselves to prepare submissions
54 and 'get their voices heard'.

55
56 As for consultation at the national level he referred to his previous comments.
57
58

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that it was very difficult to answer this question because 'only time will tell' the significance of the directive for the rest of the harmonisation process. The interviewee did however comment that there was certainly going to be further copyright harmonisation and that he was aware the Commission were already working on a follow-up Green Paper that would outline possible future draft legislation concerned with copyright issues in the digital context. Therefore in the respect that databases and software had been the focus of the first directives dealing directly with the challenges posed by digital technologies they were obviously important

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

The interviewee referred to his previous answers and acknowledged that increasingly there would be a need for solutions to be found at the global level, although he felt that achieving harmonisation at a European level given the differences in the copyright regimes of the 15 Member States particularly between copyright and droit d'auteur systems was useful to this end.

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 ?

The interviewee commented that in his experience there were a wide range of other factors that could potentially affect how copyright policy was made. He said that at the national level in the UK he was aware that 'many external observers view the government as risk averse in making policy' and he agreed that 'bureaucratic factors certainly have an important role to play'.

But the interviewee commented that the policy approach was 'due in part to the nature of copyright itself and Intellectual property rights more generally' in as much as 'it is a legal right with very long term consequences bound into a network of structured international treaties where undue haste is either simply not possible or inappropriate'.

This stated the interviewee was quick to point out that the policy making environment 'is rapidly changing for a number of reasons including Intellectual property's inclusion in the GATT as a trade issue and the growing body of opinion arguing that copyright is outmoded and inadequate for these new environments' The interviewee commented on this last point that he remained 'unconvinced copyright is outmoded' although he remained 'open to new solutions'.

At the European level the interviewee identified a number of potential obstacles to the policy-making process and open discussion 'particularly at the initial stage'.

The interviewee said 'Firstly several countries, most prominently France tend to adopt a quasi-theological approach to copyright' (i.e. driven by concepts rather than by the pragmatics of the discussion like the UK for example was).and 'Secondly some other countries act as obstacles because of their lack of interest in the topic and tend to exhibit a resultant willingness to bargain with other Member States over their position for concessions in other areas of policy (political alliances), or to act on the whim of a particular negotiator'.

In the policy process itself he commented that the role of each Member States period as President was important in that there was an unspoken process of comparison and tallying of how much legislation had been accomplished in any six month Presidency, particularly amongst the larger Member States.

The interviewee also identified simple dislike or spite amongst negotiators as often as underlying reason that proposals were held up. He also commented that during the process of negotiating there

was usually a large amount of misinformation, disinformation, gossip and backbiting between those individuals and groups involved in European copyright policy.

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 ?

The interviewee referred to his previous answers and commented that there were clearly a large number of challenges faced in extending copyright into the digital environment including the increased danger of piracy, the global nature of computer networks and the changing nature of relationships between authors, publishers and users. The interviewee went on to comment however that these attributes of the digital environment also opened up wonderful opportunities for greater access to more information.

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

The interviewee commented that this was a difficult question to answer and that while there were issues to consider he was not an expert outside of the copyright field.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that it was still a bit premature to answer the question, although he sensed that there was emerging a greater awareness of how different issues were linked.

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 ?

The interviewee commented that one aspect of improving policy formulation was possibly to 'improve the criterion used to select and appoint policy negotiators', because from his experience in the UK most government officials involved lacked formal legal training in intellectual property issues (although legal staff tend to be involved before any policy documents are released). As a result individuals 'acquire their knowledge of the government's position on these issues through a process of osmosis and acculturation which is itself built on experience dating back to the late 1970's and 1980's when there was a huge amount of discussion for the revamping of UK intellectual property laws' (e.g. the Whitford Committee Royal Commission). The interviewee also commented that there was also a lack of specific criterion to judge a policy negotiator's success, which tended to be 'evaluated within one's peer group' which could he acknowledged did raise 'a potential for a lack of direct accountability'.

The interviewee commented positively on how in recent years the European Commission had become 'increasingly open to the idea of involving and receiving suggestions from Member State administrations. This the interviewee noted was a change from even 'ten years ago the Commission was extremely wary of involving any Member States administration in preparing policy proposals' it had a 'do something or do nothing attitude'. This has changed although the interviewee felt that this greater openness was partly due to the increased power of the European Parliament e.g. co-decision procedure where 'now there are two readings of any Commission policy proposals which provides greater opportunities for both discussion and the raising of awareness'.

The interviewee also commented that in releasing its copyright proposals the Commission 'already psychologically prepared itself for UK protestations and so almost discounted them at a very early stage of the discussions in terms of different conceptualisations of a problem'. The interviewee said that this awareness on the part of the Commission to likely protests from the UK over particular issues was shared by other Member States. The interviewee was keen however to stress

1 that the Commission 'does not always side against the UK.' but 'the UK remains the odd one out
2 in terms of a number of copyright issues e.g. private copying'

3
4 Finally the interviewee commented that in his many years experience of copyright policy-making
5 at the national and European level the 'only pattern I have noticed in the IPR (intellectual property
6 rights) field is the divide between those coming from a human rights perspective versus those
7 coming from an investment perspective. The interviewee said that he had not noticed any particular
8 pattern of Member State alliance in this field other than France and Belgium often sided together,
9 the UK and Ireland usually agreed and that Germany was frequently willing to compromise' The
10 interviewee as acknowledged that national stereo-types often came to the fore in negotiations and
11 that personally speaking he had 'even found myself acting during negotiations in what could be
12 classified as a stereo-typically British manner'. He further commented that these national stereo-
13 types appeared to be employed very deliberately by negotiators who were fully aware of what they
14 were doing i.e. almost acting out a role to enable them to gain as much advantage as possible,
15 using the stereo-type as a mask to shield one's actual position on an issue.
16
17

INTERVIEW no. 16

UK Representative in Council Working Group - Department of Trade and Industry

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'prior to the release of the database proposal the Commission had already indicated the areas in which it wanted to bring forward proposals in the field of copyright both in its 1988 Green Paper and its Follow-up communication'.

The interviewee recalled that 'in the preparation of the Green paper there was some consultation with the Commission' from which he became convinced that 'the Commission was susceptible to some of the advice that was offered at the time'. Indeed the interviewee said that "the UK government had a direct impact on the shape of the copyright Green Paper because at the time it was putting the finishing touches to the reform of its own copyright act and so had experience on the most urgent issues'.

The interviewee commented that the issue of databases 'was an idea from the Commission' and that at the time 'the largest database industry was in the UK and it was satisfied with the protection afforded to it under UK copyright'. Further 'this industry was very critical of the Commission proposal'.

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 ?

The interviewee participated in the Council discussions of the database directive on behalf of the UK government up to its adoption. Formally 'I attended all the Council working group meetings on the directive, prepared reports for my superior and engaged in public consultations with interested parties in the UK'.

The interviewee commented that sometimes his boss Mr. Peter Brittan also attended the Council meetings but mostly he attended the meetings in Brussels alone. He described the Commission representative Mrs. Czarnota as 'a worthy opponent' although he went on to comment that in the later stages of her involvement in the directive there was 'disquiet amongst some Member State delegations that she had become unprofessionally involved in the directive'.

The interviewee went on to say that 'the database directive became more important with the emergence of discussions on the information highway because of debate on extent to which multimedia products and services fell within the scope of the directive'. The interviewee described the directive's sui generis right as 'an important attempt by the European Commission to accommodate both copyright and droit d'auteur systems in protecting investors in the production of particularly electronic contents'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee said that on the database directive itself his opinions did not change that much or at least only to the extent that the directive itself changed. He also acknowledged that he became accustomed to the dual approach of the directive that became more acceptable as the information highway debates developed.

1 The interviewee clarified this by saying that his role was to represent 'the UK's position on the
2 directive and not my personal opinion'. His knowledge of the UK position was built up gradually
3 through discussions with colleagues, the Commission and consultation with interested parties so
4 that gradually 'I became acculturated into the UK's position'.
5

6 **4. During the discussions with whom did you form alliances ? How influential do you feel**
7 **perspectives like your own were in shaping the directive?**
8

9 The interviewee said that as a civil servant it was not his role to form alliances, although he
10 acknowledged that in the course of discussions in Council there were times when other Member
11 State delegations were in agreement with the UK's position.
12

13 The interviewee commented that the UK's position as the main 'copyright' country in Europe and
14 as the country with the largest database industry was clearly influential in both the shape and final
15 form of the database directive.
16

17 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
18 **Database directive ? How was this influence exerted during the policy process ?**
19

20 The interviewee commented that 'as well as the UK, France and Germany played a significant role
21 in shaping the directive'. The interviewee also said the Commission was very important both as
22 proposer of the directive and also during its negotiation.
23

24 The interviewee commented that basically the policy process at the European level always
25 involved all the main European institutions; with the Commission proposing legislation, the
26 Parliament commenting on it and the Council disposing of it by its adoption or rejection. The
27 Presidency also had an important role by deciding the timetable for the passage legislation. This
28 timetable to a greater or lesser extent being dependent on the priorities of the Member State
29 holding the Presidency at the time. The interviewee also commented that 'copyright is a single
30 market issue and so is discussed in the internal market Council'.
31

32 The interviewee also commented that Mr.Gaster who took over from Mrs.Czarnota played an
33 influential role in the final adoption of the directive. The interviewee also identified the Parliament
34 with having extended the term of protection for the sui generis right to 15 years during its First
35 Reading and Mr.Clive Bradley and Mr.Charles Clarke from the Publishers association as well as
36 representatives from Reed.
37

38 **6. Did any international policy developments impact on the outcome of the Directive?**
39

40 The interviewee said that throughout the negotiation of the database directive he had remained
41 aware of the on-going WIPO discussions and he recalled that towards the end of the negotiations
42 Mr. Jukka Liedes who was chairing a WIPO committee on copyright issues joined the Council
43 working group as part of Finnish delegation.
44

45 The interviewee also remembered that the Feist case was discussed in the Council working group
46 although he said it was difficult to assess its influence. Certainly for the UK it did not cause a
47 major shift in its position because UK case law (Waterlow case) continued to protect databases
48 under copyright. He also mentioned Article 10(2) of the TRIPS agreement as having been
49 discussed in Council.
50

51 **7. How do you account for higher public profile of the Database directive ? Do you agree**
52 **with the characterisation of the Directive as the Cornerstone of the Multimedia society ?**
53

54 The interviewee commented that the database directive's higher public profile resulted partly from
55 the development of the discussions on the information society and multimedia and the significance
56 of databases in the functioning of the information highway. As such the interviewee felt that
57 'electronic databases are becoming increasingly important as the 'building blocks' underpinning
58 the information economy'.
59

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee said that he did not feel in a position to comment on the European Consultation process although from the outside he was satisfied with the approach of the Commission to consultation on these issues. Within the UK the Patent Office made every effort to canvas opinion from interested parties on copyright issues including the database directive.

The interviewee recalled that shortly after the release of the Directive proposal the Patent Office sent it out to database operators, trade associations, publishers and other interested parties to receive their comments. He recalled that at the time these comments 'had tended to be very critical of the directive, many arguing that there was no need for such a proposal'. Following this the interviewee said the Patent Office organised the first of a number of public hearings it held during the passage of the directive, at which over 60 predominantly industry representatives expressed their views.

The interviewee commented that in his personal opinion 'these public meetings tend not to be very useful but they do help protect the Patent Office from accusations that it is not consulting properly'. He went on to say that other channels of consultation included the 'standing committee on industrial property whose membership was determined by the Minister upon advice from the Patent Office and contained representatives of the 'great and good' from organisations such as the CBI and Consumer groups'. Although he did say that it 'remains difficult to get representation from users on copyright issues because of the difficulty of identifying them'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to his previous answers but added that the database directive along with the software directive was the first real attempt to address the difficulties faced by copyright regimes on the information highway and that as the Commission's second Green Paper had indicated it would certainly be followed by a range of other copyright initiatives in the near future aimed at addressing the needs of the European Information Highway.

The interviewee commented that further harmonisation was still needed on a number of issues including copyright exceptions, temporary copies, technical systems for copyright protection, the collective administration of rights and the liability of information service providers.

The interviewee said that in his opinion the making available of works in intangible form, such as on-line should be within the exclusive rights of rightsholders. In this regard he said the software and database directives had already covered these issues although debate still continued. The interviewee also said that technical systems for copyright protection should be eligible for legal protection against circumvention. On collective administration he argued for more collaboration between collecting societies although he said the cross-border nature of the information highway meant that European competition law issues would need to be clarified. Finally he commented that the liability of information service providers was an issue that would have to be addressed if the information highway was going to work effectively.

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

The interviewee commented that there was still a need for further copyright harmonisation both at the European and international level and that it would play an integral role in the successful development of the information society as had been identified in reports such as prepared by the Bangemann group.

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 ?

The interviewee re-iterated the point that personality played an important role in the way an issue was presented and the reaction it received from participants in its negotiation. In terms of the Council negotiations the interviewee said that in his experience in the Council working group 'national stereotypes' are not very useful with most negotiators coming from their national Justice or Cultural ministries. However, in the opinion of the interviewee a stronger and more useful distinction could be made between 'copyright pragmatists and copyright philosophers in their approach to issues under negotiation. In terms of the database directive the Commission like the interviewee himself had a very pragmatic approach.

The interviewee also recalled that in relation to the database directive a significant factor during the negotiations in Council had been an internal dispute between members of the French delegation itself and with the French Presidency between January and June 1995. This dispute as far as he could remember was between delegates from the French Cabinet Office (whose representative headed the Presidency) and delegates from the Cultural Ministry. He said that this certainly contributed to an eagerness on the part of the French Presidency to ensure a common position was reached by the end of their term. He further explained that by this time the French Software industry and in particular the company Bull was strongly in favour of the directive and lobbied the French Cabinet Office through the French Ministry of Industry to ensure the directive was passed quickly. The antagonism arose because delegates from the French Cultural Ministry adopted a philosophically pure *droit d'auteur* stance and remained dissatisfied with some aspects of the directive including its definitions and so did not want to rush the proposal through.

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 ?

The interviewee referred to his previous answers and that the ease of copying and the potential for piracy were the biggest dangers faced.

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

The interviewee acknowledged that there were concerns about the extension of copyright protection onto the information highway both for the balance of rights in copyright and for its impact on issues such as freedom of access and privacy in the context of technical systems for copyright management.

The interviewee said that he felt confident that exceptions based on the Berne Convention would be adequate for end users but that institutions like libraries might need to be provided with specific exceptions for digital sources to guarantee public access for the purposes of inspection.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee said that it was difficult to give an assessment as so many of these issues had only recently come onto the public policy agenda. This stated, he felt that the work of the Bangemann group and the recent G-7 conference on the information society showed that the political will to address these issues in the round was developing.

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 ?

The interviewee commented that evaluating how effective policy-making is can be 'extremely difficult and depends upon the premises from which you start'. At the European Level he said that

1 success for government Ministers tends to be measured at the Council meetings if there is consensus,
2 and if that consensus is satisfactory to UK interests. He went on to say that in these circumstances
3 Ministers are 'only too happy to sit on their hands'.
4

5 The interviewee said that personally he did not 'make a distinction between 'negotiators' and
6 'policy makers' as they were nearly always the same individual'. This stated he did quote Margaret
7 Thatcher who made the point that "Advisors advise, Ministers decide" and commented that 'if this
8 was not the case then we obviously would no longer be living in a democracy due to a lack of
9 accountability on the part of those actually making the decisions'.
10

11 The interviewee did however go on to make the point 'the fact remains that Ministers are usually
12 not specific experts other than in being able to recognise an issue of importance. Therefore
13 negotiators are the experts who Ministers consult, who advise them and who guide them through
14 the issues'. The interviewee went on to say that in his experience 'the Minister rarely decides to
15 override the negotiator's view, but of course this is partly because the negotiator has him/herself
16 become acculturated into the particular stance a government of the time may wish to adopt'.
17

18 The interviewee also said that 'expertise is utilised to make policy decisions unless politics
19 intervenes to reshape a government's position on an issue'. Despite this the interviewee said that 'it
20 is however a fact that competence for copyright issues has generally moved to the European level
21 which has reduced the role of the Patent Office to conducting UK consultations on copyright issues
22 and sending representatives to Council working groups'.
23
24

INTERVIEW no.17

Belgian Representative in Council Working Group - Ministry of Justice

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that his first contact with the database directive was in June 1993 as part of his duties in the Ministry of Justice. He recalled reading the proposal and reading through the amendments from the first reading in the Parliament under rapporteur Garcia-Amigos. He recalled finding 'the initial proposal to be a document written in a very complicated style, with the dual approach of sui generis and copyright mixed together in a manner that made them difficult to separate out'. He added that 'the original proposal did not talk about sui generis protection per se but rather about competition issues and its scope was very unclear and appeared at least initially very narrow in comparison to what it became later on in the discussions'.

The interviewee also recalled that the issue of compulsory licensing was far from clear. The impression that he had at the time from the initial proposal was that it raised many more questions than it answered. Overall he was quick to acknowledge that, at least at the beginning, 'I found it difficult to obtain a global picture of the Commission's initiative on databases....although this changed as I gained more experience in the Council working group and also following two consultations conducted by the Belgian Ministry of Justice towards the end of 1993 with interested parties from the public sector and the private sector respectively'. The interviewee went on to state that these consultations were the first ever conducted by the Belgian Ministry of Justice in the field of copyright due to the complex history of copyright policy in Belgium 'much of which has revolved around an antagonism or struggle for jurisdiction between the Ministry of Justice and the Ministry of Economic Affairs'. He added that in the 1960's copyright was the responsibility of the Ministry of education, by the 1970's education was part of the competence of the regions in Belgium rather than under the federal government whilst copyright remained a federal issue. At this time it was no longer clearly linked to a particular Ministry after more than 10 years of debate copyright became formally a federal issue through the 30th June 1994 Belgian Copyright Act.

The interviewee was quick to acknowledge that 'these two consultations were by no means wholly comprehensive because at the time being the first consultations we had ever conducted the list of interested parties invited was rather incomplete' He recalled that the Belgian copyright association SABAM and its French equivalent SACEM, IFPI, the Belgian CBI (FEB), the Publishers Kluwer and two external experts Jean-Paul Triaille and Alain Strowel among others attended.

The interviewee commented that 'at the beginning the database directive provoked a lot of questions from all the delegations in the Council working group on the basic issue of the need for harmonisation action in this area and especially over the justification and practice involved in the creation of an unfair extraction right (sui generis). He added that his impression at the time was that 'much of the questioning was the left overs from discussions on Chapter 6 of the 1988 Commission Green Paper and April 1990 hearing on databases which had produced overall a negative opinion on the need to create a sui generis right and a general lack of interest or urgency over the issue of the database protection'.

The interviewee added 'the general tenure of many of these questions was relatively pragmatic in nature e.g. what is the scope of the protection offered by sui generis right ?, what are its objectives ? does it apply to all or part of the contents of a database ? although I think this pragmatism in the working group was partly created by a greater awareness of a number of Court rulings that indicated that rightsholders might need additional protection for their database products and services, notably the US Feist case, the Dutch Van Dale case, the French Coprosa case'.

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 ?

The interviewee commented that both formally and informally he 'was involved in the database discussions as a member of the Belgian delegation in the Council working group and in national level consultations during its passage'. On the directive itself he recalled that 'the main area of debate, discussion and conflict was clearly the sui generis right which took many forms with questions over; object of protection, its duration, non-voluntary licensing, the exceptions to it and the issue of reciprocity'.

During these debates the interviewee commented that 'divergence of opinion over the sui generis right often fell squarely along the droit d'auteur - copyright divide'. In this regard the interviewee provided two examples of the distinct approaches to the directive; Firstly, 'the UK, especially at the beginning adopted an approach which whilst not directly hostile to the sui generis approach was rather sceptical of the need for it, tending to reserve its judgement on issues during the discussions except on the question of non-voluntary licenses which it was against unless they were to be introduced with very strict provisions. He recalled that the UK wanted the sui generis right to provide 50 year protection like all other copyright protection at the time'. He commented that he 'was also aware that the UK's approach was partly to do with the fact that the UK delegation was sceptical about the need for further database protection in the UK because of the UK's new copyright Act which had been introduced in 1988'.

Secondly, on the question of the transferability of rights (author's rights of employees) addressed by Article 3(4) in the original proposal 'the UK was prepared to cede employees copyright to employers whilst the Germans were very much against such a move and the French had the problem that throughout much of the passage of the directive their opinion was split on issues between the views of representatives from the Cultural Ministry (who supported employees maintaining their copyright) and from the Ministry of Industry (who supported the rights being ceded to employers). In the end the question was resolved by removing the Article altogether and leaving it up to the Member States to deal with the issue separately. The Netherlands was in favour of the transfer of rights because of their similar approach on the issue to the UK common law approach'.

The interviewee commented that 'whilst in general there was a positive attitude towards the directive from most Member State delegations, problems arose because good, full answers to their questions were often not forthcoming from the Commission representative at the time Madame Czarnota'.

As this kind of behaviour had astonished the interviewee, he provided the following example - 'just after the Parliament's first reading of the database directive Mrs. Czarnota came to the Council working group to discuss the Parliamentary amendments, as soon as she arrived Mrs. Czarnota announced directly that the Parliament wanted to extend the duration of sui generis protection to 15 years (a proposal to which the Commission had no objection) and that therefore before the meeting went any further or anything else was discussed could any delegation say if they could not agree with the extension directly'. He recalled that 'any attempts by delegations to raise other issues were resisted and in the end all the delegations remained silent and so that was how the 15 years was agreed - by silence'. The interviewee recalled that this approach by a Commission official was a real surprise to him particularly as it was a procedure which approached every issue point by point rather than viewing the policy as a whole.

The interviewee added that 'through my contacts with representatives from DGXIII of the Commission I was aware that they were also shocked by Mrs. Czarnota's approach but that there was little they could do as relations between the two Commission services were strained'. Indeed he added that 'I can recalled on a number of occasions being asked by a DGXIII official for an update on progress in the discussions'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that 'during the passage of the database directive the Belgian delegation changed its position on several points as the discussions developed and throughout we were keen to ensure a balance between the scope of the exclusive rights given and user rights and freedom of

information'. In this regard the interviewee recalled that 'we really had to fight hard on the scope of the sui generis right which was worded in a manner which apparently extended protection even to insubstantial parts and so we pushed for the issue of substantiality to be taken up, on this point the Scandinavian Countries also agreed but there was resistance from the Commission'.

The interviewee also recalled that during the passage of the directive 'each Member State had bi-lateral meetings with the Commission (represented by Mrs. Czarnota and later by Mr. Vandoren and Mr. Gaster)'. He commented 'these bi-lateral (delegation/Commission) meetings tended to take place before or immediately after the working group meetings'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that 'in the Council working group 'alliance' is probably the wrong word to describe the occasions when a number of Member State delegations find that they share the same opinion on a particular issue, however beyond this in the field of droit d'auteur traditionally France and Belgium have often held similar views on European directives'.

For example; 'Firstly, after initial doubts both France and Belgium were in favour of the sui generis approach especially once the issue of substantiality had been clarified. Secondly, on the application of reciprocity - France, Belgium, Italy, Spain, and the Scandinavians were in favour of it while the UK and German delegations pushed for national treatment and were supported by lobby groups including AMCHAM and UNICE. The German delegation maintained national treatment was better for sui generis type rights and already had a precedent in the Paris Convention on Industrial Property, whilst we and others argued that the on the semi-conductors directive the sui generis protection was provided on the basis of reciprocity'.

'Thirdly, on non-voluntary licenses there were a large number of reasons why they were dropped during the penultimate meeting of the Council working group before the common position, including that the UK, Germany and Finland were against the introduction of compulsory licenses because they were more concerned with the interests of database producers rather than information access as a whole (although right at the end of the negotiations the UK had come forward and said it could agree with the licenses as long as they had very strong and restricted application). France and ourselves had problems with the strict conditions of the licenses and after having examined Articles 85 & 86(competition rules) of the EU treaty, ended up wavering between the pro and anti positions. This problem was compounded by the issue of their application in both the public and/or private sectors. In the end the French agreed to the provisions being dropped for the sake of ensuring the directive reached a common position under their Presidency'.

The interviewee added that 'in the end the Commission put the question of the deletion of the licensing issue to the delegations by asking which delegations could not agree to their deletion. Fourteen Member State delegations remained silent showing strong agreement that they could be dropped (and once France had agreed, we(Belgium) were alone and so compromised and agreed to the deletion'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that in terms of influence on the discussions 'the Commission especially at the beginning with Mrs. Czarnota had the leading role in shaping the directive but with the arrival of Mr. Gaster a more flexible approach was adopted by the Commission. Throughout her involvement in the discussions it was clear that Mrs. Czarnota was highly industry oriented and in favour of stronger protection for database producers'.

He commented that 'once Mr. Gaster became involved in the discussions rumours began to circulate that Mrs. Czarnota was going to leave although she did not actually leave until the second half of 1994 during the German Presidency'. He added that 'whilst Mr. Gaster had certainly an important and significantly different negotiating style to Mrs. Czarnota that proved useful for getting the appropriate text through to adoption, it would be wrong to overstate the role of personality. In reality the database directive was actually a very complicated discussion that generated serious conflicts of interest between

1 database producers and users, between Member States and between Copyright traditions (droit
2 d'auteur/copyright) that would have arisen regardless of the style of the Commission negotiator'.

3
4 In terms of Member States the interviewee commented that 'the Germans particularly towards the end
5 of their term as President were very influential especially on the copyright sections of the directive and
6 they put forward the text to the COREPER for orientation with a number of questions for them to
7 consider including on the issues of the transferability of rights Article 3(4) and reciprocity on copyright
8 and the sui generis right'. In this regard the interviewee said that in his opinion Mr. Kemper who led the
9 German delegation had been influential on the discussions (although he has since moved to WIPO)'.
10 This Presidency he compared to the Greek Presidency during which 'progress was very slow'.

11
12 The interviewee also mentioned Mr. Dobelle and Madame de Montluc from the French delegation as
13 having been important during the discussions. 'Mr. Dobelle acted as the President of the Council
14 working group during the French Presidency and was instrumental in overcoming the differences of
15 opinion amongst the French delegation and in pushing the directive through to a common
16 position'....Mr. Dobelle did this quite simply by supporting the Ministry of Industry over the Ministry
17 of Culture in the discussions'.

18
19 The interviewee also mentioned 'Mr. Jukka Liedes (Finnish delegation) and Mr. Olssen (Swedish
20 delegation) both joined the negotiations late on but made an impression with their knowledge of the
21 directive, as did Mr. Norup Nielssen (Danish delegation)'.

22
23 The interviewee reiterated that 'the Commission clearly have a key role to play in the negotiation of any
24 directive and through inflection and nuance they can significantly change the emphasis of discussions'.

25
26 As for Lobbying, the interviewee commented that he 'received requests for information mostly from
27 private sector consultants and a few interested parties following Council working group meetings, but
28 overall there was not a huge amount of lobbying partly because of the relatively small size of the
29 Belgian database industry, although I was aware that companies like Reuters and Dun & Bradstreet
30 were in contact with the Commission'.

31 32 **6. Did any international policy developments impact on the outcome of the Directive?**

33
34 The interviewee recalled that 'the TRIPS agreement certainly had an influence on the database
35 discussions, especially on the scope of the definition for databases. The initial Commission proposal
36 only referred to electronic databases but following the TRIPS agreement many Member State
37 delegations argued that its Article 10(2) (which provides for copyright protection to electronic and non-
38 electronic databases), supported their positions that the database directive should apply to all
39 databases'. At the time 'France and Belgium were reluctant for such an extension because the text had
40 been drafted for the protection of electronic as opposed to non-electronic databases and were concerned
41 that simply extending the protection to all databases without further consideration would cause
42 potentially unforeseen problems'....'We also pointed out that TRIPS 10(2) was drafted and signed on
43 copyright and not on a sui generis right'.

44
45 The interviewee then provided an explanation of why later on in the negotiations Belgium and France
46 agreed to an extension in the scope of the directive to cover all databases. 'once the issue of
47 substantiality had been clarified and the wording 'substantial investment' introduced the French became
48 willing to agree on an extension in the scope of the directive, from this point on during the their
49 Presidency it was only a matter of time before our position became untenable and we agreed to the
50 extension. Part of the pressure to compromise was exerted by the French who at the beginning of their
51 Presidency in cooperation with the Commission announced that if a common position could not be
52 reached, then the directive would be dropped all together'.

53
54 The interviewee added that most of the major compromises in the directive were made during the
55 French Presidency and he recalled that 'by this stage there was a degree of fatigue amongst the Member
56 State delegations in the discussions which made them more willing to compromise'.

57
58 The interviewee commented that other important events included the Magill decision and the on-going
59 WIPO discussions in its expert group on databases. Overall the effect of these developments in the

copyright field influenced the database discussions by 'raising the significance of the discussions and the need for protection'. He added that 'while I would have preferred to see the whole proposal before taking decisions on any specific issues' in practice progress was made by a piece-meal approach of specific issues being dealt with and then a re-drafted text being produced'.

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 ?

The interviewee commented that 'the increased profile of the database directive is directly as a result of the directive having become associated with multimedia issues and the emergence of wider discussions on the importance of content in the information society'. . . . 'Certainly the discussions that led to the directive were long, complicated and full of conflicts of interest and the end result was by no means perfect'

Although the interviewee was sceptical of characterising the directive as the cornerstone of the Multimedia society he acknowledged the directive as an important element in the European copyright approach to the digital environment.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that 'I did not attend the Commission's early consultation on databases and I am not familiar with how consultations took place in the other Member States during the passage of the directive - in Belgium it was all relatively uncontroversial. In the Council working group some deputations were received from groups like Reuters, AMCHAM(on the issue of reciprocity) and UNICE all of which were announced by the Presidency in charge at the time but no attempts were made to encourage delegations to look at any documents and these deputations were never discussed'.

The interviewee commented that his overall impression was that the Commission was generally quite open to consultation although of course 'it is up to the interested parties themselves to get their views across'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that 'above all the chapter on the sui generis right in the database directive is likely to prove the most significant aspect of the directive in the context of future European copyright harmonisation because it protects content providers in the context of the information society, a key aspect of all future regulation in this area'.

In terms of the directive itself the interviewee was quick to point out that 'For some delegations the directive was always very important and quickly grew in significance as the electronic information industry expanded and developed (e.g. the UK with its huge database industry). For other delegations the directive started off as much less significant, including in Belgium, where it was viewed as concerning traditional compilations. However by the end of the negotiations all the Member State delegations realised the wider significances that were being drawn out for the directive in relation to multimedia and audio-visual databases'.

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

The interviewee commented that this was a difficult question to answer but that the Commission was already preparing new proposals for the digital environment and the EU had already made moves to begin to harmonise the copyright laws of the East European countries that are going to join the Community next.

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 ?

The interviewee commented that 'Firstly, the Commission is the key institution in shaping how copyright issues are framed and discussed at the European level. Its functioning is affected by a number of factors including the degree of bureaucracy within any particular Commission service (e.g. DGXV has for almost ten years been very dynamic and unbureaucratic in the copyright field), this is in turn related to the degree of freedom given to lower level civil servants to decide the orientation of a text (e.g. Mrs. Czarnota and Mr. Gaster both had very different orientations to the database directive and placed different emphasis on different aspects of it but both were apparently given a large degree of freedom to make these decisions). It is also important to consider the type of coordination and communication between Commission services (e.g. for much of the database directive DGXIII officials were clearly not being kept well informed by their DGXV colleagues) although it is difficult to assess what impact this has any particularly policy initiative'.

He added that 'next to the Commission the Presidency is the next most important actor in copyright policy such that a good Presidency can push a proposal forward rapidly while a poor Presidency can have the opposite effect' e.g. both the Germans and French provided strong Presidency's during the database discussions. For the Germans Mr. Kemper was very active and tried to push things along rapidly with quite some success. While they were eager to achieve a common position their stumbling block was their own delegation's opposition to the sui generis right. The French Presidency was also very determined under the leadership of Mr. Dobelle who organised bi-lateral meetings with all the delegations before and after the working group meetings and was as a result able to move the negotiations on rapidly to the common position. However, a weak Presidency has to rely very heavily on the Commission and often has no clear direction for the discussions thus frequently little progress is made e.g. AS occurred under the Greek Presidency during the passage of the database directive where the Greek Chairman did not really know a great deal about the subject'.

The interviewee also commented that 'the co-decision making procedure is a very important way of ensuring that the Parliament has the opportunity to decide on the content of a directive, even though it is often a rather burdensome way to reach a compromise'. He added that 'however the contribution of the Parliament in the database directive was not ultimately very great and the second Parliamentary reading raised no concerns for the Council'.

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 ?

The interviewee commented that 'the extension of copyright into the digital realm is a natural development given that the goals of protection have remained the same but this new environment presents a number of threats that concern:

- * the scope of the reproduction right and the extent to which it should cover transient copies
- * the liability issue i.e. the responsibility of service providers in on-line environments
- * reproduction by/for users, and the issue of browsing on-line
- * the deployment of technical systems for the protection and management of copyright materials (ECMS)
- * the possibility of copyright exceptions where ECMS are deployed
- * the role for fair use for educational/scientific purposes in on-line environments
- * the whole issue of data per se being protected under copyright

The interviewee commented that he looked 'forward to new proposals from the Commission for directives to resolve some of these issues although I anticipate that the Commission will continue to push for further extensions of copyright protection as was indicated in the 1995 Green Paper and its Follow-up communication'.

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

The interviewee commented that 'in the digital environment as ECMS are deployed to enforce copyright there are concerns for personal privacy and data protection but at the moment there are too few people with a global view of these issues and their linkages with the tendency being to focus on either copyright or data protection'.

He added that within his own Ministry while there were projects on copyright, on privacy and on computer misuse there remained little or no coordination between the projects which was something he felt was increasingly necessary so as to identify and reflect on the interrelationships between these issues.

Whilst he acknowledged there was 'a need for us to work towards more integrated solutions to these information policy problems there is little evidence of this developing at the moment, partly because of personal, structural and political rivalries in institutions such as the Commission'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that 'Formally there is little coordination between for example, experts on privacy and copyright, although given the behaviour of different Commission services this is perhaps hardly surprising' As an example the interviewee added that 'in recent OECD negotiations on the Investment Multi-lateral Agreement(IMA) a proposal was made to include IPRs. At this discussions DGI was representing the Commission and became unwilling to allow officials from DGXV to discuss these issues even though it did not have the necessary copyright experts within its own DGI services. This unwillingness was because DGI was more concerned to extend its policy jurisdiction than make good policy. Fortunately the Belgian Ministry of Justice was able to exert some pressure and some experts were invited to participate. This experience however suggests that similar behaviour may be more common than we think leading to the burying of policy proposals because of the difficulty of coordinating between Commission services'.

The interviewee added 'Even the Legal Advisory Board(LAB) run by Mr. Papapavlou(DGXIII) in Luxembourg which is an attempt to generate global views is dominated by academics and private sector interests. This is all right as far as it goes but it leaves the public sector wholly under-represented. More generally public civil servants particular at Member state levels have few opportunities to discuss these issues and maintain an awareness of this global perspective. Consequently if there are few opportunities and competencies remain clearly defined it is very difficult and hard to expect civil servants to recognise these interrelationships in their work'.

The interviewee provided another example from his experience of how difficulties can be placed in front of policy-making 'during the TRIPS working group on IPRs Belgium requested a sub-committee be set up to discuss the intricacies of the copyright issues and assist the main committee. This however proved impossible because at an informal meeting with a representative from the Commission (DGI)all the working group delegations turned up but the Commission failed to provide any translation services as a result the meeting was extremely unsatisfactory and failed to reach any conclusion. As a result the administrative obstacles and timetables really did inhibit the setting up of a sub-committee which would have provided an environment for more in-depth consideration of specific as well as more global issues'.

The interviewee commented that for him the issue in European copyright discussions that continued to be the most difficult and culturally sensitive issue especially in the context of digital technologies and the area where the question of interrelationships with other policy areas was most obvious was the 'harmonisation of exemptions where for example on the issue of private copying alone there are at least 2 or 3 extreme and conflicting positions'. The interviewee anticipated 'any proposal on exemptions to give a very broad definition to the right of reproduction, although harmonising exemptions would have to overcome the differences between the strong Commission position for minimal exemptions versus the strong position of the Nordic countries and the Netherlands in favour of strong exemptions'.

1 He added that in his personal opinion 'a lot will depend on the success or failure of ECMS, although
2 here too the whole range of issues at stake tend to remain obscure. There is certainly a valid case for
3 providing legal protection against unlawful circumvention otherwise to apply them at all becomes
4 problematic'. In this regard the interviewee commented that 'given the limited success of provisions on
5 circumvention at WIPO the Commission is likely to produce an EU proposal on this issue shortly as
6 detailed in the Commission's Follow-up communication in November 1996'. He added that 'the
7 Nordic countries have already said that they want careful implementation of the ECMS proposals and
8 with Finland and Sweden as well as Denmark now Members of the EU they could form a significant
9 block in Council that will protect against any attempt to reduce the level of exemptions'.

10
11 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
12 **concerns over the issues of democratic participation and accountability ?**
13

14 The interviewee commented that 'how to improve policy-making was a difficult question. In general the
15 Commission appears to make good efforts to consult large numbers of people the problem is to assess
16 how well it works. There is a real need for the information society to develop in a manner that enhances
17 or at least defends existing freedoms of speech, circulation of and access to information and promotes
18 diversity of content and pluralism and creativity'. He added that 'while there are still a lot of things to
19 do recent election results in both France and UK leave me feeling optimistic about future European
20 development'.

21
22 'Following monetary union, Europe needs to develop a social dimension that can begin to take account
23 of for example, the cultural aspects in the field of copyright, and then to join together to develop an
24 external face to the rest of the world in the arena of foreign affairs'. He added that 'it would be
25 desirable if indeed there was in practice a real free movement of people as under the Schengen
26 agreement'.

27
28 The interviewee commented that 'democracy is a big question particularly in terms of the policy
29 process. In my own personal experience, I can recall being surprised at the approach to power and
30 responsibility of Council working group members particularly given how influential they for individuals
31 who are not directly accountable to the electorate. We need to improve the involvement of the
32 European Parliament although not before it's present system of functioning is also improved and its
33 own systems for democratic accountability and participation are enhanced'.
34

INTERVIEW no. 18

French Representative in Council Working Group - Ministry of Culture

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that as far as she could recall prior to the formal proposal there 'was not a great deal of discussion of the legal protection of databases'. She did recall that a chapter was devoted to databases in the 1988 Green Paper and she remembered having 'a meeting with Mrs. Czarnota just before the formal proposal was released in the middle of 1992 and she also visited Paris shortly after its release to discuss it at a meeting of industry representatives'.

The interviewee described the initial period after the proposal's release as 'a period of seeking understanding' because the proposal was written in 'an over-complicated style that made it difficult to evaluate the Commission's motivation and what it was exactly that the Commission was interested in regulating'. The interviewee said that 'at the beginning the definition of a database was very wide indeed' and she recalled that during the preliminary meetings of the Council working group questions were asked about 'whether the Commission was attempting to regulate all the copyright issues in the digital domain in this one directive'. She added that 'it was also entirely unclear as to what the likely economic consequences of the directive would be and how the licensing would affect the public and private sectors'.

The interviewee recalled that her initial impression had been that the directive proposal 'was being pushed by the UK because of the size of its industry and also because Mrs. Czarnota was a UK national' but she quickly became aware that 'the proposal was very much a Commission initiative'. In this regard she commented that 'from the Software directive onwards the Commission has continued to be extremely active in the copyright field'.

The interviewee commented that although France was in favour of the proposal from the beginning it was important to be aware that in France aside from the Ministry of Culture which is formally responsible for copyright and neighbouring rights issues, at the European level the SGCE (Secrétaire Générale pour les relations avec la Communauté Européenne) has a specialist role in coordinating the position of the French government. The interviewee said that 'the SGCE's role is very important and its tasks include examining the position prepared by the government department in charge of a portfolio and coordinating that position with those of any other government departments or Ministries consulted.' On the database directive the interviewee confirmed that the French Ministry of Industry and Ministry of Justice had been involved, with the former having a representative attend (who has since left) a number of the Council working group 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 ?

The interviewee commented that she had attended 'the Council working group meetings as a representative of my government and also organised and conducted public consultations on the directive in Paris'.

She recalled that 'at the beginning of the discussions on the directive few copyright owners were involved in the discussions' this she explained by saying that at this time 'these discussions were deemed to be rather esoteric and technical and of concern only to the relatively small database industry'.

The interviewee also recalled that 'a study had been prepared by Professor Vivant for DGXIII in Luxembourg on the legal protection of databases (PROPINTELL) which was very good and aided me in

conducting the initial public consultations on the proposal before its first reading in the European Parliament'. She added that these consultations were taking place in parallel with those on rental and lending right directive, the cable and satellite directive and the duration directive. They also coincided with a report published by the Prime Ministers office on what has since been called the information society. The interviewee also commented that she had been involved in trying to resolve the differences of opinion between representatives of the Ministry of Culture and the Ministry of Industry.

The interviewee commented that 'a lot of the discussions on the substance of the directive were difficult at the beginning because the Commission's answers were always rather general'. She recalled her impression that 'during this period Mrs. Czarnota was disinclined to be specific and preferred to argue that the key thing was to establish the principal of the directive and then to work out the details'. Partly as a consequence of the Commission's approach the interviewee said 'a good deal of time was spent discussing the definition of what is a database, the differences in approach in the proposal with the software directive and the issue of where multimedia fitted in'. Many Member States expressed concerns that the directive was 'too broad in scope, was attempting to cover far too much and needed to be narrowed'. She added that while 'Mrs. Czarnota knew the directive intimately, her style of negotiation was very strong and eventually provoked a negative reaction from most of the delegations that impacted on all the issues under discussion'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that it was less a question of her views changing and rather more of her becoming more knowledgeable on the issues as the negotiations continued. Although she acknowledged that any changes that did occur in her opinions were 'at least in part due to the fact that the proposal itself changed quite considerably during its passage through Council'.

The interviewee recalled that 'much later in the discussions the German Presidency came out very strongly against the sui generis right and proposed its removal in conjunction with a widening in the scope of the copyright section and the introduction of some unfair competition rules'. The Dutch delegation she recalled as having a strong but quite fixed opinion throughout the negotiations that gave her the impression that 'the two young ladies who represented Holland were under the direct control of the Dutch Parliament and only said what they were told to say and no more'.

The French position was generally one 'in favour of the sui generis right with some reservations because it remained an unknown quantity particularly with regard to any potential consequences it might have for the audio-visual industry' i.e. was a CD to be considered a database.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that this was a difficult question to answer in the context of the working group's discussions and that it was more a question for the COREPER or Ministers in the Internal market Council. This stated, the interviewee commented that 'although France and Belgium have very similar droit d'auteur legislation it would be inappropriate to characterise them as always having had the same position on the database directive'. She explained this on the basis of two reasons; firstly 'the sui generis right was new and so each Member State had to establish its own position on it' and secondly 'during the French Presidency it would not have been appropriate for the Presidency to have formed an alliance with any other Member States delegation'.

The interviewee did however recall that within the Council working group the 'Danish delegation appeared to quickly form alliances with the other two Scandinavian countries when they joined the EU' (i.e. Finland & Sweden). On the UK, the interviewee commented that although she had a friendly personal relationship with the UK delegate she often had the impression that 'the UK was holding contradictory positions on the directive that shifted in the context of the evolving Council discussion'.

On the French Presidency she commented that Mr. Dobelle who had chaired the Council working group meetings had played an important role through his 'strong determination to conclude the directive in the six months of the French Presidency. The interviewee recalled that at the beginning of the French Presidency round table discussions were held with each of the Member States delegation to assess their

1 final negotiating positions i.e. 'What they wanted, where the difficulties lay, where they could give
2 ground and where they would not move'. She complimented Mr.Dobelle's ability to 'assess those issues
3 that were substantial and those that were incidental'.
4

5 The interviewee commented that in the end-game of the negotiations France finally gave ground on the
6 the extension of the directive to cover non-electronic as well as electronic databases 'because it was
7 clear that this was what the majority of the Member States delegations wanted'. On the issue of
8 compulsory licensing the interviewee commented that 'in reality as you approach the end of a
9 negotiation more and more work is shifted to COREPER level and it became clear that the issue of
10 licensing was the issue that was going to clinch the directive' it was therefore a political decision to
11 drop the licenses whereas her role was as a 'civil servant working to provide strong advice and to open
12 up possibilities but ultimately decisions move up the hierarchy become questions of politics'. She did
13 recall that the Commission had been in favour of retaining the compulsory license provisions and a
14 number of Member States were concerned that in the Second Reading in Parliament the issue would
15 become a sticking point.
16

17 In the context of the above comments the interviewee said it would be inappropriate to comment further
18 on her influence on the directive.
19

20 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
21 **Database directive ? How was this influence exerted during the policy process ?**
22

23 The interviewee referred to her previous answer and added that the Commission certainly had a key role
24 in shaping the database directive but that the personalities involved also proved influential. In this
25 regard, she said that 'Mrs.Czarnota often appeared to present discussions of the directive as if France
26 wanted to destroy it'. While this was certainly not the case the interviewee said that 'Mrs.Czarnota was
27 clever and used this sort of approach as a strategy to play Member State delegations off against one
28 another or to undermine the position of a particular delegation on a specific point'.
29

30 The interviewee said that in her opinion part of the problem was that 'Mrs.Czarnota tended to interpret
31 any question on the substance of the directive as a criticisms against it (and by implication herself) and
32 so often replied in a sarcastic or hostile manner and on occasions refused point blank to answer direct
33 questions'. This stated, the interviewee was quick to point out that 'Mrs.Czarnota was a sufficiently
34 clever negotiator to remain apparently open to discussion'.
35

36 The interviewee commented that even the context of her previous comments 'the role of Mrs.Czarnota
37 should not be exaggerated as it is quite normal for a Commission official attending the Council working
38 group meetings to be eager to push forward a Commission proposal, after all that is their job'.
39

40 The interviewee also accredited Mrs.Czarnota with 'having been among the first officials in the
41 Commission to see the future of the electronic environment and the need for a good European legal
42 regime' she added that 'but for the work of Mrs.Czarnota and Mr.Verstrygne on the Software and
43 Database directives the reputation and profile of DGXV would not be what it is today'. The interviewee
44 commented that Mr.Verstrygne had also played an important role in shaping the early part of the
45 database discussions. She confirmed that he had come from the Cabinet of the President Jacques Delor
46 and had a reputation as a strong political operator.
47

48 The interviewee commented that later on during the negotiations when the directive was really moving
49 forward slowly the Commission announced that Mr.Gaster was going to replace Mrs.Czarnota. at the
50 time she recalled that 'the official Commission line was that Mrs. Czarnota had been promoted' but in
51 her opinion 'the move had been effected because the Commission had begun to become frightened that
52 the Council might decide to drop the Directive altogether'. She added that 'the new approach of
53 Mr.Vandoren and Mr.Gaster gave the directive negotiations some new impetus just as most delegations
54 had begun to become impatient with the lack of progress'. The interviewee commented that 'Mr.Gaster
55 also proved himself to be a clever negotiator and was highly motivated to get the directive adopted as
56 soon as possible' he also adopted 'a very different style to Czarnota and was willing to explain at length
57 any points where clarification was required'.
58

On the lobbying process in France the interviewee commented that 'overall the consultations on the database directive were good and there was relatively little overt lobbying because we made every effort to contact interested parties'. She recalled that in the period up to the common position she had contacts with representatives from the French information industry, from the ESA(European Space Agency), the French CBI and a number of press agencies, all of whom wanted information on the progress of the negotiations. The interviewee also commented that following the adoption of the directive a presentation was made to library groups and that more recently the Ministry of Culture has become 'instrumental in discussing these issues with research centres, public bodies, libraries in an effort to raise their awareness on the importance of copyright issues in the digital context'. She added that 'until recently the libraries in France showed little interest or concern for European copyright legislation but both the database directive and particularly the more recent WIPO discussions have really awakened their interest'.

In Brussels the interviewee recalled meetings and conversations with Mr.Charles Clarke from the publishers association, Mr. Barry Wojcik from Dun and Bradstreet and Mr.John Stevens from Reuters. She also recalled that Reuters had made a presentation to the Council working group although she had been unable to attend. Just prior to the Common position she also recalled a meeting with Madame Huppertz from Bertelsmann to discuss the Article 15 of the directive on the binding nature of certain provisions.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that during the negotiations of the directive Article 10(2) of TRIPS was 'used by the Commission and by the German Presidency as a strong argument in favour of supporting the rapid adoption of the directive' i.e. the directive was an easy way of fulfilling the EU's TRIPS obligations.

The interviewee mentioned the final Magill judgement that occurred toward the end of the Council's negotiations. She commented that she 'felt it was a very Common law interpretation with a strong UK feel about it and was a judgement that would never have been delivered in France' She added that her overall impression was that 'the importance of the case was rather over-emphasised in the UK and that in reality it was not as heavily used in the Council working group as some might assume'.

The interviewee also commented that the US Feist decision was 'a case frequently referred to by numerous delegations throughout the discussion and especially by the UK'. She added that the case was clearly important for the UK delegations particularly with regard to the question of reciprocity or national treatment.

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 ?

The interviewee commented that the directive's higher profile was probably just to do with it being linked with discussions of the information society.

The interviewee did not like to refer to it as the 'multimedia directive' especially when she recalled 'the long and difficult discussions in Council with the Commission over what exactly the directive covered'. In her experience 'multimedia is a very wide and inclusive term that implies not just databases but also the audio-visual sector'. She recalled that in France at the time the directive appeared that it would cover content in all audio-visual works there had been concerns expressed from these industries that it would distort their production and their existing legal protections'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee did not think it appropriate to answer this question other than to say that she felt that at the European level the Commission consultation procedures were very adequate.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that the database directive was likely to be very important for future copyright harmonisation as had been highlighted in the Commission's 1995 Green Paper and more recent follow-up communication. The interviewee commented that the database directive had given an indication of the Commission's intention for regulating content in the digital domain.

The interviewee also commented that a central problem that remained in all discussions of copyright harmonisation at the European level was the differences between the two major systems for protecting intellectual creations - Copyright and Droit d'auteur, e.g. the originality criterion, which was one of the major reasons that the Commission developed the sui generis right.

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

The interviewee commented that the database directive was a good illustration of the way in which European legislation was being used a platform for further harmonisation of copyright regimes at the international level. Although she was quick to acknowledge that the database proposal was finally rejected at WIPO, she felt that this was a trend that would be repeated in the future.

The interviewee also commented that in her opinion discussions of IPRs at the European and International levels would continue to grow in importance in line with the economic importance of the content industries and the on going discussions of the information society. She added that in this context she felt sure that DGXV 'has a very clear idea of what it wants to do in the copyright field' and that there were 'interesting times ahead'

The interviewee commented that 'there remains a strong need for harmonisation even though this creates problems both in negotiations and in the solutions found' (i.e. inconsistency of approach between directives'. She added 'Europe is very strong in content which will be a key to future economic growth and therefore requires strong protection'.

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 ?

She referred to her previous comments and said she had nothing to add.

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 ?

The interviewee prefaced her comments by saying that 'in the digital environment there is a need to distinguish between two aspects that often cause confusion i.e. between the infrastructure and the content. She added that 'in early discussions of the digital environment most of the attention was focused on the infrastructure but as we have gained experience it has become apparent that content is the most important factor in the success of the information society'. The interviewee commented that 'this view is evident in the Bangemann report and more recently in both the Commission's 1995 Green Paper and USA's White Paper'.

The interviewee commented that 'there is clearly a need to protect copyright owners but there is also a need to develop this protection in the context of a range of measures on related issues such as pornography and illegal content, the protection of minors and the evolution of electronic commerce'. The interviewee also viewed liability as another important issue linked to copyright in the digital environment as was witnessed by the opposition of information service providers and telecommunications companies to proposals at the WIPO conference'.

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

3
4 The interviewee said that this was a difficult question to answer as she was a copyright expert and not
5 an expert in other areas of information policy. She did however say that she did not see any links
6 between copyright and the use of copyright management technologies with dangers to personal privacy
7 or data protection because she remained confident that adequate legislation was already in place to
8 protect these other areas.

9
10 **14. How adequately do you think current European Information policy processes handle these**
11 **interrelationships?**

12
13 The interviewee commented that it was still too early to tell but that she detected a more coherent policy
14 approach to information in the context of debates on the information society.

15
16 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
17 **concerns over the issues of democratic participation and accountability ?**

18
19 The interviewee preferred not to respond to this question - this was compounded by running out of time
20 in the interview.
21
22

INTERVIEW no. 19

Legal Counsel for Federation of European Publishers(FEP)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that he was aware of 'the European Commission's activities in the field of copyright prior to the 1988 Green paper' With regard to databases the interviewee recalled 'a meeting in late 1989 or early 1990 with DGIII of the Commission at which Mr.Verstrynge provided a briefing on copyright issues including software and at which I spoke to Mrs.Czarnota with regard to protecting databases' The interviewee acknowledged that he had known Mrs.Czarnota before she joined in the Commission and while she was still in the UK at the Central London Polytechnic.

The interviewee also recalled that in the UK by the late 1980's 'Mr. David Worlock from the EIIA was already agitating about the growing information industry and by the same time there was also valuable work being done on copyright and information by DGXIII through its Legal Advisory Board headed by Mr. George Papapavlou'.

The interviewee commented that 'from the outset of discussions on the legal protection of databases Mrs.Czarnota was very clear about what she wanted and was very open to discussion even during the drafting process prior to the release of the proposal'. He added that in his experience 'the best way to find out what it happening with a particular policy is to stay as close as possible to the official concerned' which in the case of the database directive was Mrs.Czarnota so that was exactly what he attempted to do. The interviewee commented that fortunately this was relatively easy with Mrs.Czarnota because she 'was very open and always keen to try things out on you with regard to her ideas and solutions for the directive proposal partly as a means of gauging your reactions to different suggestions'.

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 ?

The interviewee commented that 'formally I attended the Commission's hearing in April 1990 at which the dominate view from those who attended was that there was not a great need for a directive on databases but that if there was to be copyright should be used'. The interviewee could not however remember any of the other people who attended the hearing.

The interviewee said he could not recall any activities after this hearing until the release of the proposal in 1992 and then he recalled it going on to the parliamentary committees. The interviewee commented that at this stage the organisations he was representing were 'not in favour of the unfair extraction right and I proposed in an initial submission to the Commission a form of neighbouring right to protect databases' He added that this suggestion 'met with a resounding silence both from the Commission and from the wider industry'. The interviewee explained this by saying that 'this was partly due to the nature of the subject matter (i.e. esoteric, rather complex) and also because at this early stage there was a lack of consciousness amongst industry representatives of what the implications of the directive might be' indeed he admitted 'at the time it was difficult to tell'.

The interviewee commented that this approach of 'a neighbouring right was based on the fundamental fact that publishers do not as such have a direct and clear stand point in copyright and that as such they are like phonograph producers'. As a result he was eager 'to establish a position for publishers in the debate on databases and copyright more generally and especially at the European level because of the weaker status of publishers in droit d'auteur systems'.

1 The interviewee also said that he could vaguely recall 'making a presentation to the parliament during
2 the first reading and having a few brief contacts with Parliamentarians during its second reading'. He
3 also commented that he attended briefings on the Council working group from the UK's patent office
4 and had direct contacts with Graham Jenkins who was part of the UK delegation in the Council working
5 group.

6
7 The interviewee further commented that from his experience in the field he had an extensive range of
8 contacts with other interested parties and that during the same period he was also working on the other
9 directives being pushed by the Commission including the Rental and lending right directive and the
10 Duration directive. He said that he also attended the Commission's 1994 hearing on copyright in the
11 information society that has since produced the second Green Paper on copyright and its more recent
12 follow-up communication. He also acknowledged that he had been involved in a number of European
13 projects including IMPRIMATUR.

14
15 **3. Did your opinions change during your involvement with these discussions ?**

16
17 The interviewee commented that his views had changed on these discussions during the passage of the
18 directive as the discussions themselves had evolved, but at a fundamental level his basic concerns over
19 the introduction of the sui generis right remained.

20
21 These were that from the beginning he was aware that 'harmonisation of the legal protection of
22 databases at the European level was set to lower the copyright protection available to databases in the
23 UK which had the biggest industry' He added that 'the sui generis right also introduced a new right that
24 had not been tried and tested and that was not formally part of the copyright system'.

25
26 This stated, the interviewee commented that 'overall the directive was not particularly controversial and
27 it did not, at least from the groups I was involved with, meet with any great resistance partly because
28 most groups agreed with the idea of formally extending copyright protection for compilations to
29 electronic databases'.

30
31 **4. During the discussions with whom did you form alliances ? How influential do you feel**
32 **perspectives like your own were in shaping the directive?**

33
34 The interviewee commented that as in other copyright discussions his allies were 'the usual suspects'
35 including representatives from IFPI and Reuters all of whom he added had similar aspirations for the
36 database directive which included 'to strengthen the sui generis right, extend the directive to cover non-
37 electronic databases, limit the exceptions to the new right and remove the compulsory license
38 provisions'.

39
40 The interviewee commented that 'apart from Reuters most of the other interested groups entered the
41 debate quite late on'. He added that during the discussions he was 'quite surprised how during the
42 discussions individual publishers, unlike the trade associations, were so inactive'. In the UK he recalled
43 that 'a good deal of work was done on behalf of authors through the BCC and ALCS' and in particular
44 he mentioned; Maureen Duffy & Geoffrey Adams from the British Copyright Council (BCC) and
45 Heather Rosenblatt from the Authors Licensing and Collecting Society(ALCS). The interviewee also
46 commented that one of the problems in lobbying was that as trade association sometimes the European
47 institutions simply preferred to speak to representatives of individual firms.

48
49 The interviewee commented that 'in comparison with other copyright directives I have been involved
50 with, interest in the database directive was relatively low and there was never really a great deal of
51 information about'. In this regard, he said that in his experience 'getting information from the UK
52 government is always more problematic than getting direct from the Commission'. and that 'the culture
53 of secrecy is something that is quite specific to the UK and does not operate in Brussels.

54
55 The interviewee said that it was difficult to assess one's own influence on a proposal but he always had
56 the impression that his opinion was taken on board and certainly there were changes to the text that he
57 was glad to see but also others that he was less pleased about.

The interviewee commented that 'overall I am not terribly satisfied with the directive because whilst in principle it is perhaps a good idea, in practice so many things have been left in the recitals rather than put in the directive text that many issues remain unresolved'. As a small example the interviewee cited recital 35 which says among other things that '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 contents of a database . . . and to the extent that the exceptions relate to the structure of the database. . .'. The interviewee asked rhetorically 'what does this mean in practice ? what exceptions apply only to the structure of a database ?' he added that speaking as a copyright expert answers to these questions were far from clear.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to his previous comments that it was difficult to assess influence on a directive although of course the Commission and Council were the dominant institutions.

In terms of those involved in the policy process on the database directive and more generally he commented that he had always found 'the role of the ECOSOC as really quite problematic, not only is its role as an initial policy filter not very clear but with one or two exceptions I have a very low opinion of the abilities of its members to contribute anything to debates in the area of copyright'. In this regard the interviewee recalled attending one ECOSOC meeting on the database directive which became 'a complete shambles as representatives confused data privacy and databases' He added it was the last time he was involved with the ECOSOC although he acknowledged that he did know both Mr. Robert Moreland and his legal counsel Mr. Harry Small who worked on the database directive.

In the Parliament the interviewee recalled discussions during the first reading with the legal affairs committee rapporteur Mr. Garcia Amigos and his assistant Maria Martin Pratt and also that he had made a formal presentation to the legal affairs committee. The interviewee commented that after this involvement he 'came away from the Parliament feeling quite comfortable with the way the discussions were going'. The interviewee also recalled that presentations were made by representatives from Reed, Dun and Bradstreet and EUSIDIC.

The interviewee commented that his 'initial position was to push for a neighbouring rights solution with 50 years protection and then later when it was clear that the sui generis approach was being adopted to argue for a 25 year term of protection'. He acknowledged that even at the time 'we did not think that we would get that long because we knew that the Commission was using the Danish Catalogue right with its 10 year duration as their initial benchmark'. This stated, he commented that 'the extension to 15 years was deemed to be a success even though some publishers with archival databases Chadwyck-Healey in the UK still wanted a much longer period of protection'.

The interviewee commented that he could not recall any significant developments in the Council working group other than 'in the first semester of 1994 the Greek's took over the Presidency which marked the beginning of a very slow period for the database directive and for copyright policy more generally'. He added that 'almost immediately after the Germans took over the Presidency in the second semester of 1994 the pace of the negotiations on the directive changed for the better'.

As far as he could recall the main issues outstanding on the directive were 'the compulsory licensing provisions, the extension to analogue databases and the level of originality for databases to be eligible for copyright protection'. He added that 'in terms of the originality criterion the Feist decision and the solution adopted in the software directive had to some extent indicated that a higher level of originality than was required in the UK for copyright protection was most probable'. During these debates he remembered discussions with Mrs. Czarnota and held the opinion that 'the Feist decision really got the USA industry interested and involved while in European case law such as the Van Dale v. Romme in alerted some European industry representatives that there were potential problems with existing protections'. The interviewee also commented that in his opinion on the compulsory license issue the final Magill judgement was influential although 'publishers remain concerned that this decision will be able to be used by rival database producers to their disadvantage'.

The interviewee commented that 'during the German Presidency I received a good deal of information about how the negotiations were going in Council through our German national representative'. He added that as a result he was aware that 'from the beginning the Germans had reservations about the sui generis approach and would have preferred an approach using copyright in conjunction with unfair competition rules'. Indeed the interviewee recalled that German publishers at the time supported their governments position and were arguing that the sui generis right would not be a good approach and would lead to uncertainty for database producers, although he suspected that this was partly because German publishers were nervous about going against the views of the German administration. He added that he was aware that in Council there was opposition to the German approach both from the UK and the French as well as other Member States.

The interviewee commented that 'after the Germans the French took over the Presidency with the working group meetings chaired by Mr.Dobelle' who he described as 'a career civil servant who was very un-french in his approach to the negotiations'. He added 'Mr. Dobelle was extremely effective in ensuring the directive finally reached adoption' and he also recalled that by this stage of the negotiations 'Graham Jenkins the UK representative in the Council working group had become very much more open about the negotiations than at earlier stages'.

In the second reading in Parliament the interviewee recalled that there was particular concern that the decision to drop the compulsory license provisions would be rejected by the Parliament. He recalled that he had 'contact with Anna Palacio, the Rapporteur from the legal affairs committee and it quickly became apparent that the Parliament was not going to make any major changes'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee referred to his previous answers and mentioned again the Feist case, Magill and added 'the TRIPS agreement influenced the extension of copyright protection to cover both electronic and non-electronic databases in the directive as under Article 10(2) of TRIPS both are covered'.

The interviewee also explained how the position of the organisations he was representing shifted from opposition to the sui generis to support for it. He commented that his advice had been that 'support the sui generis right because it is as close as you are going to get at a European level to the existing copyright protection you have in the UK'. He reflected that 'opposition to the sui generis from database producers in the UK was hardly surprising given that it involved a reduction in the copyright protection available to their products'.

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 ?

The interviewee commented that the increased profile of the directive was perhaps as a direct result of the issue of the protection of databases being discussed in the context of the WIPO diplomatic conference.

The interviewee commented that the database directive is likely to be most significant because of its introduction of a new sui generis right regime because it directly affect the interests of database producers and publishers who are central to the development of content in the digital realm. He added that as a result the sui generis right would be a 'major building brick for the infrastructure of the information society'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that it was a difficult question to answer. He said that certainly in his experience increasing numbers of interested parties were participating and making submissions to the Commission on copyright issues. He also re-iterated that in comparison to the UK culture of secrecy he always found Brussels a very open place.

The interviewee did comment however that he only 'noticed the involvement of the academic and scientific community in the database discussions after the common position had been reached which is

surprising considering how vocal they have been about the directive since'. The interviewee tried to explain this lack of involvement in the discussions by saying that 'firstly, in the EU there is no formal focal point for the scientific community to raise these issues like there is in the USA with the National Academy of Sciences(NSA) or at the international level with the International Council of Scientific Unions(ICSU), and secondly in the EU academics and user groups have tended to examine databases and the information market via the European Commission's DGXIII rather than via DGXV IPR focus'. He added that many of these groups became directly involved in the information society initiatives and DGXII libraries programs rather than on specific copyright proposals.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to his previous comments and added that 'the European copyright harmonisation process has been dominated up until now by the Commission using internal market arguments for justifying their policy initiatives or lack of them in areas like moral rights'. He added that in his opinion 'this use of the internal market argument has almost always ultimately been an argument of convenience invoked when useful and discarded when unsatisfactory'.

The interviewee commented that it was still difficult to assess how significant the database directive would be for future copyright initiatives but added that in his opinion given that the EU had now adopted 5 directives since May 1991 'we should perhaps move towards a total European Copyright Act as originally envisaged by Professor Adolf Dietz in his study on European copyright published in the late 1970's', although I doubt that this will happen in the near future, if at all'.

He added that in his opinion 'it is no longer tenable to leave things up to Member States in the field of copyright especially with the development and expansion in the use of electronic forms that exhibit little respect for national or even international boundaries'.

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

The interviewee referred to his previous comments.

But added that already preparations were under way to update the copyright laws of those Eastern European countries who would be joining the EU most quickly e.g. Hungary, Poland and the Baltic States.

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 ?

The interviewee said he had little more to add other than the fact that as a lobbyist at national and international levels he was aware of the strong differences in style between the UK where the civil servants always tried to keep you at a distance 'they are very courteous but you always feel that you never know exactly what is happening' and at the European level where they are very accessible.

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 ?

The interviewee commented that in his opinion in the digital environment 'we should move away from copyright to contract as the principle means of protection for information products and services' and in this regard he saw site licenses as important and especially for the digital domain. In this regard he saw site licenses as the way forward especially for electronic works.

The interviewee commented given that technology was the cause of many of the problems facing copyright it was also probably the answer as well ' though its an old cliché the answer to the machine is

1 in the machine'. In this regard he viewed the development and use of electronic copyright management
2 systems(ECMS) as the best means to 'facilitate the implementation and enforcement of copyright
3 legislation'. He also acknowledged that he had worked on the original CITED model (Copyright in
4 Transmitted Electronic Documents).

5
6 The interviewee commented that regardless of the threats or opportunities in the digital environment for
7 rightholders want protection for their investments. In his opinion ' in the end we will move to one-stop-
8 shops for copyright clearance and enforcement although we are still probably between 10 and 20 years
9 away from a global system of identifiers and watermarks'.

10
11 The interviewee also said he accepted that 'in reality there should be some exceptions for legitimate
12 users' but he added that 'when the concept of fair use was first introduced copying by hand was the
13 means for making copies, as a result it is not a suitable concept in the context of the new technological
14 advances and it should not be allowed to be used as an excuse for the copyright abuses now taking
15 place'. The interviewee did however say that he was aware of the arguments of academics like
16 Professors Reichman and Samuelson and their concerns over the public domain and public sector
17 information and said 'in many respects their concerns seem legitimate'.

18
19 **13. How would you characterise the relationships in digital environments between copyright**
20 **policy and other areas of information policy such as Privacy ?**

21
22 The interviewee commented that in the digital environment as efforts to protect copyright increased he
23 could see that 'there are concerns for people's privacy with regard to things like customer profiling'.

24
25 The interviewee referring to his previous commented that Reichman and Samuelson have written a lot
26 that he considers 'plain twaddle' but he acknowledged that they have also made a number of valid
27 points including ' the dangers posed by gigantic and ever expanding databases owned by multi-national
28 producers particularly on the scientific community, which was a point missed almost entirely in the
29 discussions of the database directive'.

30
31 The interviewee commented that 'Professor Hugenholtz from Amsterdam was strongly against the
32 removal of the compulsory licensing provisions from the directive because of similar concerns'.

33
34 **14. How adequately do you think current European Information policy processes handle these**
35 **interrelationships?**

36
37 The interviewee commented that as a copyright expert he did not really feel qualified to answer this
38 question other than to say that as copyright issues and discussions on information continue to have a
39 higher public profile there is likely to be increased discussions of any interrelationships.

40
41 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
42 **concerns over the issues of democratic participation and accountability ?**

43
44 The interviewee commented that the process of making policy at the European level would certainly
45 need to be restructured if the EU was going to expand to as many as 20 or more Member States and
46 there was clearly a tendency on the part of the Parliament to try to extend its powers which it had been
47 quite successful at doing.

INTERVIEW no. 20
Chief Executive UK Publishers Association

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that 'from soon after DGIII began to be involved in the field of copyright' his organisation 'had regular meetings with DGIII officials both prior to and after the 1988 Green Paper on an on-going basis'.

The interviewee recalled that as early as 1984 when the CICI (Confederation of Information & Communication Industries) was established in the UK, 'copyright was already a major issue of discussion for it' although he pointed out that 'at that time the focus of these discussions was very much on analogue works as opposed to digital ones'.

The interviewee's overall assessment at the time of the initial database proposal was that 'the proposal on databases only offered a partial solution to the problems faced and left far too many issues open concerning the reproduction right up to Member States to resolve' He added that in many respects 'this remains my view even of the adopted directive' and supported this view by pointing to the number of issues that ended up in the recitals rather than in the main text of the directive.

The interviewee commented that his organisation has always and continues to be 'concerned with the whole of the reproduction right and not just how it affects/operates in databases'. Reflecting on this, he commented that considering that it is only in their most recent proposals that the Commission have begun to address these issues in the digital domain in his opinion 'they have moved rather too slowly'.

This stated the interviewee recalled that 'in the early 1980's when European copyright harmonisation was first being discussed, I was wary about supporting or advocating a single all inclusive European Copyright Act not only because it would have been problematic to negotiate but also because in a single move it would have transferred all competence for copyright issues entirely to the European Level'. The interviewee added 'one of the major concerns of such a move has since been illustrated by the TRIPS agreement at which the EU spoke on behalf of the Member States which is that the voting strength of Droit d'auteur countries produces solutions that always favour those systems, a situation that is always potentially problematic for UK copyright'. The interviewee further commented that 'these problems also emerged at the WIPO diplomatic conference where the EU was only speaking alongside the Member States on most issues but the voting strength still brought a number of differences to a head'.

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 ?

The interviewee commented that this concern over the strength of droit d'auteur systems at the European level was part of the reason for the UK government's initial scepticism towards the database proposal 'basically they did not see the need for the proposal, especially as the UK government had just finished an extensive round of consultation that had finished with the 1988 Copyright Designs and Patents Act which both industry and government considered provided adequate protection for compilations and database producers'.

The interviewee recalled that 'quite how adequate the protection offered by the CDP Act to digital works became a large and involved discussion at the time particularly around the issue of the protection offered under the published edition right'. This right it transpired 'applied to facsimile reproduction but not to digitised works and there was an implication protection for some types of digital works might prove inadequate'.

This stated, at the time of the database proposal 'both the UK industry and government delegation to Council were convinced that adequate protection was offered to databases under the UK compilation right and there were a number of clear concerns about the implications of harmonisation' These included that 'the level of originality required for protection was different between UK and continental copyright systems and the key problem was that UK industry could see the danger of losing its sweat of brow copyright protection'

This said the interviewee acknowledged that 'in many respects even before these discussions had really begun we were wrong footed by the US Court decision on Feist, even though I still think that it was far too wide an interpretation of case law'. He added that at the time he recalled discussing Feist with John Baumgarten of the US directory publishers association(DPA) and also that in discussions with Trevor Fenwick of the UK DPA that Mr.Fenwick remained relatively unconcerned over Feist, and confident of the copyright protection offered under sweat of brow in the UK.

The interviewee commented that once it was clear that the database proposal was going to be negotiated he recalled in discussions with other UK industry representatives that they were aware 'it was unlikely that the existing UK copyright approach to compilations would be adopted at the European level because even though the UK had by far the largest database industry it was basic mathematics in Council that the majority droit d'auteur countries would not adopt the UK's lower originality criterion'. Indeed he said ' by this stage the originality criterion for copyright protection had already really been resolved in the context of the software directive and so we knew that there was little hope of winning this battle'.

The interviewee commented that he worked closely with Charles Clarke who had good contacts with Mrs.Czarnota (who was very conscious of not leaning, or appearing to lean too far towards the UK copyright approach because she was a UK trained lawyer). He recalled that 'our first major lobbying triumph was to successfully argue for the extension of the directive to include all databases (digital and analogue) and to strengthen the sui generis protection'.

The interviewee recalled that 'another key battle was over the duration of the term of sui generis protection'. His own organisation wanted 'a 50 year term i.e. the same period of protection as copyright (at the time)but from the reactions of the Commission to our submissions we realised that it was improbable that we would be successful so we argued for 25 years like other neighbouring rights'.

The interviewee commented that it was at this point that the Commission informed that they intended to use 'the Danish catalogue right with its 10 year protection as a basic model for the unfair extraction right in the initial proposal' He recalled that 'we argued strongly against the Commission 10 year protection and continued to lobby for a longer period of protection'. He recalled feeling at the time 'how were we supposed to know or be familiar with Denmark's catalogue right or its similarity with the sui generis protection being offered and/or how such protection was going to operate in practice'.

The interviewee commented that as a basic strategy he was involved in lobbying the UK and Charles Clarke took responsibility for the European level, although he did meet with the Commission and the knew the UK government's Council representative well. He commented that as a result he was not directly involved in the lobbying at the Parliament though he had received regular reports on progress of the negotiations there.

The interviewee recalled that his organisation had made a presentation to the parliamentary committee on legal affairs and 'had meetings with the rapporteur on the first reading Mr.Garcia Amigos and his assistant at the time Maria Martin-Pratt'. He said that the impression left from these meetings was that 'Mr. Amigos was friendly towards their arguments but was the type of MEP who was prepared to nod and smile a lot but who in reality did very little'. The interviewee commented that ultimately 'our lobbying was successful in extending the term of sui generis protection to 15 years' but the interviewee made no mention of contacts with Lord Inglewood the MEP who tabled the amendment for extending the protection. His overall assessment was that the Parliament was 'not a major player in the passage of the database directive'.

In summary the interviewee commented that there were three major battles on the database directive which were; the originality criterion in copyright for selection and arrangement of a database, the sui generis right - extending the term and strength of protection it offered and its limitation by exceptions and the compulsory licensing provisions - which involved lobbying strongly for their removal.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that his basic opinions on the directive had not changed which were that he would have preferred to stick with an entirely copyright based solution rather than the dual approach that in effect reduced the protection available to databases in the UK. However given that the Commission had been determined to push forward with their proposal the ultimate solution was not too bad although a lot was still open to debate at the implementation stage in which he was also going to be heavily involved.

The interviewee also recalled that 'the sui generis right generated some opposition in other Member States including 'from the Germans who felt that unfair competition rules would be sufficient and that a sui generis right was not needed at all'. The interviewee said that as far as he could remember the Germans maintained this opposition almost until the common position was reached when they finally agreed to the sui generis solution.

The interviewee added that for a detailed summary of his organisation's position as the directive evolved it would be useful to talk to Charles Clarke.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that in his opinion during the passage of the directive the organisation he represented was 'the leading lobby on the directive, not only because we were the most active but also because we were the most successful especially in getting the compulsory licenses dropped'. The interviewee said that in lobbying it was certainly not possible to rely on the strength of the argument and that 'how it is put across is often very important' indeed he added 'there is definitely a need to use a hard-cop soft-cop approach which sometimes involves banging your fist on the table and over-stating your case so as to avoid being ignored'.

The interviewee commented that his organisation did not form direct alliances with any groups but that many of their views did overlap with other organisations involved in lobbying on the directive including Reuters, IFPI and some large European publishers like Bertelsmann. He added 'we were also aware of the work of Dun & Bradstreet and I can recall having some disagreements with representatives from the EIIA and Reed'.

The interviewee commented that from his perspective 'the passage of the directive can be characterised as a debate between legal specialists from droit d'auteur versus copyright traditions rather than as a debate between the more normal combatants of suppliers versus users'. Indeed he added that on the database directive 'users were not obviously involved and did not as far as I can recall get together to lobby on the directive'.

The interviewee contrasted this lack of user involvement in Europe with the situation in the US where 'there are many more forums for users to get together and exchange ideas and views' He added that 'as early as the mid 1970's there were discussions amongst libraries on these issues lead by Congressman John Hershey in the CONTU (Commission on New Technological Uses for Copyright Works) and from this tradition other forum have developed including CONFU(Conference on Fair use)which was a forum where a large number of organisations were represented to discuss fair use in electronic environments prior to the US White paper on IPR's and National Information Infrastructure' although he was quick to point out that 'this consensus building ran into a large number of difficulties and actually broke down in many cases'. He commented that Europe was now itself making moves in this direction with the 'European consensus building project IMPRIMATUR'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that 'from the Commission Mrs.Czarnota and Mr.Verstrygne were both very heavily involved in the early passage of the directive', although he added that 'they later both left and were replaced by Mr.Gaster who was involved in the final stages of the Council working group negotiations when most of the changes to the amended text were finally agreed'

The interviewee also recalled that DGXIII of the Commission were also involved. He also recalled that in the late 1970's and early 1980's he had spent a long time 'trying to convince DGXIII(Luxembourg) first of the basic principle of copyright protection and second of the need to extend this protection in the developing information markets'. He added that at the time DGXIII approached copyright simply as 'a restriction on free trade and as a monopoly right held by paper publishers that would actually inhibit the growth of electronic information markets and publishing'. He acknowledged that the views of DGXIII had changed a bit since then but that their basic stance during the passage of the directive was to safeguard the development of the information market and users of electronic information sources which sometimes put them in conflict with his own organisation's interests.

In terms of lobbyists he referred his previous answers and added in the UK Reed/Elsevier were also active through Quentin Rappoport who chaired the CBI hearing on the directive. The interviewee remembered being horrified by the CBI's position which appeared to be that they were satisfied with the directive in late 1994 including the licensing provisions.

In terms of Member States he commented that apart from the UK and Germany France was also heavily involved in the passage of the directive.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee referred to his previous answers referring to the Feist case and TRIPS.

He also added that the Magill case was also important in the argument over the dropping of compulsory licenses because it could be argued that if competition rules prevented abuse of a dominant position there was no need for extra licensing provisions.

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 ?

The interviewee commented that 'overall I am reasonably satisfied with the directive as adopted but of course a lot will depend on the implementation, particularly with regard to the situation with exceptions'.

The interviewee commented that in terms of the higher profile of the directive a lot of it is to do with 'the increased profile of copyright issues more generally and perhaps also the discussion of databases at the WIPO conference'. He added that he did not like characterising the directive as the cornerstone of the multimedia society but it was certainly a directive that was important per se and also as a model for future initiatives concerned with the digital sphere as had already been highlighted by the Commission in both its Green Paper(1995) and follow-up communication.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that European consultation on copyright issues was an interesting business. As an example he recalled that early on in the database directive 'Mrs.Czarnota began to say that if people did not hurry up and accept the proposal then it would be removed altogether and that it would be a long time before the Commission would make another proposal on databases'. He added that his response was to state 'publicly that it was better to have no proposal rather than the wrong one'.

He commented that the Commission is the key institution responsible for consultation but in his experience 'European Commission officials appear to prefer to speak to representatives of individual

large firms rather than associations or groups' He explained this by saying that 'these officials appear to hold the view that the thinking of trade associations where consensus amongst diverse members is important makes any opinions they may have a bit woolly whereas individual firms can tell it how it is'. The interviewee absolutely refuted this kind of thinking and commented that 'individual firms with their own business objectives and strategies can often provide a very warped and misleading picture'. The interviewee was however quick to point out that during the passage of the database directive 'we always found Bridget [Czarnota] to be particularly open, accessible and straight-forward with us'.

The interviewee also recalled that in terms of his organisation's own consultations they had contacts with the Directory Publishers Association (DPA) and Periodical Publishers Association (PPA) both of whom were also members of CICI. They also had contacts with Reed and Reuters.

The interviewee also recalled he had contacts with the European Information Industry association (EIIA) and its representatives Mr. David Worlock and Mr. Lennart Scharff. He commented that he found Mr. Worlock's ideas 'a little off beam on copyright' and that in particular 'he was always pushing for copyright in added-value services rather than in the primary material'. The interviewee acknowledged that this was clearly because 'of the EIIA's work on pushing for the commercialisation of public sector information but their position on the database directive brought us into conflict with them'. He added that he remained 'in doubt over exactly what the position of the EIIA is on copyright issues'. The interviewee also recalled that the CICI had links with the Information Industry of America (IIA) who he commented had 'liased closely with Czarnota on the database directive partly because of a relationship that they had built up during the software directive on which they were extremely active along with the US publishers'.

The interviewee also commented that 'organisations who participate in consultations do not just differ in their opinions but also in the different ways that they are organised and managed'. IN this regard he pointed out that in his own organisation he has 'to report all the time to his Council, whilst in some of the looser groupings individuals can basically shoot from the Hip and get away with murder in terms of the personal views they express'. As an example he said that 'in CICI there are no reporting requirements and I have a free hand to speak up although of course I do not get paid'.

The interviewee finished by saying that in his experience consultation at the European level was pretty good and that he was relieved that the main issues under discussion were 'no longer struggling simply the principle of the need for copyright protection but rather how to establish an effective copyright system in practice'. Ultimately for him 'copyright is a trading system for works of the mind'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that the database directive is likely to be significant 'because it raised many of the issues concerned with the protection of copyright works and information in digital form that are central to discussions of the information economy'.

The interviewee commented that 'while the debate over the copyright balance between suppliers and users was raised in the database directive, it really came to a head in the discussions at WIPO when the lobby from hell arrived and surprised, shocked and caught off-guard the publishers lobby'.

The interviewee added that 'prior to WIPO we were very satisfied with the draft protocol but the coalition of users, telecommunications operators led by Thomas Vinje was very strong particularly on the liability issue'. For his organisation the powerful alliance formed between telecommunications operators, consumer electronics groups, third world countries and libraries was a new force to be reckoned with in discussions of copyright at the International and possibly European levels'.

On libraries the interviewee commented that 'in the UK while there is a willingness and awareness in among specialist and University libraries of the need to seek solutions with publishers e.g. site licenses, the same cannot be said for UK or European public libraries'. Indeed he added that he found 'Emanuella Giavarra the director of ECUP (European copyright users platform) too dogmatic on the

public library side'. He added that 'the difficulty for publishers has always been that for users what is a fair exception or fair use has always tended to be whatever users want it to mean in any given set of circumstances which has always been unsatisfactory'.

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

The interviewee commented that there was 'evidence that the European Commission is moving rapidly forward with further proposals on copyright that will address issues arising from increasing use of electronic information and the Internet'. He added that 'above all there is a need for publishers to be able to gain remuneration for their works' but he had the impression that 'users simply do not understand the economics of publishing and do not really care, especially in an environment where the new technologies have given users the potential for greater control over the information they receive and over their ability to evade payment for it'.

The interviewee commented that 'Libraries are becoming a growing problem because of their moves towards the delivery of materials electronically both within their existing systems (inter-library loan) and in the delivery of information services directly to the individual (publishing themselves)'.

The interviewee commented that harmonisation at European and international levels will continue to be important but that there was also a need to examine the need for technical systems to enforce these rights as 'above all there is a requirement to make a comprehensive solution and to ensure that it can be effectively enforced'. This stated, the interviewee held the view that 'while electronic copyright management systems (ECMS) appear to offer a conclusive answer to all the problems faced by rightholders in the electronic environment, in reality the widespread use of these systems is still probably 20 years away'.

The interviewee acknowledged that 'even though I am often characterised as a copyright fundamentalist, I am aware that the idea of no copyright exceptions is not politically possible, but I must have a negotiating position'.

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 ?

The interviewee commented that 'at the European level copyright policy has most recently been effected by the EU's information society initiatives as articulated in the Bangemann Report which have made copyright a central issue in the development of the information society'.

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 ?

The interviewee commented that 'in the future as more and more information is placed on-line there will be an even greater need for enforcement mechanisms and for copyright protection to be passed down the value-chain'. He added that this will involve service providers in contracts with suppliers and refocus attention on the whole issue of rights clearance as more multimedia products and services become available. The interviewee also envisaged that 'publishers will in the digital world face problems arising over the protection required by creators (authors) that may lead to conflicts'.

In this regard, the interviewee commented that 'Authors groups such as ALCS have always been motivated by a desire to ensure compensation for authors but in reality there has always been a need for commercial exploiters of others creative works and this will remain the same in the future'. He added that 'there is a continuing and very important role for these intermediaries partly because it is simply quite rare to find individuals who are both creative and business orientated'.

The interviewee also said that 'most of the new multimedia works were compilations of others creative works rather than entirely original creations'. In his opinion the model we will almost certainly move to

1 is likely to be similar to that employed by film producers e.g. Instead of struggling through rights
2 clearance to get a film sound track just they just commission another piece of music
3

4 **13. How would you characterise the relationships in digital environments between copyright**
5 **policy and other areas of information policy such as Privacy ?**
6

7 The interviewee commented that he was aware of the 'arguments that copyright is too strong and that it
8 will have a detrimental impact on information access and even on freedom of speech'. He said that he
9 was not persuaded by these arguments and questioned the motivations of the people expressing them
10 such as Justice Laddie who he accused of being controversial for the sake of his own career.
11

12 The interviewee commented that these arguments cause a lot of trouble for publishers because
13 'everyone gets tarred with the same brush and is demonised like Rupert Murdoch' and he also argued
14 that the Magill case should not be continuously cited as an example of publishers behaviour because it
15 was a decision based on Article 86 as well as Article 85 of the Treaty.
16

17 In the opinion of the interviewee 'the copyright system has been very effective as is shown by the fact
18 that now we have more information, over more channels and through more media than ever before'. He
19 added that for publishers the advent of digital technologies has however raised greater dangers of piracy
20 at a time when initial investments are increasing 'for publishers remuneration remains their lifeblood
21 but the investments they have to make to ensure that they get this remuneration are enormous especially
22 in electronic formats (e.g. £20,000 for a book, £250,000 for an interactive CD-ROM)'.
23

24 The interviewee commented that 'in the digital environment the capacity to download and manipulate
25 information has increased as has the ability to distort and deprive returns on investment - it is these
26 aspects of the digital environment that make the debates on copyright protection so serious'.
27

28 He added 'it is not fundamentalist to want a return on investment'.
29

30 **14. How adequately do you think current European Information policy processes handle these**
31 **interrelationships?**
32

33 The interviewee did not have any further comments and referred to his previous answers.
34

35 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
36 **concerns over the issues of democratic participation and accountability ?**
37

38 The interviewee commented that at the heart of copyright policy was the problem that 'information
39 suppliers and information users fundamentally disagree'.
40

41 In his experience a part of this problem is that for example 'Library representatives are only too willing
42 to agree to the principle that publishers should get remuneration but they then link this together with
43 exceptions which they proceed to interpret allows them to do what they want'. In other words
44 'disagreement occurs over implementation rather than principles'.
45

46 Looking to the future, the interviewee saw 'site licensing as very important but only if exceptions can be
47 curtailed sufficiently to prevent loopholes' He added 'University libraries who are increasingly in poor
48 financial straits have seen the possibility for remuneration by acting as collecting societies for
49 publishers i.e. by joining the copyright management cycle. But it remains to be seen whether publishers
50 will be happy to go down this path'.
51

52 The interviewee also said that ECMS offers a potentially good solution to many of the problems faced
53 but it may be some years before they are in common use.
54

INTERVIEW No. 21

Member of Federation of European Publishers(FEP) Representation

Preliminary Comments by Interviewee

The interviewee commented that her organisation had just appointed a new Secretary General who might wish to arrange to interview. The interviewee went on to say that this new appointee had previously been an MEP and that her organisation had already found that her contacts and experience in Parliament were already proving to be 'of great benefit to their organisation in its activities'

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 ?

The interviewee stated that the organisation she represented was formed 'as the preliminary discussions on the database directive began to take shape', because of this her first task had been to familiarise herself with the developing discussion (in the period between the April 1990 hearing and the release of the draft proposal in 1992). The interviewee was aware that the issue of databases had been mentioned in the copyright Green Paper and that even before that some studies had been conducted for DGXIII in Luxembourg in the context of the information market.

The interviewee said that as far as she could recall the focus on databases emerged out of the information market focus of the Commission and that there was opposition at the time to any non-copyright solution.

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 ?

Although she acknowledged that Charles Clark and Bridget Czarnota (the expert employed by the Commission to prepare the draft) had built up a close friendship at the time which continued today.

The interviewee said that her organisation 'both followed and participated in consultations for the database directive'. In terms of her personal involvement she said that 'while she had not been directly involved' she passed on to the organisation's members information and recommended policy positions which were developed in consultation with Mr.Charles Clarke (the eminent copyright expert). Mr.Clarke she commented had already built up a 'close relationship with Mrs.Czarnota' the draughtsman of the database proposal.

The interviewee commented that as far as she could remember 'the passage of the Directive was a very difficult and long process'. This she explained was partly because of 'difficulties experienced in the Parliament' in particular the interviewee pinpointed the Parliamentary Rapporteur during the directive's First Reading Mr. Garcia Amigo (a Spanish conservative MEP) who she commented 'did not treat the database directive as a priority issue because he was not an expert in the field and consequently its passage through the Parliament was particularly slow'.

The interviewee also recalled that the Commission itself also inhibited the passage of the directive because Mr. Vandoren, who during some of this period was Mrs. Czarnota immediate boss proved himself to be 'very weak offering little support to Mrs. Czarnota during the negotiations in Council'. The interviewee further commented that Mrs.Czarnota's later transfer out of the database discussions was not related to any difficulties she was having in Council but rather simply that "her contract had come to an end".

The interviewee said that ultimately her organisation were 'pleased with the Database Directive even though it failed to provide database producers with the total contractual freedom that we would have liked to see'. This said her organisation would now follow closely the implementation of the directive in Member States 'because much of the directive allows for considerable interpretation on the part of Member States'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that this was difficult to answer because at the same time as the database directive was being negotiated she was also involved in a number of the other copyright directives and had throughout the whole period been 'on a very steep learning curve over all copyright issues'.

The interviewee commented 'as a result my views changed during the discussions of the directive as I became more familiar with the issues and I know for example that whilst at the beginning we were totally against the sui generis approach in the end we were generally satisfied with the protection it offered makers of databases'.

The interviewee also commented that her organisation had lobbied very strongly against the compulsory license provisions and were pleased when these provisions were removed by the Council prior to the common position.

On the other legal issues that were of concern to her organisation she recommended I discuss them with Mr.Charles Clarke.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee prefaced her comments by saying that her organisation as a Brussels based lobby group was keen to promote the interests of its members on a broad range of topics, not only copyright but also taxation, pricing systems, market rights, postal services and new technologies. Consequently while focusing on these activities, issues and events in the EU her organisation is always 'happy to co-operate with similar associations both inside and outside Europe'. The interviewee said that her organisation also involved itself in 'a large number of forums, liaisons and projects with other associations and groups in trying to develop adequate solutions to ensure the development of positive policies to encourage the availability of books in, and their circulation among, all Member states'. In the field of copyright this involved lobbying to ensure 'effective protection of both creativity and of vital investment to safeguard the interests of publishers'.

In this regard during the database directive and in the discussion of copyright issues more generally the interviewee said that she had contact with representatives from among others the; European Writers Congress; (IFPI) international federation of the phonographic industry; and (STM) scientific, technical and medical publishers association.

In terms of other contacts she said I should interviewee Charles Clarke and Clive Bradley of the Publishers Association(PA) in the UK and also possibly Mr.Lex Lefebvre of the International Association of Scientific, Technical and Medical Publishers (STM) and Mr. Jerome Debrulle (Belgian representative in the Council working Group).

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that because she had not been directly involved this was a difficult question to answer though given that her organisation had lobbied on the directive and that as adopted it had been reasonably satisfactory she felt that her organisation and perspectives like it had been influential.

In terms of the activities of her own organisation she said 'concentrate most of our lobbying activities on the Commission who tend to be very open although this has shifted as the European Parliament's powers have increased' thus her organisation has already started 'to expend time focusing on the Parliament's role in policy formulation in the area of copyright'.

In the Parliament however the interviewee's experience has been that 'generally MEPs exhibit little knowledge of copyright issues within the (C-7 legal affairs) parliamentary committee, with a few exceptions'. As a consequence policy was formed 'by MEPs either following the suggestions of the rapporteur, shadow-rapporteur or their political grouping' The interviewee commented that 'in some

senses except for high profile political issues like "mad-cows disease" MEPs were not very accountable to their electorates'.

Following on from the Database's Second Reading in Parliament her organisation had maintained good contacts with Mrs.Palacio-Vallersundi(MEP) and had also had contacts with Mr.Barzanti(MEP). The interviewee also commented that ensuring people were aware of your organisation's standpoint also involved her 'expending time communicating with the various administrative officers for each of the political groups, particularly Mr. Kavalierakis(EPP) and Fraser Clark (PES). The interviewee said 'these individuals often have more time to talk and are very important in preparing MEPs agendas and issue priorities', although she was quick to point out that it was necessary in the Parliament to 'lobby both MEP's and their administrators in parallel'.

On the issue of lobbying per se the interviewee commented that as a Brussels based organisation 'it is disappointing how inactive the national members are in lobbying their national MEPs'. This said, she did acknowledge that often when she was contacting a particular MEP she would endeavour to bring along a representative from a national member of her organisation from an MEP's country because experience had shown her that 'cultural issues play a very important role in the communication of issues and problems particularly in the Parliament., even though on issues as technical as copyright they play a less significant role'. In the interviewee's experience 'British members of all European associations and lobby groups tend to be much more active even though they are often not the most pro-European'. In explanation the interviewee thought that this was partly to do with the culture of lobbying that exists in the UK and she commented that many other European nationalities 'exhibit a distinct lack of understanding of the importance of lobbying as an activity that influences the shape of policy formulation'.

The interviewee commented that 'in the Council the series of events and actions during the passage of a piece of legislation are much more mysterious' and that 'it is very difficult to find out exactly what is happening' with the 'whole process can seem very obscure'. The interviewee acknowledged that although there 'are always documents leaked from the Council working group it is not always clear how accurate the information they contain is'. Certainly for the policy formulation process the Council Working Group is the main focus with 'a good deal of importance is related to how the Commission approaches the exercise'.

The lobbying approach her own organisation employs is to encourage its national members to lobby their national civil servants who participate in the working group in Council. The interviewee also said that at the Member State level the UK stood out 'as probably the only country to engage in such wide consultation over issues' indeed she expressed the view that other Member State representatives in the Council working group often did not consult widely on the Council discussions in their own countries.

In the interviewee's experience of the Council discussions on copyright issues, like the database directive the French and Germans are active but also the UK 'because harmonisation has often faced problems that run along the divide between copyright and droit d'auteur systems'. In the database directive the interviewee also recalled that 'Belgium was active despite its limited number of votes in Council'.

The interviewee commented that the Economic and Social Committee(ECOSOC) was not very active or influential in the area of copyright or more generally, although she did have contacts with Mr. Robert Moreland who was the rapporteur on both the software directive and the database directive. As an indication of its lack of influence the interviewee commented that often she met 'parliamentarians discussing a proposal that had not even received the ECOSOC's opinion'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee said because she was not a lawyer by training she found it hard to answer this question but that she was aware during this period that both the US Feist case and the European Magill case had been discussed in the context of the database directive particularly in the Council working group, although she said that she found it difficult to assess the impact of these developments on the directive itself.

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 ?

The interviewee said that the directive had a higher public profile because copyright issues generally had become more important in the 1990's as the internet and other technologies had developed and the Commission had produced its action plan for the information society etc...

In her personal opinion the database directive 'is not a 'multimedia' directive but it is certainly an important piece of Commission legislation because it is the first attempt at the European Level to address the protection of digital works'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee said she had a mixed view on this question. In terms of the European Commission she characterised DGXV as 'one of the most democratic and open directorates being extremely clear on its policy of consultation, public hearings and openness to private and informal meetings'

The interviewee also said that the recent 'appointment of Mr. Reinbothe as head of DGXV/E/4 has been a very good move because he has an excellent grasp of copyright issues and is someone who has realised that organisations such as her own are important potential allies in the process of policy formulation, despite the fact that they disagree on some issues'.

In the process of consultation as a lobbyist the interviewee said that 'we have to be realistic and know that we will not get everything that we want' however overall she has been 'very pleased with the manner in which DGXV handles copyright issues and is confident that DGXV has the same broad goals as her own organisation 'a high level of legal protection for copyright right holders'.

The interviewee however said that in the Parliament and the Council there was often a lack of consultation and at a practical level few opportunities to express an opinion. For the interviewee these factors as well as the technical nature of the issues involved in copyright discussions meant that often 'decisions were being made by a very small number of individuals who were experts in the field' e.g. In the Council, Member States Ministers often find it difficult to understand copyright issues and so decisions are taken or strongly guided by civil servants who are not really democratically accountable.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee said that the database directive was certainly part of the 'acquis communautaire' i.e. part of European legislation and as such was certain to 'guide the future pattern of copyright approaches for the digital world'.

As such her organisation view it as a useful 'base of knowledge on these copyright approaches for the digital world' Certainly for her own organisation's interests the database directive was also very important because of the introduction of the sui generis right which 'acknowledged formally for the first time in European legislation the investment right of publishers'.

This stated the interviewee commented that her organisation had been disappointed with both the July 1995 copyright Green Paper and its Follow-up released by the Commission. The interviewee acknowledged that while both documents provide a comprehensive discussion of the issues 'they are not very creative in terms of working towards solutions and continue to provide only vague indications of what the Commission legislative drafts will be'. For example 'in relation to the very important issue of copyright exceptions the Commission documents remain very vague'. The interviewee did comment that 'in direct discussions with the Commission, Mr. Reinbothe(DGXV) had been considerably less vague about their proposals'.

The interviewee said that part of this 'vagueness in the Commission consultation documents is understandable considering how delicate the issues are' as clearly the Commission does not want to commit itself publicly until it is ready to produce a draft piece of legislation. The interviewee also said that DGXV itself also had to be careful about its proposal because of the difficulty of intra-service discussions within the Commission e.g. to her knowledge DGXV had already 3 times prepared consultation documents on the issue of private copying but these had each time been prevented from release by intra-service objections from other DGs, in this regard the interviewee mentioned DGXIII, DGIV and DGX.

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

The interviewee commented that there was still a considerable amount of harmonisation of copyright regimes needed and that this was required not just at the European level but also at the international level e.g. WIPO and GATT. Indeed she said that reaching harmonisation at a European level first would certainly help international agreement to be reached, because as experience at the WIPO diplomatic conference highlighted many of the conflicts that had arisen were due to differences amongst Member States. Thus it would have been better if the greater European harmonisation had occurred on these issues so that the European Union 'spoke with a single voice'. Although she agreed that this still did not guarantee that a proposal would be adopted e.g. as in the case of the rejected database proposal at WIPO.

The interviewee commented that the Information Society itself was clearly 'differentiated by generation in the sense that whilst for most people over 25 years old, the information society was something that was just arriving as they gained experience of using email or surfing the internet for those under 25 it had already arrived and for the under 10 years old it was completely transparent'. The interviewee highlighted that publishers 'will need to find new ways to adapt to these environments' especially as 'some children are more accustomed to using computer networks than reading books'. This stated the interviewee was confident that 'the book will survive because of its portability and ease of use'

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 ?

The interviewee commented that while there were a host of factors, one that was particularly pertinent to our discussion was the role of human interaction in how issues were discussed. In this regard, as an example the interviewee referred to the November 1996 IMPRIMATUR 2 day workshop in London entitled 'Free market or Free for all: Rights and Consensus in the Information Society' with we had both attended. The interviewee commented that personally she had found the workshop to be 'very atomised and cleaky' she went onto acknowledge that this was characteristic of most international conferences she had attended 'where people stick together with their own interest groups'.

The interviewee also commented that she found that 'these events are often a little hostile and sometimes aggressive' this was in her experience especially the case where 'you find yourself being caste in the role of the interests you represent with little room left for you as a person who may have additional concerns and viewpoints that are distinct from the association you represent'. The interviewee found this frustrating and a little self-defeating because it ensured that consensus was harder to achieve as people were immediately on the defensive and became unwilling to be more forthcoming about their positions.

These experiences acknowledged the interviewee commented that on a day-to-day basis in Brussels communication on the whole was considerably more open and less aggressive, particularly with the Commission and there was a tendency for people to 'approach you as both a professional and a person, acknowledging that you could just as easily move to represent another groups interests'. In this context people were aware that 'getting to know a person privately as well as professionally is an important aspect alongside the interests they currently represent'.

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 ?

The interviewee commented that 'in the wider context of copyright policy-making there is as a result of the new technologies a range of challenges in the information society. Many of which go beyond the specific concerns of the association I represent'. The interviewee commented that while the potential for piracy was the greatest threat there were obviously new opportunities. For publishers she said that while most continued to operate in the same way as in the past 'a range of factors including greater European integration, global business practices and developing technologies had made publishers more aware of and put them in contact with a new public'.

The interviewee said although the 'future is always uncertain' she felt that publishers would increasingly add value to their products becoming 'more involved in the creative process, particularly in the development of new electronics products' which would have 'a host of implications for everyone in the information chain from authors through publishers to consumers'.

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

The interviewee commented that following on from the previous question that 'how we choose to regulate copyright in the digital domain may effect other areas of information policy'. The interviewee expressing a personal opinion said that 'without due care there is a danger of creating an information rich and information poor divide'. While acknowledging that her members were legitimately concerned with their revenue streams, she said that 'there is perhaps a need to look a little wider than simply these factors in these new environments where the interlinkages of issues, events and consequences have yet to be clearly seen'.

The interviewee commented that 'although in the end we will need global solutions, the European Union's attempts are certainly courageous and an essential part of pushing the solutions forward'. This stated the interviewee said that she felt in many respects that 'North America is developing legal solutions to these problems more quickly than in Europe. This in itself is not a major problem because what is needed is a focus on the enforceability of the solutions presented, as no matter how good the legal solution if it is not possible to ensure that 'people play fair' it simply will not work'. In this context, the interviewee had a rather pessimistic perspective on the outcome of the WIPO diplomatic conference (1996 December) which she characterised as 'hurrays' from equipment manufacturers and 'boos' from the European Union, indeed she said that she had been very disappointed to see the conflicts that developed between content publishers, manufacturers and telecommunications operators particularly over the liability issue'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee said that the initiatives on the information society were evidence of an attempt to coordinate policies at the European level. In terms of copyright discussions themselves the interviewee also said that there was an increasing awareness of the linkages with other policy areas but that other factors often intervened to affect how well these issues were handled. In this regard the interviewee made a distinction between 'consensus and compromise'. She commented that 'compromise has tended to drive previous directives in this field but it is not as good as making policy by consensus'.

The interviewee went onto say that making policy through compromise was partly due to the structure of European policymaking - 'Mr. Gaster who took over from Mrs. Czarnota in DGXV came from Agriculture (DGVI) and is keen on making bargains and trading things off against one another. This is not surprising as it is common practice in many areas of policy-making especially where particular countries holding the Presidency of the Council are keen to push certain pieces of legislation through to gain 'brownie points' by their success during their term of office'. The interviewee however said that 'with the complex of issues that arise in the field of copyright in the digital environment such a trading approach is potentially detrimental because issues are interlinked in ways that make trade-offs

1 potentially ill-advised'. From her organisation's point of view therefore 'what is needed is genuine
2 consensus on these issues even though achieving consensus is going to be much more difficult'.

3
4 For her organisation a mix of legal and technical mechanisms was likely to lead to this form of
5 consensus. In particular she said that her organisation 'consider ECMS(Electronic copyright
6 management Systems)to be the only possible solution to problem of tracking the use of works and
7 pricing' and that these systems further 'highlight the point that legislation that cannot be enforced is
8 useless'. This said the interviewee acknowledged that 'the deployment of ECMS clearly raises the issue
9 of privacy which will have to be addressed'.

10
11 Looking to future copyright legislation the interviewee commented that her organisation were hoping
12 that 'any future directives that may appear in the next few years will be comprehensive and complete
13 with less options for Member States to re-interpret at the implementation stage'. In the context of the
14 digital environment her organisation is 'very keen to lobby for legislation which does not leave things
15 open for Member States to determine' but she said that this was likely to be very difficult to achieve,
16 especially given the reliance of previous directives (including the database directive) on optionality at
17 the implementation stage. The interviewee did point out that if this approach continued to be used it
18 would rather beg the question of the purpose of future legislation for European harmonisation ' if
19 Member States are able to adapt a directive to their own requirements'.

20
21 The interviewee commented that 'the issue of exceptions is likely to form part of any future directive
22 for the harmonisation of copyright at the European level' and 'there is a need to investigate and analyze
23 in terms of economics the implications of particular exceptions'. The interviewee commented that
24 although her organisation accepts that 'many exceptions will exist in the digital environment on the
25 basis of political and cultural reasons but it is important to work out what the economic costs of each
26 will be'.

27
28 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
29 **concerns over the issues of democratic participation and accountability ?**

30
31 The interviewee commented that policy-making could be improved if greater emphasis was placed on
32 achieving a consensus on issues rather than just a compromise. As an example of a poor approach to
33 policy-making the interviewee was critical of DGXIII of the European Commission in its approach to
34 building agreement on the role of libraries in the copyright field. In this regard the interviewee
35 commented that her organisation strongly disagreed with DGXIII's approach which was to give
36 EBLIDA the mandate to build consensus on these issues which ended up 'with libraries just agreeing
37 amongst themselves'. From her organisation's participation in the ECUP program the interviewee said
38 that communication between participants proved very difficult and 'too often I was receiving documents
39 with not enough time to prepare before meetings'. 'The steering committee of ECUP was made up of
40 only librarians which builds consensus amongst no-one'.

41
42 In contrast to this European program the interviewee said that other programs appeared to be genuinely
43 trying 'to build a broad base of consensus' such as the IMPRIMATUR project. The interviewee did
44 however acknowledge that 'IMPRIMATUR has an immensely difficult task but even if it does not
45 produce conclusive results it will have been a courageous and worthwhile effort and will succeed in at
46 least highlighting the broad range of issues that need to be addressed and perhaps bring the different
47 players slightly closer together'.

INTERVIEW no. 22

Legal Counsel for European Publishers Council (EPC)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented ' while I am familiar with European moves in the copyright field over the last 10 years or so, professionally I only became involved on behalf of the EPC(European Publishers Council) in 1994 by which time the Commission was already preparing its second Green Paper on copyright and related rights in the information society. As part of its preparations the Commission also sent out a questionnaire to interested parties and held a public hearing in Brussels on the issues in the July [1994].

The interviewee added 'There were however some questions raised over the database directive and more particularly the future use of the sui generis right approach in the context of the information superhighway. I can remember that Mr.Waterschoot [Director DGXV/E] raised the issue of the extent to which the database directive covered multimedia and the issue of whether or not for example CD's would qualify as databases, clearly of interest to groups like IFPI[International Federation of the Phonographic Industry]'.

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 ?

The interviewee commented ' Most of my own activities were UK based and involved discussions and meetings with Graham Jenkins from the DTi (Department of Trade & Industry - Patent Office) rather than at the European level. I didn't go to Brussels a great deal although I did have some contacts with Commission Officials in DGXV such as Mr.Reinbothe [Head of DGXV/E/4]'.

The interviewee added 'I can remember attending a meeting at the DTi in 1994 at which Graham Jenkins (who was the UK's representative in the Council working group) informed the interested parties present of the progress being made in the database negotiations. At this meeting most publishers remained quite hostile to the directive because they saw it as dramatically reducing the protection available to databases which under the UK's 1988 copyright Act had full copyright protection as compilations for the author's life plus 70 years (after the duration directive). In this respect, Clive Bradley (from the Publishers Association) and Steven Hall (from Chadwyck-Healey) were particularly active'.

The interviewee added 'Clearly the most innovative aspect of the directive is its two-tier system of protection for databases. But it was also good to see the removal of the compulsory license provisions which the industry lobbied hard for'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that in relation to the database directive they had not particularly changed but that this was perhaps partly because he entered the discussions towards their end.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that specifically on the database directive it was difficult to remember but he added that in general he had an extensive range of contacts with others representing rights holder interests in the copyright field. He added 'more recently as you will have seen from my files I have been involved in a the Reproduction Right Forum that has brought together a wide range of interests

including equipment manufacturers, Publishers and rights holders to address the issue of the reproduction right in the digital environment'.

The interviewee added ' I also represent a number of other publishing organisations including the DPA(Directory Publishers Association),PPA(Periodical Publishers Association), and the NPA(Newspaper Publishers Association)'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that he simply was not involved for long enough to be able to give a full answer but that clearly the UK's database industry which is by far the largest in Europe was very active.

More generally from his own experience participating in the DTi's consultations and expressing views on issues was worth while and had some impact on policy outcomes.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented ' In my opinion the US Feist case was significant and had a major impact on the early database discussions. This impact was not felt in the UK where with a new copyright Act [in 1988] rights holders felt confident of the protection afforded to databases and compilations but in the rest of droit d'auteur Europe'.

The interviewee added ' at beginning however the discussions on the protection of databases remained quite small which was partly to do with the fact that the electronic database industry was still very small and predominantly UK based'.

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 ?

The interviewee commented 'it is really only in the last 2 years that people have begun to consider the database directive as an important piece of legislation particularly for on-line environments where it has a key role to play in protecting the information assets of content owners'.

The interviewee added 'the database directive is not however particularly significant in terms of the protection it offers under copyright i.e. copyright protection in selection and arrangement, as in this regard the directive just followed the lead of TRIPS Article 10(2) but it is significant in terms of the sui generis protection it offers to factual compilations of data where no copyright protection exists especially where this protection can be linked to new technical systems to control and monitor access and use of databases'.

The interviewee added ' In the article I wrote on the directive in EIPR (European Intellectual Property Review) I posed the same question as to whether it would become the cornerstone of the information society, in a short answer I think subject to its successful implementation it still has the potential to become a key element of the IPR framework in the digital environment'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that speaking from his own experience he had always found the DTi in the UK and the Commission in Brussels to be very efficient in consulting on these issues and he felt that it was very important to respond as actively as possible to policy proposals.

C. European policy for Copyright

(From this point on - the interviewee said that he could only spare another 5 minutes for the interview)

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to his previous answer to Q7 and said we would have to wait and see not only how the directive's implementation proceeded but also how the Commission's further copyright proposals on the reproduction right, distribution right, communication to the public right and technical systems for copyright protection developed as they would all be vital in creating the right environment for investment in the digital environment.

The interviewee added 'The EU has clearly taken a strong lead in the area of copyright harmonisation but it now faces a major test in addressing the issue of the reproduction right, its scope and the permissible exceptions in the digital world - as this is at the centre of the on-going debates on copyright'.

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

The interviewee had nothing to add.

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 ?

The interviewee had nothing to add.

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 ?

The interviewee commented ' the main concern for rightsholders is that if traditional exceptions are applied to the digital environment they will prejudice their interests. As you will have seen from my files this debate about the reproduction right has led to the setting up of the reproduction right forum and the creative industries group both of which I am involved in and both of which have examined the related issues of incidental or transient copies and technical system for copyright protection'.

The interviewee added 'Technology is a critical issue in all of these questions as is the issue of interoperability which in many ways I am not sure that the law facilitates and I think that it would be better to let the industry (content providers and equipment manufacturers) work together to ensure that the systems that are created are interoperable'.

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

The interviewee didn't see any major relationships between copyright and other information policies although he acknowledged that 'technical systems for copyright management may enable rights holders to protect public domain information within their commercial databases through the sui generis right but in the real world publishers make money by making things available and not keeping them locked up and I think increasingly we will see the use of site licenses as a method of overcoming these sort of potential difficulties'.

The interviewee added 'to quote Charles Clarke while the answer to the machine is in the machine I personally feel that there will always be those individuals capable of breaking any code and so while these technical systems may will be an important part of the enforcement of copyright in the digital world they themselves need legal protection to prevent such circumvention'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

Ran out of time

1 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
2 **concerns over the issues of democratic participation and accountability ?**
3

4 Ran out of time.
5

INTERVIEW no. 23
Representative for Reuters

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that during the database directive he had worked initially for Reuters (1987-1992) before changing jobs in 1992 to become an academic. In Reuters he said that he had worked alongside Catherine Stewart, John Stevens and Henry Mannistry. The interviewee commented that his first recollection of European discussions on databases was 'from an internal Reuters memorandum from John Stevens on the European Commission's preparations to introduce some kind of European wide protection for databases. This memorandum was being circulated within Reuters before the 1988 Green Paper'.

The interviewee commented 'After the release of the Commission's Green Paper I followed the development of its copyright proposals including on database protection. Then in April 1990 I attended the public hearing held by the Commission in Brussels, which concluded with a resounding no vote from the vast majority of interested parties against a proposal for a European directive to protect databases. This was because most industry representatives felt that their existing national legislation already provided adequate protection and some were concerned that harmonisation would lead to a reduction in the protection offered to databases, especially in the UK'.

Commenting from a Reuters perspective the interviewee recalled that 'during this early period the feeling at Reuters was that a Commission proposal would be completely inappropriate. This was partly because Reuters had just finished its hard lobbying of the UK government on the Copyright, Designs and Patents Act (1988) during which it had tried, and succeeded in ensuring an adequate level of protection for its products and partly because a European proposal concerned with the electronic database industry was thought to be an unusual move considering that the industry was still relatively small and overwhelmingly UK based'.

The interviewee commented that early in the 1990's he also attended a DGXIII LAB (Legal Advisory Board) meeting in Luxembourg which discussed intellectual property rights and the impact of new digital technologies 'at this meeting, again the general view was that there was no need for further protection of databases'. The interviewee added 'I can recall thinking at the time that there was no need for a directive to protect databases and in many ways, despite its adoption, I remain unconvinced that it is a particularly useful piece of legislation. Certainly from the beginning it was a Commission led initiative, and one that they chose to pursue despite a lack of general interest from industry'. The interviewee added that he recalled that during this LAB meeting he had asked Mrs.Czarnota publicly why the Commission had proceeded with a proposal that industry had not called for and plainly did not see the point of 'her reply was both shocking and illustrated the lack of accountability of Commission technocrats at the time. She said that there was a clear need for the directive and that I had obviously not understood the problems that the directive was responding to'.

He recalled that at the time 'the Commission's version of events was always that the need for a proposal on databases had resulted from discussions with, and complaints from, two Dutch database producers who had expressed concerns about the protection available to protect their products. I can recall inquiring on a number of separate occasions who these database producers were and being told that their names could not be revealed on grounds of confidentiality. Apparently these database producers were nervous about further investment in the industry because of a lack of harmonised protection across Europe, although this always sounded to me like a pretty weak argument on which to launch a directive proposal'

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 ?

The interviewee commented 'while I was still at Reuters I had regular team meetings, drafted documents and submitted views to the Commission and the UK Patent Office at the Department of Trade and Industry(DTi) up until the release of the formal database proposal, which was about when I left Reuters, although I continued to have contacts with Catherine Stewart and Henry Mannistry for a number of months afterwards'. The interviewee added that 'even before this, it had been decided within the team at Reuters that I would not get personally involved in the direct face-to-face lobbying of the EU institutions and that instead that would be Catherine Stewart's responsibility¹. As a result, it was Catherine who had the most direct contact with Mrs. Czarnota and who wrote the internal Reuters reports on the directive proposal'.

The interviewee commented that after leaving Reuters his second form of involvement with the database directive was as a member of the LAB about which he made the following comments 'In my opinion the LAB has a slightly distorted view of the world because at least in its early days, it was a bit of an academic talking shop and whilst in theory DGXIII has the power to summon Commission officials to discuss proposals with it (as occurred once or twice when both Mrs. Czarnota and Mr. Verstrygne came to Luxembourg to explain the database proposal) in practice it is only DGXIII officials who jump to its tune and act on its advice'. He added 'more recently I have heard that there has been an effort to create an inner circle of experts to meet more regularly and make policy statements. This is a good idea but I haven't as yet, heard any more about it'.

In terms of the database proposal itself the interviewee commented 'the Commission presented the proposal in a number of ways. Firstly, as part of its step-by-step approach to copyright harmonisation in the name of the internal market i.e. the official party line, and secondly, in a sub-text, as part of its efforts to assist the development of the European database market and to knock out some of the competition from the US information industry'. (e.g. the reciprocity clause in the directive).

The interviewee at this point reiterated the view that he still was not really certain why databases had been selected for harmonisation at that time and he retained the impression that the only explanation was 'some vague reasoning and the drive and personal ambitions of particular Commission officials'. The interviewee added that the Commission was very clever in preparing the proposal and timing its release to coincide with end of the Portuguese Presidency who presented it in a favourable light. Although he said that he recalled that 'when the database proposal was first presented during the UK Presidency, the UK delegation requested the Council to reject the proposal, although they later withdrew this request partly on a quid pro quo basis over some other issue and partly because the other Member States had either shown themselves to be generally in favour of the directive or as having no feelings either way i.e. particularly those Member States without database industries'. He added 'although I do recall some mention of the fact that Denmark at one point questioned the authority of the Commission to propose the directive under the principle of subsidiarity, but this again was settled'.

The interviewee commented that 'the key element of the directive was clearly the introduction of the sui generis right which was new but provided no international protection and I can remember doubting that the US would ever support such a solution. Mrs. Czarnota, however argued that if European protection was achieved then it would be much easier to push for international harmonisation. Certainly subsequent events such as the US database proposal at WIPO seem to have proved that she was not entirely wrong, although I know that Bruce Lehman's (the US WIPO negotiator) approach has since been heavily criticised in the US'.

In terms of the other major issues the interviewee mentioned the compulsory licensing provisions, the term of protection and the question of date-stamping i.e. further periods of protection for continued investment. 'in the original proposal the licensing provisions were dramatic and new in terms of their wide scope and they proved to be very controversial towards the end of the negotiations. I was glad when the Parliament proposed extending to 15 years the term of protection for the sui generis right and

¹Both Catherine Stewart and John Stevens who were most closely involved in lobbying on behalf of Reuters during the passage of the database directive refused to be interviewed as part of this study.

really would have liked a longer period especially given that the issue of what sort of continued investment is necessary for continued protection beyond the 15 year term still needs clarification'.

As for the Council the interviewee's general view was that 'the Council is like a black hole and it is very difficult to find out what is going on and how things are proceeding in particular negotiations, although in the case of the database directive I think most of the changes that were made improved the directive'. The interviewee commented that one example of possible lobbying influence was over the issue of compulsory licenses in the directive. While he was basically in favour of them he was aware that most industry representatives were horrified by them and consistently lobbied for their removal which in the last minutes of the Council negotiations they were. The interviewee suggested this as possible evidence of the lobbying effect.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that his opinion did change but only in a practical sense 'while I remained skeptical of the need for the directive, at a practical level its inevitability once the formal policy process had begun made me decide that it was better to participate in the discussions and try to shape it in an appropriate manner'. He added 'now it has been adopted a lot of questions remain over what its impact will be'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

In terms of alliances the interviewee was very adamant that 'Reuters do not go in for alliances except in very rare circumstances and until the 1990 public hearing I don't think we were aware that other groups were interested in the Commission's proposals'. This stated, the interviewee added 'of course, because at the Commission's copyright public hearings it tends to always be the same individuals representing the same firms or trade associations it isn't unusual for people to build up personal alliances but this is always done very much on an ad hoc and individual basis'. Speaking personally the interviewee added 'I have always had warm relations with Charles Clarke (Federation of European Publishers), Barry Mahon & Robert Kimberley from EUSIDIC(European Association of Information Services) and David Worlock from the EIIA (European Information Industry Association)'.

On his relations with the EIIA and EUSIDIC the interviewee added that 'there is a widely held impression that the EIIA under David Worlock are in the pockets of DGXIII of the Commission and so do not contribute much to policy debates, although I know that this is not how the EIIA see things, as they argue to the contrary that because of their excellent relations with the Commission they are in a much better position to influence more effectively'. He added 'it is certainly true that in Luxembourg the EIIA have an easier reception than EUSIDIC which prior to Barry Mahon's period as its head was very critical of the Commission (under Harry Collier)'. The interviewee also acknowledged that up until 1996 he was a member of EUSIDIC and still has regular contacts with them. The interviewee also added that he couldn't recall any major conflicts with other interested parties during the passage of the directive and that generally it was not a heavily lobbied directive.

The interviewee said it was ultimately very difficult to judge one's influence over a European proposal but that he would like to think that he had made a positive contribution to improving the directive as adopted.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee following on from his previous comments said 'I don't really know who had the most influence over the directive outside of the European institutions themselves, although my experience tells me that it is often the case that those who make the most noise are rarely the one's with the real power'.

The interviewee added 'Clearly the directive was very much Mrs. Czarnota's baby until she was pushed out of the negotiations by her bosses'. The interviewee commented that the rumour he had heard was that Mrs. Czarnota had been removed from the database negotiations because she had annoyed her

superiors by becoming too fixated with the directive and spending too much time on it to the detriment of other Commission work. This stated the interviewee added that 'the power of the Commission during the passage of the database directive was still a concern, particularly at the beginning when Mrs. Czarnota behaved like the classic faceless bureaucrat. As a result, I am generally in favour of giving more executive power to the Parliament as the best way to introduce more direct accountability and transparency into European policy-making'.

As for the Parliament itself, the interviewee commented that his overall impression was that 'they didn't make a major contribution to the debate other than in the first reading by proposing an amendment to extend the term of sui generis protection to 15 years, although I must say that I didn't have a great deal to do with the Parliament'. The interviewee did however recall the involvement of the rapporteur from the ECOSOC Mr. Robert Moreland who he recalled attended a number of the Patent Office's consultations on the directive in the UK. The interviewee also mentioned that as far as he could remember Mr. Moreland had a relative who was an executive of Reuters and so he was given an entree. In the interviewee's overall assessment 'the ECOSOC played a useful role and had some helpful influence particularly on the Parliamentary debates where the MEPs took its views on board.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that 'the Feist case in the US was hugely significant on the development of the database proposal and initially at least there were concerns expressed by some lawyers that there would be a large number of Feist-like cases in Europe, although these concerns were not shared by UK lawyers where the Waterlow case had shown the protection offered by the UK Copyright, Designs and Patents Act (1988). Still, this nervousness in droit d'auteur countries ensured their support for the Commission's proposal even though many of these countries provided other defenses for databases such as unfair competition rules'. The interviewee added 'In the UK the Feist case did not cause a great deal of concern although the database proposal was initially opposed by the UK industry and particularly the UK publishers because they viewed it as weakening the UK's copyright protection of databases'.

The interviewee commented that 'the Magill case was also significant, not because of the specifics of the judgement itself but rather what it said about the compulsory licensing provisions within the database directive' (i.e. the compulsory license provisions could be dropped from the directive because there was now case law to enforce licenses in situations of abuses of dominant market position).

On TRIPS, the interviewee commented that 'my impression is that although the TRIPS discussions were in the background they didn't have a major impact on the database negotiations'.

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 ?

The interviewee commented that the higher public profile of the directive was only relative to its quiet beginnings and that overall it was not one of the better known copyright directives. 'As for being a cornerstone of the multimedia society, I am already on record as saying that this is simply not the case and is just a load of hype and nonsense. Still, I do welcome the Commission's view that multimedia raises a number of important issues that require solutions at an international level and in this context its ability to move forward so quickly with copyright harmonisation has been instrumental in a focus shift on the part of the industry to try and address issues directly at a European level rather than at the Member State level'.

The interviewee added 'the software directive was clearly a much more important directive because at the time no Member State was giving explicit copyright protection to computer software, as a consequence lobbying was vital and fierce'. He added that he recalled being invited to chair a meeting on reverse engineering but Reuters stopped him and on reflection he felt this was a sensible thing i.e. to keep a low profile on the issue. He added that 'as a general ad hoc rule Reuters liked to keep a low profile, to avoid overt conflict with other groups and not to pass on information'.

The interviewee commented 'there is however a need for consistency in the copyright harmonisation process which the Commission's step-by-step approach especially after implementation into Member

States does not always achieve'. He added 'having said all that the database is certainly a foundation block in the Commission's approach to the digital environment although it would be dangerous to assume or over inflate its importance'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that he thought that the European level consultation process was quite good at enabling the different interested parties to express their views but added that how well these different views were taken on board and the different priorities that were given to them was an entirely different question. i.e. back to the problem of assessing influence. In this regard the interviewee said that it seemed clear that rights holders have more influence over the policy process than say librarians but he added that perhaps considering the amount that they have invested in the copyright industries this wasn't entirely inappropriate

As an example the interviewee discussed the role of the LAB 'I am slightly skeptical of the influence of the LAB and certainly a certain amount of its work is about reciprocal mutual benefit and ego building on copyright issues. But I do know that many of the members of the LAB are strongly convinced of their own influence on copyright policy in the Commission, and certainly some-one like the present LAB chairman Mr. Herbert Burkert does have influence on Commission discussions'. He added 'personally speaking I have had more experience of the UK policy process and if I compare the two situations (EU and UK) my overall impression is that although EU civil servants are far more open and willing to listen to you than those in the UK, in the end I don't know what difference there is between the two, because whilst in the UK officials often appeared not to listen and then changes appear in policy texts, in the EU officials almost always listen but no changes occur to policy proposals'.

The interviewee commented that 'the database directive is a good example of the European policy process and the problems faced by the Commission in trying to harmonise copyright and of how it has tended to approach getting the right balance between copyright and droit d'auteur systems'. He added that overall 'from the five copyright directives passed so far the Commission has been reasonably successful in maintaining a balance between the two copyright traditions, although the compromise has not always been easy as the exclusion of issues like moral rights proves'.

In the interviewee's own opinion 'of the two approaches, the UK's case law approach has proved itself more flexible in dealing with new technologies, but this flexibility is not always a positive attribute and creates its own problems as well'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'There is still a lack of vision in both the UK and at the EU level over the multimedia environment, which in my opinion is the result of a fundamental lack of understanding amongst policy-makers of the issues. In my view there is a need for a comprehensive single set of rules for the digital environment covering all the mediums in use (i.e. text, graphics or audio-visual) because all of them can be reduced to the same basic element of the digital bit'. He added 'within such a set of rules there will be a need to ensure that exceptions are not dealt with in a highly enumerated fashion like in the existing UK Act but instead are approached with general broad based principles as in the US because these will be better suited to coping with fast changing technological developments'.

On the database directive the interviewee commented that 'from the beginning I argued for an extension in the term of protection of the sui generis right and for greater clarity on the extendibility of protection issue. I still think that the wording in the adopted directive is potentially problematic and that after the directive's implementation we will end up with a lack of conformity across Member states on this issue'.

On the compulsory licensing issue the interviewee commented that 'I don't go as far as academics like Dr. Eisenschitz (City University) in support of compulsory licensing and I was glad when the wide

scope of the original directive proposal became more narrowly defined but in the final analysis when the compulsory licenses provisions were dropped altogether I felt that things had gone too far in favour of rights holders from a position where the original proposal was too far in favour of users'.

On the difficult issue of exceptions the interviewee commented that 'there remains a good deal of ambiguity in the wording of the directive and I always worry when provisions in a directive are optional as it again opens up the possibility for differences across the Member States which in my opinion defeats the whole object of harmonisation'. He added 'I have repeatedly stated publicly that I am in favour of copyright exceptions and I am increasingly concerned that as concepts such as fair dealing are excluded by site licenses and contracts they may disappear through dis-use. Such a development would be very dangerous because we are not in a position to see what new developments will come in the future, developments for which such concepts might be very useful. There is obviously a need for more classic and clear law in this area, although my gut feeling is that the spirit of the directive is OK'.

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

The interviewee commented that on the basis of the Commission's second Green Paper and most recent follow-up communication there would shortly be new draft directives on the legal protection of technical systems of copyright protection and copyright exceptions and possibly other issues. The interviewee also commented that the Commission would probably continue its efforts to push these issues at the international level.

On the issue of the harmonisation of copyright exceptions the interviewee commented 'one major concern is to do, not with the extent of the Commission's activities in the field of copyright harmonisation but with whether there were conflicts as a result of the Maastricht treaty and the principle of subsidiarity'. (i.e. whether in trying to harmonise copyright exceptions the Commission is overstepping its jurisdiction).

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 ?

The interviewee commented that he had nothing to add and referred to his previous remarks.

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 ?

The interviewee commented that 'the first question we must ask ourselves is does copyright have a role at all in digital environments ? In my opinion the answer to this question is yes, copyright has an important role to play in the digital environment even if it appears that its rules are being broken and ignored. The best analogy I can give is the 30.mph speed limit in towns, which although it appears to be ignored does provide a useful guide to most drivers'.

The interviewee added 'Of course any solutions that are developed must eventually be done so at the global level and so European harmonisation is just the first stage in this process. As an example of why we need global laws imagine a person in the UK instructing a computer in the USA to download material to a computer in Saudi Arabia, in which country is the applicable law for the copyright infringement ? Saudi Arabia has no copyright laws, the infringement didn't take place in the US and the instructions were only sent from the UK'. He added 'to overcome these sorts of problems we need uniform global laws'.

In this context the interviewee returned to comment on discussions on databases at the 1996 WIPO diplomatic conference. The interviewee commented that 'Bruce Lehman tried to use WIPO as a means of pushing through his database proposal in the US after it had failed in Congress due to opposition from user groups'. He added 'certainly my assessment of the lobbying at WIPO (which ended up with the database proposal being dropped) is that it proved more successful for users rather than owners of copyright material'. He added this was because 'user groups co-operate more closely together while

copyright owners are often in competition with one another and particularly because during WIPO telecommunications operators joined forces with users and home electronics groups to form a powerful lobby'.

On the issue of why the US rejected its database proposal the interviewee said it was an interesting question 'partly it is to do with the fact that the US is a single country where single associations can act as a focus for nation-wide opposition whereas in the EU with 15 Member states and differing basic legal regimes this sort of coherent approach is more difficult to co-ordinate and fund. But also it is partly to do with the process of consultation that occurs in different Member States'.

The interviewee gave the example of the UK consultation process prior to the WIPO conference 'the UK's DTi held an open forum for discussion to which they invited interested parties to discuss the WIPO proposals. When I arrived I was one of only two users in a room full of copyright owners. At the meeting I asked two questions of relevance here. Firstly, were the DTi going to circulate their evaluation of the opinions gathered, to which the DTi said - no, certainly not and, secondly, why hadn't the DTi invited more users such as representatives from the CBI to which the DTi officials present said - they have no interest in copyright issues'.

The interviewee added that if consultations in the other Member States were conducted like those in the UK then this was part of the explanation as to why there wasn't a big lobby in the UK or EU from users about the database directive, although said that 'given the DTi is a trade ministry its actions are hardly surprising as it certainly doesn't want to encourage opposition that will make its job harder'.

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

The interviewee commented that 'the database directive introduced a dual system of protection that linked copyright to another form of protection - the sui generis right, and in dealing with the problems of the digital environment this system of copyright linked to other forms of protection such as contracts or technical systems of copyright protection may become increasingly common'.

He added 'certainly in my view electronic copyright management systems (ECMS) are a good thing but they are not the panacea that everyone hopes for and the term ECMS also masks a wide range of different types of systems (including those for managing, billing and monitoring use). I particularly have problems with those types of ECMS that negate the possibility of copyright exceptions. This is not to say I am against a legal protection for ECMS against tampering and/or circumvention but this will have to be balanced against users need for access to copyright works'.

The interviewee commented that ' the use of ECMS also clearly highlights the direct conflict between extending copyright into the digital environment and enforcing its protection with technical means, versus the principles of privacy and data protection, although I think most copyright owners are aware of these problems'. As for the extension of the property model to personal data the interviewee commented that 'the idea of selling or trading with one's privacy threshold is an intriguing proposition but it still leaves unaddressed the issue of enforcement'.

In this regard the interviewee cited the Nottingham Child abuse case where an independent report commissioned by the County Council was very critical of the Council's actions, which then refused to publish it. The academic who wrote the report then put it on the world-wide-web and was then sued for copyright infringement by the Council and had to take the report off the web. Following which several mirror sites in the USA were set up with the whole report available. The Council argued that they were concerned over the privacy of the individuals in the report but as was pointed out if this was the case why did they take an action on grounds of copyright infringement.

The interviewee commented that 'technically it is possible and it is happening that the internet is being fenced off, although I hope it will be possible to create copyright free zones (like tax free ports) although this maybe a meaningless concept in cyberspace'.

1 **14. How adequately do you think current European Information policy processes handle these**
2 **interrelationships?**

3
4 The interviewee commented that overall he thought that recognition of these interrelationships was only
5 just emerging and so there was little if any policy addressing these issues, although he assumed that they
6 would develop almost certainly out of Commission funded projects like IMPRIMATUR (Intellectual
7 Multimedia property Rights Model and Terminology for Universal Reference).
8

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

11
12 The interviewee started by saying that he was definitely a Europhile and was keen on the idea of further
13 European integration although he remained skeptical over whether the Euro would work. He added that
14 he was also somewhat nervous over the speed with which the EU was rushing headlong towards
15 enlargement. The interviewee commented that 'while I have never been a great fan of the Maastricht
16 treaty its effect of calming down the Commission and reducing its arrogance at the time was very
17 positive. More than anything Maastricht allowed the penny to drop within all the Member States that
18 no-one liked the Commission and that this was not simply a phenomenon restricted to the UK'.
19

20 This stated, in terms of policy-making the interviewee commented that 'the Commission has done a
21 great deal of good work in the copyright field and really the main problems with European policy-
22 making come from the Council which remains like a black hole where it is still a mystery how it gets its
23 information, how it makes its decisions and who is accountable for them'. He added 'to improve policy-
24 making I would be strongly in favour of introducing greater transparency into the Council perhaps with
25 observers at Council meetings and of increasing the powers of the Parliament. Certainly as the EU
26 expands there will be increasing pressure to reform its major institutions'.
27
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29

INTERVIEW No. 24

Executive Director European Association of Information Services (EUSIDIC)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that on the basis of his experience in the European information sector and as far as he could remember 'public discussions on the need to offer some form of legal protection to electronic databases emerged in the period between 1983-85 with the development of DIANE information services on the Euronet and the realisation at national and European levels of the need to encourage the development of new database services.'

The interviewee recalled in particular that during this period the German government in an effort to improve its information sector policy negotiated an exclusive deal with Chemical Abstracts Service of the US to form a joint venture STN, as a result, on-going negotiations with the French on-line service Telesystems (Questel) collapsed, which immediately led the French on-line industry to push for European level legislation on compulsory licenses, to ensure access to these chemical abstracts for other European information service providers. The interviewee commented these policy discussions were also partly initiated because of concerns over the increasing cost of running on-line database services and later on as a result of a German government report in this regard the deal with Chemical abstracts also collapsed.

The interviewee commented that towards the end of this period the issue of legal protection of electronic databases gained the attention of the European Commission (DGXIII Luxembourg) as these discussions developed towards a copyright based solution they became the responsibility of DGIII and then later DGXV (when these DGIII departments were seconded to DGXV during 1993). The interviewee commented that in terms of the directive itself it was very much a Commission idea rather than one generated as a result of industry lobbying.

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 ?

The interviewee said that as the executive director of EUSIDIC(European Association of Information Services) it was his responsibility to prepare and coordinate any submissions or lobbying activities to the European Institutions and/or to liaise with other interested parties, as well as encouraging national members to contact their MEPs and governments on any issue that was of relevance to the membership.

During the database discussions the interviewee recalled the following major activities; attending the April 1990 hearing, forming a working group to prepare a submission on the draft directive, meetings with Mr.Moreland (ECOSOC), Mrs Czarnota (DGIII Commission), a presentation to the Legal Affairs Committee during the first reading (Mr. Garcia Amigo - rapporteur), discussions with UK delegation in the Council working group. In addition to these major activities the interviewee said that as was normal for any legislative proposal he had a large number of other face-to-face meetings and made innumerable telephone calls, faxes and emails with a wide variety of contacts involved in copyright discussions in Europe.

Regardless of these activities however, the interviewee expressed cynicism about the motivations driving the formulation of the database directive in particular and copyright policy more generally. This cynicism arose from the interviewee's experience of European policy-making. In the context of the database directive it became apparent that the MEPs knew very little about the issues and how most were 'simply concerned with the management of time and documents, rather than issues'. The interviewee backed this up by saying that when he made his presentation to the (C-7 legal affairs committee) in the Parliament on the directive he came away with the impression that 'Mr. Amigos the

rapporteur knew very little on the subject despite being a lawyer and from the very small number of other MEPs from the committee who attended the presentations and with whom I had contact most had with no knowledge of the subject whatsoever'.

The interviewee was similarly critical of the policy formulation process in the Council. He described the Council secretariat as 'simply an exercise in paper management charged with ensuring things run smoothly' and went on to say that in his opinion policy-making in the Council is 'not controlled by the Ministers of the Member States but by backroom discussions between Commission officials and Member State civil servants in the Council's working groups'.

The interviewee also commented that even in the Council's working groups 'a lack of knowledge and/or intellectual capability was also often exhibited by Member States representatives such that more often than not the immediate issue of getting things done in the often limited time squeezed out many important issues'. For the interviewee the best example of this for the interviewee was the manner in which 'it was only in the penultimate session before the common position was reached on the database directive that large sections of the document were thrown out (including compulsory license provisions) as the French Presidency exerted pressure to get it adopted'. As the interviewee went on to say this 'pressure was itself motivated by a desire from within the French government to be able to point to accomplishments achieved during its presidency, rather than with any of the specific merits of the proposals being discussed'.

For the interviewee a central argument throughout was that the 'database directive did not solve a specific problem' that the directive as finally adopted text 'has still left things very open and may well end up causing as many problems as it is supposed to solve'. The interviewee also doubted that the database directive would be implemented on time in any Member State and pointed to the collapse of similar legislative discussions on databases in WIPO and in the US as evidence that the legal protection of databases required more policy consideration than had been shown by the European directive.

3. Did your opinions change during your involvement with these discussions ?

The interviewee said that basically his views on the directive had changed little during the discussions. Referring to his previous answers he commented that in the end it had remained unclear as to what specific problem the directive was trying to solve, in this regard he contrasted it with the software directive which he said had proved itself as a useful piece of legislation solving a real technical problem. This stated, the interviewee acknowledged that his opinions did evolve as the directive was amended and as wider discussions on the information society emerged.

The interviewee recalled that initially his organisation gave a caution welcome to the Commission's proposal 'to offer copyright protection to databases as collections under the Berne Convention' but expressed 'concerns about the value of the sui generis right because it was untried and would require case law to prove its worth' and about the 'licensing provisions because they might lead to more restrictive contractual terms being demanded by database producers'. He also recalled that the membership of the organisation he represented were particularly concerned over the reciprocity clause pertaining to the sui generis right because they were concerned 'that access to foreign databases might be restricted by foreign database owners until protection was offered to their databases in the EU'. The interviewee commented that this broad range of concerns arose because of the broad spectrum of interests represented in his organisation.

Later in the discussions of the database directive the interviewee said that he was conscious that the discussions of the information society that were generated by the work of the Bangemann group 'gave new political impetus to the discussions of the directive' and that 'database producers and publishers continued to lobby hard against the compulsory license provisions'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee said that his organisation did not generally form alliances with other interested parties partly because part of the very purpose of his organisation was to bring together a diverse range of interests involved in the information business to lobby on issues of mutual interest.

This stated the interviewee did acknowledge that on an informal basis he had over a number of years built up a network of contacts with other groups in the information industry. During the database discussions for example he recalled that he was invited by Lennart Scharff (formerly Secretary General of the EIIA) to attend as a guest the EIIA's formal meeting with Mrs. Czarnota on the directive. The interviewee also said that on legal issues he frequently consulted with Professor Charles Oppenheim (currently at Loughborough University) and Professor Herbert Burkert (currently Chairman of the LAB)

In terms of other contacts the interviewee suggested among others the following; Mr. Robert Kimberley (ISI - Institute for Scientific Information), Mr. Harry Collier (formerly Director of EUSIDIC - European Association of Information Services), Mr. David Worlock (EPS - Electronic Publishing Services and formerly President of the EIIA), M/s. Emanuella Giavarra (Project Director ECUP - European Copyright Users Platform) and Professor Bernt Hugenholtz (Director of the Institute for Information Law, University of Amsterdam).

As for influence the interviewee commented that he was doubtful that his organisation had much influence and said that ' We were never directly asked for our opinion or advice, although we did organise a formal meeting with Mrs. Czarnota to discuss the directive'. In this regard the interviewee commented that when looking for influence in the policy formulation process it was important to make the distinction between different interest groups 'some hold the inside track while others are on the outside track of a proposal'.

The interviewee went on to explain that 'some lobbyists become very actively involved in assisting in the drafting of proposals' In the context of the database directive the interviewee identified Mr. Barry Wojcik. (at the time of Dun & Bradstreet) as someone who was on the 'inside track' and 'on very good terms with Bridget Czarnota who drafted the database proposal'. The interviewee also commented that he recalled hearing that representatives from Reuters were also involved but he could not remember any individuals by name.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to his previous answer but also commented that the UK, France and Germany were important not only because they are the largest Member States but also because the UK had the largest database industry and a copyright regime, while France had difficulties with the directive because of its Droit d'auteur regime and Germany would have preferred a copyright regime complemented by an unfair competition rules instead of the sui generis right.

This stated the interviewee commented that in many respects the most powerful shaper of the database directive was the European Commission. 'Although in principle Commission officials are supposedly only there to generate proposals and policies in an objective and neutral manner following consultation with their respective commercial sectors, and then to pass these proposals onto the Parliament and Council, for a combination of reasons this is not what happens'

The interviewee went onto to say that the 'result of a range of forces including bureaucratic structures, the nature of Commission career development and the Commission's own wider policy goals for further European Integration has in the field of intellectual property rights (IPR) policy formulation led to a situation in which some Commission officials perceive themselves as the generators and promoters of policy'. This position whereby the Commission 'tells industry what it will do as opposed to listening to it', has in the opinion of the interviewee occurred partly because of the success of the Commission proposals in the telecommunications sector and in particular its proposals on 'a common standard in GSM technology for mobile telephone which has since been adopted almost world-wide'. As a result 'an expectation grew both within and external to the Commission that it would be able to emulate this success in other fields'.

The interviewee commented however that a consequence of this Commission influence has been that 'one of the key goals of policy-making becomes simply getting a directive through the Council to its adoption regardless of its contents or purpose such that the issues are sidelined'.

The interviewee also commented that the 'cult of the personality' had also been a 'very important factor during the negotiations of the database directive'. In particular the interviewee said 'Mrs. Czarnota involvement in the directive began to cause problems in the Council working group to the extent that the proposal was being stalled by some Member States who objected to her approach' shortly afterwards 'Mrs.Czarnota left or was pushed and replaced by Mr. Jens Gaster and the negotiations began to move forward again'.

The interviewee commented that it would be very important to interviewee Mrs.Czarnota in the context of my study as 'she was the inventor of the database directive'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that initially most interest groups had been in favour of a copyright based solution and had rejected any additional protection e.g. sui generis, but that 'this situation began to change after Feist as the view outside the UK became that legal protection based wholly on a copyright solution would be inadequate'.

The interviewee also commented that 'Magill was also influential in shaping the directive because the compulsory license provisions were clearly an attempt by DGXV to pre-empt similar case law concerning abuse of a dominant position'.

The interviewee referring to his previous answers also commented that 'the directive has itself had a direct influence on international copyright policy discussions i.e. WIPO where the proposals on database protection were rejected'.

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 ?

The interviewee commented that the higher profile of the directive was already proving transitory as the Commission's follow-up communication and anticipated future Commission copyright proposals became the focus of attention.

The interviewee commented that the Directive had at one stage the potential to be a cornerstone of multimedia developments but in the end the adopted text while clarifying some aspects of copyright protection with regard to databases had ended up raising a lot of new questions which only the implementation of the directive in Member States and future case law would resolve.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

Referring to his previous answers the interviewee said that formal consultation on the directive had been problematic. As an example, the interviewee recalled that the public hearing in 1990 organised by the Commission , which he described as 'clearly of little use'. He went onto say that 'As ever (at copyright consultations) there was an over-representation of lawyers promoting publishers and copyright owners interests, even though most had little interest in database issues per se and were there only to lobby on behalf of the general interests of their clients in greater protection'

The interviewee recalled that as a consequence 'the hearing degenerated into the reading of potential clauses for any future proposal notably by Charles Clarke, which in turn ensured a silencing of debate by less legally versed members of the audience'. The interviewee commented cynically that 'there was a clear agenda from these lawyers to push for legislation in the area thereby ensuring themselves future work from their clients'.

This the interviewee contrasted with the views of database producers at the hearing who 'mostly felt that existing copyright legislation and Berne provided them with adequate protection and that any new legislation might have a detrimental effect on the growth of the industry'.

1 The interviewee went onto to comment 'then out of the blue came the draft directive even though there
2 had been little overall support for it'. He questioned what the point of consultation was if it was going
3 to be ignored ? The interviewee said that he had asked this question directly to Mrs.Czarnota during his
4 meeting with her on the directive but he had received no adequate response.

6 **C. European policy for Copyright**

8 **9. How would you assess the significance of the Database directive for current and future 9 European copyright policy formulation ?**

11 The interviewee commented that along with the software directive the legal protection of databases was
12 likely to be significant in as much as these were the first directives specifically directed towards the
13 electronic environment. Although the interviewee suspected that the database directive would be
14 overshadowed by later proposals.

16 **10. As the global Information Society develops what role will copyright harmonisation play 17 in the process of European integration ?**

19 The interviewee reiterated his cynicism towards the motivations driving intellectual property policy in
20 particular and information policy in general, forward. The interviewee acknowledged that the internal
21 market argument continued to be the basis on which the Commission promoted its proposals in the
22 copyright field but in the global context he said that there continued to be too little discussion of
23 'whether the existing policy initiatives and proposals are the appropriate way to proceed'

25 In this regard the interviewee expressed the concern that 'such fundamental questions are obscured in
26 favour of policy actions designed to 'plug existing wholes' by providing for a set of legal mechanisms.
27 The interviewee commented that 'while it is relatively easy to write legislation my impression of the
28 copyright area is that lobbyists are pushing for legal instruments to 'close doors long after the horses
29 have bolted'. i.e. the digital environment cannot be dealt with in this piecemeal fashion.

31 The interviewee used the following metaphor to describe his perspective on the approach of some
32 lobbyists ' it is like an individual who buys a watch, goes out and tells someone the time and is then told
33 by the shop-keeper who sold him the watch that he has infringed the shopkeeper's rights because he was
34 a watch not the right to tell the time'.

36 **11. Which other factors, if any, would you identify as being significant in affecting how 37 copyright issues are framed and discussed at the European level ?**

39 The interviewee had nothing further to add and referred to his previous answers.

41 **D. Information policy-making and Copyright in the digital age**

43 **12. What threats and opportunities would you identify from the extension of copyright concepts 44 into the digital realm ?**

46 The interviewee commented that he felt that there had been a tendency to over-emphasize the threats to
47 copyright in the digital environment. In terms of the property right itself the interviewee had the
48 opinion that there was a 'lack of consideration of current developments in the electronic world evident
49 in policy initiatives and proposals'.

51 He pointed out that copyright owners were protected by governments through their copyright monopoly
52 to make their profits and he was of the opinion that 'copyright owners and in particular publishers have
53 been ripping authors off for years'. However in the context of the electronic networked environment
54 things were changing such that 'publishers have to get real' and that 'there is little evidence to suggest
55 that copying is any more rampant in electronic environments than analogue ones'

57 The interviewee commented that whilst he clearly did not condone piracy in any form 'if there are
58 incidents of serious copying or piracy then the publishing industry will be aware of it and should have
59 the responsibility to take action just like the record industry which has got to China and smashed up the

1 factories making pirate records, tapes and CD's, and that this was better than 'always looking to
2 governments to give ever greater legal protection'.

3
4 While he acknowledged that losses inevitably did take place he did not feel that they 'are so devastating
5 that the industry cannot afford them'. As he pointed out from sectors like financial services 'credit
6 card companies such as VISA anticipate losses of 8-9% without being overly concerned'. The
7 interviewee commented that in this new context 'it is wholly unrealistic to imagine that it will ever be
8 possible to stop some losses' and he wished that 'the inflated claims of copyright owners were treated
9 with more caution in the field of copyright policy formulation'.

10
11 The interviewee commented that there was a need to 'rethink the real policy issues'. In this regard the
12 interviewee advocated the 'overt and explicit separation of the author's moral right from the owner's
13 property right'. While the interviewee argued that the 'author's right is sacrosanct but it has always
14 been ignored at the European level and so it would be useful to make this decision explicit so that
15 everyone is clear that harmonisation is only focused on the economic rights'. This would also reduce
16 some of the confusion between copyright and droit d'auteur systems.

17
18 **13. How would you characterise the relationships in digital environments between copyright**
19 **policy and other areas of information policy such as Privacy ?**

20
21 The interviewee commented that whilst he could see a potential for relationships between other areas of
22 information policy these would become considerable more apparent over the next few years as the
23 Internet became increasingly used for business transactions.

24
25 The interviewee questioned whether describing the Commission's initiatives in the copyright field to
26 date as a policy was appropriate name for them, he was however clear that they were not working and
27 that they were not addressing the fundamental problems faced in these new environments.

28
29 In his opinion technology will continue to race ahead of legal responses and the US will continue to be
30 the quickest to respond to the challenges faced. This acknowledged he was positive about the
31 IMPRIMATUR program although he expressed concerns that this to was 'becoming bogged down with
32 legal issues and special interest groups (SIG's) rather than concentrating on the development of its
33 business model'

34
35 For the interviewee ultimately 'the digital environment will only work if industry and commerce as well
36 as consumers are able to communicate and function successfully'. In this context the interviewee
37 pointed out that 'the existing on-line industry is very different from the developing Internet services
38 with only very time dependent information having proved profitable over the long term'. As such this
39 industry model is

40 'unrealistic as a model for a system as open as the Internet where there will always be some clever kid
41 ready, willing and able to break a security code as part of an intellectual exercise'. If right holders want
42 to protect their rights and consumers their privacy a different model will need to be found. The
43 interviewee suggested that part of the solution could be 'anonymised Internet cash' but the Commission
44 had been noticeably reticent in bringing forward proposals in contrast to their dramatic activity in the
45 copyright field. This was partly to do with a desire for control over the digital environment and pressure
46 from banks and the financial services sector who were keen on identifiable payments on the internet'

47
48 The interviewee commented that whilst there 'is clearly a role and need for copyright legal frameworks
49 at the supra-national level, but the Commission has a responsibility to listen to and actively seek the
50 opinions of industry, which is something that up until now it has not done very well'.

51
52 **14. How adequately do you think current European Information policy processes handle these**
53 **interrelationships?**

54
55 The interviewee referred to his previous answers and said 'not very well' as even the information
56 society initiatives 'appear incoherent'.
57
58

1 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
2 **concerns over the issues of democratic participation and accountability ?**
3

4 The interviewee commented that European policy formulation in his experience had tended to be driven
5 not by the underlying issues but by structural factors at the European level particularly within the
6 Commission which encourage particular behaviour by officials and professional lobbyists. In his
7 opinion the debates on the database directive could certainly have been improved if more information
8 professionals and fewer lawyers had been involved, so that a better understanding of the database
9 business had reached the policy-makers'

10
11 As an example of the structural factors the interviewee commented that 'the tendency on the part of
12 Commission officials to identify themselves with particular pieces of legislation, developed during the
13 Presidency of Mr. Jacques Delor'. This approach which the interviewee characterised as 'Dirigiste'
14 encouraged Commission officials to identify themselves with a piece of policy because it was the best
15 way for career advancement, thus the successful adoption of legislation became paramount and the
16 content of any particular proposal secondary. 'getting proposals through the Council and adopted
17 becomes the policy goal itself'. The interviewee identified Mr.Vandoren and Mrs.Czarnota as officials
18 of this type.
19

20 The interviewee commented that with 'Denmark's initial rejection of the Maastricht agreement during
21 its referendum shook this dirigiste approach but did not remove it'. The interviewee said that although
22 things have continued to improve in this regard there remained a lack of accountability.
23

24 Ultimately for the interviewee the database directive regardless of the Commission's claims that it was
25 to encourage the development of a database industry it was serving as a pawn in a much wider game
26 concerning the US push for the free movement of goods and services in global trading through the
27 WTO(TRIPS). In his opinion the issue was not about copyright but rather a question of facilitating
28 trade in goods and services.
29
30

INTERVIEW no. 25

Representative for Dun and Bradstreet and AMCHAM

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I know that the topic of database protection was covered in the Commission's first copyright Green Paper but personally I only became directly involved in the discussions quite late on - in around September 1992 on behalf of Dun & Bradstreet (D&B - whose parent company is based in the USA). The interviewee added 'Although I worked exclusively for D&B I had close affiliations with the AMCHAM(American Chamber of Commerce) and the EIIA(European Information Industry Association) as well as contacts with Reuters'.

The interviewee commented 'To my mind the database discussions were rather esoteric and at the time D&B was the only registered member of AMCHAM who was both an information provider and had an interest in the directive'. The interviewee added 'I can remember that I joined the AMCHAM IPR sub-committee's discussion of the database proposal late on and that they had already drafted a position paper on the directive which they looked set to adopt. This paper was the committee's first reaction to the Commission's proposal and in summary basically supported the idea of a copyright directive but argued that the sui generis right was unnecessary'.

The interviewee added 'I think the chair of the committee at that time was Fred Blakemore (IBM) and that the committee's position paper had been drafted with a lot of assistance of Phillip Wacker (ECIS - European Committee for Interoperable Systems), who was previously heavily involved in the lobbying on the software directive and was viewed by many in European industry to be a defender of Japanese interests in Europe (i.e. it was an open secret). Its not surprising then that AMCHAM's position was to reject the sui generis right as unnecessary (i.e. any content protection would have been detrimental to the interests of those groups Mr. Wacker was reputed to represent'.

The interviewee commented 'After I became involved, the AMCHAM position paper was redrafted so that general support was given to the directive as a whole including the sui generis right, although a number of changes were suggested including on the compulsory licenses and the reciprocity clause which were of particular concern to D&B'. The interviewee added ' Shortly after I became involved, a number of other individuals also became active in the discussions including Marie-terése Huppertz who was working for Bertelsmann (later joining Microsoft) and Jacques Combeau (Legal counsel for IBM in Paris). In the UK I can also remember that Steven Hall from Chadwyck-Healey became involved over the issue of the term of the sui generis right which was of concern to his company because its business was mainly in static (archive) databases of facts that were written up by hundreds of Chinese workers who didn't know what they were typing'

The interviewee commented 'In many ways the people with whom I found myself in agreement over the directive all seemed to come into the discussions late on. I think this is partly because when the discussions first started while I was vaguely aware that they were proceeding they appeared from the outside to be very esoteric and concerned with some very specific and well bounded issues that had few implications for any outside the database industry'.

The interviewee added 'However, I think things began to change as increasingly large numbers of people became aware of the importance of information in terms of their own commercial activities. The Commission's first copyright Green Paper that outlined both the software and database directives was released at around the same time that the Internet began to emerge. At the beginning, these discussions tended to be dominated by equipment manufacturers (i.e. at that time the builders of the information infrastructure) but gradually it was realised that without content the infrastructure would be meaningless. It was the rapid growth of the internet that changed people's perceptions of what new

skills were required in the collection and collation of information and the (potentially) more creative role of editors and publishers in the information chain. All of these factors led to an awareness of the lack of protection that existed in the collection and collation of data sets'.

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 ?

The interviewee commented 'Unfortunately it is all rather a long time ago and I have to say that I can't remember all the things that I did but I do know that I had several meetings with Mrs. Czarnota to discuss the directive proposal. I can also remember feeling that because there was not a great deal of interest or support for the directive and because my general view was that the directive would be a good thing, Mrs. Czarnota penciled me in as a supporter of the directive'.

The interviewee added ' Personally I always found Mrs. Czarnota and later on Mr. Vandoren and Mr. Gaster very amiable and helpful in my discussions with them but I didn't really smooch (socialise) around with them and the aim of the work was always very clear i.e. to move the directive on towards adoption'. The interviewee commented 'in the lead up to the directive's first reading in the European Parliament I also represented D&B's views at a hearing held by the rapporteur of the legal affairs committee Mr. Garcia-Amigos. Some of the other groups who made presentations included EUSIDIC(European Association of Information Services - Barry Mahon), Reed Elsevier, and for the FEP(Federation of European Publishers - Charles Clarke)'.

On the issues themselves the interviewee commented 'the sui generis right along with the compulsory license provisions were the key difficulties for all the copyright lawyers involved, many of whom remained reluctant throughout the negotiation of the directive to acknowledge any need for such a non-copyright approach e.g. particularly those lawyers representing traditional print publishing'.

The interviewee commented 'other external events were also important during the discussions including the Feist case in the USA. This case appeared to bring groups like Reed-Elsevier into the discussions and to keep them supportive of the directive especially because of the implications of the case for factual databases. Content providers also became involved later on and I can remember receiving support from Alessandra Silvestro at Time Warner subject to one or two reservations'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented ' on the key issues I was not for example happy with the knee jerk reaction by rights holders against the compulsory licensing provisions because I could see the Commission's argument that it was a counter balance to the scope of the sui generis right and in terms of D&B's interests I could also see the potential use of some licensing if restricted properly.

The interviewee added 'In my opinion the provisions were a clear attempt by the Commission to anticipate the outcome of the Magill case (i.e. competition rules versus copyright) but I was also aware that there were two parts to these provisions as applied to the Public Sector and as applied to the Private Sector. Indeed John Stevens(Reuters) and myself expended a lot of time and energy in working with the Commission to successfully tighten up these provisions'. The interviewee added 'These licensing provisions offered D&B some potentially useful leverage in dealing with the public sector because as part of its business activities D&B was using large amounts of public sector data in selling its VAS(Value-Added Services). The provisions also highlighted. They also highlighted the conflicts arising in discussions over the commercialisation of public sector information and the potential problems for governments engaged in both collecting and selling public information'.

The interviewee added 'I can remember thinking that my suspicions about this growing tension were confirmed when at a Commission meeting a representative from the French government came out very strongly against licensing in public sector databases. But I was still surprised when the provisions were dropped in the very final stages of the Council negotiations and I don't know exactly what happened or why'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee referred to his previous answers and re-iterated he had contacts and affiliations with Reuters, the EIIA, IIA and also with publishers including Reed and Bertelsmann. The interviewee commented 'I have kept up my contacts with John Stevens(Reuters)'. He added 'Late on in the negotiations I also had contact with Alessandra Silvestro at Time Warner and I always found her a well informed and good contact'.

As for conflicts with other groups the interviewee commented 'There was some opposition to the directive from the authors rights lobby especially in France who were against the sui generis right because they saw it as the introduction of a kind of sweat of brow protection and the creeping of copyright dominance over the droit d'auteur system within the European harmonisation process (i.e. the dilution of the authors rights system)'. He added ' I can't remember the names of these individuals partly because the discussion of the database directive tended to spill over into other public consultations on copyright like the hearing on the Commission's second copyright Green Paper in 1994'.

In terms of exerting influence the interviewee commented 'As a lobbyist you can really only exert influence in situations where there are areas of general agreement or where the Commission official involved has no strong feelings either way on a particular issue. This is because it is simply very difficult to influence an issue if the officials concerned are opposed to your ways of thinking about it. Fortunately on the database directive this was not the case with Mrs. Czarnota or Mr.Gaster although it was not always easy to discuss all aspects of the directive. Generally speaking however officials are often very grateful for supportive arguments and they are always in need of further information and data which as a lobbyists you can provide'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

On the role of the European Commission the interviewee commented 'In my opinion inside the Commission itself there was a relatively complex picture during the database discussions whilst outside there were two basic phases in the discussions. Firstly, there was a period during which DGIII struggled to get acknowledgment that databases required protection and that to achieve this there was a need to use not just copyright but also an additional protection in the form of a sui generis right for information in the database (a right against trespass). Secondly, there was the period during Mr. Gaster's reign as the official representing the Commission in the Council working group during which he was very energetic and the directive began to emerge as a potentially significant departure from previous copyright policy with its dual approach'.

The interviewee commented 'From experience it is broadly speaking possible to classify EU officials into 2 types: those who are very involved with the issues under discussion and invest themselves into the work (i.e. they are convinced that a proposal is the right way forward for the Community to move on an issue) and those who see policy discussions as opportunities to facilitate increasing their own visibility within the Commission and so potentially enhance their career development by spotting chances that may benefit them'. The interviewee added ' while there is an element of ego in both types of official, if I was asked to characterise Mr. Gaster I would say he was in the former category while Mr.Vandoren would be in the latter and Mrs. Czarnota somewhere in between the two'.

The interviewee commented 'Mr. Gaster really cared that his approach to the directive was correct and truly significant for future approaches to be adopted in the copyright field as a consequence he was passionate, energetic and very committed to what he saw as very much his directive. After the departure of Mrs.Czarnota, he quickly got to grips with the subject and adapted well to a situation where there something of a policy vacuum as the discussions had become stalled in Council. Mr. Vandoren on the other hand was always more calculating and was more interested in achieving a result rather than with the minutiae of the texts themselves or at least he was willing to delegate this responsibility to Mr.Gaster. Mr.Vandoren is a very able and intelligent Commission official but in the database directive I always had the impression that he had been dropped into the discussions and he never considered his

position in DGXV as anything more than as a transitional post(i.e. very much a political individual looking around for career opportunities)'.

The interviewee commented 'the discussions in the Council working group became stalled after the amended proposal mostly due to the quality of the working group representatives, especially from France (i.e. its representative from the Ministry of Culture who caused a lot of problems by sticking to a very traditional droit d'auteur position). The basic problem was that the working group was a group of copyright experts who were not very aware of the commercial or technical aspects of databases'. He added 'I can also remember that the UK delegation which had two very intelligent and able officials (Peter Brittan & Graham Jenkins) were at least at the very beginning of the negotiations hostile towards the directive because they felt that the protection already offered in the UK by the Copyright Designs and Patents Act(1988) which they had helped draft, was adequate'.

The interviewee commented 'During the French Presidency things improved dramatically in Council as the French Industry Ministry became involved both at the working group level and also at the French Ministerial level in Paris. The chair of the French Presidency, Mr. Dobelle was also very good because he was not a specialist but a good politician who could get a result and who resolved the disputes between the representatives from the Ministry of Culture and the representatives from the Ministry of industry which had contributed to the slowing down of the negotiations in Council'.

The interviewee added 'The Parliament did not do a great deal in terms of amending the directive except that it extended the duration of sui generis protection to 15 years during the first reading which was a significant change for those information/database owners who had static as opposed to dynamic information compilations (e.g. Chadwyck-Healey). I can also remember before the second reading that Mrs.Palacio(rapporteur gave me quite a sympathetic hearing when that was I finally managed to get hold of her. To some extent in the Parliament I felt a major part of my role was one of basic education of the MEPs not over IPRs per se but more about the commercial aspects of the database industry in relation to the directive text'.

In terms of the other individuals who were influential the interviewee commented 'my personal knowledge of what was going on during the discussions was limited to the extent that I was operating along a relatively narrow front predominantly concentrating on the Commission and to a lesser extent the Parliament and apart from the debates in the UK delegation I didn't know what any of the other Member State delegations views were'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented 'the Feist case in the USA which occurred before the directive proposal was even released from the Commission was very important and I think DGIII viewed it as re-inforcing the need for European legislative action on databases, especially at a time when the idea of a directive had little support or interest from industry'.

The interviewee added 'certainly at the time it was true to say that for the large UK-based (English language) database industry it was not clear what protection was offered at the international level and who could benefit from it. When the proposal came out while we in D&B with our predominantly US based operations were not happy with its reciprocity provisions companies like Reuters with its predominantly UK based operation were less concerned. In explanation the Commission said that European harmonisation would be the first step and that they would later launch a policy initiative at the international level'. In this regard the interviewee commented 'I was not able to follow the WIPO discussions in December 1996 but I am aware that the debate on an international instrument (partially modeled on the EU directive) led to a wave of protests from users in the USA'.

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 ?

The interviewee commented 'in trying to assess the significance of the database directive I think it is probably still a little too early to comment before its implementation in the Member States but personally I think that it is likely to prove to be very important both as a re-assurance to database

investors and also as a legislative move which counters the common mindset and perception that everything on the internet is free by showing that information can acquire legal protection'.

The interviewee added ' After the Bangemann report there is now greater general awareness of the whole range of issues that are implicated in the digital environment and my perception is that after it the discussions of the database directive moved forward more quickly as there was a wider recognition of the importance of harmonisation initiatives'.

He added that it was still too early to tell if the directive would be a cornerstone of the information society.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that overall he felt European consultations were open and generally well done but he added 'particularly at the beginning of the database discussions I had the sense of coming in on the rather esoteric world of the copyright lawyer where everything was viewed and interpreted through the rather high brow lens of copyright intricacies. There was even a certain snobbishness about the debate and often John Stevens and I felt like engineers explaining the mechanics of the issues at stake in terms of the practical generation and commercial operation of a database to individuals only concerned with the minutiae of copyright law, and I know other groups like FEDIM(now FEDMA - Federation of Direct Marketing Associations) felt the same way. Certainly this strong copyright bias combined to colour the nature of the debates that took place'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to his previous comments i.e. still a little early to tell.

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

The interviewee commented 'the development of the internal market is both a good and necessary development and although a lot has been achieved in the field of copyright harmonisation already there are still a large number of issues that remain unharmonised, first and foremost among these being the issue of copyright exceptions which looks set to be the next directive proposal to be released by the Commission'.

The interviewee added 'In the electronic age exceptions sit at the very heart of the balancing act that is copyright and they therefore need to be examined deeply and carefully. In my opinion many of the existing exceptions were only ever introduced for reasons of expediency (i.e. when it was not possible to control use you made it an exception) but in the digital realm where total control can be exerted over the use of works there no need to maintain such exceptions especially when you can legitimately charge for the information used. There is now a legitimate economic right that can and should be defended'.

The interviewee commented 'While technical systems may increasingly enforce these rights I think that there is still a clear role for legal frameworks and of course I am aware that for a variety of political and cultural reasons many exceptions will remain. However, if we move to a situation where every piece of information has to be paid for then things should get cheaper because penny packets of information make very good business'.

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 ?

The interviewee commented 'In my experience copyright harmonisation involves a broad range of issues at the heart of which are the very difficult mine fields of copyright versus droit d'auteur, analogue and digital as well as the different levels of exceptions across the Member states'.

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 ?

The interviewee commented that while the threats of piracy were clear the digital environment also offered opportunities for greater control over information, improved revenue streams and access to global markets.

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

The interviewee commented 'In talking about information policy-making per se one obvious problem arises because of the way that jurisdiction for particular policy areas is allocated across several directorates (mainly DGXV and DGXIII) within the Commission, although it is something of a help that they both have the same Commissioner'. The interviewee added 'I have always had the impression that when it came to having experts in IPRs(intellectual property rights) there were more in DGXIII than in DGXV yet DGXV made all the proposals. This probably accounts for why there has at different times been such rivalry between the two DGs and not just in terms of the opinions from the LAB(Legal Advisory Board)'.

The interviewee added 'In the electronic environment the increasing use of technical systems for the enforcement of intellectual property rights certainly raises the potential for tensions between IPRs and other areas of information policy such as data protection. This is because inevitably when you enter the digital realm you leave foot prints that enable your activities to be monitored, but when you are running a service for commercial reasons you clearly want to know something about who you are selling to. I think that these arguments tend to be over-exaggerated by some as my impression is that in general most people are not very worried or interested about the volumes of data that can be collected legitimately on them. It seems to me that what tends to happen is that every now and then the issue is picked up by the press and then there is briefly a big public outcry after which things die down again'.

The interviewee added 'Afterall it isn't in the industry's interests to lose customers and they are keen to maintain trust and are generally acutely sensitive to criticisms over abuses of information. For example, Microsoft is already planning to implement data protection regulations ahead of legislation in Europe and even in the USA where it is not required'.

The interviewee commented 'part of the problem is that most of these developments are occurring in an environment where there is public ignorance and there is a real need to educate people to let them know how much information can already be collected. For example, I must admit to having been shocked when 3 months after my son was born he began receiving mail addressed to him directly and I had to question whether this was an appropriate use of such information. However I think that if people want these services they will have the choice to lose a degree of control over their personal information (i.e. Surf the internet for free in return for giving permission for us to monitor your use)'.

The interviewee commented 'Part of the problems we now face are caused by governments who are themselves guilty of adopting a slightly arrogant attitude when collecting and using information about their citizens. They often cloak this use in public sector reasoning based on it being necessary for the functioning of the state (i.e. for the citizens own good, for the achievement of targets). But all of these arguments are based on some misplaced assumption that all civil servants are irreproachable and guardians of our confidentiality. For example there is a real arrogance amongst healthcare professionals in the NHS(National Health Service) in freely swapping personal information about people on the basis of trusting to their own professionalism, which when we hear of the abuses that have taken place is clearly bogus and misplaced'.

The interviewee added 'Governments also have the power to legislate to facilitate the collection of information which creates conflicts and tensions within governments as they increasingly express a desire to commercialise the information they hold for their own benefit. Unfortunately this whole side

1 of the discussion is ignored and it is the commercial sector which is attacked for its behaviour when the
2 media picked up on a particular inappropriate abuse of data, which in my view is not often'.
3

4 **14. How adequately do you think current European Information policy processes handle these**
5 **interrelationships?**
6

7 The interviewee commented 'not very well but as I have said I think this partly to do with the policy
8 structures that are in place that fragment the policy approach to information'.
9

10 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
11 **concerns over the issues of democratic participation and accountability ?**
12

13 The interviewee ran out of time.
14
15

INTERVIEW no. 26

Representative for Reed-Elsevier & Rapporteur for Confederation of British Industry(CBI)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'Towards the end of 1990 I did a tour of Brussels to make contacts and meet the Commission officials relevant to my work at Reed in corporate public affairs. This is when I first met Mrs.Czarnota who a little while after telephoned me and told me that the Commission were in the process of putting together a proposal for a directive to harmonise the protection available to electronic databases across the EC(European Community) and asked if I would like to contribute some views'.

The interviewee added 'I remember at the time that she told me that because of the UK copyright approach with its sweat of brow protection the Commission anticipated that there would be some opposition to their directive proposal in the UK and that they were concerned about avoiding a backlash. It was clear that she was testing me for my perspectives, which I was glad to give because even at that stage I could see a good strategic argument for the directive in relation to the USA'.

The interviewee commented 'from this point on Reed (and me personally) were heavily involved in the database directive, particularly in the UK. At the time I was working as part of a team in corporate affairs and I liaised on the directive with our department's legal adviser Mr. Richard Baker, although I have to say that on a personal level we didn't get on'.

The interviewee added 'When I first arrived at Reed I had little experience of the publishing industry and wondered what it was all about but on databases the Feist decision in the US had a huge influence on my thinking and I can remember that when I read it I was appalled and horrified by what it implied about the lack of protection available to database producers/publishers. Particularly as at the time Reed had over 40% of its business in the US. I was very keen therefore to get some protection against the possibility of Feist like situations occurring in our European markets'.

The interviewee commented ' When the Commission's proposal was published in May 1992 I have to say that it was not the easiest document in the world to understand but it did improve in later drafts and on the whole I was very much in support of the directive throughout'.

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 ?

The interviewee commented 'the first thing to make clear is that there was not, at least initially, agreement within Reed on a company position on the directive. Indeed, I think that you should be aware when talking to industry representatives of just how much time they spend simply getting internal agreement on issues like this. Fortunately for me Richard Baker was helpful and lent his support to creating a coherent Reed position, which was generally favourable towards the Commission's proposal'.

The interviewee commented 'When the proposal was first released there was, as the Commission had anticipated, some opposition to it particularly from UK publishers (Clive Bradley) who argued that existing UK copyright protection made the directive unnecessary. I was however in favour of the proposal because I could see the strategic argument that if protection could be achieved throughout the EU then it would be much easier to push for similar protection in the US or at the international level. In fact having discussed this with Mrs.Czarnota I later heard that she was also using this argument as one of the reasons for lobby groups to support the directive'.

The interviewee commented 'In terms of Reed's involvement: I attended the Department of Trade and Industry's (DTi) consultations on the directive (which were good places to meet people and collect information) and I can remember that Richard Baker made a presentation to the European Parliament before the first reading. I also chaired the CBI's (Confederation of British Industry) working group on the directive and had regular contacts with Mrs.Czarnota. Among others in the CBI working group were Roger Broadie from ICL, Dick Jones from the IEE(Institute of Electrical Engineers) and Colin Fricker from the DMA (Direct Marketing Association)'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'No, I remained in favour of the directive right through to its adoption'. He added 'I wanted European wide protection for databases and I saw the copyright/sui generis approach as an ingenious way of achieving protection for our investments in the growing electronic information marketplace'.

The interviewee commented ' throughout, the key issues were: lobbying for the removal of the compulsory licenses, pushing for a longer term of sui generis protection and clarifying on what grounds this protection could be extended, lobbying so that the copyright and sui generis protection was cumulative and ensuring that the protection was provided under the terms of reciprocity as opposed to national treatment. Looking at the adopted text I feel quite satisfied at our success'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented 'I don't think we had any formal alliances with other companies but Reed at the time was a member of the PA (Publisher's Association) and so I had regular contacts with Clive Bradley and through him with Charles Clarke both of whom were quite active in lobbying on the directive in the UK and in Brussels (and initially they opposed the directive)'. He added 'I also employed the services of Catherine Stewart in Brussels to keep me informed of progress in the Council negotiations'.

The interviewee added 'In the UK there were also a number of academics involved in the discussions including Professor John Adams from CLIP (Common Law Institute of Intellectual Property). I can also remember conversations on several occasions with Barry Wojcik from Dun and Bradstreet, John Stevens from Reuters and Tom Martin from Dow-Jones Telerate. I also met David Worlock from EIIA (European Information Industry Association) and I know that the EPC through Laurence Kaye and Angela Mills lobbied on the directive'.

The interviewee commented ' I do also remember that many of the academics who came in towards the end of the negotiations and attended the DTi consultations had rather negative opinions of the directive'. The interviewee added ' I also met Mr. Robert Moreland who was the ECOSOC rapporteur on the directive but I had little or no contact with European Parliament, although at the first reading Richard Baker reported that the Commission was keeping the Parliament under control and that there would be no surprises'.

In terms of influence the interviewee re-iterated that he was generally satisfied with the adopted text and added 'I kept on shouting against compulsory licenses until the end and finally they were dropped, although of course I wasn't the only organisation against the licenses'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that outside of the Commission and Council it was difficult to assess who had the most influence over the directive. In his opinion much of the lobbying was certainly UK based and he felt that the opinions of companies like Reed and Reuters as well as publishers representatives like the PA were taken seriously by the UK government and at the European level. He added ' the publishers were the last to come on board with the directive and both Charles Clarke and Clive Bradley hung on and pushed for copyright protection and no weakening of UK copyright law. They never really capitulated rather they just accepted the directive pragmatically'.

The interviewee commented that 'towards the end of the Council negotiations debate revolved around fewer and fewer issues with compulsory licenses being the final issue that clinched the common position'. He added 'by this stage the merger between Reed and Elsevier was going through and I got into contact with Erik Ekker (Reed -Elsevier Netherlands) to discuss the directive and although we had differences of opinion we were both generally satisfied with the directive'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee re-iterated that for him the Feist case was the backdrop to his views and he added 'When the judgement in the US Chinese directory case came out allowing wholesale copying of an existing telephone directory I felt it vindicated my own worst fears i.e. that selection and arrangement of information in a database only had to be changed in a minor way to prevent charges of copyright infringement'.

The interviewee added 'The Magill case was also discussed in the context of the database directive although I can't say how influential these discussion were overall'.

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 ?

The interviewee commented ' at the same time that the database directive was being discussed in Council I became involved in the Bangemann Group on the Information Society where I deputised for Reed's Chairman Sir Peter Davis. During its meetings I emphasised the issues of importance to information providers including intellectual property rights and I think if the database directive has a higher public profile it is at least partly because of this work'.

He added 'labeling something as the cornerstone of the multimedia society is a bit premature but certainly the directive is important for protecting and encouraging the development of new information products and services particularly over the Internet'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that his overall impression was that the European consultation process was very good although he acknowledged that the majority of those who participated tended to be rights holder organisations.

C. European policy for Copyright

(From this point on - the interviewee said that he could only spare another 5 minutes for the interview)

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that having since left Reed he had not kept up with the issues and so really wasn't sure about the Commission's latest copyright proposals.

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

The interviewee commented that from his work in the Bangemann Group it was clear that IPRs would play a very important role in the future of the information society both in Europe and globally.

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 ?

The interviewee had nothing to add and referred to his previous comments.

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 ?

The interviewee commented that the major threat was clearly piracy but with mediums like the world-wide-web businesses also had access to a global market for their products.

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

The interviewee commented that from his work in the Bangemann group he was aware that the digital environment changed the nature of existing relationships between policy areas and that this was something that would certainly have to be examined in the future as the information society developed leading maybe to a single set of rules for the digital environment.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that he didn't think that the relationships themselves had yet properly developed so he wasn't surprised that there was not yet much coherence in policies dealing with information e.g. data protection, IPRs, government information etc., although he felt that this would emerge in the near future.

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 ?

Ran out of time.

INTERVIEW no. 27

President of European Information Industry Association(EIIA)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'The EIIA(European Information Industry Association) has been involved in European discussions on copyright since the beginning. We contributed to the 1988 Copyright Green Paper on the challenge of technology and I have regularly been involved in contributing to the DGXIII and LAB (Legal Advisory Board)discussions on these issues'. The interviewee added 'In terms of databases themselves I have some expertise in the field having been in the electronic database industry since 1981 with EUROLEX (The European Law database which was sold by Thomsons to Reed in 1985. I also made the first UK CD-ROM in 1984 at the very birth of the industry when there were still only 10 CD-ROM drives in the country'.

The interviewee commented 'Even in those early days there were contractual difficulties and a general lack of understanding in discussions of the problems faced by the industry. Part of this was due to the fact that databases were very much a UK centred industry, although from quite early we in the industry were keen to push for an extension of copyright to electronic databases as part of the Berne Convention so as to obtain legal protection that was of a similar level to that offered to analogue database publishers'. He added 'at this time however the main reason that the industry wanted copyright protection was not primarily to prevent against piracy but more importantly simply to the level of investment in the industry by encouraging investors to feel confident that their investments were protected. This was because there was serious financial resistance from bankers and financiers to any investment in something that had no legal protection'.

The interviewee commented 'During this early period I also had very close links with Morton Goldberg and Steven Metalitz of the IIA (Information Industry Association) in the USA and in 1987 we formed the GIIA(Global Information Industry Association) the first resolution of which was to push for an extension of copyright protection to databases'. The interviewee added 'Between 1988-1992 I was very annoyed by the stupid debates that occurred on software over reverse engineering between mainly the ECIS (European Committee for Interoperable Systems)/Fujitsu and Microsoft. These debates overshadowed the discussion on databases and more generally the Software directive became a real stumbling block for other legislation in the copyright area'.

The interviewee commented 'Thinking back my impressions of that whole period are of how things became bogged down over definitions both in the software and database discussions. Being the first copyright directive software required that definitions to be made and there was the clear implication at the time that these definitions would set the tone for the future directives that had already been sketched out in the 1988 Green Paper including databases over which it was very influential'. He added 'in this regard, the originality criterion was a key definition as it is clearly considerably higher in the droit d'auteur countries than in the copyright countries like the UK which had sweat of brow protection. This was resolved in the software directive and had a direct impact on database directive and the whole of tone of European copyright harmonisation'.

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 ?

The interviewee commented 'During the passage of the directive from the pre-proposal period through to its first reading in Parliament (1990-1993) it is very important to remember that the database industry particularly in the UK was still tied to its historical links with the paper publishing industry. As a result this publishing tradition expressed by people like Charles Clarke and Clive Bradley from the PA(Publishers Association) had a strong influence on the initial approach adopted, including on my

own. He added ' this history is evident even in the naming of the different groups representing publishers interests i.e. you the NPA(newspapers), PPA(periodical), MPA(magazine) and then the PA for books, which to me just illustrates the arrogance of the PA in that publishing must automatically be book publishing'.

The interviewee commented 'that the electronic publishing industry took its lead in the copyright field from the print based industry traditions is not actually that surprising considering that at this time almost all of those involved in electronic publishing had come directly from careers in print based publishing industries. However by the mid-1990's this situation had begun to change as a result not only of technological developments and the expansion of electronic publishing but also because many of the individuals now working in electronic publishing have never worked in any other type of publishing and have developed their publishing skills solely in electronic environments for example, many electronic databases are now being built without any direct reference to print sources'.

On the database directive the interviewee commented 'At the time of the formal proposal the EIIA was against the introduction of the sui generis right because we felt that firstly it would be complex and give rise to a lot of litigation and secondly because it was in effect reducing the protection available to databases in the UK under the 1988 Copyright, Designs and Patents Act. In discussions with the Commission I can remember that throughout Mrs. Czarnota & Mr. Verstrygne did their hard-cop/soft-cop routine until their gradually coaxed the EIIA around in to accepting that sui generis right was necessary to achieve European harmonisation and provided adequate protection for our electronic products'.

The interviewee commented ' One example of the hard-cop approach used by Mr. Verstrygne was when he came along to a meeting at which I was speaking on the database directive and proceeded to actually interrupt my speech to tell the audience that my opinion on the directive was dangerous and that if they as a whole didn't take the opportunity of the directive then it would be a very long time before the Commission would look again at the issue of database protection. As you can imagine I was furious with him and I responded by telling the audience that here was an example of the servant telling the master what to do'.

The interviewee commented 'in the European Parliament I know that before the first reading there was a hearing organised at which some industry representatives made presentations e.g. by Barry Mahon from EUSIDIC(European Association of Information Services) and Barry Wojcik from Dun and Bradstreet but personally speaking I can't remember having had much success in dealing with Mr.Garcia-Amigos who was the rapporteur although Geoff Hoon who shadowed him for the socialist grouping was more receptive and a real powerhouse generally'.

The interviewee added 'I can also recall that we met with the Commission on several occasions to discuss the issue of the amount of change that would be required of a database within any single year to qualify for a further period of sui generis protection. This eligibility for de facto perpetual protection was how we understood the directive and at our meetings the Commission did not deny it, so we became more confident about the strength of the protection being offered which is the main reason we dropped our opposition to the sui generis approach'.

The interviewee added 'In my contacts with the IIA the general tone was one of them whispering in the EIIA's ear - are you sure that this dual approach is the way to go. Although this response was reasonably typical of the IIA's view on any non-US legislative move that might have implications for the US industry'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee referred to his previous answers and acknowledge that the views of the EIIA had changed particularly concerning the sui generis right but that overall they had always been in favour of the principle of harmonising the protection available to electronic database across the EU.

Looking towards the directive's implementation in the UK the interviewee commented 'Fortunately the directive remains imprecise where it needs to be imprecise and so it will be possible to move forward'.

The interviewee added 'During the negotiations themselves a key point of contention throughout was the compulsory licensing provisions which the EIIA did not want and actively lobbied against it. Personally however I felt a little two' faced about this issue because in the original proposal the provisions were attached to both public and private sector databases which I could see tied in directly with my work and active lobbying on the commercialisation of public sector information. Although this implicated a bigger and wider discussion about VADS(value added data services) and their development if compulsory licenses had been introduced for public sector data sets it would certainly have encouraged the development of this sector'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented 'The EIIA represents the information industry and so during the discussions on the database directive we organised meetings with the Commission to which we invited our members and some guests including FT profile, Dun & Bradstreet, and EUSIDIC we also had some contacts with other groups involved in lobbying on the directive including Reuters'.

The interviewee commented that while it was difficult to assess influence they were satisfied with the directive overall.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented 'many of the UK's largest database producers exhibited a most arrogant approach towards the proposal, at least initially, and argued that the directive was unnecessary and not of concern to them. Indeed their general attitude tended to be - we know our customers and the proposal while perhaps interesting to trade associations is not of interest to us or them'. He added 'Of course getting individual companies interested in any European legislative move is always difficult especially when their products are not going to be directly affected e.g. Reuters dynamic databases. He added 'this rather apathetic stance changed later on in the negotiations as interest in the information society and the buzz around multimedia and the Internet grew'.

The interviewee commented 'One exception to this rather arrogant approach was from Barry Wojcik of Dun & Bradstreet(D&B) who was very active throughout, although clearly the US base of D&B and his clear understanding of the Feist decision may have contributed to the desire to push for European protection'. The interviewee added 'Some other more medium size companies for example Chadwyck-Healey also took a more active role in discussions on the directive particularly in the UK through lobbying of Graham Jenkins in the Patent Office.

The interviewee commented 'Perhaps not surprisingly EUSIDIC had a hell of a run in with the directive, because as a club of users and suppliers of information it had serious problems reaching internal agreement amongst its members on the right balance it wanted in the directive. This contrasts with the EIIA which as a private sector industry lobby didn't have to pull any punches in the discussions'. He added 'The EIIA was and continues to be keen to build a information industry and to encourage commercial investment backed by adequate protection'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that as well as the Feist case international developments such as the TRIPS agreement had a bearing on the database discussions as did the development of debates on the information society etc.

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 ?

The interviewee commented ' as the most recent copyright directive and one adopted in the middle of discussions on the information society, the internet and the information economy it was somewhat inevitable that the directive would become better known within copyright circles but I don't think that the general public are particularly familiar with it'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'I can't really comment on the whole process but certainly I have never had any major difficulties in getting access to Commission officials or officials in the UK Patent Office to discuss legislative proposals that are of concern'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'This is a difficult one to answer because in my experience increasingly those working in the electronic publishing industry are beginning to question whether copyright is the appropriate vehicle for the protection of their works which has led to us being caste as unreliable on copyright by lobbyists from the traditional book publishers like Clive Bradley'.

The interviewee added ' For us it is more a question of getting the balance correct between access and control of works and in this regard there have clearly been many potentially useful new alternatives in the recent past including identification systems and technical systems for the protection of works which may supersede copyright. Obviously I am very conscious of the fact that to have got to the strong position that the rights holder industries are now, (including electronic publishers), it was very necessary to have the copyright system and I wouldn't try to deny that it has been very effective and flexible in the past. But in my opinion the existing system is part of a transition to other forms of control over works in electronic environments'.

The interviewee added 'In a sense the database directive might prove to be most significant for having highlighted explicitly the fact that copyright for all its strengths is not capable of protecting everything as the sui generis right proves. In my opinion people like Clive Bradley and other publishing lobbyists like Laurence Kaye from the EPC look at things only through a copyright lens and view it as capable of adaptation to the new circumstances of digital environments but I think this is partly because of the primacy of book publishing in the UK'.

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

The interviewee commented that he anticipated future proposals for copyright in electronic environments from the Commission and that increasingly the EU would push for harmonisation at the international level.

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 ?

The interviewee didn't have anything to add.

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 ?

The interviewee commented 'In digital environments he was of the opinion that there is unlikely to be long term tolerance of strict use of copyright in the sense of the 'originality criterion' etc... and instead metering, contracts, ECMS will all take up an increasingly important role.

Indeed he went onto say that in terms of threats to copyright, competition law was as big a threat to copyright on the network as anything else - this view coming from his involvement in the Financial

1 Times defense against the UK's MMC (Monopolies and Mergers Commission Report) at which the
2 EIIA submitted oral evidence.

3
4 The interviewee commented that he had the feeling that there is a need to move into a pluralist world
5 for controlling access through brand and neighbouring rights and through access/metering agreements
6 (3rd party protection). He also expressed deep reservations and reluctance to re-visit the exhaustion of
7 rights in copyright debate. In essence copyright is not the only solution available and it will not remain
8 the dominant one in the future.

9
10 e.g. Reuters have recently withdrawn services from LEXIS/NEXIS which in turn has prevented 3rd
11 parties from reprocessing and passing information onto clients i.e. the role of these businesses as
12 intermediaries has been blocked. Here competition may come in on the grounds of Reuters abusing a
13 dominant position even though Reuters own the copyright in the LEXIS/NEXIS on-line service.

14
15 The interviewee's gut feeling was that he didn't believe that competition law at national and European
16 levels would allow copyright to move untrammelled through into the digital world. Indeed we may look
17 back in the future and learn to view the database directive as a weakening or de-constructing of
18 copyright - as part of a longer tradition which has 'watered it down'.

19
20 This in turn may promote the significance of forming unique customer relationships, where it is the
21 service i.e. the value-added that is paid for, whilst the information itself remains free.

22
23 The interviewee commented that 'the nature of the technologies are such that data leaks out everywhere
24 and can be collected and collated but it is the value-added service that you pay for not the information.
25 In his view there was simply a greater commoditisation taking place in the data, information &
26 knowledge pyramid.

27
28 The interviewee added that systems like crown copyright will eventually collapse, a process that has
29 already started as indicated by the fact that public statements, SI's (statutory instruments) and statutes
30 have gone public and the HMSO's adoption of a policy that says that 'if you use a statute - it is
31 presumed you acknowledge the HMSO copyright'.

32
33 The interviewee anticipated that this commoditisation would spread outwards gradually and that
34 companies like Reuters would perhaps even adopt policies making their newlines free within 10-15
35 years.

36
37 **13. How would you characterise the relationships in digital environments between copyright**
38 **policy and other areas of information policy such as Privacy ?**

39
40 The interviewee commented 'I can recognise relationships between privacy and copyright but I can also
41 see copyright itself as giving way to a system of add on rights like contracts, site licenses, metering and
42 the use of electronic copyright management systems'.

43
44 For the interviewee the major concern was the need to encourage the development of VADS
45 particularly through the commercialisation of public sector information

46
47 The interviewee acknowledged problems for privacy including on control and violation would occur
48 but he anticipated that the boundaries of the problem would themselves shift as people accepted re-use
49 of what they previously considered personal information. Naturally these uses will have to be patrolled
50 and there will be difficulties but people want to operate in these digital environments and so will accept
51 that things will shift a lot and different boundaries will operate.

52
53 **14. How adequately do you think current European Information policy processes handle these**
54 **interrelationships?**

55
56 The interview was ended at this point.

57
58 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
59 **concerns over the issues of democratic participation and accountability ?**

INTERVIEW no. 28

Vice-President of the Information Industry Association (IIA)

Preliminary Comments by Interviewee

None.

B. Policy formulation for the Database Directive: the issues and processes

(NB. This interviewee was conducted by telephone)

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

The interviewee commented ' I was not personally involved in the early European database discussions but I know from our files that at the time of the European Commission's Copyright Green Paper in 1988 a submission was made by the IIA(Information Industry Association) on its database chapter and that when the European Commission held a public hearing on the issue in April 1990 Mr.Metalitz , Mr.Goldberg and Mr.Bremner represented the IIA'.

The interviewee added that he was aware that at this initial hearing the IIA had supported the principle of protecting databases by copyright but had been against the introduction of the sui generis right on the basis that there was no international precedent for this type of protection and that it would be inconsistent with the Berne Convention.

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 ?

The interviewee commented that throughout the discussion of the database directive the IIA kept up close contacts with Mr.David Worlock of the EIIA(European Information Industry Association) who provided them with information on the development of the database discussions and also had contacts with AMCHAM(American Chamber of Commerce)based in Brussels and representatives from some of our members who have operations in Europe including Dun & Bradstreet and Reuters.

The interviewee also commented that the IIA participated in discussions on the directive towards the end of 1992 when Mrs.Czarnota was in the USA promoting the directive during which it expressed concern about the reciprocity provisions. The IIA continued to monitor the development of the proposal through its negotiations in the European Council of Ministers and prior to the Common position in June/July 1995 submitted a further position paper to Mr. Mogg (Director-General DGXV) of the European Commission expressing concerns about the proposed directive including on the exceptions permissible under both copyright and the sui generis, the compulsory license provisions and the reciprocity clause.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that since the European Commission first released its proposal a great deal had changed including the attempt to get international agreement on the database treaty at the WIPO diplomatic conference and the development of proposals in the US for a Bill to protect databases (H.R. 3531 -database investment and intellectual property antipiracy Act) both of which the IIA supported.

The interviewee commented that the key concern for the IIA remained how to redress the competitive disadvantage that many US producers operating within the EU would face as a result of being denied protection under the terms of the database directive once it was implemented on 01/0198.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee referred to his previous comments

1 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
2 **Database directive ? How was this influence exerted during the policy process ?**
3

4 The interviewee commented that he was not sufficiently familiar with the directive or what occurred
5 during the negotiation of the directive to be able to answer this question.
6

7 **6. Did any international policy developments impact on the outcome of the Directive?**
8

9 The interviewee commented that for the IIA the Feist Publications v. Rural Telephone(1991) case
10 remained the most significant in terms of creating uncertainty about the level of protection afforded by
11 US copyright law to databases. Since Feist subsequent cases have perpetuated this uncertainty for
12 example Pro-CD v. Zeidenberg.
13

14 The interviewee added that he was not sure how much of an impact the Feist decision had on
15 encouraging the European Commission to initiate its proposal on databases.
16

17 **7. How do you account for higher public profile of the Database directive ? Do you agree with the**
18 **characterisation of the Directive as the Cornerstone of the Multimedia society ?**
19

20 The interviewee commented that the directive was clearly better known because the issue of database
21 protection had not only been discussed in the EU but also the US, in WIPO and within the
22 TRIPS(GATT)agreement.
23

24 The interviewee commented that if there was harmonised global protection for databases this would
25 certainly be a building block for the information society but the EU directive on its own without any
26 harmonisation on the sui generis right internationally and with its reciprocity clause was in fact only
27 excentuating international differences in the protection available to databases and causing problems for
28 some of the IIA's members operating in the EU.
29

30 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
31 **with copyright were represented in the directive ?**
32

33 The interviewee commented that he was not sufficiently familiar with the directive or what occurred
34 during the negotiation of the directive to be able to answer this question.
35

36 **C. European policy for Copyright**

37 (The interviewee was terminated at this point)

38 **9. How would you assess the significance of the Database directive for current and future**
39 **European copyright policy formulation ?**
40

41 **10. As the global Information Society develops what role will copyright harmonisation play**
42 **in the process of European integration ?**
43

44 **11. Which other factors, if any, would you identify as being significant in affecting how**
45 **copyright issues are framed and discussed at the European level ?**
46

47 **D. Information policy-making and Copyright in the digital age**

48
49 **12. What threats and opportunities would you identify from the extension of copyright concepts**
50 **into the digital realm ?**
51

52 **13. How would you characterise the relationships in digital environments between copyright**
53 **policy and other areas of information policy such as Privacy ?**
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55 **14. How adequately do you think current European Information policy processes handle these**
56 **interrelationships?**
57

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

INTERVIEW no. 29

Professional EU lobby consultant B/W Partners

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that he first became involved in European discussions on databases during the time he was working for ECIS (European Committee for Interoperable Systems) on the software directive from 1989 onwards. Prior to this the interviewee acknowledged that he had followed the discussions leading up to and including the Commission's 1988 Copyright Green Paper at which time he was involved with AMCHAM(EC Committee of the American Chamber of Commerce).

The interviewee commented that 'the Commission's policy proposal on databases, like all its other intellectual property rights (IPRs) proposals originated from basically the same period. From about 1984 - 1985 onwards IPRs started to become a key area of policy debate, partly because the TRIPS negotiations raised their profile, and then more importantly in Europe, (particularly in the case of computer software), the Commission released its Single Market White Paper in 1985'. He added ' from then on companies, predominantly US companies began to push for more IPR protection at the international level first through TRIPS and then later on through WIPO as was illustrated at the recent diplomatic conference'.

The interviewee commented that 'In Europe the whole Single Market project and the removal of obstacles to trade instigated the Commission's drive for harmonisation and this created the fundamental tension that underlies all European discussions which is between the different laws and regulations in Member States and the harmonised rules of the internal market. Following Maastricht this tension is explicit in questions over subsidiarity'.

In terms of the database directive specifically the interviewee commented 'basically what happened was that in late 1991 or early 1992 early drafts of the Commission's proposal started to become available amongst some of the interested parties in Brussels and I along with a friend (Thomas Vinje) received a copy and proceeded to analyse the proposal together. At the time I didn't have any clients who were interested in it and so the analysis we did was initially motivated by almost an academic interest in the text. Having completed a 3-4 page draft response we then sent this out ourselves to a number of our contacts including to the, then Chairman of the UNICE(Union of Industrial and Employers Confederations of Europe) copyright working group Fred Blakemore(IBM)'.

The interviewee added that ' during the initial discussions there was something of a roll-over effect from the lobbying that had taken place on the software directive, mainly because the Commission officials involved were the same (Mr.Verstrygne & Mrs.Czarnota), as a result the issues and the tensions that arose in those negotiations were a factor in how people viewed the proposal'.

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 ?

The interviewee commented ' I have been involved in European lobbying on IPR issues for more than 10 years and I have as a result always had a considerable amount of contact with Commission officials (DGXV). From my own experience of Mrs.Czarnota both on the software and database directives I always found her to be very open, which is different from the current rather closed approach of DGXV officials now. She was always prepared to hand out work in progress (i.e. unofficial drafts) and to discuss issues, although after the lobbying on the software directive her relations with certain groups became relatively strained on the database directive'. The interviewee added that 'I also spoke to officials from DGIV(Competition) and DGXIII(Telecommunications & Information Market) from who I got the impression that they were not going to oppose the directive proposal'.

In terms of his own involvement the interviewee commented that he was only really actively involved briefly at the beginning - in the period before and just after the release of the Commission's proposal. He added ' I can recall being doubtful as to whether there was a need for this directive and having followed it since I still hold the same opinion. For me, any piece of legislation should only be proposed if it is based on a real need to regulate something rather than just on a particular Commission directorate wanting to extend its own sphere of competence. In my opinion the database directive was based on the latter rather than the former'.

The interviewee added ' While opposition to the directive was rather patchy and fragmented the main thrust of it was focused around a couple of basic points: Firstly, the view that the proposal was unnecessary and that it was dangerous to create further monopoly rights when there were no clear reasons for them, and secondly, the view that if there was going to be a directive then it was doubtful if the sui generis approach was the best way forward and that more consideration needed to be given to the available alternatives (e.g. unfair competition rules)'.

The interviewee commented that ' I was never really convinced by reasons the Commission provided for justifying the need for the database directive. These included references to the Danish catalogue right and the low threshold of originality in the UK, but for me these arguments were always too theoretical whilst on the ground practical questions concerning the implications of giving out a new monopoly right were far from satisfactorily answered'. He added 'in terms of sui generis approach I could never think of the kind of database that wasn't sufficiently original in selection and arrangement to get copyright protection except for a telephone directory and yet it wasn't as a result of hard lobbying from directory publishers about their need for protection that led to the directive proposal'.

The interviewee commented that 'In my opinion the database directive was shaped to a large extent by the UK not least because Mrs. Czarnota was English, as were most of her close confidants including John Stevens [Reuters], Charles Clarke[FEP], and Barry Wojcik[Dun & Bradstreet]. The UK had the largest database industry in Europe and one of the most advanced pieces of intellectual property legislation in Europe in the CDP(Copyright , Designs and patents Act, 1988) which US companies had been active in trying to shape because they saw the UK as an important gateway for them into the European market'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'No they didn't' and he then referred to his previous comments.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee reiterated his previous comments that he was only involved at the beginning of the policy-making process and so did not get to the stage of forming alliances or trying to exert any direct influence over 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 ?

The interviewee commented 'It is important when considering trying to influence a directive to realise that almost always the Commission officials responsible for preparing a proposal don't have a lot of resources which makes them eager to have input from outside and particularly from industry. In the case of the database proposal it was basically Mrs.Czarnota who wrote it and so it is not surprising that representatives from UK industry, most of whom she already knew from the software directive, were happy to feed her with lots of documents, facts and figures and to give their public and private support to the proposal'.

The interviewee added 'without resorting to cliches these representatives were making the biggest investments in the database industry, they were certainly the most concentrated and consistent in their contact with the Commission and quite unsurprisingly they had the greatest influence in shaping the proposal'. In this regard the interviewee mentioned Charles Clarke from the Publishers Association,

Roger Broadie from ICL, Barry Wojcik from Dun & Bradstreet (who he said was very active) and also Catherine Stewart from Reuters.

The interviewee commented that 'overlaid on top of this direct contact is the role that personality plays in what becomes the politics of policy-making. In other words, those industry representatives who managed to build-up a good rapport with Mrs. Czarnota were better able to influence her in the preparation of the proposal and subsequent changes to it. From memory these 'friends' certainly were able to put her at her ease after the stress of the software directive'.

The interviewee commented that Mr. Verstrygne, (Mrs.Czarnota's immediate boss in the Commission) was influential and he said ' Mr.Verstrygne was a big political player who was drafted into DGIII from the cabinet of President Delor at a time when the software directive negotiations had become bogged down. He used sheer political power to get things moving again by going around and brokering between cabinets and between Commissioners in the college until he had built up a strong base of support with which he went and confronted the industry and made them realise that the directive was going to happen with or without them and that they had better get on board'. He added 'Mr.Verstrygne also ensured that the database proposal was adopted by the Commission and gave Mrs.Czarnota support until he left DGIII, I think about 1993'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented 'prior to the release of the Commission's database proposal, the US Supreme Court came out against the sweat of brow defense for a telephone directory in the Feist case. This judgement, although it was not a major influence in the European discussions, was certainly in the background and did as far as I can remember, raise a point of discussion over the directive's reciprocity clause'. The interviewee also recalled ' later on there was another US case in New York concerning a Chinese directory list where a Chinese company had removed all the Chinese names from the New York telephone directory to create a Chinese name directory. This led to an action for copyright infringement from New York's telephone directory publisher which was again rejected because the derivative work didn't compete in the same market'.

The interviewee also commented that the on-going TRIPS negotiations particularly when databases were added (Article 10(2).) raised the profile of the European discussions.

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 ?

The interviewee commented that he wasn't sure that the database directive had a particularly high public profile but he agreed its profile was higher than in the past which he accounted for because it had been referred to by the Commission as an important foundation for its future actions in the digital domain.

The interviewee commented 'the database directive is certainly the cornerstone of the multimedia society if you are a primary compiler of information (i.e. data warehouse) because it facilitates you in expanding your compiling activities whilst at the same time sitting back and using your 'creativity stores' as banks. All these type of companies have to do is wait around until some-one wants to use their information and then to collect royalty payments for the use of it. However, for secondary compilers of information such as producers of multimedia products the directive is likely to inhibit their activities as they have to pay more and more royalties to primary compilers of information'.

The interviewee commented 'Quite apart from these issues the continued expansion of primary compiling poses a threat to the public domain. In my opinion there is a real need to draw a line under what it is legitimate to put under IPR protection and what should be retained in the public domain for all to use. Coming from a droit d'auteur tradition I feel that its higher originality requirement is better than the copyright approach of the common law system as used in the UK. It is this more the common law approach adopted in the database directive that raises for me growing concerns about the public domain'. In this regard the interviewee commented that he was aware that some lobbying groups 'have recently been arguing that at a European level as we approach the information age there appears to be a move increasingly towards a common law approach'.

The interviewee commented that 'obviously investment per se in information products is definitely worth protecting but I don't think that IPRs like the sui generis right are the appropriate way forward especially in the digital world. As I have said I think that there is room to explore the use of unfair competition rules or other alternative solutions which is something the Commission simply haven't done'.

He added 'I am not in favour of the sui generis right because I fear it has the potential to block or inhibit further creativity as innovators are prevented from creating new products because they can't afford the royalties charged by database owners. More than this there is a danger that the 15 year term of sui generis protection will end up giving in effect eternal rolling protection because the issue of proof of further substantial investment lies with the rights holder. I also think it is very dangerous as we move into an *information* society to give collectors of information the power (through royalties/licenses) to control the actions of innovators/creators who wish to build on others ideas'.

He added that in his opinion 'we have to learn to live with the technology and this includes providing individuals with use of information on the networks'. He added as an example that multimedia producers when creating web pages often just use the cut and paste facility to make new compilations from their cache memory in which the origin of the material used is not clear. 'This type of use must be deemed legitimate because it does not injure the economic rights of the original rights holders in as much as it is not competing in the same market and creates a totally different product'.

He commented 'while I am totally against piracy there is also a danger in rights holders trying to stifle this kind of creativity by claims of copyright infringement. In saying this I am only echoing the views of a number of eminent copyright experts such as Justice Laddie and Anthony Mason QC both of whom have written in EIPR that copyright has become too strong and that it is important to realise that not all copying is bad'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that in his experience European consultation procedures were often more open than those that take place at the Member State level however he acknowledged that there was in copyright discussions a strong over-representation of rights holders that made it potentially problematic to get alternative opinions heard. He also acknowledged that officials in DGXV had a very pro-industry outlook in comparison to other Commission directorates involved in these issues e.g. DGXIII.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'It is important to make a distinction between the database directive as a document and as it appears when implemented and enforced in the Member States because I would anticipate that there will be a considerable amount of difference across the EU after its implementation'.

The interviewee added 'Looking to the future from a pessimists point of view there is the potential for total control to be exerted by primary collectors over their information. However in practice I don't think this will happen partly because as a business strategy it is in the interests of the database rights holders to wait until businesses using their material are successful before pouncing on them to reap royalty payments'.

On future copyright proposals the interviewee commented ' the Commission have already indicated in their follow-up communication that they will shortly be releasing a directive proposal on copyright exceptions but when it arrives I think that it will be considerably less ambitious than some might have hoped. This is because in recent months in my discussions with DGXV officials many have begun to argue that both moral rights and exceptions are not essential to the internal market. This shift in perspective is in my opinion above all to do with the change in the status of the Commission, which has occurred under the Presidency of Jacques Santer. In comparison with the dynamic and confident

Commission of President Delor it is now something of a non-Commission. Since Maastricht there has been a power vacuum in the EU which has been slowly filled by the Member States re-affirming their control and the Commission concentrating more on expansion than integration'.

The interviewee added 'this shift is also an example of the way the Commission is adept at using the internal market argument when it suits its purpose, as in the database directive and then drops it when it wants to pull back from policy action'.

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

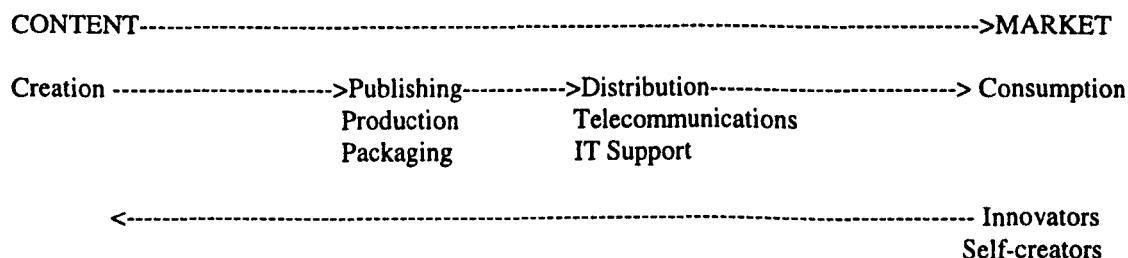
The interviewee reiterated that as the follow-up communication from the Commission indicated copyright harmonisation was certainly going to continue and as well as initiatives on copyright exceptions and legal protection for electronic copyright management systems (ECMS) he was aware that 'there will shortly be a proposal for a copyright directive covering phonograms on which companies like SONY, Polygram and IFPI(International Federation of the Phonographic Industry) have already been lobbying frantically. I also don't think that database proposal at WIPO is dead and it will be returned to again in the not too distance future'.

The interviewee commented ' Clearly globalisation requires decision-making at a high level and copyright policy is certainly part of this which is why I think in some respects national capitals are increasingly losing their relevance in this type of policy-making although they clearly have a role to play in other types.

Unfortunately at the present moment at the European level there is a lack of political leadership and a general lack of public support, both of which are necessary for this type of policy-making to be successful. It is the rule of anarchy with decisions taken in reaction to sensationalism in the media, issues and priorities change from day-to-day, there is a lack of leadership, a lack of vision particularly as Europe has lost Jacques Delor, Francois Mitterand and Kohl's position becomes increasingly fragile'.

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 ?

The interviewee commented that at the root of the problems with which copyright policy was now trying to cope was a new cycle in the production of information products. In his opinion there was still a lack of proper conceptualisation of this cycle that he viewed as concerning a number of key actors involved in the creation and distribution of products into the market place:



The interviewee commented 'the winners in the digital world will be those who control the distribution channels, although it would be a bad thing if telecommunications operators, broadcasters or publishers became dominant. But I think that there will end up being a large number of information superhighways and a range of distribution channels available for the new information products that are being developed. Of course the flipside of this argument is that there will be a strong temptation for these large players simply to merge together and control the lot'. He added ' I agree that the large number of recent mergers in the information and communication industries seems to support this view but the approach of publishers exhibited most recently at WIPO conference suggests a counter-trend, especially over the transient copies issue which pushed telecommunications operators into a corner over liability and forced them into action. As a result I can see the possibility that telecommunications operators may just cut out publishers all together and attempt to control the whole of the value chain'.

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 ?

The interviewee commented that the digital environment poses obvious threats to copyright regimes but what is important is the ability of policy-makers to respond to these challenges and in comparison with the US he felt that Europe is not in a strong position in this regard. 'In the US because the different interests groups concerned with these issues appear better able to ensure that their opinions are heard by policy-makers the balance of rights appears to be better than in Europe. Already the US Courts and legislature are better equipped and more knowledgeable on these issues than in Europe where policy-makers are still ignorant of technology and worse, most of them appear not to be interested to learn. The courts also appear to be poorly equipped to deal with these new technological advances and their implications for existing legal regimes'. He added 'Nevertheless the EU also seems to be in too great a hurry to legislate while in the US they appear more prepared to wait to see how the digital environment develops'.

The interviewee commented 'In Europe there is also a considerable imbalance amongst lobbyists, with some of the large rights holder lobbyists very well mobilised and connected and very keen to push for all sorts of protection including IPRs, Contracts, ECMS to enable them to be in a position where they can control everything from production to market e.g. Bertelsmann'.

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

The interviewee commented that one of the obvious interrelationships between other aspects of information policy concerned the commercialisation of public sector information where he said 'I am totally against the principle of crown copyright in the UK on the basis that if a government official produces work paid for by taxpayers it should be available to those taxpayers with a minimum of processing either for free or at very low cost'. He added 'This would not exclude a positive role for intermediaries who can add value to this government information'.

On electronic copyright management systems(ECMS) the interviewee commented that 'these systems are potentially useful tools for policing the networked environment as long as they are used to police what they are intended to police and where it is legitimate to do so. Unfortunately there is however a strong and real danger that this is not what will happen and that such systems will, once they are up and running, be used to protect and police more than is official allowed'. The interviewee added that this tendency to abuse rights once given could be illustrated by an example from the music industry. 'This industry is traditionally very conservative yet they continue to put out CD compilations of songs that are all out of copyright and then put their own copyright on them which is not only surprising but shows how legitimate protections may be abused once they have been given. My experience suggests to me that wherever possible the rights holder industries will try to over-extend protections even to things that are not covered'.

The interviewee commented 'although the use of ECMS is legitimate to protect copyright works, their use will in my opinion generate an irresistible temptation to use these systems to protect other things as well and to massively increase the control rights holders exert over information. As a result ECMS's are potentially very dangerous (e.g. to users privacy) and especially in the light of the proposals to introduce legal protection from circumvention for such systems'. In this regard the interviewee referred to an article written by Thomas Vinje in EIPR on the dangers of ECMS entitled 'A Brave New World of Technical Protection Systems: Will there Still Be Room for Copyright?(1996) EIPR 8 pp.431-440'.

The interviewee added 'another danger of these systems is that the data gathering that will occur and the nature of the organisations who will collect it into databases will have a serious impact on the future of the public domain and even creativity'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that 'Even in the field of copyright I am aware that a number of industry players are beginning to wake up to these interrelationships, particularly on the question of privacy. But amongst the ordinary citizens of Europe there is still a real lack of awareness over the way the internet is currently being used to collect data on them. Therefore I think that there will be in the near future a strong backlash against these uses once they reach the political consciousness of politicians who will then probably respond quickly'.

The interviewee commented 'I certainly think that industry has a role to play in informing the public of these developments and indeed as part of my involvement in the EMF (European Multimedia Forum) that is what I am trying to do. In my own view once people are generally aware of these developments I think they will come to the same conclusions as me which are that anonymity will not be sustainable on-line but what data, who can use it, how it can be used and when and where will all be important questions needing to be addressed'.

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 ?

The interviewee commented that improving European policy-making was evolutionary and that there would be further changes as the EU expanded. Ultimately in his opinion the system could work very effectively already if the EU had strong leadership with vision. He added that the single currency would if successful possibly lead to a new round of dynamism in the EU.

The interviewee commented 'For me personally democracy is not the rule of the masses but rather a system of checks and balances that prevents dictatorship i.e. representative government, but it is clear that to work it requires leaders with vision which the EU currently lacks'. He added that as such he didn't have any major concerns about democratic participation and accountability.

INTERVIEW no. 30
Legal Counsel for Phillips and Union of Industrial and Employers' Confederations of Europe(UNICE)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that he could recall discussion of legal protection for electronic databases in the Commission's 1988 Green Paper and also attending the Commission's 1990 public hearing prior to the release of the formal proposal in 1992. The interviewee commented that during his involvement in the discussions on the directive he act both as a representative of his own company and as a member of UNICE's copyright committee. Between the public hearing and formal proposal the interviewee recalled that there was little discussion at the European level of the topic or at least he was not personally involved in discussion of the various versions draft versions that circulated in copyright circles before the proposal was published.

The interviewee commented that although during the passage of the database directive extensive lobbying occurred, it was 'in no way to the same extent as the lobbying that occurred on the software directive' in which he had also been involved and which he described as 'high octane lobbying'. He said that while an initial policy statement was prepared on the directive proposal in late 1992 he personally became more active in the database directive after the first reading in the European Parliament.

The interviewee commented that 'as a policy issue the protection of databases developed as this sector became increasingly economically important' but as far as he could recall 'it was not a policy area that at the time the database industry was particularly concerned about, even though most of them were quick to support the idea of more protection'. Indeed as far as he could recall the database proposal was generated very much by the Commission working on its own rather than in conjunction with industry. The first real industry involvement was at the 1990 hearing where he recalled 'the genuine voices of the database industry were represented'. Aside from the major industry players like Reuters and Reed and information industry associations like the EIIA and EUSIDIC there were 'a surprisingly diverse bunch of representatives from among others horse-racing and sports results database companies'.

In the opinion of the interviewee it is really only since the mid-1990's with the 'rise and rise of the Internet that databases have really come to the fore'. The interviewee said that this was likely to continue especially with the latest 'voice-processing multi-working environments that have been developed following the link up of database sub-sets with Expert systems e.g. the Karen Car Navigation systems'

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 ?

The interviewee commented that following the formal release of the proposal he was involved in discussions with other representatives on the UNICE copyright committee in formulating a position. He also recalled being invited by the rapporteur of the ECOSOC Mr. Robert Moreland, to attend one of its meetings to express his views. The interviewee added that this replicated his involvement in the software directive where he also attended a meeting of the ECOSOC as an expert, again where Mr. Moreland was the Rapporteur. He further commented that his experience with the ECOSOC left him with the distinct impression that it 'is not an influential body in the European policy process and in terms of lobbying is not a good use of company resources to bother to attend its meetings'. Even at this stage his company and UNICE had already allocated more resources to lobbying in the Parliament. He

1 added however that the Parliament had to be 'approached with kid gloves which meant less direct
2 lobbying and more sending of position papers'.

3
4 The interviewee recalled that during this period he kept up with events taking place in the
5 Parliamentary first reading through his company's European Liason Officer and through the UNICE
6 copyright committee. He added that 'the Parliament is always difficult to approach and there are
7 potential dangers because with a subject as complex as copyright, issues can easily be misunderstood or
8 implications misconstrued such that they are over-powered by politics which can then lead onto
9 unpredictable and potentially negative reactions'.

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11 The interviewee also recalled several meetings over the period of his involvement with the database
12 discussions with the Commission - Mrs. Czarnota, Mr.Gaster and Mr.Vandoren through whom he
13 remained aware of the Council discussions.

14
15 **3. Did your opinions change during your involvement with these discussions ?**

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17 The interviewee commented that while his views on the directive had changed little he was aware that
18 the context into which the adopted text emerged had. The interviewee acknowledged that although
19 'there was some resistance towards a sui generis type solution' the vast majority of industry
20 representatives supported 'the principle of offering copyright protection to databases as collections' and
21 the 'need to protect database producers investments from unfair competition'.

22
23 Following the amended proposal the interviewee recalled that UNICE continued to lobby for the
24 extension of the directive to cover non-electronic as well as electronic databases, for rightsholders to
25 hold all employees rights and against the compulsory license provision.

26
27 The interviewee added that just days before the Council's common position UNICE produced a further
28 position paper which it submitted to the Council working group. In this document it welcomed the
29 extension of the directive to cover all databases but pushed for great clarity so that 'multimedia
30 products were not automatically covered by the directive as it might unsettle existing protection for
31 some audio-visual products' UNICE also continued to push for the removal of any exceptions to the
32 reproduction right for electronic databases and the compulsory license provisions. UNICE was also
33 eager for national treatment rather than reciprocity for the sui generis right and lobbied hard against the
34 restrictions on contractual freedom.

35
36 **4. During the discussions with whom did you form alliances ? How influential do you feel
37 perspectives like your own were in shaping the directive?**

38
39 The interviewee commented that he personally did not form any alliances per se although of course he
40 pointed out that UNICE was an alliance of sorts itself. Aside from this he acknowledged that as a result
41 of his experience and attendance at numerous European level discussions and conferences on copyright
42 he had good contacts with many representatives of other right-holder groups. In the context of the
43 database directive he did recall talking to Dr.Andreas Rowold from EUROBIT and with
44 representatives from IFPI.

45
46 The interviewee also recalled that there was some opposition to aspects of the directive from Mr.Phillip
47 Wacker (now from the European Multimedia Forum) who he said 'decided to rehearse arguments on
48 inter-operability that were little or nothing to do with the database directive and were more a throw-
49 back to the heavy lobbying on the software directive'. The interviewee also recalled some concerns
50 over the position being taken up by EBLIDA. Whilst he was ready to acknowledge that 'libraries in
51 some instances may well have legitimate concerns but in practice their behaviour remains problematic'.

52
53 In terms of influence the interviewee commented that it was always difficult to assess how significant
54 any single organisation's contribution to a policy debate might be. However in the context of the
55 database directive the focus of their lobbying was mostly with the Commission who generally seemed
56 receptive to their concerns and as the adopted directive was reasonably satisfactory the interviewee said
57 that he felt it fair to assume that the lobbying efforts had had a positive impact on the outcome of the

directive. Although he was quick to point out that the Commission did not listen to all of their petitions e.g. Article 3.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee referred to his previous answers but added that in the Council working group he was aware that the Germans, French and British had been the most influential. In this regard, he recalled that while the Germans had raised concerns over the utility of the sui generis right, the French had raised concerns over the scope of the directive, with the British being concerned to maintain their high levels of protection for database producers.

In terms of the policy process itself the interviewee commented that 'it is often very difficult to evaluate how the negotiations are going especially in the Council'. He did however provide one example of these processes taken from his meetings with Mr.Gaster of the Commission in the run up to the common position in April/May 1995. The interviewee commented that he became 'aware of how much Mr. Gaster was treating the directive as his baby' indeed the interviewee said that Mr. Gaster 'certainly appeared to be getting a kick out of the power he had as the principal Commission negotiator'. The interviewee added that on the issue of 'compulsory licensing UNICE's position from the beginning was one of opposition to their introduction' he had made this clear to Mr.Gaster in written submissions and during several face-to-face meetings but he recalled that he never received a definitive answer on whether they would be dropped. The interviewee commented that during this period he had the impression that he was being kept 'hanging on deliberately' and that in some respects he was treated like a child who is told 'now be a good boy and I will see what I can do' - a kind of 'patting them on the head'. Mr.Gaster clearly treated the issue as negotiable while for UNICE this was not the case.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that 'aside from Feist which is probably the most well known case there was also a Dutch case Van Daele v. Romme' he added that this case 'produced an opposite outcome to the Feist decision following a judgement by the Dutch Supreme court'. He recalled these cases being discussed in the context of the database directive as illustrative of the problems of legally protecting electronic information compilations.

The interviewee added that in his estimation 'this juris-prudence is only the tip of the iceberg of what is actually going on in the database and information industry'.

The interviewee also commented that 'the TRIPS agreement and in particular Article 10(2) providing copyright protection for electronic and non-electronic databases was also influential on the argument about extending the scope 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 ?

The interviewee commented that 'as the database discussions evolved clear links emerged between them and the information society initiatives particularly in the Parliament'.

The interviewee said however that he has 'always been strongly against an approach to the database directive that characterises it as some sort of 'cornerstone of the multimedia society'. This was a description that as far as he could recall had originally been coined by DGXV's director Mr.Waterschoot. He added that DGXV also labeled the database directive the 'Multimedia directive' which was in the opinion of the interviewee 'complete nonsense'.

The interviewee acknowledged that 'the directive is important for industry but it is going too far to say that the directive covers or was even designed to cover Multimedia in total'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that in general at the European level he felt that the Commission was open to submissions from all sides of the copyright circle. He acknowledged that there were a large number of rightsholders involved in lobbying but commented that this was hardly surprising as they are also the ones who make all the investments and have the biggest stake in ensuring that protection works.

Overall he was reasonably satisfied with the consultation process although the discussions in Council still raised concerns because they were closed and it was always difficult to find out how the discussions were developing.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that 'already since the adoption of the directive the Commission have released their follow-up communication outlining further directive proposals for the digital environment which clearly use the software and database directives as reference points'. He added that to assess the significance of the directive 'we will have to see how the information society itself develops'.

This stated, the interviewee added that the database directive was a good example of how any future copyright policies are likely to be negotiated. He added that in his experience 'in negotiations in the field of copyright it is not unusual for a lot of changes to be made to a text at the last moment'. He added 'this was certainly the case with the software directive and with the database directive where compulsory licensing was dropped just days before the common position was reached'. The interviewee further commented that 'this seems to be the way of EU negotiations and in the case of the database negotiations the changes that occurred were as a result of a combination of brute political force and necessary IPR fine-tuning'.

The interviewee commented that given large number of issues remain unresolved until the last minute of negotiations 'it is not necessarily a good thing for policy-making in this field or in any other because it means that solutions are shaped by politics rather than by the merits of a particular argument'.

The interviewee commented that 'at the European level politics does not just intervene in the making of policy but also in the location for EU offices'. As an example the interviewee pointed to the siting of the EU trademark office in Alicante, Southern Spain which 'is not exactly convenient to the other offices dealing with intellectual and industrial property in Europe'.

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

The interviewee commented that 'there are likely to be a number of further European copyright directives although as a result of the single directive approach to issues that the Commission prefer inconsistencies between directives will continue which is not good for the internal market'. He acknowledged that increasingly there was a need to address these issues at the international level but he commented that European harmonisation was still an important part of this process.

The interviewee also commented that 'apart from inconsistency between directives there was a danger of eroding copyright as new creations were brought within the domain of intellectual property protection e.g. Bio-Technology directive and Spare Parts directive, and he questioned whether these were issues really best dealt with in the context of IPRs

In the context of the information society the interviewee commented that 'I have some sympathy with the arguments put forward by some academics that copyright is in danger of becoming too strong e.g. Professor Samuelson, but at the same time arguments put forward by the library lobby are often a shame especially those concerning electronic inter-library loans'. The interviewee also expressed the

view that the argument that copyright is finished put forward by some e.g. John Perry Barlow 'tends to confuse freedom of speech arguments with copyright issues, copyright is a multi-billion dollar industry and these arguments tend to muddy the waters of the real problems faced'.

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 ?

The interviewee referred to his previous answers but added 'some compromises occur in copyright policy-making that are well thought out and are driven by a clear understanding of the issues whilst others are not'. In this context he commented that 'as an industry representative I always eager to get the best position for the interests I represent but if a position is reached that is well thought out it is possible to accept it even if it is directly beneficial, however in other circumstances where decisions are made that show real amateurism in their drafting it is easy to become completely disenchanted with the policy process'. i.e. the professionalism in drafting solutions is important to the policy process.

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 ?

The interviewee commented that in the context of the digital environment the key threat was the fact that 'digital fixation and transmission enables easy unauthorised copying, re-use and exploitation'. He added that he did not want to appear to be 'a copyright ogre of multi-national greed, but there are legitimate concerns for rightsholders and solutions will have to be found'.

The interviewee commented that 'in principle copyright should apply and provide the same level of protection for works in both analogue and digital environments'. In his opinion 'no change of the basic principles as embodied in the Berne Convention is necessary, although there may be a need for a wider concept of communication to the public'. The interviewee was also very clear about the need for a 'an explicitly recognised publishers right in respect of multimedia products on the same footing as neighbouring rights with respect to audio-visual products'.

In his opinion 'information access in the widest possible sense is a key issue'. This stated the interviewee felt that 'in recent discussions there has been some confusion over the different issues involved. Whilst cultural concerns linked to debates on information access are legitimate they should not be confused with copyright issues'. Although he acknowledged that part of this confusion arose because 'from a political perspective copyright remains a hot topic'.

On the issue of contracts and licensing the interviewee commented that 'rightsholders should be free to license and make contracts as appropriate. and added 'while libraries have shown an encouraging willingness to discuss one-stop-shop licensing their angle still appears to be how can we get information for free'. The interviewee was not however in favour of a 'compulsory one-stop-shop licensing system because this would restrict rightsholders contractual freedoms'. He added 'the collection societies that operate in Europe cover a variety of types of copyright works and apply to them a variety of licensing structures that differ between the media covered. As a result, given the different interests of the rightsholders a one-stop-shop is undesirable'.

The interviewee commented that he was 'aware that the copyright balance is shifting as we move into the digital realm' In his opinion an important factor in these debates 'is your starting position on issues like pay-per view, per use, or per download., because as differences between media are dissolved so should the differences between what is an what is not allowed i.e. Home taping on video (legal) versus home taping on audio(illegal) in the digital realm these differences do not exist.

The interviewee commented that 'it is perfectly legitimate for rightsholders in on-line environments to want to be paid each and every time a work is accessed'.

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

3
4 The interviewee commented that 'debates on copyright in the digital environment have been muddled
5 by the introduction of debates on freedom of speech and privacy etc. which have little to do with the
6 real problems faced'.

7
8 This stated, he acknowledged that in terms of the information superhighway legal developments were
9 only a part of the debates. In his opinion 'the development of new information products and services
10 will depend on global standardisation of devices, interfaces and conditional access systems'.

11
12 **14. How adequately do you think current European Information policy processes handle these**
13 **interrelationships?**

14
15 The interviewee commented that this was a difficult question to answer in the abstract and as he had
16 mentioned above he was sceptical about the interrelationships between issues such as copyright and
17 freedom of speech or privacy.

18
19 This stated however the interviewee commented that he was aware that in the recitals of the database
20 directive it was stated that its provisions were specifically with prejudice to the data protection directive
21 [recital 48].

22
23 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
24 **concerns over the issues of democratic participation and accountability ?**

25
26 The interviewee referred to his previous answers. The interview also ran out of time.
27

INTERVIEW no. 31
EC Legal Counsel for Bertelsmann

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that prior to joining Bertelsmann in 1992 she had not been aware of the proposal for a directive on databases. However, immediately after her arrival she began preparing a draft response to the formal proposal and thereafter continued working on the directive as it passed to the Parliament on through the Council to its common position and final adoption. She added that during the same period she also worked on a number of other projects including the cable and satellite directive and to some extent some of issues on the copyright aspects overlapped. A few months after the database directive's adoption the interviewee joined Microsoft.

The interviewee commented that 'from our perspective at the time the directive was very much a Commission generated initiative and was something that we certainly had not lobbied for, although once the proposal was released we were happy to contribute to the consultation process'. The interviewee added that 'at the time was we were involved in three key areas: Publishing, Music and Electronic Goods including CD-ROM's (an area from which the company has since pulled out) and so the directive was certainly of interest'.

The interviewee also commented 'this said, at the beginning of the 1990's the electronic database industry remained relatively small and was still predominantly UK based and as far as I can remember the database proposal was being partly pushed forward by Barry Wojcik from Dun & Bradstreet and by representatives from Reuters (including John Stevens & Catherine Stewart)'.

The interviewee added that as far as she could remember 'most of my information about the directive came from, in the Commission Mrs. Czarnota (with whom I had some contact and who was a very competent official), and in industry from our trade association contacts; Alessandra Silvestro (IFPI) and Charles Clarke(FEP)'. She added that during the directive's passage she had little or no contact with Mr.Verstrygne.

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 ?

The interviewee commented that 'throughout the passage of the directive I maintained frequent contact with the Commission officials involved (firstly Mrs. Czarnota and then following her departure, Mr. Gaster and Mr.Vandoren) and also with my own industry contacts in Brussels. Information was also passed through to us from our Bonn office concerning the German national position on the directive as the negotiations continued'. She added that 'at least initially there was very much a UK feel to the discussions'.

The interviewee commented that 'prior to the TRIPS agreement, which added a significant international dimension to the arguments justifying the need for database protection, my analysis of the directive was generally favourable, although it was clear from the outset that the issues of rights clearance and permissible exceptions under the new rights to database producers might create problems for publishers especially in the creation of future multimedia products in the digital environments'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that 'Overall, no, my opinions on the directive did not change. In principle the directive offered greater protection for traditional copyright holders which was beneficial and a

positive development. Also, along with the software directive the database directive was the first real attempt to extend copyright into the digital domain'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that 'at a practical level my involvement in the database discussions consisted of preparing draft responses to the various stages of the directive: proposal, amended proposal, various Council consolidated texts, common position and adopted text. As part of the process of generating and consolidating a coherent company position I liaised on a regular basis with other lawyers in Bertelsmann including Mr. Eric Gahrau'.

She added that 'I also had contacts and several formal meetings with Mrs. Czarnota during which I gathered information on the progress of the negotiations and expressed the company position' (delivered Bertelsmann position papers). She re-iterated that she also had regular contacts with colleagues in the various trade associations of which Bertelsmann is a member including Alessandra Silvestro (formerly IFPI now Time Warner) with whom she acknowledged having continuing good, close contact and also Barry Wojcik of Dun & Bradstreet.

The interviewee commented 'I do not recall forming any alliances per se with other companies or groups during the passage of the directive, but of course I continued to have frequent contacts with other groups interested in obtaining legal protection for their information products'.

The interviewee commented that she also recalled 'a meeting with Mr. Kemper (the German representative in the Council working group) at the Ministry of Justice in Bonn which was very difficult because the German government position at the time was clearly not in favour of a sui generis solution'. The interviewee added 'despite the fact that the sui generis approach was agreed to by the German government and adopted in the final directive I have retained the impression that Germany would always have preferred an unfair competition rules solution'.

The interviewee also recalled that 'during the German Presidency in the second half of 1994 the sui generis right was facing pressure from the German Presidency and so we lobbied hard in Brussels and Bonn to ensure that it was kept on track and on the table'. She added that 'trade association members also made efforts to keep up the lobbying pressure at the Member State level and I regularly exchanged information with them'. In this context the interviewee mentioned the importance of nationality when lobbying and said 'as a German national I tended to talk to Mr. Kemper and Mr. Gaster while Alessandra Silvestro contacted the Italian representative in the Council working group'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that outside of the role of the Commission and Council in shaping the directive in her opinion the most influential lobbyists were: Reuters, Dun & Bradstreet (Mr. Barry Wojcik) and for publishers interests Mr. Charles Clarke.

The interviewee acknowledged that she had little involvement with the European Parliament on the first reading of the directive proposal but recalled 'some contacts with Mrs. Anna Palacio during the second reading, particularly on the continued removal of the compulsory license provisions'. In this regard the interviewee commented that 'my impression was that during the second reading the MEPs involved felt they lacked the expertise to deal with the directive and so instead of exerting influence over it they allowed the Commission officials to guide them'. During this period the interviewee recalled having contacts with Mr. Gaster (Commission).

As for the issues the interviewee recalled 'while we were generally positive about the directive, we had some initial concerns over its scope which was rather too broad and also the compulsory licensing provisions which we were always against'. She added that Article 3 in the original proposal also raised some concerns until it was later removed, but that they were satisfied with the originality criterion which adopted a droit d'auteur approach that followed on from the software directive. She also commented that 'we were happy with the reciprocity clause in the directive'.

The interviewee added 'Overall, in terms of Bertelsmann's priorities the database directive was relatively less important than the other copyright directives, particularly the rental and lending right directive'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that 'the US Feist case was initially discussed in relation to the directive and was cited by the Commission as indicating that there was a problem in the whole area of database protection. The TRIPS agreement was also very significant because not only did it place databases within an international agreement but it provided a basis for those arguing that the directive should be extended to cover all databases'.

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 ?

The interviewee commented that she was skeptical about attributing the title cornerstone of the Multimedia society to any single piece of legislation but taken together the software and database directives 'are a significant attempt to address the issue of copyright protection in the digital environment'. She added that her preferred approach in this context was to examine both directives together.

The interviewee reflected that 'despite dissatisfaction with some aspects of the software directive from certain quarters of the industry, generally it had been a success as was evidenced by the lack of legal actions that had arisen since its adoption and implementation'. In this context the interviewee commented that she was 'very much in favour of both pieces of legislation, particularly to the approach to the reproduction right in the software directive and the approach to the distribution right in the database directive which has adopted the approach of a communication to the public right'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that she was not sure how best to answer this question but from her own experience of the policy process she said that 'the focus of Bertelsmann's lobbying activities was certainly on the Commission officials involved'. She was quick to acknowledge that she was aware of some 'internal differences over the database directive between the different directorate-generals involved' although she added that she did not see this as particularly surprising or even problematic rather 'these differences are an inevitable result of the practical need to divide the responsibilities of each Commission service to focus on a particular policy area with tensions arising at the areas of overlap' (i.e. they are part of the normal process of policy-making at the European level.)

This stated, the interviewee acknowledged that 'At the beginning of my work in the field of copyright policy I tended to only approach officials from DGXV but experience has taught me that it is important and necessary to work with all parts of the Commission concerned with copyright issues if you are to remain fully aware of the development of policy proposals'. (In this regard she mentioned DG1, DGIII, DGX , DGXIII and DGXV to mention just the most important Commission services.)

The interviewee commented that in her experience 'lobbying MEPs is a frustrating activity, particularly as many involved in debating these issues frequently exhibit a lack of expertise and even interest in the legislative proposals'. For example, she commented that recently she had arranged to meet some Parliamentarians in Strasbourg but when she arrived they informed her that they were really too busy to see her but she could have 10 minutes to discuss the issues that she wanted to bring to their attention. The interviewee commented that another problem in dealing with MEPs was that 'it is often very difficult to find them at the Parliament building even when you have made arrangements to meet them'.

This stated , the interviewee commented that 'it would be good to have a stronger Parliament but perhaps unsurprisingly the reality is that there is a perception among the other European institutions and amongst lobby groups that the Parliament tends to show a lack of seriousness with regard to dealing with these issues'. She added that 'even after having had the experience of five directives concerned

with copyright there has been no noticeable improvement in the Parliament's ability to deal with this type of legislation'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee referred to her previous answers. (See Q.7)

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

The interviewee commented 'in the developing information society the approach that has been adopted in the field of copyright in relation to the digital domain appears to recognise that copyright alone is not sufficient to adequately protect information products. As a result a system is emerging of copyright type rights plus additional rights (sui generis) or technical systems (e.g. Electronic Copyright Management Systems - ECMS). In a sense this new approach has been technologically driven as the need to ensure both compliance with and enforcement of rights becomes ever more important'.

The interviewee commented that ' whilst at the European level in much of the copyright harmonisation legislation that has been adopted there has been the tendency to lean towards the droit d'auteur tradition, I sense that in responding to the challenges posed by digital technologies there is an increasing tendency on the part of the Commission to lean towards the copyright tradition. For example, the sui generis right in the database directive in a sense introduces a kind of sweat of brow notion into European copyright regimes. Looking to the future I anticipate the Commission will opt for a specific list of permissible exceptions rather like the UK model in any new proposals on harmonising exceptions at the European level'.

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 ?

The interviewee commented that she had nothing more to add to her previous answers.

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 ?

Following on from her previous answers (see Q.10) the interviewee commented that in responding to the threats posed by the digital environment a major concern has been how best to facilitate commercial activity over the internet. Speaking from her present position within Microsoft she commented that 'for the software industry the threats of pirated software are obvious. In Europe piracy is estimated to be 50% of all the software while in Asia the figure is estimated to be over 90%'. She added that in this context there is clearly a need for action because it in the long run this piracy will make the software industry commercially unviable. This said she was quick to add that 'there are however clearly new and exciting opportunities for the electronic delivery of software which Microsoft is already exploring'.

The interviewee commented 'I am strongly in favour of some form of temporary reproduction right for an environment in which the service or product will travel across the internet with the software that enables you to use that product, because in these contexts both the product and software are the same (i.e. a digital bit stream) and so it will be untenable to have a different legal regime covering the software to the product it provides access to. There is a real need for consistency of treatment in the legal regimes'.

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

The interviewee commented that she was 'well aware of concerns being expressed vocally particularly

1
2 in the USA by user groups warning about the damaging impact on access to information and other
3 areas of information policy that too strong a copyright regime will.' But she commented that she was
4 not convinced by these arguments because 'Microsoft and other companies involved in selling
5 information products on a global scale are not in the business of restricting access to the very products
6 that they want to sell, these businesses are not intent on preventing potential customers from having
7 access to the information, indeed as the advertising model proves it is often in their interests to give
8 information away for free to encourage future sales'.

9
10 The interviewee did not have concerns that public domain information would be locked up in private
11 sector databases and she saw ECMS as a secure way to enforce legitimate property rights in the on-line
12 environment.

13
14 On the issue of whether there were concerns about the impact of copyright policy on privacy in on-line
15 environments the interviewee commented that 'with the development of 'cookies', and 'fingering'
16 techniques on the internet there are clearly concerns if the information that can be collected is misused.
17 This is why in Microsoft the lawyers regularly meet up with the computer scientists/software engineers
18 to create an ethical policy on these sorts of issues'. She added 'privacy itself is a much wider issue than
19 the potential problems of accessing copyright materials on-line'.

20
21 The interviewee commented that in the wider field of information policy 'encryption techniques will be
22 used to secure more than just copyright data but also personal data'. This said the interviewee was not
23 in favour of the trusted third party (TTF) option to secure privacy or any other information on the basis
24 that 'organisations will be reluctant to entrust their security to a third party and by creating a central
25 clearing house for security it is clear that there is a real danger that such a central site will be attacked
26 by hackers for all the information. There is also the question of how best to administer such a system,
27 which will be very costly and difficult to do'.

28
29 **14. How adequately do you think current European Information policy processes handle these**
30 **interrelationships?**

31
32 The interviewee commented that it was a little early to tell how well these interrelationships were being
33 handled especially as the environment itself had yet to fully develop. 'what is happening is occurring at
34 great speed and for organisations even like Microsoft it is difficult to work out what the economics of
35 the digital environment will be. Overall it is a very young animal and there are still few companies
36 really making money out of the Internet. It is also clear that copyright is only one of a number of key
37 issues that need to be addressed before we can really see how things are developing. Other issues
38 include taxation, applicable law, security and contracts'.

39
40 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
41 **concerns over the issues of democratic participation and accountability ?**

42
43 The interviewee commented that 'given the digital environment is no respecter of national boundaries
44 there will be an increasing need for solution to be found at European and international levels. In this
45 context if we are to maintain democratic accountability there would appear to be a strong case for
46 increasing the European Parliament's powers although I hope if this occurs it will be possible to also
47 improve the quality of the MEPs'.

48
49 The interviewee commented that from the perspective of an organisation increasingly dealing in content
50 the approach is 'wait and see what happens and work towards setting up clear legal frameworks for this
51 new environment'. She added while it is clear that these are global issues, the EU context provides a
52 useful intermediate level to work out good frameworks which can then be taken to the global forums
53 e.g. WIPO, GATT(TRIPS) etc..

54
55 The interviewee commented that 'these developments even in the EU will take time especially given the
56 range of different philosophies, cultures and ideas, and the tendency on the part of many European
57 firms to focus only on their own national markets'.

INTERVIEW no. 32

EC Legal Counsel for International Federation of the Phonographic Industry (IFPI)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented she first became aware of the discussions on the legal protection of databases shortly after joining IFPI(International Federation of the Phonographic Industry) in late 1991/early 1992 and was involved with the discussions until her departure in November 1995.

The interviewee commented 'immediately after joining IFPI this was one of the first issues that I had to deal with, at that stage as far as I can recall no formal proposal had yet been published by the Commission and I remember examining a number of drafts of the proposal that were at the time circulating around amongst interested parties'. The interviewee added 'Even then the draft directive had already been characterised by many as concerned with very technical issues and when the proposal was finally published it was considered by most interested parties to be very complicated'.

The interviewee commented 'From this period on I kept up telephone contact with Commission officials involved in working on the proposal and on a number of occasions during the passage of the directive I met up with Mrs.Czarnota to discuss the directive and IFPI's position on specific issues within it'.

The interviewee added 'the proposal on databases was very much an issue being pushed by the Commission because I can even recall that initially there was some opposition from industry about it'.

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 ?

The interviewee commented that her main role in the discussions was to represent the copyright and neighbouring right interests of IFPI's members (who are producers and distributors of sound and music video recordings from around the world). In practice she said that this involved following the policy process of the directive through the Parliament and Council, preparing responses to changes in the text and also setting out IFPI's position, as well as making formal and informal contacts(in person or by telephone, fax email etc..)with Commission officials, MEPs, Council delegates and other interested parties.

The interviewee recalled that 'at the beginning it was a real struggle to persuade the industry [sound recording] that this was an important issue for them and one that they needed to get on board with'. She added that 'the industry only really became actively involved in the process late on, as an awareness of the issues and their potential implications spread partly because of wider debates on multimedia and the information society'.

The interviewee commented that her impression of the policy process was that 'gradually things changed but not because those involved came to a particular understanding of the proposal from inside but because a range of external events refocused their perspectives of the directive's significance including greater realisation at the international level of the significance of IPRs for economic growth and development'.

Other significant factors the interviewee mentioned were the US National information infrastructure initiative (NII), the Bangemann group, the work of the LAB(DGXIII's Legal Advisory Board). She added 'as the on-line environment became the focus of increasing National, European and International attention the profile of the directive was raised'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that 'basically my views on the directive did not change a great deal. From the beginning IFPI was keen to get protection under the directive extended to all and not just electronic databases and to see the removal of the compulsory license provisions. IFPI's view was that without coverage of all databases there was a real danger of abuse through the transfer of documents into paper form especially with the sui generis protection'.

The interviewee commented that 'another key issue for the sound recording industry at one stage in the negotiations was whether or not CD's would be considered databases under the terms of the directive but this idea was later dropped and is referred to in the directive's recitals[recital 19]. Then during the second reading in Parliament, the Authors Rights Societies lobbied hard to have CD-i and CD-ROM also excluded from the scope of the directive. Although they eventually lost this argument it was clear that their motivation was political as these Societies were conscious of the situation in the US and didn't want to lose their bargaining positions in a European context'.

The interviewee added that in terms of the proposal 'the debates revolved predominantly around two key issues which proved to cause the greatest difficulties in understanding'. Firstly the sui generis right 'it was difficult to define where its parameters ended in relation to copyright and I can recall long seemingly endless debates over the abstract notion of what is a database versus what a database contains'. Secondly, 'the other issue was how was the copyright in selection and arrangement to operate in relation to the content and structure of the database and to be honest I am still not really sure how it will work out in practice once the directive is implemented'.

The interviewee commented 'we were very pleased about the elimination of compulsory licensing because it was an issue that we along with other rights holders had lobbied hard on throughout the negotiation of the directive especially with Graham Jenkins, Kurt Kemper and Madame de Montluc in the Council working group'. She added 'but up until almost the end of the negotiations it looked as if licensing would stay in the directive'

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that 'over the period of the directive's negotiation I had numerous contacts with other industry and lobbying representatives including: Charles Clarke (FEP - Federation of European Publishers), Allen Dixon (BSA - Business Software Alliance), John Stevens (Reuters), Marie-terese Huppertz (Bertelsmann) as well as representatives from the FIAPI (International Federation of Film Producers Associations) and IVF (International Video Federation) although the last two were little involved on the issue of databases'.

In terms of lobbying the interviewee commented 'we were very pleased that our lobbying contributed to ensuring that private copying was excluded from electronic databases as this was a key issue not just for IFPI but also for other rights holders, because we realised it would be impossible to live in an on-line environment if private copying was allowed'. She added 'we were however unsuccessful in retaining the work for hire provisions that were in the original proposal and on other issues notably on exceptions we found ourselves in conflict with the Commission's view'. The interviewee commented that 'on the work for hire issue [Article 3(4) in the original proposal] we argued that by removing it the Commission was acting in an inconsistent manner because a similar provision was already implemented in the Software directive's Articles 2(1) & 2(3)'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that 'in terms of lobbying our main focus was with the Commission and the Council with less attention given to the Parliament'.

On the Commission, the interviewee commented that 'personally, I always found Mrs. Czarnota very open and receptive to IFPI's views and I suppose on reflection, her proposal for databases was in many senses ahead of its time. Certainly I remember that even from the very beginning she was very clear

1 about the purpose of the directive'. She added that 'Unfortunately the proposal experienced difficulties
2 because there was very little interest in it from the Member States or industry. Part of the problem was
3 to do with the considerable confusion as to what the directive covered and why it was needed at this
4 time. There was very little vision as to future developments in the information sector'.

5
6 The interviewee commented that 'following Mrs.Czarnota's departure, I had several meetings with
7 Mr.Gaster'. She added 'he was quite a different character to Mrs. Czarnota and was willing to speak at
8 length about the directive although he tended to be very discrete about what was actually happening in
9 the negotiations and what he thought the outcome would be'.

10
11 The interviewee commented on the process of lobbying 'to exert pressure is very difficult but the
12 normal methods is to be in as frequent contact as possible with the Commission officials handling the
13 portfolio and with members of the Council working group, particularly immediately after their
14 meetings. These contacts being either through face-to-face meetings or via the telephone'. The
15 interviewee added that 'a common practice is to contact members in the Council working group of the
16 same nationality as yourself, so being Italian my first contact point tends to be with the Italian
17 delegation in the working group'. She also confirmed that 'in reality most new versions of the Council's
18 working documents leak out from the working group during the negotiations so that with good contacts
19 it is not difficult to have a good idea of what is going on'.

20
21 The lack of attention on the Parliament the interviewee explained by commenting that 'in terms of
22 resources it is a difficult place to lobby, contacting politicians can take a lot of time and often they
23 simply don't understand the issues'. She added that 'at the Parliament you often have the feeling that it
24 is simply a waste of time lobbying'. This stated the interviewee commented that 'during the second
25 reading of the database proposal in Parliament, I can recall talking with Anna Palacio, [the rapporteur]
26 who whilst receptive to IFPI's concerns appeared unwilling to rock the boat and clearly did not want
27 the database proposal to go to conciliation where she would be confronted by industry and Council
28 experts'. The interviewee also commented again that in lobbying even at the Parliament the tendency
29 was to try to speak to an MEP from the same country as the lobbyist'.

30
31 **6. Did any international policy developments impact on the outcome of the Directive?**

32
33 The interviewee commented that 'certainly in terms of database case law the Feist case in America and
34 the Dutch Van Dale case were important, not so much as topics discussed during lobbying but more as
35 issues in the back of the mind of the industry'.

36
37 She added that 'the TRIPS agreement i.e. Article 10(2) was very significant because it extended
38 protection to all databases and because unlike the Berne Convention, the Europe Community was itself
39 a signatory'.

40
41 The interviewee commented that 'By 1994 Databases had become a sexy issue and so things began to
42 move in the negotiations especially once the Germans took over the Presidency. These discussions were
43 also more visible by this stage because the electronic database industry had grown substantially as had
44 the whole of the information sector'.

45
46 The interviewee also commented 'the Magill case was also important in as much as it scared the rights
47 holder industries and really made the removal of compulsory licenses a key issue for them'.

48
49 **7. How do you account for higher public profile of the Database directive ? Do you agree with the**
50 **characterisation of the Directive as the Cornerstone of the Multimedia society ?**

51
52 The interviewee referred to her previous answer but added that it was inappropriate to label the
53 directive as the cornerstone of the information or multimedia society even though she was aware that
54 some Commission officials close to the directive had referred to it in this manner.

55
56 The interviewee commented that 'IPR issues in general have a much higher profile now than in the past
57 and attract a much larger number of interests'. As an example, she added 'throughout the discussions on
58 the database directive, telecommunications operators and to a large extent equipment manufacturers

were almost entirely absent and yet at the recent WIPO conference both of these groups engaged in some brilliant and extensive lobbying'.

The interviewee reflected that 'if the telecommunications operators had been more active in the European database discussions the final text might have turned out very differently'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that at the European level she had always found the consultation process more open and extensive than at the national level in most Member States.

The interviewee added that 'I can't recall any major conflicts of opinion between the different companies and industry groups involved in lobbying on the database directive and certainly IFPI had no internal conflicts or external difficulties with companies like Reuters, although my contact with them was not extensive'.

This stated, the interviewee added that 'this lack of conflict amongst rights holders is no longer the same where there are conflicts between companies like with Bertelsmann and Reuters both of whom have interests as on-line service providers'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'the database directive is clearly a model for the Commission in the way that it is proposing to address copyright issues in the digital environment. It is also being used as a model for industry, especially amongst those industry groups who have in recent years become considerably better organised to deal with European legislation'. In this regard she mentioned EPC (European Publishers Council), BSA(Business Software Alliance), FEP(Federation of European Publishers), EUROCINEMA (Association of Producers).

The interviewee added that 'taken together the Database and Software directives provide very useful precedents for the Commission's approach to the digital environment'.

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

The interviewee commented 'In discussing copyright harmonisation it is important to have an historical perspective and to remember that it is only since the late 1980's that the Commission has been involved in IPRs prior to which there was virtually nothing happening in the field of copyright'. She added that 'it is easy to forget that this period was before the information superhighway and the Internet and that the Commission's 1988 Green Paper was more about looking forward than anything else'.

This stated, the interviewee commented that her impression was that 'the choice of which directives to push forward first was clearly politically driven rather than motivated by rational selection. I can recall when first reading the cable and satellite directive thinking - how can they hope to deal with cable and satellites without first having resolved the issue of duration as different terms of protection across the Member States was bound to distort the market in cable and satellite services'.

The interviewee commented that 'within DGIII (later DGXV) most of the political drive for the Commission's proposals was at this time being generated by Mr.Verstrygne who was a very strong willed individual with a lot of political experience'. She added 'I always found him to be very open about his approach, when he needed to be but for better or worse he was simply unstoppable because of his tremendous political drive which enabled him to push things through the Commission hierarchy'.

The interviewee commented that Mr.Vestrygne had the rare ability of being able to speak in real detail on the text at one moment and then in political generalities at the next. He had always done his

homework and became an expert both technically and politically during the passage of the database directive'.

Looking to the future the interviewee commented that 'the Commission have already begun on several more proposals in the copyright field notably on exceptions and technical systems for copyright protection but the extent to which further harmonisation takes place will be guided by internal market principles'. She added that 'following WIPO it is also clear that there is a growing international awareness of the need to harmonise at a global level and the Commission clearly want to increase their role in setting this global harmonisation agenda'.

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 ?

The interviewee commented that this was a difficult question to answer but added that as a lobbyist it was important to be aware of the differences in approach of the different European institutions, for example that 'whilst the Commission is almost always very open and easy to access the Council is much more closed and requires you to really know how the system works otherwise it is easy to come away with nothing'.

The interviewee added that 'as well as the Commission's role, the stance of individual Member States is very important in the negotiations. During the database directive the UK, Germany and France were all committed to the proposal and as far as I can recall Germany pushed against the UK especially on the copyright aspects of the directive'.

The interviewee added that 'other important factors are clearly the issues of copyright exceptions, the protection of digital copyright works and at the most general level the on-going differences between droit d'auteur and copyright traditions at the European level, although following the software and database directives the level of originality required for copyright protection has to a large extent been resolved'.

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 ?

The interviewee commented 'in the digital environment aside from the obvious threat of piracy a key issue is the question of liability for copyright infringement. AS the WIPO conference showed opinion is very divided on the issue and there is a clear need for the parameters to be defined'.

The interviewee added 'Companies like ours (Time Warner) are still debating whether they can commit themselves fully to really going on-line because they still fear that their very expensive investments will simply disappear. We want to prevent people from re-distributing and using our works illegally which has enhanced the need for ECMS (electronic copyright management systems). But for these systems to be implemented effectively implies agreement with software and hardware producers and consumer electronics manufacturers that will put meaningful technical measures in place, for example, if any encryption is deployed it is imperative that in all the equipment for sale there are decoders'.

The interviewee added 'but these measures alone will not be enough and one of the most important additional measures is that of providing legal protection for ECMS against illegal tampering or circumvention via other technical devices i.e. against those little black boxes that would make the ECMS redundant'. The interviewee imagined a future general purpose device which would control the use of works effectively.

The interviewee acknowledged however that an underlying problem is that Computer/Hardware manufacturers are keen to make new equipment available e.g. recordable CD's, because there is a demand for such hardware and because it is their source of income. This is why rights holders want legal protection against the misuse of such equipment

The interviewee commented that 'while we don't believe there is a good case for any exceptions in the digital environment, the political reality is that there are bound to be some' This stated she rejected the notion that the industry wanted to restrict access to copyright works and commented 'rights holders will provide some exceptions of their own because it is in their interest to advertise their products and let potential customers see and use them in limited ways, for example, like the strategy already used in the computer games industry'.

The interviewee commented 'in the digital context there are still real problems in defining normal exploitation versus non-commercial exploitation especially where it is both possible and legitimate to charge for every bit of information'. She added 'during the database directive most of the Scandinavian countries were keen to maintain similar exceptions in the digital environment as in an analogue environment but they did not appear to understand that apparently keeping the status quo actually meant a real change in the law in favour of users because of the nature of the digital environment'. In this context the interviewee looked forward to the possibility that these issues would be addressed at an international level and referred to future WIPO discussions.

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

The interviewee expressed the view that it was necessary to distinguish between copyright and other areas of information law and that she did not see any direct relationships between them. In terms of copyright itself the interviewee rejected the view that there was a danger that the copyright monopoly was being extended or abused to protect the information itself. She commented that 'copyright holders have already started to discuss these issues with libraries and archives and are beginning to find ways to provide these organisations with access to their works on a non-commercial basis, for example, the development of site licenses by publishers is a move in this direction'. Although she acknowledged that with libraries the issue of electronic inter-library loans was still an issue of contention between libraries and publishers.

Despite the interviewee's strong views on the need for ECMS she still felt that there was a role for copyright per se because 'it provides the legal backing for rights holder claims for protection including via ECMS'. The interviewee did not think that rights holders views were over-represented at the European level and commented that users interests were often very well represented by consumer electronics groups and equipment manufacturers, for example, Phillips or as in WIPO where telecommunications operators and libraries joined up under the banner of defending the public interest'.

On the relationship between copyright and privacy in the digital environment the interviewee commented that 'clearly while anonymity is important there are also situations where it should be waived, for example to catch those putting Fascist-nazi material on the net or to prevent copyright piracy'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee referred to her previous answer.

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 ?

The interviewee started by describing herself as 'a committed European despite my almost daily struggles with its institutions'. She added that 'in recent years monetary union has become an increasingly big factor in shaping the form and speed of European policy and integration'.

The interviewee commented that 'in this context as the EU prepares itself for further expansion with the accession of new Member States like the Czech Republic and Hungary, there is clearly going to be a need for a multi-speed or multi-track Europe and a reform of the EU's main institutions which may result in the Parliament having more power'.

1 The interviewee added that in terms of copyright protection 'there is clearly a strong argument for
2 postponing the accession of those potential new Member States where piracy remains rife. It was for
3 this reason that we lobbied so hard against the inclusion of IPRs in the trade zone recently being
4 negotiated with Turkey'.
5

6 This stated, the interviewee commented that 'the European union is unstoppable and speaking cynically
7 it is a system that has been useful in preventing war in Western Europe and which has become a
8 necessity for any industry aiming to compete on a global stage'.
9
10
11

INTERVIEW no. 33

EC Representative for the International Federation of Journalists(IFJ)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I was aware of the Commission's 1988 Copyright Green Paper and I attended the April 1990 public hearing in Brussels on databases which was, as far as I can remember, my first direct contact with European discussions on database protection'. The interviewee added that on the database directive as with other copyright issues 'it is unfortunate that Commission officials and others too often assume that journalists are not concerned with copyright issues, although I am pleased to say that attitudes are changing'.

The interviewee commented 'For the IFJ (International Federation of Journalists) the database directive was not a major priority for our lobbying activities but we did follow its passage through the ECOSOC and Parliament to the Council. As I remember it our main concern with the original proposal was Article 3(4) which would have automatically transferred all employees economics rights direct to employers (as in the software directive) and I think we can take some of the credit for having persuaded the Council to drop this provision'.

The interviewee commented that she wasn't sure exactly what factors led to databases becoming a focus for European policy but she thought it had partly grown out of the policy discussions on the legal protection of computer software.

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 ?

The interviewee commented that 'because of our relatively limited resources most of our lobbying on the database directive was through written submissions particularly to the Commission and Council and through attendance at one or two public consultations. I don't remember having done a great deal of face-to-face lobbying and I can't recall having any specific meetings on the issue with Mrs.Czarnota, who was the Commission official in charge of the database file'.

She added 'As chair of the IFJ's expert group on copyright I did try to encourage our national representatives to lobby their Member State representatives in the Council, although I have to confess this was not, and still is not always easy. Personally because I am Danish, I had direct contacts with Mr.Norup Nielsen who is a brilliant and very influential man and someone who I think was very active in the Council's database discussions'.

The interviewee (referring to her documents)commented 'The problem for us as journalists with Article 3(4) in particular was that it appeared to assume that employee/creators of computer programmes were in a similar position to journalists as employee/creators contributing to a news-media database. Fortunately at this time the Danish Parliament had just passed a new law that distinguished between editorial databases and information databases. The main concern was that the individual and collective agreements that in a number of Member States protect journalists from abuses of their material (economic or ethical) by third parties would be removed'. As an example of the abuses that can occur the interviewee referred to the Belgian 'Central Station' case. Here some Belgian publishers started an on-line service called central station but attributed no copyrights to journalists whose work was on the site. The Belgian Journalists Association took them to court and the web site was blocked.

The interviewee commented that the IFJ did not really lobby on any other aspect of the database directive although at an intellectual level she found the dual copyright/sui generis approach interesting and added that the original model for the sui generis right was Denmark's 10-year catalogue rule.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that on the key issue for their lobbying activities, Article 3(4) the IFJ had not changed its position, however she added that 'at the initial public hearing we were not in favour of a sui generis right because we viewed it as further extending the rights of producers and publishers who already had enough rights. Our position changed because as the technology developed we saw that to some extent that there was indeed a need for the protection of investments in electronic databases which was highlighted by some court cases in Holland and the US and so we made the compromise not to object to the sui generis right'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that 'during the database directive we did not really form alliances with any other groups but I know that some other authors rights associations like AIDAA(Association Internationale des Auteurs de l'audio-visuel) and CISAC(Confederation Internationale des Societes d'Auteurs et de Compositeurs) took part'. The interviewee added ' more recently the IFJ has recognised the need to forge links with other groups who share similar concerns to us with protecting the rights of authors and users. This has become increasingly necessary because publishers and other rights holders have become very strong and are over-represented in European copyright debates. Over the last 5-10 years this has become easier as more European legislation has been adopted and we have gained more experience of policy-making in Brussels. But it can still be very difficult and take a lot of time to team up with groups who have different priorities to us'.

In terms of conflicts the interviewee (referring to her documents) commented that 'Publishers have continued their assault on authors rights by pushing for full ownership of all rights now and in the future so that they can profit from the exploitation of the multimedia information market. They argue that to compete in the global market they need to be able to acquire all these rights now but this is not true as they can easily acquire further rights in the future through individual or collective agreements like now'.

In terms of influence the interviewee commented ' it is always difficult to judge what influence you have over a proposal but in the case of the database directive we were very satisfied when Article3(4) was dropped and felt that we had certainly contributed to this change'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that among the European institutions the Commission and the Council were the key players in any proposal but that during the database directive she did not know which Member States had been most active although she said that given the size of the UK's database industry it must have been one of the countries heavily involved. On the European Parliament she added that she was in favour of giving it more power but that at present 'we don't usually lobby hard at the Parliament because our general feeling is that you can put in a lot of effort for very few results'.

The interviewee commented 'generally we concentrate our lobbying on the Commission because it has considerable power over proposals, (not just at the proposal stage but throughout a negotiation) and with our limited resources we can't cover all the institutions, but also because our national members organisations hopefully lobby their own Member State governments'.

The interviewee commented that she did not know which lobby groups had been most influential on the database directive but that even at the 1990 public hearing publishers and database producers from the UK and US were already making a lot of noise on the issue'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented that she was aware that prior to the release of the formal proposal in 1992 there was an important database case in the US and some other cases in Holland but she couldn't remember what they were called.

The interviewee said she was not aware of any impact on the database discussions from the TRIPS agreement but added that by this stage in the negotiations of the directive she was just keeping track of the Article3(4) issue.

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 ?

The interviewee commented that she did not think that the database directive was particularly well known by the public at large but that if it had a higher public profile this was a consequence of the higher profile of copyright issues more generally which was due in part to 5 copyright directives and the work of the Bangemann group on the information society which specifically identified copyright issues as important. In this regard the interviewee added that 'the IFJ's Secretary General Mr.Aidan White is a member of the Bangemann Information Society Forum and is very active in speaking, writing and lobbying on journalists and authors concerns'.

The interviewee commented that she didn't think that the database directive was the cornerstone of the multimedia society and that she had heard the same phrase being used by the Commission to describe other directives.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'European consultation procedures tend to be quite adequate and I cannot say that the IFJ has ever had to make any direct complaints against them. Once you get to know the process they are very similar to lobbying at the national level in as much as there are always key people who you must contact and when you have their names or get to know them policy-making which has previously seemed so complex becomes immediately much more transparent and easy to understand'. She added 'of course there is an over-representation of strong publishing interests in the area of copyright policy which can make it difficult to get your views heard but this is not a problem with the procedures themselves'. The interviewee added that in her experience 'overall the Commission officials involved have a good grasp of the issues'.

This stated, the interviewee added that 'quite a different but big problem during European consultations is due to information overload because of the sheer volume of documents you have to read and activities that you have to involve yourself in just to stay up-to-date, although I suspect that this is not the same for those organisations with more resources for lobbying'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that she really didn't feel able to offer an expert assessment of the database directive in relation to other European copyright initiatives other than to say that by addressing the protection of content in electronic form it was probably the first in a number of directives that the Commission would propose for copyright protection on the internet.

The interviewee added 'more generally the copyright harmonisation and strengthening of authors rights that has occurred at the European level has been a good thing, although when the Commission released its first copyright Green Paper in 1988 with its strong bias towards the interests of publishers and producers, I didn't think that things would turn out as satisfactorily as they have. But as we wait for further proposals from the Commission on copyright I am sure there is still a lot of work to be done to protect the interests of journalists and authors more generally. For example, in the area of copyright exemptions will have to continue to lobby hard to ensure that no right of private copying is introduced into the digital environment'.

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

The interviewee commented that 'through Aidan White we have been very active in the development of the information society discussions and personally I have been following the Commission's(DGXV) latest moves in the copyright field including the 1995 Green Paper and its recent follow-up communication. Both of which show that the Commission wants to release some new copyright proposals shortly, either towards the end of this year [1997] or the beginning of next year'.

The interviewee commented 'I have noticed that in the last few years that intellectual property rights policy at the European level has begun to change, for example, on the issue of moral rights the Commission's views has clearly shifted from a position where under Mr.Vandoren(DGXV)they were not on the agenda to recent meetings with Mrs. Weise-Montag(DGXV) who has given indications that they may well be on the agenda for possible future Commission proposals'.

The interviewee added 'I think as the information society develops the issue of copyright harmonisation will be increasingly pushed at the international level but before that I think there will be further harmonisation proposals for copyright released from the Commission particularly on issues such as copyright exceptions'.

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 ?

The interviewee had nothing to add but on the accession of Sweden and Finland into the EU the interviewee commented that 'As yet we have not noticed any growth in the influence of the Nordic perspective at the European level but given the similarity between the copyright Acts of Denmark, Sweden and Finland in future European copyright proposals there may be a Nordic effect'.

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 ?

The interviewee commented ' in the digital world if you are not protected by law or by contractual in-house agreements then you are lost. So the stronger we can make the authors rights the better the in-house agreements are likely to be'.

As an example of a good model for the digital environment the interviewee described the situation in Denmark where 'in the on-line environment journalists have successfully demanded that when their news articles appear on web pages they do so with the original context of each article (i.e. it is not presented out of context) or agreements are made in detail with the authors concerned prior to the article being placed on-line covering what can and cannot be done with the text, image or sound. These agreements establish the principle of authors right in the digital on-line environment with Danish publishers but elsewhere in Europe publishers continue not to respect authors rights'.

The interviewee added ' it is frustrating to hear certain representatives of publishers, particularly from the UK, stating publicly that journalists don't and shouldn't have any rights at all. Such views from some publishers not only disregard the principles of authors rights but also basic ethics and respect for services about which journalists and publishers normally speak with one voice'.

The interviewee commented 'establishing these principles is not only important for authors but also for publishers who increasingly in on-line environments are themselves becoming creators who add value to informational products, creators who should also be eligible for authors rights'.

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

The interviewee commented that there were a large number of links between copyright policy and other areas of information policy. As an example she discussed the issue of privacy and said 'from my

1 experience with journalists I am aware how often as part of their every day work they use computers
2 and databases to find things out about people, and how restrictive existing legislation can be. While I
3 think there is clearly a need for privacy and data protection my own view is that as we enter the digital
4 age our present notions of the boundaries we define around ourselves as domains of personal integrity
5 will change dramatically'. The interviewee added ' this is especially the case as technical systems for
6 the protection of copyright become more common and rights holders demand to monitor use of their
7 products by users'.
8

9 The interviewee commented 'linked to these issues is the problem of information security on the
10 Internet because of the actions of hackers. While we need to introduce technical systems in the form of
11 encryption and authentication applications, as lobbyists we must also ensure that the Commission and
12 the other European institutions do not go too far in tying all information up. It is vital that a proper and
13 fair balance in copyright and in other information policies is maintained'. She added ' There are clearly
14 dangers for democracy if we go too far down the road of protection but this said my experience in
15 Denmark has left me against the fair use or public interest model which is a particularly Anglo-Saxon
16 concept that in practice leads to publishers, authors and other rights holders losing out on considerable
17 sums of legitimate revenue in countries like the UK, which I think is wrong'.
18

19 The interviewee commented 'In Denmark we use collective agreements and collecting societies in for
20 example schools who in agreements with these societies pay for copies made. This establishes contact
21 between the owner publisher and the users the principle of a right to remuneration'.
22

23 **14. How adequately do you think current European Information policy processes handle these**
24 **interrelationships?**
25

26 The interviewee commented that 'at the moment I am pleased with the degree of consideration these
27 issues are being given by the EU as it is nice to see evidence of thinking before legislating'.
28

29 The interviewee added that 'increasingly in policy discussions I sense that there is a realisation that the
30 digital environment is an evolution rather than a revolution and that not everything is different. I am as
31 a result reasonably optimistic about the future and our ability to work towards comprehensive solutions
32 at national, European and global levels for the digital world'.
33

34 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
35 **concerns over the issues of democratic participation and accountability ?**
36

37 The interviewee commented that she hoped that as the European institutions were reformed as the EU
38 expanded that more power would be transferred to the Parliament which she saw as the best way to
39 ensure democratic accountability and participation. She added that she didn't have any major concerns
40 over the democratic aspects of European policy-making.
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INTERVIEW no. 34

EC Representative for International Association of Audio-visual Authors (AIDAA)

Preliminary Comments by Interviewee

none

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 ?

The interviewee recalled that shortly after joining her organisation in 1989 she became aware of the 1988 copyright Green Paper and its chapter on Databases as part of some preparatory work she conducted on copyright issues. Then in April 1990 she attended the Commission's hearing on Databases. From memory this was the first European public hearing on copyright she had attended, although representatives from her organisation had attended the Commission's other public hearings on copyright issues taking place during this period.

The interviewee acknowledged that 'in reality' her organisation was not overtly interested in the topic of databases at this time. The general organisation view was that any Commission proposal on databases would almost certainly be 'a technical piece of legislation of concern only to producers of databases'. This was in part because at the time the 'database industry was neither particularly big nor well organised'. As a consequence, the interviewee attended the public hearing simply 'on an information basis rather than to bring along a definitive position'.

The interviewee's own organisation's copyright policy priorities were focused much more on the other issues indicated as priorities for action in the 1988 copyright Green Paper -including proposals on the rental and lending rights, moral rights and private copying. The interviewee commented that 'the rental and lending right initiative was her organisation's top priority for lobbying activities' and that it was in her opinion 'the most significant European copyright harmonisation initiative with its immediate and direct effect on the market for copyright materials throughout the EU'.

On the April 1990 hearing the interviewee commented that although she could not remember it clearly, she did not think that there had been any controversy amongst the interested parties who attended. This she compared with the rental and lending right discussions which 'even from quite early on generated disputes' and led to concerns within her organisation 'over the definition of authors, the exclusivity of the author's right and the issue of unwaivable remuneration'.

Following the release of the Database proposal she recalled 'it was not considered a particularly important policy initiative because the technology had yet to fully develop'. One of her lasting impressions was that 'from the initial proposal in 1992 it seemed to take a very long time for the Council to reach a common position in July 1995'. The interviewee stated that this was in part 'due to some of the Commission officials involved not being particularly dynamic'. Although she could not recall who these officials were the interviewee stated that they were not Mrs.Czarnota or Mr.Gaster both of whom she knew.

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 ?

The interviewee commented that her organisation 'did not take an active role in the discussions at the beginning, only taking up an official position on the directive much later on before the Second Reading in the Parliament'. In her recollection 'discussion of the directive began to become more significant in the period after the first reading in the European Parliament and up to the Council common position'.

During this period the interviewee's organisation became actively involved in the European policy discussions on copyright including databases. The interviewee commented that this involvement included 'direct face-to-face contacts with Mr. Gaster and Mr.Reinbothe (now head of DGXV/E/4) complemented by a large number of telephone and written contacts'.

The interviewee also recalled spending a considerable amount of time in making contact with the national members of her organisation 'to encourage them to lobby on these issues to their Member State representatives in Council'. As the interviewee went onto to comment 'thus the normal procedure for lobbying at the European level'.

The interviewee stated that as an organisation representing the interests of Authors, in the Database directive they were 'most concerned with the copyright section of the directive' although they were eager to ensure that 'the sui generis or (investor's right) did not affect any authors rights'. The interviewee went onto comment that her organisation only became more involved in the database directive 'as Multimedia and the hype around the legal issues it raised began to enter discussions of the database directive'. The interviewee recalled that at this time her organisation 'was very keen to ensure that there was a clear definition of a multimedia work - because at the time it had become a meaningless concept that could be applied to almost any and every work'. She said clearly representing authors their concern was to establish authorship of works rather than to focus on information works.

The interviewee said that the database directive's system of double protection (copyright and the sui generis neighbouring right) presented a new challenge to her organisation which 'tried to ensure that authors rights were in no way effected by the sui generis investors right'. A situation which she commented 'for long periods during the directive's negotiation was unclear'. Ultimately the interviewee said that her organisation and the interests it represents were 'reasonably satisfied that this was clarified in the adopted text'.

The interviewee stated that she has not followed the implementation of the Directive but she was aware that 'France in particular was having some difficulties over the authorship issues involved in databases'. She went onto comment that perhaps this was not surprising 'given the central role of authorship in the French Droit d'auteur system' and that 'similar problems had arisen for France during the implementation of the rental and lending right directive'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee stated 'Yes they did'.

The interviewee went onto to comment that her opinions had changed on all copyright discussions for a variety of reasons but most significantly because of the way in which the copyright landscape had itself changed in the last few years. On the Database directive the interviewee commented that her change of opinion on the importance of the directive was mostly due to 'the way in which the legal discussions were overtaken by technological advances and database industry expansion, as well as the manner in which legal discussions over the amorphous concept multimedia leaked into debates on the directive'.

The interviewee went onto comment on how dramatically the European copyright landscape has changed over even the last 5-6 years. 'Whereas before the range of interested parties tended to be rather fragmented and little aware of one another, now there is an increasing awareness of not only all the issues and the Commission's responses, but also other interested parties'.

The interviewee commented that 'whereas now most copyright professionals at national and European levels become quickly aware of any new Commission project in the field of copyright even just a few years before that would not have been the case'. The interviewee went on to say 'there is a real sense of all being involved to get a good solution' As an example of this new landscape the interviewee said that the WIPO diplomatic conference in December 1996 was a good illustration of the way 'copyright professionals have as a result of the global nature of the problems come to realise they are all in the same boat' and that at the WIPO conference this solidarity became obvious as 'it was very much all the right holders versus the telecommunications operators and user groups (who were pushing for very wide exceptions)'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that 'certainly in the initial stages of the database directive' her organisation 'did not have a great deal of contact with any other copyright lobbyists other than with the national members of her own organisation'.

The interviewee went onto to say 'but as the Information society discourses have evolved' her organisation 'has had increasing numbers of contacts with other groups on copyright issues including other authors groups like GESAC and CISAC and other groups like EURO CINEMA, ARTIS and IFPI'.

The interviewee commented that 'often the degree of contact I have with other groups has as much to do with the personality of its representative as it does with the particular they represent', she went onto clarify this by saying that 'a good personal relationship with a particular lobbyist almost always ensures a greater degree of contact when issues arise'.

The interviewee did not think that authors perspectives had been particularly influential on the directive but that this was partly because of the nature of the directive 'in the final analysis during the Parliamentary Second Reading we had some impact on the wording in some of the recitals which in their own terms improved the clarity of the text'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee said that 'Unfortunately my contact with the directive was not sufficiently close for me to be able to provide a detailed answer to your question'. The interviewee commented that the directive throughout its passage remained for her 'just an interesting discussion and an exercise in gathering information, which I then passed on to my national members'.

The interviewee said that aside from her contacts with the Commission representatives in her role as a European policy adviser she also sometimes contributed with national representatives from her organisation to the lobbying of the Council delegations of Belgium and France. In the Parliament the interviewee recalled direct contact and several lunches with the Rapporteur on the directive during its Second Reading Mrs. Anna Palacio(MEP) and also on other copyright issues with Mr.Barzanti(MEP).

On the Second Reading in the Parliament during which she was mostly heavily involved with the directive the interviewee commented that in her experience it was 'quite common practice for little to be changed in a text, not least because as part of co-decision making any major changes mean that a directive text will have to go to conciliation which is something neither the Council or Parliament want'. Indeed, in this regard from quite early on during the Second Reading the interviewee said that she was aware that Mrs.Palacio did not feel that it would be necessary to go to conciliation on the database directive so 'there were never going to be any major changes to the text from any quarter'.

This stated the interviewee commented that for the lobbyists 'there is always some room for manoeuvre' and that at this time from discussions with the Commission representative Mr.Gaster(DGXV) she was aware of 'what was acceptable to the Commission to present to the Council for the directive to be adopted' the interviewee also said that she aware of 'the degree of changes I could expect to get from the Parliamentary Legal Affairs Committee'.

In this environment the interviewee said that 'the normal lobbying approach was to push things as far as you could on an issue with the Parliament even though you were conscious that the Commission would then reign back the furthest extent of the changes you achieved back to some middle ground'. The interviewee said that this 'pull and push of reaching a compromise is so much the bread and butter of European negotiations'.

With regard to the actual process of negotiation the interviewee said that her experience had indicated that 'it is always very important to meet the people concerned face-to-face as in the end this enables you to know them as individuals and so you can more readily get a friendly business relationship with them

that facilitates a better exchange of information and views'. The interviewee was however quick to point out that on top of this 'you must do all the normal lobbying activities like sending all the members of the Parliamentary Legal Affairs Committee a copy of your organisation's position paper'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee again stated that during most of the time the directive was negotiated she was not directly involved so did not feel able to provide a detailed answer.

This stated the interviewee commented that she 'was certainly aware of the Feist case, the Magill judgement and the TRIPS negotiations, which led to Article 10(2) covering electronic and non-electronic databases'. The interviewee however did not feel able to comment on the extent to which these policy developments played a role in the final outcome of the directive other than to say that certainly these issues were discussed by the Commission, Parliament and Council during the passage 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 ?

The interviewee said that part of the higher profile of the directive was due to the way in which 'the legal discussions of the directive were effected by hype and panic over multimedia which filtered into the database discussions as the information society initiatives developed. Certainly this effected the passage of the directive especially after the First Reading in Parliament as the Council became more actively involved'.

The interviewee said that her impression at the time 'was that some Member States (France, UK) were deliberately stalling the directive's passage because they felt the Commission saw the directive as a opportunity to solve many of the issues of the digital environment in one go which was something the original proposal had not suggested'. The interviewee said 'as the multimedia debates became more prominent some Member States decided they wanted more time to think through the implications of this directive in the rapidly developing new context'.

The interviewee commented that her contact with the Council working group was through informal meetings with the Belgian delegation representative - Mr. Jerome De Brulle. She attended these meetings as a part of her Belgian member organisation's team. The interviewee pointed out 'it is very important in such meetings to firstly, have a legitimate position and secondly, to make that position clear to the person you meet with, because you can easily ruin good contacts and business relationships by attending such meetings on a basis which at a later date could be misconstrued as illegitimate or by deception'. i.e. it is important to make clear you status and perspective in all lobbying activities.

The interviewee said 'I do not want to comment on whether or not the database directive is a cornerstone of the information society though I have heard it said'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee had little or no comment to make on this question other than in general she considered the copyright consultations procedures to be 'pretty good' with easy access to Commission representatives and others involved in these issues.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee said that the significance of the directive will become clearer following its implementation and the emergence of new case law. 'The dual approach adopted in the directive seems to have been an interesting approach especially as awareness of the global context has increased so dramatically, and even though it was a departure from a strict copyright solution ultimately it is not that

different' indeed for the interviewee the largest problem in copyright harmonisation remains 'the big differences between copyright and droit d'auteur systems' although she went on to say that 'We have all learned to live with them and the same is likely to be true of the sui generis right in the future'.

The interviewee went on to provide an example 'of how approaches are being found to bridge the differences between copyright and droit d'auteur systems', 'We have done considerable work with the writers guild in the USA on moral rights and also in the USA we have contracts with the major publishers'

This is significant because the USA 'is an entirely different system to continental Europe - yet we have still managed to find common ground on these issues' This said the interviewee pointed out that 'things are far from simple and even in the USA with its contract approach to authors rights there remain a large number of problems'.

On the database directive itself the interviewee said that 'whilst it is the first directive to directly address the protection of contents in electronic environments, it would be wrong to ignore the previous copyright directives which have provided general principles that apply just as well in digital as analogue environments - the key point is always the establishment of the principle of protection'. However the interviewee did state that the 'database directive did open up the important discussion 'of which exceptions are legitimate in digital environments'. For the interviewee the adopted database directive is still very much 'a specific protection offered for database producers like that offered to other products e.g. music, paper whose significance will be in a general sense by providing a principle of protection to electronic information products'

For the interviewee and the organisation she represents the 'database directive is not the most important copyright directive particularly because the sui generis protection does not concern authors rights at all'.

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

The interviewee said that she was very much a 'pro-European' and that even though the challenges faced in copyright were increasingly global it was important to establish the legal principles first at a European level. The interviewee said that both 'copyright and droit d'auteur systems have proved themselves time and again flexible enough to evolve to the new technologies.

The interviewee commented that many of the issues will move to the global level as illustrated by the WIPO discussions and that 'there will always be a split between those pushing for greater protection and those looking for exceptions as each new technological advance arrives'.

The main trend however in copyright harmonisation at European or the global level was 'lightly to be evolutionary rather than revolutionary - although 'the database sui generis right was something of an exception and had yet to become harmonised at an international level'.

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 ?

The interviewee had nothing more to add. She referred to her previous answers.

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 ?

The interviewee commented that 'for copyright the biggest problems in the digital environment involved ensuring the respect of rights and payment' and that this 'neatly highlighted the distinction between the rights themselves and their enforcement which would almost certainly be ensured by technical systems for copyright protection in the digital environment'.

The interviewee commented that her own organisation 'is currently heavily involved in work on identifiers for digital copyright products. These technical systems will eventually enable rightsholders to know when, how and by whom their works are being used'. She went on to say that 'this will ensure that above all rightsholders can fulfill their first responsibility to consumers which is to sell them a good and perfect product'.

The interviewee did say that 'there is a need to ensure pluralism of information products which might be threatened by the dominance in the global market of large, particularly US information producers'. Aligned to this concern the interviewee said this 'if rights cannot be protected in electronic environments then there would be a reluctance on the part of rightsholders to place materials on the internet which would in turn lead to a reduction in the plurality of available publications'. The interviewee was as a result in favour of technical systems for copyright management and protection.

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

The interviewee's first point was that she did not 'see any antagonism between copyright and other areas of information policy such as privacy or consumers rights. These rights should not be seen as opposed but rather as legitimate and necessary'

The interviewee went onto comment that she was 'certainly in favour of privacy rights etc.. and in principle did not oppose any other rights in information'. The interviewee was of the opinion that despite the difficulties posed by the digital environment 'it will be possible to find solutions that respect all these different rights'. Although she admitted that she was not a technologist the interviewee remained confident that 'technology will be able to advance to the degree that it will be possible to distinguish between types of use, types of user and therefore respect privacy and other user concerns whilst ensuring the protection of rightsholders rights'. As an illustration the interviewee pointed to 'services like phone banking which distinguish between users yet successfully remain completely private'.

On the issue of the blurring of the idea/expression dichotomy and its impact on the notion that ideas should remain outside the scope of intellectual property protection The interviewee acknowledged that there are 'problems of definition but it would be wrong to become confused over this issue as many information products (e.g. those in a specialist academic libraries) users are already required to pay for entry to browse or examine the information, so why should the same principle not apply on the internet'.

The interviewee acknowledged that 'yes information and ideas are in principle outside the scope of copyright and always free' but she questioned what is meant by 'information ?' The interviewee did not 'see a real problem with distinguishing between the idea and its expression' even though she acknowledged 'that there may be a need for some adaptation of the system'. As she went onto argue 'even in the analogue world when you buy a book it is not the tangible support (i.e. the paper and ink) that in reality you are protecting it is rather the intellectual work and thus the same principle should apply in the digital world'.

The interviewee also warned against the dangers of under protection in the digital environment by saying that this too 'could impact negatively on the plurality of the information available'. As an example she recalled how 'at the beginning of the introduction of photocopying machines there was strong lobbying from users saying that it was a nonsense to have to pay levies on photocopies but as the size of the number of photocopies increased it became clear to the industry that it was impacting on the numbers of books sold and as a result the Nordic countries, the Germans and Dutch all introduced levies on photocopies'.

The interviewee saw a strong need for the legal protection of electronic copyright management systems(ECMS) 'the reason being that whereas in the analogue world the copies that are made are not very good in the digital environment the copy made is perfect and exactly as good as the original' and 'while with other technologies there is less piracy (i.e. not so many people have two video recorders or their own photocopying machine) the computer is rapidly becoming an all purpose digital device'. 'The piracy question looms large because digital copies are perfect copies'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee said 'looking at these problems currently I am not sure that as yet we have answers to all of them and indeed as the internet develops it maybe too early to force a solution'. Looking to the immediate future and further harmonisation proposals she said 'private copying in the analogue world is an important issue and as 13 European countries already have some form of legislation on this issue it is clearly ripe for harmonisation'. The Commission was also working on a proposal on copyright exceptions although the interviewee said 'it will not produce anything surprising and the Commission will step very carefully on this issue'

In terms of interrelationships the interviewee commented that 'In my work I come into contact with computer scientists, economists and other lawyers and I am always surprised at the different ideas that emerge from these differing perspectives' In her opinion digital technology is not yet ready to take on all these different aspirations but 'eventually there will be a system of identifiers for works and we will be able to allow for copies to be made and rights to be balanced'.

The interviewee commented that 'quality will of course remain a key issue and will continue to remain very important for authors and the publishing industry' Ultimately in the interviewee's mind the issue is quite simple 'if you do not protect the works, no-one will put them onto the network'. She did however comment that 'in the future, pluralism is likely to become a big problem such that we will need to preserve our cultural diversity' although the interviewee was quick to say 'this is not a copyright question but more of a social question relating to globalisation and the homogenising influence of the market i.e. Americanization'.

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 ?

The interviewee said in general the policy process worked as well as could be expected considering the number of participants.

The interviewee did not respond to the wider questions on democracy and simply referred to her previous answers.

INTERVIEW no.35

Secretary-General for the European Alliance of Press Agencies (EAPA)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented that 'to answer this question it is important to point out that news agencies have always since they were very first established had problems with copyright. They have also found themselves battling against the perception held by many, including the public at large that news does not have copyright material in it, for example, if an aeroplane were to crash in Brussels because everybody can see and hear it, an assumption is made that no copyright is held in the story written by the journalist because it does not meet the criterion of sufficient originality'.

This stated he added that 'by the mid-1980's the alliance of European News Agency Alliance had set up a copyright committee to get on top of the issues of direct concern to its members'. At this the interviewee recalled 'consultations with two copyright experts on the possibility of acquiring copyright protection for the press releases and releases from press agencies. While one expert was doubtful of the possibility, the other said that it was likely to take sometime but there was a case to be made'.

With this background and given that by the late 1980's press agencies were at the forefront of using database technology when the European Commission released its 1988 Green Paper the interviewee said that his organisation paid close attention. He recalled that he 'met the Commission official responsible for the Green Paper, Mr. Posner (DGIII) and also Mr. Verstrygne, who was a remarkable individual and one of the most intelligent I have ever met'. He added that at the time 'Mr. Verstrygne appeared sympathetic to the concerns we expressed about the need for protection'.

The interviewee was quick to point out that at this time 'most of the issues under discussion had little to do with the digital revolution, or internet and in our organisation were more about concerns of how to acquire protection against teletext operations and radio broadcasts who were just pirating our material'.

The interviewee also recalled that it was Mr. Verstrygne who in the late 1980's informed him that the Commission were working on the proposals for databases outlined in the chapter 6 of the 1988 Green Paper. He added that the proposals on databases seemed to have been an idea generated by Mr. Verstrygne and staff in DGIII rather than as an initiative instigated following pressure from industry and appeared to link up with the Commission's initiatives on software which had generated so much discussion and debate.

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 ?

The interviewee recalled that early in 1990 'Mr. Verstrygne informed me that it would be good for our interests to express general support for the Commission's proposals in the copyright field and in particular on databases which would provide some of the protection that we wanted'..

'in view of the fact that press agencies have always been in the forefront in terms of the use of on-line computer technologies and other information technologies the Commission's proposal for the legal protection of electronic databases was of great interest to us and we were keen to be involved'. However, he added that his organisation contained members from more than just the Member States and had members from former communist countries as well which meant whilst they saw the European discussions as important for providing protection to some of their association members they also had to be conscious of the wider perspective and the need for global protection.

1 The interviewee recalled attending the April 1990 hearing in Brussels, which he said 'attracted a
2 diverse range of groups who were generally in support of a copyright approach to the protection of
3 databases'. He added that for his organisation the main concern was 'to acquire protection of whatever
4 kind, with copyright as an obvious area of interest for them'.
5

6 Following the 1990 hearing the interviewee recalled that his organisation 'arranged a number of
7 meetings in Brussels with representatives of the Commission'. More specifically he recalled 'a meeting
8 with Mr. Posner some time during the 1988-90 period during which there was 'a very frank exchange of
9 views and Mr. Posner appeared very interested in the our views and concerns'. At a slightly later date
10 the interviewee recalled a number of meetings with Mr. Verstrygne 'at which Mr. Verstrygne was
11 always extremely keen for us to push up the profile of the database proposal and provide it with public
12 support which he explained would be very helpful as the more hype and clamour for the protection
13 around the directive would make it easier to persuade the Council of the need for legislative action on
14 databases'.
15

16 The interviewee added that his organisation also consulted with a number of copyright experts, which
17 led to a concern over the limited scope of the original proposal to cover just electronic databases. 'so
18 we argued for an extension of the scope of protection to cover all databases'. He added that by this
19 stage in the passage of the proposal 'members of the association particularly from Eastern Europe
20 including the Russian and Polish agencies began to push for us to extend the debate on database
21 protection to the international level at WIPO. As a result I arranged to meet Mr. Bosch (Director-
22 general, WIPO) and attended some meetings of the WIPO copyright working group to express my
23 members concerns over the Commission proposals' He added that it was at these meetings that he
24 became aware that there was a WIPO expert group examining the issue of database protection. This
25 information he then shared with Mr. Verstrygne who was both 'sympathetic to our request that the
26 coverage of protection be extended to all databases and the need to harmonise not just at a European
27 level but also internationally'.
28

29 **3. Did your opinions change during your involvement with these discussions ?**

30

31 The interviewee commented that his views did not change a great deal as the main concern for his
32 members was to ensure that protection per se existed and that this was always their focus. He recalled
33 that aside from pushing to extend the scope of the directive to all databases, Article (3)4 in the original
34 proposal would have adversely affected the ownership of copyright in the work of among others
35 journalists and so they lobbied for its removal as his organisation had always held the view that it was
36 an issue best dealt with by contract.
37

38 He explained more fully by saying that 'journalists working for a news agency are not in the same
39 position as journalists working for a newspaper because the news agency produces the 'raw material'
40 and is rarely if ever a publisher and so does not exhaust the copyright in the material. As such it is
41 nonsense to suggest that once an agency has sold some information to a newspaper which uses that
42 material, the journalist who produced the raw material for the agency should be paid again' This stated,
43 the interviewee was quick to point out that 'it would be wrong to assume because of this view that I
44 always see eye to eye with publishers'.
45

46 He added that 'By the end of 1993 I had little involvement with the database directive and increasingly
47 our efforts began to be concentrated at the WIPO level as the best means to provide our non-EU
48 members with similar protection. By this stage, it was clear that there would be a European directive on
49 databases and we felt that in terms of a use of resources we had done as much as we could to get the
50 database directive on-track'.
51

52 He added that these developments also coincided with his election as secretary-general of the
53 organisation and his replacement as chair of the copyright committee by the Swiss representative Mr.
54 Sheer who based in Geneva was on hand to maintain excellent contacts with WIPO.
55
56
57
58

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that in terms of allies 'clearly we had linked concerns to other press groups like Reuters who were while friends in terms of lobbying the Commission also our competitors in the market place'. He added that Reuters tended to be rather tight with any information and that as far as he knew it was actually their company policy never to give out information but always to collect it'. This stated he recalled that 'it was actually Reuters who contacted me, probably because they had heard that I had been making a noise on the issue'. He could not remember for certain who he had spoken to, but he thought it was Catherine Stewart. He added that 'our alliance did not go much further than some telephone calls'.

In terms of influence he commented that while his own organisation may have ultimately had little effect, other groups like Reuters did have an influence on the directive 'in reality of course, it is sensible and fair that those with the largest investments and interests in an area of policy should have an opportunity of making a contribution to that policy (i.e. they need to be heard). He was quick to point out though 'that often those who are most effective at getting their opinions heard do not have the intention of helping the European economy or the Internal Market at all , as is best illustrated by the lobbying tactics of US companies during the passage of the software 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 ?

The interviewee re-iterated how 'at the hearing on the database directive I was surprised to see the range of professional organisations represented and active on the issue including the Association of Cartographers who were concerned about the protection of copyright in maps and also lobbyists representing US interests such as the Information Industry Association(IIA) and the American Chamber of Commerce(AMCHAM) both of whom had a lot to say'.

This stated, the interviewee was of the opinion that the key players in the database directive were the Commission (Mr.Verstrynge & Mrs.Czarnota) and the in the Council France, Germany and UK (which has always had the largest database industry in Europe and a copyright system that traditionally had protected that industry. He added that in his opinion the 'the Council is very political where the interests involved are less concerned with any particular proposal and rather more with the issue of political interplay, bargaining and their Member State's stance'. He added that his own organisation 'had real difficulties with the German delegation in Council because the officials involved objected to the idea of extending copyright protection to the extent that it would protect news databases'. He recalled that his organisation was originally advised of this opposition by Mr. Verstrynge and that it was he who had suggested that they visit the Ministry of Justice in Bonn to make a deputation to try and soften the German position.

The interviewee also acknowledged the distinction between Member States with copyright systems and those with Droit d'auteur (authors rights) systems as having been an important influence on the approach adopted in the directive. He added that 'perhaps unsurprisingly because of our base product our organisation has always had more sympathy with the UK copyright approach (i.e. sweat of brow) which is why we were so keen to support the database directive and its sui generis solution to the problem of harmonising protection between the two copyright systems'.

The interviewee added that outside of these main European institutions in his experience of copyright policy-making both at the European and international levels 'there are always two key groups involved in lobbying: groups representing authors interests(including journalists) versus groups or individual companies representing publishers interests'. He added one of the best examples of this antagonism was the 'Belgian Central station case' where in his judgement publishers had behaved very poorly.

Indeed he added that 'while publicly publishers support the idea of news agencies receiving copyright protection, at a practical level they regularly do not understand and object to having to pay again for information they purchase from those agencies in one medium when they wish to use it again in another medium e.g. when creating web pages.' and ' for publishers the less protection that news agencies have

1 in terms of copyright the better for them but they also do want a minimum level of protection because
2 otherwise they will be paying for information that others would be able to get for free’.

3
4 **6. Did any international policy developments impact on the outcome of the Directive?**

5
6 The interviewee commented that he recalled the US Feist case at the beginning and being aware of the
7 TRIPS agreement which provided copyright protection for all databases but that he doubted it had a
8 major impact on the database directive discussions, although he acknowledged that by this stage he was
9 less involved.

10
11 He was not aware of any other significant international developments although he said that the Council
12 working group was aware of the on-going discussions on databases taking place in WIPO.

13
14 **7. How do you account for higher public profile of the Database directive ? Do you agree with the**
15 **characterisation of the Directive as the Cornerstone of the Multimedia society ?**

16
17 The interviewee commented that ‘on reflection the database directive proposal was a very big step and
18 shows how far sighted the Commission were at the time. In my personal opinion I think it is impressive
19 how far the Commission has come in less than 10 years in the harmonisation of European copyright
20 with five directives adopted and more on the way. It just shows what can be achieved’.

21
22 This stated, he added that whilst the database directive had certainly gained a higher public profile in
23 the context of discussion of the information society he remained sceptical of any characterisation of it
24 as the cornerstone of the multimedia society although it was clearly an element in the Commission's
25 approach to the regulation of information in digital environments.

26
27 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
28 **with copyright were represented in the directive ?**

29
30 The interviewee commented that from his experience of the consultation process on the database
31 directive and more generally the Commission appeared very open to views from all interested parties,
32 although as he mentioned previously he thought it reasonable that those who have the largest
33 investments should have a say in how a policy develops.

34
35 **C. European policy for Copyright**

36
37 **9. How would you assess the significance of the Database directive for current and future**
38 **European copyright policy formulation ?**

39
40 The interviewee re-iterated that the database directive was likely to act as a model for future legislation
41 particular with regard to future policy-making on boundaries of copyright in digital environments: e.g.
42 the originality criterion, scope of the reproduction right etc..

43
44 The interviewee added that ‘on the issue of exceptions in principle users should have similar abilities
45 to use material in both analogue and digital environments but in practice the situation was likely to be
46 very different, although hopefully an appropriate balance will be found’.

47
48 **10. As the global Information Society develops what role will copyright harmonisation play**
49 **in the process of European integration ?**

50
51 The interviewee commented that as more Eastern European countries joined the EU and the information
52 society developed copyright harmonisation would probably play an increasing important role in shaping
53 the process of integration.

54
55 **11. Which other factors, if any, would you identify as being significant in affecting how**
56 **copyright issues are framed and discussed at the European level ?**

57
58 The interviewee commented on the role of the Civil servants within the European Institutions, lobbying

and approaches adopted by Member States in the Council as being significant on how policy is made:

Firstly, that he has 'always been impressed by the quality of European civil servants, most of whom are of a high calibre with a lot of know-how and have been picked after a severe selection process. They also have to operate in environments with lots of restrictions and constraints including the difficulties of communicating both internal to each institution; Commission, Parliament, Council and also between institutions and to the outside world more generally'. He added that 'unless you are directly involved with an issue or follow developments very closely the whole policy process can easily appear to be rather complex and opaque - transparency is a problem that the EU institutions particularly the Council must address'.

Secondly, he commented that 'there are serious frustrations for lobbying groups in dealing with European civil servants and Parliamentarians because overall there are relatively few in number and they are always themselves eager and in search of information' from his own experience of lobbying many civil servants and Parliamentarians have their own serious problems in getting information and so those lobby groups that are able to present information directly and succinctly often get to have influence over how proposals develop'. This stated, in principle he agreed with European civil servants being paid high salaries because 'it puts them beyond the grasp of corruption or if that is too strong a word biased influence'.

Thirdly he commented that in his opinion 'Civil servants clearly have their own opinions on issues and are sufficiently intelligent to be able to sift through the information that they receive and to not be unduly influenced'. This stated, he added that 'sometimes it is not always easy to differentiate between getting information versus being pressured by lobby groups. Although I doubt that the policy process is that different in most Member State national parliaments'.

Fourthly, he commented that given that in all Member States the Parliament is the executive decision-making body while at the European level it is the Council in his experience there are two basic approaches adopted by Member States to policy concerned with the internal market 'there are those Member States that can be described as integrationist e.g. Benelux countries, France, Germany and Italy (i.e. the founder Members of the Community) and those that can be described as neo-liberal in approach the most extreme example being the UK'. The interviewee added that whilst 'integrationists tend to be more willing to consider compromises on sovereignty the neo-liberal position tends to block such moves'.

Finally the interviewee commented that policy-making is affected by the Parliament where in his experience the Parliamentarians vary dramatically in calibre which is very frustrating 'many are very talented and hard working individuals while others are complete idiots. The power of the Parliament remains limited even under the co-decision procedure and a major problem that it faces is that it is still not always taken very seriously by the other institutions especially the Council. In some senses there is genuinely a democratic gap which will only be solved by improving the quality of the parliamentarians and then the powers of the European Parliament'.

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 ?

The interviewee commented that 'for the digital environment there is a need now for a total rethink of copyright and the kinds of protection needed. Copyright is based on a 19th century or older philosophy that in the age of 21st century technologies is no longer tenable'. He added that 'there is a need to think about alternatives or additions to the copyright approach which has always been basically about ensuring and facilitating a fair return for creative work'. He acknowledged that he personally has always emphasised the economic aspects of copyright over its philosophical, ethical, or moral aspects.

The interviewee added 'copyright faces real problems in the digital world because for example it remains impossible to control 100% effectively an Internet service'. In support of his argument that we

1 cannot yet control the flow of copyright works on the internet he pointed to the recent advertisements
2 produced by software houses offering financial rewards for information concerning those engaged in
3 software piracy- clearly he commented that 'the software industry is pretty desperate when it feels the
4 need to resort to this kind of action'.
5

6 He acknowledged that he did not have an answer for all the problems faced. He suggested 'perhaps we
7 need heavy sanctions combined with the pro-active capture and condemnation of the copyright
8 infringers/pirates and destruction of their factories'. The interviewee commented that he still had little
9 faith in technical systems for copyright protection and management on the basis that 'there will always
10 be some-one who knows how to build a better system or way of circumvent it. Just look at email, it is
11 basically completely insecure'.
12

13 The interviewee commented that 'I am concerned about the future of copyright protection as the
14 Internet continues to expand. The rate of change is so dramatic that even if we had a global agreement
15 on copyright legislation now we would still have to address the enforcement of rights on a global
16 scale'. He added that 'in such a global environment I still doubt that we even have the means to
17 establish that infringement is taking place let alone enforcing our rights'.
18

19 From the interviewee's perspective these are the concerns that his organisation faces and to which
20 answers need to be found otherwise in the worse case scenario their business could become
21 economically unviable to operate'.
22

23 **13. How would you characterise the relationships in digital environments between copyright**
24 **policy and other areas of information policy such as Privacy ?**
25

26 The interviewee commented that he did not see any major concerns or relationships between copyright
27 and other areas of information policy e.g. for privacy or the public domain. He did however
28 acknowledge that individual or company profiling did present a problem to privacy issues especially if
29 the information collected was inaccurate.
30

31 In essence the interviewee did not recognise any interrelationships between extensions in copyright
32 protection in the digital environment and other areas of information policy. In the interviewee's view 'if
33 you make the effort intellectually or with time, money and effort you should get protection to facilitate
34 fair remuneration'. He re-iterated that for him 'copyright is an economic and not an intellectual issue. It
35 is this latter aspect that in my opinion tends to cause confusion in the debates on the subject'.
36

37 **14. How adequately do you think current European Information policy processes handle these**
38 **interrelationships?**
39

40 The interviewee referred to his previous answers.
41

42 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
43 **concerns over the issues of democratic participation and accountability ?**
44

45 The interviewee referred to his previous answers and in particular the general need to increase the
46 decision-making role of the Parliament.
47

48 The interviewee added that 'reform of the European institutions is already high on the agenda of
49 changes required by the EU although few major changes are likely now before the introduction of the
50 Euro- and the further expansion of the EU early in the new millennium'.
51
52

INTERVIEW no. 36

Director of Public Affairs for Federation of European Direct Marketing Associations(FEDMA)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'Firstly I should explain that FEDMA is a recent amalgamation of two separate direct marketing groups FEDIM(concerned with public affairs) and EDMA(concerned with membership services). Since February 1992 I have been the Director-general of FEDMA which itself has always been made up of two parts: (i) national DMA(direct marketing associations) representing about 10,000 companies (some in the USA) and (ii) 24 direct members of varying types with a backbone of publishers such as Time Warner, Bertelsmann, Reader's Digest'.

The interviewee commented 'As Director-general of public affairs in FEDMA(Federation of European Direct Marketing Associations) the main focus of my lobbying activities is directly with the Commission and, to some extent with the Parliament. I also try to ensure that any information gathered from these activities is transmitted to our national members along with advice and encouragement to them to lobby their Member State's national representatives. Although persuading our national members to get involved is never easy we assist them by preparing briefings and position papers on particular proposals of interest'.

He added 'on the database directive I know that one of our national members who showed a lot of interest in the issue was the legal counsel from the Dutch DMA(Direct Marketing Association) Alexander Sigenwold who was quite active in lobbying the Dutch Ministry of Justice representatives who attended the Council working group. I think his interest was partly due to the fact that certain Dutch case law at the time concerning tampering of rented lists on a business to business basis had highlighted the lack of protection under Dutch copyright legislation'.

The interviewee added 'Shortly after starting operations in the Brussels office in 1992 I remember that one of the very first activities I worked on was the European proposal on data protection. This was a key issue for our members and to a large extent it over-shadowed many other Commission proposals. However, shortly after this I can remember meeting Mrs. Czarnota (whose reputation preceded her) to discuss the database proposal and other copyright issues'.

The interviewee added ' because we joined the database discussions quite late it was difficult to be certain what was driving the proposal forward but my impression is that it was very much a Commission initiative pushed forward by Mrs.Czarnota and her boss (Mr.Verstrygne). At the time FEDIM made a submission to the Commission which broadly supported the proposal and I remember meeting Mrs.Czarnota very early on in 1993 at which time she was very keen to get us to make every effort to lend our support to the directive' He added 'I can't remember meeting her again after that but then we got much of our information about the directive through Mr.Barry Wojcik(Dun & Bradstreet) who was in regular contact with Mrs.Czarnota throughout the negotiation process'.

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 ?

The interviewee commented ' I remember that the Commission's initial proposal was very difficult to read and understand and that even before its release Mrs.Czarnota was in a difficult position because she had to try to whip up industry interest on the issue that few appeared concerned with it. Partly this was because the database industry at the time was still small and mainly concentrated in the UK, so from the outset many viewed the proposal as to do with a rather technical and esoteric issue of concern only to the UK'.

The interviewee added 'I am not a lawyer by training and I also have to say that because I wasn't heavily involved in the directive it is difficult to recall all the issues but I can remember that a key issue of concern to our member was the directive's articles dealing with compulsory licensing and the also the amount of data that could legitimately be extracted without the rightsholders permission. Obviously as direct marketers this is a key issue when renting or selling information because if it is legal to extract then companies will be reluctant to pay. For example, take supermarket loyalty cards where information on customer purchases are stored in a marketing database. A dog food manufacturer will only want information on who and how much dog food is purchased which will be only a very small part of the total database. So if it is legitimate to extract this information then the direct marketing business would evaporate'.

The interviewee added 'the sui generis right also caused considerable confusion at the beginning particularly to copyright lawyers because it was outside their normal area of expertise. It also caused us concern at the beginning because of its limited duration and while in the end 15 years was OK most of our members would have preferred 20-25 years or longer as was proposed by the UK government. A related issue was what would constitute a major change or investment so that a database might qualify for a further period of sui generis protection (because in direct marketing any list that remains unchanged quickly goes out of date. On this point however I have to say that I am still not sure how it will work out during the directive's implementation'.

The interviewee commented 'at the European Parliament during the first reading I talked to Mr.Garcia Amigos the rapporteur who I found to be a very sympathetic listener and somebody that was easy to get on with, although to some extent this may have been because my wife who is Spanish also works at the Parliament. However regardless of this he was certainly singing from the same song sheet as the publishers and my general impression is that the directive went through on a wave with no problems'.

The interviewee added 'During the second reading in Parliament I talked to Mr.Medina-Ortega (shadow rapporteur) and Mrs.Anna Palacio(rapporteur) but by this stage our members were reasonably content with the directive and we did not try to push for any major amendments although there was considerable concern at one stage that the Parliament would amend the directive in such a manner that would have to go to conciliation particularly over the compulsory licensing provisions which were dropped by the Council just before the common position. As a result a lot of the lobbying that took place was aimed at keeping the directive as much like the common position as possible and putting the Parliament off making any major changes. Mrs.Palacio was sympathetic to the idea of keeping things the same and Mr.Medina-Ortega was very laid back about it all (which I have heard is his normal reaction to all proposals) so we felt that we could ease off and relax'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'in terms of the directive itself my opinions haven't really changed a great deal simply because I wasn't that heavily involved in it. I think I could best describe my role as one of lending the support of FEDIM (FEDMA) to the view that a directive to protect databases was wanted by industry'. The interviewee re-iterated that 'after an original note from Mrs.Czarnota that highlighted over 70% of all electronic databases were held in the UK and protected under sweat of brow most of our members kept up only a marginal interest in the directive. Personally I relied very much on Barry Wojcik to point out any major issues of concern or the need for any lobbying activity as he was very much the one eyed man in the land of the blind on the directive'.

The interviewee added 'Of course the database directive and the developing new technologies were important in respect of where our members decided to place or centralise their databases. An example of the impact of the directive is that whereas in 1992 Reader's digest centralised all their databases in Swindon because of the sweat of brow protection they would be eligible for, by 1994 with the prospect of European wide protection Citibank and Diner's club were happy to site their databases in Holland. Obviously I am not suggesting this was the directive was the only or even the most important factor in the decisions of these companies but it was most definitely a factor'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee referred to his previous answers and added 'the main conflicts that we had during the directive were with the library lobby over the issue of exceptions, although I should point out that these differences of opinion occurred not between the direct marketing part of FEDIM but with the publishers in the association. These single firms were themselves in other alliances and trade associations such as FAEP- (European Magazine Publishers Association), ENPA(Newspaper Publishers Association) and the EPC(European Publishers Council) which is headed by Laurence Kaye and Angela Mills. I should add that FEDMA and the EPC are happy to support one another on a cross issue basis on the grounds of good neighbourliness'.

The interviewee added 'It is always a very difficult assessment to make in terms of how effective your lobbying has been but in the case of the database directive it is pretty clear that we were not key players although I think we made a valid and useful contribution to a debate the outcome proved satisfactory for us'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented 'One of the most important impacts on the directive was the Germans taking over the Presidency in the last 6 months of 1994 directly after the Greeks. As I remember it the Germans put a considerable amount of effort into pushing the directive forward and they really wanted to try and get it adopted before the end of their term, although quite why they were so interested in the directive I do not know. Although part of the reason may have been because during the Greek Presidency next to nothing was achieved'.

The interviewee added 'Certainly when the Germans took over the discussions on the directive and on all other copyright issues changed gear which was a good thing because I think there was a feeling among many lobby groups that the directive was beginning to drag'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented 'Certainly I was aware of what was going on internationally and I had a number of discussions with our USA members including Ron Plessner from the Direct Marketing Association(DMA) who we arranged for Mrs.Czarnota to meet when she visited the USA in 1992 or 1993'. He added 'I was also aware that prior to the European database proposal there had been some important case law in the USA that highlighted the limited protection available to products like telephone directories i.e. factual compilations'.

The interviewee also added 'The TRIPS discussions in the GATT as well as the on-going discussions in WIPO were also important for the outcome of the database 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 ?

The interviewee commented 'In my opinion discussion of the information society in Europe and the NII(national information infrastructure) in the USA has had an impact on raising the profile of all copyright discussions both at the European level and internationally at WIPO and in the TRIPS. But I should say that new technologies themselves have not been a major influence on most of our members who since the late 1970's have continued to be at the forefront of the use of new techniques for business practice'.

The interviewee added 'for our members specifically, clearly the key issue in recent years has been data protection and not databases but secondary issues including security of payments, liability, and applicable law have all become increasingly important in the context of the developing digital environment'.

The interviewee added 'Personally I think calling the database directive the cornerstone of the Multimedia society is probably a little bit excessive but it could certainly be characterised as a foundation stone without which the position in digital environments for our members and publishers more generally would be much more tricky'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented ' In general I think consultations at the European level are thorough and in terms of FEDMA's own activities it is possible to identify three stages each one corresponding to one of the key European institutions: For the Commission it is almost always totally my responsibility to organise and co-ordinate lobbying as early as possible in the policy process and to identify and contact all the key Commission officials involved in any particular proposal. For the Parliament often many of the lobbying duties are shared with our national associations especially because contacts with rapporteurs for example can be easier if our contact is of the same nationality. For the Council it is a little difficult to comment because its work is far from transparent and we can only encourage our members to lobby their national delegations and to lobby the Ministers concerned, for me personally the main source of information as to what is happening in Council is almost always through the Commission who attend all the Council meetings'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that it was probably still a little early to tell but as he had mentioned early it was probably a foundation block for the Commission's future approach to protecting information and copyright works in the digital environment'

The interviewee also made two broader points about FEDMA's general approach to copyright issues: 'Firstly the member associations of FEDMA tend to play a supporting role in any lobbying that takes place on copyright issues in that they follow the lead of the large publishers in the association who keep their eyes open on these issues. Secondly, on copyright itself one of the main concerns of many of our members revolves around the rights of creative authors in relation to those who commission work from them for example in the advertising field. Unfortunately within FEDMA we have members from all sides of this issue including advertisers, service providers and users of these services which makes it a very sensitive topic. Conflict particularly arises in the case of smaller advertising agencies and users where for example a small agency may be fired after having generated a successful campaign and then the user of that service may a few years later decide to re-use the same campaign. This clearly makes small agencies get very angry, especially if the re-use terms have not been covered in the original contract which is why many DMA's have developed model contracts to deal with these IPR issues'.

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

The interviewee commented 'Professionally speaking direct-marketing stands to gain an enormous amount from cross-border and electronic commerce if copyright and other legal regimes can be harmonised across not just the EU but also in the wider Europe and internationally. Indeed because so much harmonisation has already been achieved within the EU in the last 10 years there is an increasing tendency to look for harmonisation in the former Eastern block and internationally'.

The interviewee added 'personally however I can see that there are still two contradictory forces acting within the EU: One is the increasing concentration of decision-making in Brussels and the other is the increasing devolution and de-centralisation that is occurring with Member States across Europe. As a consequence I think we will end up with a kind of Europe of regions rather than a United States of Europe'.

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 ?

The interviewee commented 'the Commission is without doubt very much more transparent and open in Brussels than in the UK or any other Member States national civil service I have come into contact with and I say this from a position of my previous working experience with the CBI (Confederation of British Industry) and ITC(Independent Television Commission), it is also despite the criticisms of the Eurosceptics a very small bureaucracy, smaller even than for example the UK's Welsh Office. As a consequence of this the personality of particular Commission officials can play a greater role in the policy-making process'.

The interviewee added ' during the database directive for example both Mr.Verstrygne and Mrs.Czarnota both had very strong personalities although I personally didn't have any problems with them. Another possibility in some policy proposals is that there will be a joker in the pack i.e. a national expert who is brought in to assist with the drafting of a particular directive. These individuals usually have a vested interest in slanting proposals to suit the interests of their own Member State, especially that is if they want to return to a good job when their secondment is over'.

The interviewee added 'it is partly because of the unfair recruitment policy in the upper echelons of the Commission where people are political appointees who are simply parachuted in from above that means that one of the few ways to enhance your career position is to become more visible which can be achieved by pushing a directive through to its adoption, although it is also a bit risky for officials if the proposal fails'.

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 ?

The interviewee commented 'A major problem for intellectual property in the new digital environments, apart from the obvious threat of piracy, is the different approach of the droit d'auteur system versus the copyright systems, especially as although the majority of EU Member States have droit d'auteur systems it is the least suitable regime for the digital world'.

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

The interviewee commented 'In my opinion there is a considerable degree of overlap between copyright and other areas of information policy particularly data protection where for example some people in the USA are pushing the idea of individuals claiming copyright for their personal data (i.e. the extension of the property concept to personal data)'.

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented 'since the Bangemann report I think that there is a greater willingness to consider relationships between issues in the digital environment and as we move forward with electronic commerce I think solutions will be found so that it can take place whether that is through anonymised cash, a system of trusted third parties or some other solution'.

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

The interviewee commented that he didn't have any major concerns about democratic participation and re-iterated that generally he found policy-making to be quite transparent at the EU level although he said that he hoped in the future the Council would also improve its transparency and that the power of the Parliament would be increased - both of which he thought would happen over the next 10 years or so as the EU expanded to accommodate new Members'.

INTERVIEW no. 37
Director of European Bureau of Library, Information and Documentation Associations
(EBLIDA)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented ' Firstly I should explain that I have been directly in the European copyright arena since about 1990 at which point I became involved with the Rental and Lending right directive and Term directive. The database directive did not as far as I can remember generate a lot of lobbying and more than anything else I can remember that it seemed to create an enormous amount of confusion which began with a rather difficult proposal text and carried on right through until the beginning of the French Presidency when suddenly there was no information at all available on what was happening in the Council negotiations. Even in the Parliament there was confusion and in the second reading it was clear that both Mrs.Palacio(rapporteur) and Mr.Medina-Ortega(shadow-rapporteur) decided simply to let the directive go through without any major discussion or amendments'.

The interviewee added 'The database directive proceeded through from its proposal to the first reading reasonably smoothly but after its arrival in Council it seemed to get blocked and it took two and half years of negotiation before the common position was finally reached. In my opinion this was partly due to the rather uncompromising approach of Mrs.Czarnota (the Commission official who drafted the directive) in the Council working group and partly because of problems in understanding how the dual copyright/sui generis system of protection would work in practice. Certainly after Mrs.Czarnota's departure and her replacement by Mr.Paul Vandoren the negotiations moved forward swiftly to a conclusion'.

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 ?

The interviewee commented that she was involved in keeping up with the directive along with her other lobbying work on behalf of the library community on the other copyright directives. But she commented that for most of the directive - really until after the common position and into the second reading the directive was a closed topic to the library community because it didn't seem initially to be of major concern and because little information was available on the changes being made'.

The interviewee commented ' I know that defining the term database proved very difficult and that at one point it was argued by some in the Council working group that without an improved definition books would qualify as compilations (i.e. almost everything was within the scope of the definition). This problem was characteristic of all the discussions on the database directive in that it was an issue that nobody seemed to understand very well which partly explains why so many changes were made to the original proposal before it was finally adopted'.

The interviewee added ' In the Parliament a major concern during the first reading was that nobody could tell what the consequences (economic and social) of the directive would be, and remember this was at a time when the Internet and discussions of the information society were only just beginning. But there were also other problems in the Parliament like the rapporteur Mr.Garcia-Amigos only speaking Spanish, for example, he was one of the few people to commission a study on the issues arising from the adoption of the directive (from a Spanish University - Madrid I think) but the report was never published or translated so was of little use to anyone else'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'To summarise there were a number of reasons why the database directive was both confused and relatively low key: Firstly, the original proposal was as I have said simply a difficult document to read. Secondly, there was a general lack of awareness and recognition of the importance of databases for the developing information superhighway/information society and a lack of knowledge as to what the impact of the directive would be on the industry. Thirdly, in the Parliament the topic of databases was far from sexy in that whereas with other copyright directives it was possible to have a clear message, the database directive seemed to be only concerned with a niche market concentrated in the UK, for example, on the rental and lending directive we lobbied with the message do something or there will be no libraries which made it easy to get MEPs to act. Fourthly, after the massive lobbying that occurred on the software directive many MEPs were very of the issue of databases in case it gave rise to a similar amount of lobbying. Finally, even where the MEPs involved were lawyers few were copyright specialists and even for these (as the work of the Council working group highlighted) the dual approach combined with the differences between copyright and droit d'auteur regimes made the directive difficult'.

The interviewee added ' Yes my opinions did change, especially after I saw the common position and the changes that had been made and I think as we await the directive's implementation there are still a large number of questions that remain confused in the directive text including how insubstantial part will be defined in the digital environment and what level of continued investment will be necessary to extend the period of sui generis protection - with the clear danger that the directive has introduced a system of never-ending protection for ever-expanding databases'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented 'Other than informal alliances with some groups on specific issues like pushing for the extension of the directive to cover both electronic and non-electronic databases where I had an understanding with the FEP(Federation of European Publishers) it was pretty difficult to form any strong alliances with other groups concerned with users interests. For example neither BEUC(The European Consumers Organisation) nor the FID (International Federation for Information and Documentation) had, as far as I know, any policy statements on the directive and in the UK Sandy Norman for IFLA/LA (International Federation of Library Associations/The Library Association) like EBLIDA(European Bureau of Library Information and Documentation Associations) followed the directive but only became seriously concerned by the directive at the common position stage by which time the directive was inevitable'.

The interviewee added ' Overall there was a lot of confusion during the policy process and in terms of my influence or that of any members of the library community I would have to say that we drew a blank'.

The interviewee added 'Many people have said that the Library community gave away reproduction for private purposes in electronic environments without a fight but I don't think this is the case because while it is clear that you can't make a copy of an entire database insubstantial parts remain available, although I appreciate that it definition also remains problematic'. This stated the interviewee commented that she had recently become more concerned about this issue because 'many of those saying that private use was gone were Member State government representatives and Commission officials but I still think under Article 9 of Berne and examining the text of the directive that fair use remains even for digital databases'.

The interviewee added ' I should also say that the dropping of the compulsory license provisions seems less serious now than it did at the time, although I still think that there might be a danger of information monopolies but since Magill it is clear that competition rules do have a role to play in this area. Above all the issue of concern was access to information however because most copyright exceptions have been left up to Member States national laws I don't think that the directive will cause any major problems as long as there is hard lobbying on the issue during its implementation'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented ' within the Council working my understanding is that the UK and France were most influential on the directive, the UK because of it has the majority of the European database industry and France by resolving its internal disputes over the directive and pushing it through to a common position during its Presidency of the Council. Germany also had a role but was not much in favour of the sui generis right and would have preferred a system of unfair competition rules along with copyright for the protection of databases. Of the other Member States most were not very active although I have the impression that Spain and Portugal tried to block a lot of things while Denmark along with the Sweden and Finland(after they joined the EU) objected to the compulsory license provisions'.

The interviewee added 'of course the Commission through Mrs.Czarnota also played a vital role in the shape of the directive, while lobbyists like Charles Clarke (for the publishers) and representatives from AMCHAM (American Chamber of Commerce) were also active'.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented ' Two cases I can think of that were important are the US Feist case and the Dutch Van Daele case both of which preceded the Commission's proposal and were in the background as partly justifying the Commission's action'.

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 ?

The interviewee commented 'the real implications of the database directive have only recently begun to emerge especially over the last two years, partly because of the information society initiatives which have focused the public's attention on information as a resource and also because of other moves in the copyright field at EU and international levels for example, the conclusion of the TRIPS agreement and the WIPO diplomatic conference, all of which has raised the profile of IPR discussions (including on databases)'.

The interviewee added 'I don't however think that the directive is the cornerstone of the information society but it has certainly contributed to the beginning of an approach for the digital environment which DGXV is continuing with its latest proposals. To see this you have to consider the issues in a global context and the Commission's desire to increasingly push its harmonisation agenda at the international level. As the WIPO conference highlighted similar motivations were driving the US delegation under Bruce Lehman who saw the opportunity to bypass opposition in Congress to proposals in the White Paper by pushing for international agreement. There was clearly strong agreement between the US and EU delegations at WIPO on most issues and it seems that this joint approach may continue in the future'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'One major disadvantage that the library and user community faces in lobbying on copyright issues is a lack of up-to-date information on the Commission's latest proposals. While industry representatives appear always to receive this kind of information ahead of time we are left relying on good personal contacts to get this information early'.

The interviewee added 'On the database directive the last 6 months of the Council's work were particularly frustrating because there was a real lack of transparency, although I should say that this is not always true of Council negotiations, for example during the rental and lending right directive it was relatively easy to find out how the negotiations were proceeding'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented that she felt it was still a little too early to tell and a lot would depend on how the directive was implemented in the Member States and whether this led to large differences between Member States on exceptions etc..

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

The interviewee commented ' I am not sure what role harmonisation will play at the European level but I am quite sure that there will be more harmonisation at the international level and I am aware that many in the Council working group are becoming sensitive to the apparent influence of the US on the Commission as increasing numbers of US firms become active in Brussels. Both the Commission and the US are increasingly focusing their attention at the global level while many companies and governments in Europe continue to examine issues at a national or at best European level'.

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 ?

The interviewee commented that she had nothing specific to add but that she had 'often wondered whether the very high percentage of German officials within DGXV in anyway relates to the generally highly protectionist approach of the directorate to copyright'.

D. Information policy-making and Copyright in the digital age

(From this point on - the interviewee said that she could only spare another 5 minutes for the interview)

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

The interviewee commented 'Overall there has been a worrying extension and widening of protection offered by copyright and this trend looks set to continue because of the highly protectionist approach of DGXV officials. An example of this approach is the DGXV copyright working group that meets regularly to discuss copyright issues yet does not have a representative of user group in it, and this is even after my repeated request to join the group'.

The interviewee added 'For me personally the key tension that exists is between on the one hand cultural forces and on the other commercial forces and on how we choose to balance the two in the relationship between authors and users i.e. creativity and its protection versus access to information. Similar tensions exist between the requirements of copyright and competition rules and between IPRs in general and the need for standards and interoperability'.

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

The interviewee commented ' the relationships between other areas of information policy and copyright are only just beginning to be discussed and I know that the increasing use of technical systems for copyright management have led many to raise concerns about consumers privacy as the ability of rights holders to monitor their actions on-line increases. I do think however that in the near future some of these issues maybe addressed with the introduction of PETs(privacy enhancing technologies) and the use of TTPs(trusted third parties)'.

The interviewee added 'with regard to databases there is clearly also the issue of public domain information becoming protected within them and although this does not prevent users from finding alternative sources it may lead to potential problems of information access as more and more information is stored in commercial databases'.

1 **14. How adequately do you think current European Information policy processes handle these**
2 **interrelationships?**

3
4 The interviewee commented that currently these relationships had not been examined very closely but
5 that programmes like the ESPRIT - IMPRIMATUR(Intellectual Multimedia Property Rights Model
6 and Terminology for Universal Reference) and DGXIII's ECUP(European Copyright Users Platform)
7 were definitely moves in the right direction. At the international level the interviewee also pointed to
8 developments like the Digital Future Coalition and the Electronic Frontier Foundation as movements
9 that were generating awareness and support for a better balance of rights in digital environments.

10
11 The interviewee hoped that the Commission would continue to initiate programmes like these to build
12 up greater public awareness and understanding among the different industry players of the problems
13 faced in extending copyright into digital environments.

14
15 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
16 **concerns over the issues of democratic participation and accountability ?**

17
18 The interviewee commented ' One obvious way would be to increase the transparency of policy-making
19 throughout the European institutions but perhaps most particularly in the Council'.
20

21 The interviewee added ' the issues of democratic participation and accountability are certainly big
22 questions but I am an optimist and I think increasingly more and more people are becoming both aware
23 of and involved in policy-making on these issues'.
24

INTERVIEW no. 38

EC Representative for International Federation of Library Associations

Preliminary Comments by Interviewee

The interviewee started by saying that she was not a lawyer by training and that she could recalled that when she first became involved in copyright issues in 1989 she faced a very steep learning curve.

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 ?

The interviewee commented that 'I took over the job of preparing submissions in response to new legislation in the UK and at the European and international level from Ray Wall and Ross Shimmmon (now director of the Library Association) in 1992. One of the first pieces of legislation that I dealt with was the database directive, which I first heard about with the Commission's formal proposal'.

She added 'However, before this I had gained experience of some of the issues and personalities because the UK's Copyright, Designs and Patents Act had just come into force and I had attended several meetings on its implementation'.

The interviewee commented that she did not really know what factors led to databases becoming a focus for European policy discussions although she recalled 'I do not think it was as a result of pressure from the UK database industry or government because there appeared to be some confidence in the assumption that under the new UK Copyright Act the provisions on compilations provided adequate protection to electronic databases'.

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 ?

The interviewee commented that 'initially the database proposal did not seem to be a key issue for the library profession and users, so we pretty much let the lawyers get on with it. Later on as discussions of the information society, multimedia and the internet began to become more prominent and some began to label the database directive as the multimedia directive it became clear that it had wider implications for the balance of copyright in the digital environment'. She added that 'library groups certainly became more active after the common position, which to some extent may have been too late'.

The interviewee commented that most of her involvement in the database discussions were in the UK both writing submissions on behalf of the Joint Consultative Committee(JCC) on copyright and attending meetings organised predominantly by the Patent Office to consult with and keep up-to-date interested parties. As she went onto explain the JCC was founded in 1992 by the merging of the library association sub-committee on copyright and the former JCC which represented the interests of the following organisations: ASLIB(The Association for Information Management), The Institute of Information Scientists, The Library Association(LA), SCONUL(Standing Conference of National and University Libraries) and The Society of Archivists.

In this regard the interviewee recalled attending meetings at the Patent Office on the database directive in April 1993, March 1994 and September 1994 and receiving reports from meetings organised on the same subject by the Confederation of British Industry(CBI) and the Confederation of Information Communication Industries (CICI) early in 1994. The interviewee also commented that during this period and more generally she 'rarely went to Brussels partly because of my work load and the limited financial resources available for such activities and partly because I did not want to duplicate the effort of EBLIDA(European Bureau for Library, Information and Documentation Associations)'. She added that 'the lack of financial resources was one of the major reasons that I resigned from my role in as IFLA's(International Federation of Library Associations) copyright adviser where my post was 50% funded by the LA and 50 % by IFLA. There was simply never enough money available to do an adequate job for the work load involved'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented 'Yes, they did'. She added 'what started as a relatively small discussion within the information and database industry later became part of a wider debate that culminated most recently with the WIPO diplomatic conference concerned with the extension of copyright into the digital environment'. In this regard the interviewee mentioned a research paper by Professors Reichman and Samuelson which had really been 'an eye opener' on the potentially harmful effects on information access of the European and US initiatives on the copyright protection of databases.

The interviewee referring to a recent JCC document prepared on copyright in the digital environment said 'We believe that the full use of the new technologies and advanced telecommunications will not be fully realised until adequate protection and effective networks of remuneration for use are built into national and international intellectual property legislation. However, *there is concern by the user community that too much control could impede access to works* which are out of copyright or which have been deliberately put into the public domain by rights holders wishing to waive copyright. Although it is essential that digital works must be protected from piracy, *any attempt to gain total control will be counter-productive. Too much technical copyright protection could prevent creativity and/or lead to a disrespect and disregard for copyright*'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee commented that aside from other members of the JCC (e.g. Ray Wall - ASLIB, Denis Heathcote - SCONUL) her main contacts during the passage of the database directive were 'Emanuella Giavarra from EBLIDA who kept me well informed of developments in Brussels and other contacts in IFLA who could find out information about reaction to the directive negotiations in other Member States'. She added that she also had contacts with some academics including Charles Oppenheim and Tamara Eisenschitz and Graham Cornish at the British Library. She admitted that her direct contacts with the Commission and Parliament were relatively limited.

Overall she commented that her impression was that 'our perspectives were not very influential over the directive at the European level but we will lobby the UK government at the implementation stage of the directive to ensure that the interests of libraries and their users are represented'. She added that in dealing with copyright issues at the UK national level she has always had the impression that 'officials at the Patent Office, which is within the Department of Trade and Industry, are always basically on the side of industry on questions of whether copyright protection should be extended or not. As a result they tended not to be terrifically helpful or sympathetic to our concerns'. In this context the interviewee commented that 'following Peter Brittan's (former head of the UK Government's copyright division) retirement from the Patent Office it was no surprise a little while later to meet him at the WIPO diplomatic conference in Geneva in his new capacity as a consultant working for the British Software Association(BSA)'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented that from her experiences at the UK consultation meetings 'certainly the most vocal individuals were people like Charles Clarke and Clive Bradley representing publishers, although how this translates into influence over the UK government position I don't know' She added that given the receptiveness of the Patent Office to the industry point of view she imagine that they had a good degree of influence'. She also mentioned Reuters(John Stevens) and Chadwyck-Healey (Steven Hall) as having been active.

The interviewee also said that from her contacts her impression was that the European Commission was clearly very influential and inside the Council the three most influential Member States were the UK (because it had the largest database industry in Europe and a copyright system fundamentally affected by the directive), Germany and France(who respectively held the last two Presidencies up to the common position).

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee mentioned the TRIPS agreement although she said that she was not how sure how significant it was for the directive beyond adding wait to calls for the directive to cover both electronic and non-electronic databases.

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 ?

The interviewee commented that in her opinion the database directive had a higher public profile because it had emerged at around the same time as discussions of the information society and information superhighways and the popular realisation that content and its protection were crucial to their success.

The interviewee was sceptical of characterising the directive as the cornerstone of the multimedia society but she agreed that given events since its adoption including the Commission's follow-up communication on the July 1995 Green Paper it was clear that it had in some respects set a precedent that would guide future Commission policy proposals.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented that given that there had in a relatively short space of time been five European copyright directives she acknowledged that everybody's experience of the policy process, of the main interested parties and how best to engage in the consultations had improved.

This stated, while the consultation process had improved the interviewee was not confident that the ability of groups representing users interests was any more effective now than in the past. She added 'we already have serious concerns that in the digital environment very powerful lobbying by rights holders in defence of their economic rights will be of detriment to information access more generally. Basically we have fewer resources, less information and less clout with DGXV officials, who are anyway inclined towards stronger protection'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

Referring to her previous comments the interviewee said that the most significant aspect of the database directive was likely to be the sui generis right because it set a precedent in international copyright regimes by introducing a dual system of protection.

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

The interviewee commented that it was a difficult question to answer but judging on the rapid expansion of the Internet and other forms of digital communication copyright harmonisation particularly at a global level was likely to be very important.

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 ?

The interviewee had nothing more to add to her previous comments.

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 ?

The interviewee commented that speaking from the perspective of a library professional whilst she acknowledged that copyright owners had legitimate rights in wanting to 'obtain a fair economic return on their intellectual property' and 'protection against piracy, unfair use and unauthorised exploitation of their works' the biggest threat of extending copyright concepts into the digital realm was that of over-protection.

The interviewee referring to a recent JCC document prepared on copyright in the digital environment added that librarians have a crucial role in facilitating users 'to gain access to copyright works and the information and ideas they contain, in order to assist in the advancement and dissemination of knowledge. They further recognise that this process often leads to the creation of new intellectual property'. . . Copyright was not designed to prevent access to information and ideas. Indeed, unimpeded access to knowledge, information and ideas is the bedrock of democracy'.

She added that particularly in the digital environment ' there is a risk that only those privileged enough to be able to afford to pay will be granted access'.

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

The interviewee commented that this was a difficult question to answer but that it was clear that as more and more information was held in digital formats the impact of changes in a regime like copyright would be felt more widely across other information policies than previously in analogue environments.

The interviewee again referred to an Article by Professors Reichman and Samuelson that highlights some of these wider relationships. (*See Reichman, J.H. & Samuelson, P. (1997) Intellectual Property Rights in Data?, Vanderbilt Law Review, Vol. 50:51 pp.51-166*).

14. How adequately do you think current European Information policy processes handle these interrelationships?

The interviewee commented that in general it was a little early to tell. At the most general level documents like the Bangemann report indicated that there was a growing awareness of the need to consider the interrelationships between issues rather than simply having a narrow focus on single issues.

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

The interviewee referred to her previous comments (see Q.12). She added that she hoped in the future there would be more information professionals involved in discussing public policies dealing with information like copyright at national, European and international levels.

INTERVIEW no. 39

Intellectual Property Expert - Centre de Recherches Informatique et Droit (CRID)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I first really came into contact with the European discussions at the time Michel Vivant (Professor at Montpellier University) was commissioned by DGXIII to do the PROPINTELL study on the impact of new technologies on intellectual property regimes. This study examined a range of questions including the existing protection available to databases'.

The interviewee added 'Obviously I was aware of the chapter on databases in the 1988 Copyright Green Paper and there may have even been some work done on databases before this by WIPO or someone else but I am not sure. Still any work done would have been quite embryonic and I personally only started to examine the issue of database protection from about 1990 onwards'.

The interviewee commented 'the database directive itself is part of the wider European copyright harmonisation process which has produced 4 other directives and while the 1988 Green Paper marks the beginning of this formal process in fact copyright harmonisation was first considered in the early work done in the 1970's by Professor Dietz for the Commission on the differences in Member States copyright laws'.

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 ?

The interviewee commented 'I was not involved in lobbying on the database directive but I did have discussions with the Commission about it both as an academic researcher and as a member of the LAB (Legal Advisory Board)'.

The interviewee added 'After the Green Paper the Commission held a public hearing on databases in 1990 at which the industry came down generally in favour of introducing copyright protection but strongly against a sui generis type right. This initial rejection of the sui generis approach was partly because the hearing took place before the rise of debates on the information society and multimedia and partly because the electronic information industry was still relatively small and it wanted to stick with copyright because it was something familiar whereas the sui generis right was unknown and was not recognised at the international level as remains the case today'.

The interviewee commented 'later on in the discussions of the directive itself one of the most controversial issues proved to be the compulsory licensing provisions, although the discussions tended to be quite theoretical in that the only example anyone could think of where there was both a monopoly situation and where the data couldn't be independently collected was from a satellite. Finally the provisions were dropped because the scope of the sui generis became more narrowly defined and so most Member States felt that the issue of information monopolies could be left to Articles 85 and 86 of the EC treaty as they had in the Magill case'.

3. Did your opinions change during your involvement with these discussions ?

The interviewee commented that 'not really' he added 'the basic nature of the directive is still to protect databases - factual or otherwise and the investments that make them. Now that the directive is about to be implemented in the Member States I think it is important not to over-exaggerate its role because as adopted it does not cover all aspects of the internet and multimedia products and services as some people have suggested'.

4. During the discussions with whom did you form alliances ? How influential do you feel perspectives like your own were in shaping the directive?

The interviewee re-iterated that he didn't lobby on the directive and that his role was very much as an academic during the passage of the directive. This stated he did acknowledge that in this role as a member of the LAB he became caught up in the tension that existed at the time between the Commission services involved in the directive i.e. DGIII (later DGXV) and DGXIII

The interviewee commented 'before the formal directive proposal was adopted by the Commission I was aware that there was tension between DGIII and DGXIII over the directive and some officials from DGIII began to view the LAB as a tool used by DGXIII for justifying its involvement in copyright issues (even though it is an independent advisory body made up of individual academic and industry experts)'.

He added 'I know this because at the time my membership of the LAB caused me some problems while I was working on a reprography study for DGIII. Mr.Verstrygne, the clever official in charge of DGIII's copyright proposals told me that he was angry that I had not informed him that I was a member of the LAB and that it wasn't possible for me to work for the LAB and for DGIII at the same time. Following this while Mr.Verstrygne was at DGIII I didn't do any more research for them'.

5. Which (individuals, organisations, member states) were the most powerful in shaping the Database directive ? How was this influence exerted during the policy process ?

The interviewee commented 'the database proposal was very much the product of work by Mrs.Czarnota and Mr.Verstrygne. Both were very clever, ambitious and strong individuals who formed a powerful team within DGIII. While Mrs.Czarnota was responsible for the drafting of the actual proposal, Mr.Verstrygne was very good politically within the Commission and had strong links with the Commission's cabinets alerting them to copyright proposals his service was preparing and ensuring that the Commission as a whole adopted them'.

The interviewee added 'my impression is that along with the important role of the Commission the work of the Council working group was very crucial in shaping the directive. While there were conflicts between the Member State delegations it seems clear that the industry did not follow the passage of the directive on a point by point basis as for example, the software industry did during the passage of the software directive, as a result most of the delegations had more of an opportunity to exercise their own views on the issues discussed during the database directive'.

The interviewee added 'I am not sure which of the lobby groups played the most active role but clearly the publishers and database producers did participate. This said, my impression is that the lobbying was not very extensive, at least not in comparison with the degree of lobbying that has taken place on other directives e.g. Software directive'.

The interviewee suggested I contact Charles Clarke for a publishers perspective on the directive, Phillip Wacker (professional lobbyists) for a perspective on lobbying at the European level and Jerome De Brulle for a perspective from the Belgian representative in the Council working group during the database directive.

6. Did any international policy developments impact on the outcome of the Directive?

The interviewee commented 'Of the cases that in some respects had an impact on the directive I would mention the Coprosa case in France, the Van Daele case in Holland, the Feist case in the US, the European Court of Justice decision in the Magill case and Article 10(2) of the TRIPS agreement'.

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 ?

The interviewee commented that he doubted the database directive was well known outside copyright circles although he acknowledged that more people had become aware of the directive following the

1 emergence of discourses on the information society and multimedia which had in general raised the
2 profile of IPRs (intellectual property rights).

3
4 **8. How Adequate was the consultation process for ensuring the full range of interests concerned**
5 **with copyright were represented in the directive ?**

6
7 The interviewee acknowledged that during European consultations there was always a very high
8 proportion of rights holders present and he was aware that DGXV had a reputation for having a very
9 strong industry focus but he said that part of the problem was the difficulty of informing and identifying
10 user groups although often their perspectives were represented by academics.

11
12 **C. European policy for Copyright**

13 *(From this point on - the interviewee said that he could only spare another 10 minutes for the*
14 *interview)*

15
16 **9. How would you assess the significance of the Database directive for current and future**
17 **European copyright policy formulation ?**

18
19 The interviewee commented that it was a little too early to tell and that we would have to wait until after
20 the directive's implementation to be able to assess its importance but he was wary of over-exaggerating
21 the significance of this directive, although he acknowledged that the Commission were already
22 referring to it as an important point of reference in generating their latest proposal for the digital
23 environment.

24
25 **10. As the global Information Society develops what role will copyright harmonisation play in the**
26 **process of European integration ?**

27
28 The interviewee commented that if we believe the hype of the information society then copyright will
29 continue to have a very important role both at the European and increasingly global level.

30
31 **11. Which other factors, if any, would you identify as being significant in affecting how**
32 **copyright issues are framed and discussed at the European level ?**

33
34 The interviewee did not have anything to add to his previous answers.

35
36 **D. Information policy-making and Copyright in the digital age**

37
38 **12. What threats and opportunities would you identify from the extension of copyright concepts**
39 **into the digital realm ?**

40
41 The interviewee commented 'my general conclusion is that copyright holders have nothing to fear from
42 the growth of the internet and ICTs (information and communication technologies) and in fact if
43 anything has occurred it is that their ability to control the exploitation of their works has increased.
44 Digital networks allow authors and publishers to regain the control that they lost over their works with
45 the invention of the printing press i.e. the possibility of a direct link between the source of the work and
46 the user'.

47
48 The interviewee added 'it is not copyright that is increasingly in danger but rather the public domain
49 partly because increasingly copyright protection is being used in conjunction with technical systems for
50 its protection and management, encryption systems and contracts. In a sense these developments are
51 unavoidable and as the digital environment is safer and safer for business electronic commerce will
52 develop perhaps with every byte and bit of information being charged for'.

53
54 **13. How would you characterise the relationships in digital environments between copyright**
55 **policy and other areas of information policy such as Privacy ?**

56
57 The interview was ended at this point.
58

1 **14. How adequately do you think current European Information policy processes handle these**
2 **interrelationships?**

3
4 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
5 **concerns over the issues of democratic participation and accountability ?**
6

INTERVIEW no. 40

Senior Consultant Norall, Forrester & Sutton (Brussels Law Firm)

Preliminary Comments by Interviewee

None.

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 ?

The interviewee commented 'I don't remember exactly when I heard about the database directive but I first got involved in IPR (intellectual property rights) issues in 1989 while I was working in DGIV during the discussions over the impact of the software directive on European competition policy (e.g. like the IBM decision which is still so important in European competition law). The main issue was whether these new IPRs would protect software to the extent that they would over-ride competition rules'.

The interviewee added 'the database directive was directly linked to the software directive both in the Commission's 1988 Green Paper and even before that in its 1985 internal market White Paper where software was specifically identified as a problem that required European action. Following the Single European Act during 1986/87 there was what can only be described as a harmonisation frenzy from which IPRs as a European policy area and the 1988 Green Paper as a plan, both emerged'.

The interviewee added 'in looking for the reasons behind the directive it is important to realise that the nature of policy-making in Brussels is such that the Commission when setting out its explanations for a copyright directive always argues like hell that there are good internal market reasons for it. However, in the case of the database directive whilst these internal market reasons were produced it is obvious that they were very weak and that in fact the real reason behind the directive was a kind of industrial policy because of concerns over the size and strength of the US database industry'.

The interviewee added 'after the experience of the directive itself, of the WIPO diplomatic conference and the on-going US discussions on database protection, I am now basically opposed to the introduction of an international instrument covering databases in the near future. But I must confess given the strength of political agreement between the EU and US delegations at WIPO I was surprised when the database proposal didn't get adopted. This rather unexpected turn of events is at least partly due to lobbying from US user groups and the academic community'.

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 ?

The interviewee commented 'by 1991 I had left the Commission and I can remember that just as the debates on software were coming to an end discussions on databases were starting, and although some lobby groups did carry over into these discussions, most thought the database proposal was uninteresting'.

The interviewee added 'as a result for most of the directive we simply followed its progress from a distance, passing on information, preparing memoranda and providing some interpretation of the various changes that occurred in the text to our clients. However, in the period just prior to the second reading in the Parliament we did lobby actively on behalf of one of our clients'. He added 'the main reason that we didn't lobby more on the directive was simply because it proved very difficult, at least at the beginning to get people interested. However, in terms of the work here it was an important directive because at the same time we were representing the Commission in the Magill case'.

The interviewee commented 'It seems to me that basically the database directive just slipped through to adoption without really causing any major controversy and in my opinion looking towards its implementation I don't think it is perhaps as mature a text as it might be which is perhaps part of the

1 reason why the European Parliament insisted on the review procedure for 3 years after its
2 implementation'.

3
4 The interviewee added 'the database directive was not simply a Commission initiative because of the
5 drive for harmonisation but also perhaps more importantly because DGIII were very aware that these
6 copyright directives expanded their competence in the area of IPRs and gave them the authority to
7 speak for Europe on the issue in international forum. i.e. for the Commission harmonisation was partly
8 also an opportunity to expand its policy jurisdiction and competence'.

9
10 **3. Did your opinions change during your involvement with these discussions ?**

11
12 The interviewee commented that he had never had very strong views on the directive and he said that
13 we will just have to wait and see what the impact of the directive will be on the European industry
14 which has developed considerably without the protection of the directive up until now. This stated he
15 commented 'it is clear why the US industry works better than the industry in Europe. it is simply a
16 question of economics and existing infrastructure. In the US they have a bigger potential customer
17 base, cheaper telephone charges, and a common language - English'.

18
19 The interviewee commented ' in this context as we wait to see what the impact of the European
20 directive will be, it is interesting to look at how the debate on database protection has developed more
21 recently in the US especially since the failure of the database resolution at WIPO. Even as preparations
22 for US legislation have continued there has been a questioning both by users and more importantly by
23 the database industry itself, of the need for such legislation'.

24
25 The interviewee added ' I know for example of a letter sent by Dun & Bradstreet to Congress
26 questioning the advisability of database legislation in the US which is a curious change of position
27 when you consider how active Dun & Bradstreet were in lobbying for the database directive in Europe.
28 Similarly Reuters legal department in the US has also begun to question the need for more protection.
29 All of this in my opinion is in part due to a view held by the US industry of the potentially restrictive
30 impact of the EU directive, especially now as there is a growing acknowledgment of the fact that
31 contracts and technical systems of protection provide potentially much better solutions'.

32
33 **4. During the discussions with whom did you form alliances ? How influential do you feel**
34 **perspectives like your own were in shaping the directive?**

35
36 The interviewee re-iterated that he did not lobby actively on the directive except for a short period
37 before the Parliament's second reading and that generally speaking his law firm did not form alliances
38 when lobbying, although he acknowledged that they maintained an extensive range of contacts with
39 those involved within the copyright industries.

40
41 The interviewee commented 'In my opinion the database directive suffered from a rather low level of
42 debate due to a lack of interest from industry and elsewhere particularly at the beginning. But this is not
43 to say that the dual approach adopted in the directive is not interesting in itself and I can remember first
44 reading about the sui generis approach in relation to databases in article by George Metaxas in EIPR
45 called something like steering in the wrong direction in about 1990'.

46
47 On discussions of alternatives to copyright for the digital environment more generally the interviewee
48 added 'as early as the late 1970's the US government through its CONTU(Commission on New
49 Technological Uses of Copyrighted Works) report was examining these issues and it was Congressman
50 Hershey who stood out and stated that it was not a good idea to protect computer software by IPRs and
51 that alternatives should be looked for. At around the same time similar debates began to occur in Japan
52 as to how best to protect electronic products (especially software) and its Ministry of Trade and
53 Industry (MITI) proposed a sui generis type of protection while its Cultural Ministry advocated a
54 copyright based solution. In the end this debate was resolved by the intervention and lobbying of the US
55 computer industry led by IBM who came out in favour of a copyright solution'.

56
57 The interviewee commented ' in my opinion one of the main reasons for IBM's lobbying position was
58 that by pushing for a copyright based solution it could guaranteed future legal uncertainty which in turn

1 worked in its favour by allowing it to potentially drive smaller companies out of business or at least to
2 exert pressure on them through legal actions in such an legally uncertain environment'.
3

4 The interviewee added ' then in 1989 came the Commission's software proposal and the explosion of
5 these discussions in Europe where apart from DGIV no-one was advocating a sui generis approach for
6 software which is why we ended up with a copyright solution'. He added 'following these events came
7 the US Feist decision and I think it is at this point that Mrs Czarnota, with the Software directive behind
8 her, saw the possibility of using a sui generis type of protection in conjunction with copyright to protect
9 databases and in particular those comprehensive databases insufficiently original to qualify for
10 copyright protection in most Member States'.
11

12 **5. Which (individuals, organisations, member states) were the most powerful in shaping the**
13 **Database directive ? How was this influence exerted during the policy process ?**
14

15 The interviewee commented that apart from the role of the Commission and Mrs.Czarnota in particular
16 in drafting the database proposal and presenting it to the other European institutions a number of other
17 participants shaped the directive.
18

19 The interviewee commented ' Within the Council as I understand it the French Presidency played an
20 important key role, particularly at the end of the negotiations in solving a dispute between two parts of
21 its own government's delegation (i.e. a dispute between the Ministry of Industry and Ministry of
22 Culture). The Presidency did this by supporting the Ministry of Industry on its position in relation to
23 the sui generis right and requesting the Ministry of Culture representative to restrict her comments to
24 the copyright sections of the directive'. He added 'the Germans, who held the Council Presidency
25 before the French were also very influential and kicked up a real fuss over the sui generis which they
26 did not like as their preferred option was to use unfair competition rules to provide the necessary
27 protection'.
28

29 The interviewee added 'There was also some initial opposition to the database directive from the UK
30 but perhaps this is not that surprising given that the UK had just completed its new copyright Act. More
31 generally to understand negotiations in Council you have to realise that the basic starting positions of
32 most Member State delegations is that their national legislation is adequate and that they don't want to
33 change it or as little as possible. Although this is truer of the larger Member States than the smaller
34 ones'.
35

36 As for the lobbyists involved the interviewee mentioned Dun & Bradstreet, Reuters and also Charles
37 Clarke for the Publishers. He added 'In all lobbying the golden rule is always get in as early as possible.
38 A good lobbyist will already at the Green Paper stage be trying to make contacts and introduce
39 him/herself to the officials in the Commission service responsible, to its Commissioner and his cabinet
40 as well as the other Commission services participating in the intra-Commission discussions. Looking
41 back at the 1988 Green Paper for example it is clear that it set the tone for both the software and
42 database directives and the Commission's general approach to IPRs over the last almost 10 years'.
43

44 The interviewee added 'once any proposal leaves the Commission there is an urgent need to get down
45 to the European Parliament to contact not just the leading committee considering the proposal but also
46 the supporting committees along with their rapporteurs and shadow rapporteurs and the administrative
47 support as well as the influential individuals within the particular political groupings concerned. This is
48 particularly the case under the co-decision procedure because of the increased power that this has given
49 to the Parliament in the decision-making process.
50

51 The interviewee commented ' of course the lobbying strategy in the Parliament is very different to that
52 used with the Commission or Council because quoting technical legal arguments, except perhaps to a
53 very few MEPs is a complete waste of time as they simply will not understand what you are talking
54 about. AS always it is a matter of horses for courses'.
55

56 **6. Did any international policy developments impact on the outcome of the Directive?**
57

58 The interviewee commented that various case law had an impact on the directive and in this regard
59 mentioned the Dutch case Van Daele V's Romme, the US Feist case, and the ECJ (European Court of

Justice decision) in the Magill case. He added 'the impact of these cases was clearly restricted to those who were in a position to understand the significance of the arguments for example within the Council and Commission but perhaps not in the Parliament'.

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 ?

The interviewee commented that the directive was better known simply because it had come at the end of four other directives in the copyright field and had been negotiated during a period of intense activity discussing issues including the information society, multimedia products and services and the digital environment more generally.

The interviewee then reviewed the other copyright directives as follows:

Software directive - 'This was the first directive and was extremely significant in itself and in setting the tone for the database directive. In view of the huge amount of lobbying that took place during its negotiation it is remarkable how quiet case law has been on software since the directive was implemented'.

Cable & Satellite - 'This directive was basically a measure to plug holes in the TV without Frontiers directive and whilst it decided in favour of collecting societies its provisions were quite specific'.

Rental and Lending - 'This was a very important directive although its specific relevance to the digital environment is perhaps less important'.

Term of Protection - This again is an important directive for copyright but at a very broad level rather than specifically to do with the digital environment.

The interviewee commented 'while it is certainly the software and database directives that have taken the lead in protecting works in the digital environment, an examination of the copyright sections of the database directive shows that they were heavily influenced by the software directive such that in terms of the protection of copyright works in the digital environment it is the software directive that has set the agenda rather than the database directive, although in terms of new forms of protection for information works the database directive's sui generis right may prove to be important'.

8. How Adequate was the consultation process for ensuring the full range of interests concerned with copyright were represented in the directive ?

The interviewee commented 'my job is to ensure that the views of the clients we represent are heard in the appropriate policy circles'.

C. European policy for Copyright

9. How would you assess the significance of the Database directive for current and future European copyright policy formulation ?

The interviewee commented 'Looking to the future, I don't anticipate that the Commission will opt for more product specific legislation like the database directive and I think that they will restrict things to a much more mainstream copyright harmonisation agenda such as a proposal on copyright exceptions which will try to limit exceptions in electronic environments taking the lead from the database directive'.

The interviewee added 'during the database directive there was a strong copyright lens through which the directive was negotiated that had a detrimental impact on the discussions, particularly of the sui generis right and as a result there was too little consideration of the economics (i.e. what will the impact of the sui generis right be ?). This problem has come up already in the implementation of the directive and some Member States have opted to separate the implementation across different government Ministries i.e. Ministries of Culture are being left to draft the implementation of the copyright section

1 and Ministries of Trade and Industry to implement the sui generis sections (i.e. a division in
2 implementation that did not occur in its formulation)'.
3

4 The interviewee added ' the same is true of the copyright sections of the database directive (i.e. too
5 little consideration was given to the economic impact of the directive). DGXV always comes out with
6 the same argument which is that more protection is better because it ensures more production of IPR
7 products but I have never seen, nor am I aware of any study that has been commissioned by DGXV that
8 establishes this view as fact. I also doubt that if such a study were commissioned that it would be able to
9 prove conclusively in favour of DGXV's view'.
10

11 The interviewee commented 'I still question whether copyright was the best way to deal with the
12 protection of databases, especially electronic ones and as the recent US debate has shown alternatives
13 including contracts and technical protection systems may provide a better answer. I don't however
14 blame the Commission or the other European institutions for the current European approach because in
15 my opinion it is the copyright and database industry's who when they were consulted either showed a
16 lack of interest or clamoured for a copyright based solution'. The interviewee added ' Once this basic
17 approach had been established then it is the job of the Commission to get the proposal out and
18 adopted'.
19

20 The interviewee added 'it is still difficult at this stage to be able to assess impact of the directive and
21 really we can only wait and see what develops over the next few years'.
22

23 **10. As the global Information Society develops what role will copyright harmonisation play**
24 **in the process of European integration ?**
25

26 The interviewee referred to his previous answers and said that the importance of copyright would
27 certainly continue but other forms of protection for information products and services would also
28 become more developed as electronic commerce increased most importantly technical systems.
29

30 **11. Which other factors, if any, would you identify as being significant in affecting how**
31 **copyright issues are framed and discussed at the European level ?**
32

33 The interviewee commented ' in the database directive part of the reason that DGXV was prepared to
34 allow the compulsory license provisions to be dropped was that the official negotiating the directive on
35 the Commission's behalf was concerned that if these provisions remained they might conflict with the
36 EU's competition rules. Another reason is that in the process of creating the internal market there has
37 been created within the Commission a whole industry whose sole aim is to rid the community of
38 compulsory licenses. Indeed the mere mention of their introduction makes some of these individuals
39 start to foam at the mouth in opposition and anxiety'.
40

41 On the issue of whether recitals are binding on Member states the interviewee commented 'this is
42 legally speaking a grey area but I am aware that some of those close to the database directive hold the
43 view that a directive's recitals are binding on Member States. If this is proven to be the case then there
44 are clearly going to be serious problems in situations where recitals and Articles appear to contradict
45 one another and in the implementation of directives where Member States in some have opted to
46 implement recitals and in others to ignore recitals i.e. introducing further inconsistency contrary to the
47 ideal of harmonisation'. approach.
48

49 **D. Information policy-making and Copyright in the digital age**
50

51 **12. What threats and opportunities would you identify from the extension of copyright concepts**
52 **into the digital realm ?**
53

54 The interviewee commented 'my basic view is that in many respects copyright is an inappropriate form
55 of protection for the digital environment. Contracts and technical systems appear to offer valuable
56 alternatives for ensuring that creativity and innovation are adequately rewarded. Quite aside from the
57 growing debates on the future of copyright part of my opinion results from disenchantment with policy-
58 making in Brussels on this issue. Too often DGXV appears to have as its sole aim the agenda of
59 pushing for the highest level of copyright protection whether or not this is the most appropriate form of

1 protection. They have also been reluctant to conduct studies to confirm whether this higher protection
2 does create and encourage greater creativity (i.e. they haven't commissioned any studies to prove the
3 economic benefits of higher copyright protection)'.
4

5 The interviewee added 'Unfortunately the nature of European policy-making is not conducive to a
6 healthy debate, for example during the software directive DGIV only reacted because it considered that
7 the directive was going to affect its own competency but because the database directive presented no
8 challenges it made no contribution to the debate, even though there would appear to be clear
9 competition implications (i.e. the introduction of high levels of protection in an industrial sector with
10 low levels of competition)'.
11

12 The interviewee also commented 'in an international context however it is interesting to see how policy
13 perspectives can change, for example in Japan in the early 1980's companies like Fujitsu lobbied
14 strongly against increases in copyright protection on the basis that it was a protectionist industrial
15 policy, yet now in the 1990's these very same companies are lobbying the Japanese government to
16 institute stronger intellectual property protection. This change is due to a number of factors not least of
17 which is the shifting focus from primary and secondary production to intellectual production as a source
18 of future economic well being'.
19

20 **13. How would you characterise the relationships in digital environments between copyright**
21 **policy and other areas of information policy such as Privacy ?**
22

23 The interviewee commented 'While the copyright provisions in the directive do not cover information
24 the sui generis right clearly does give protection to non-copyright information held as part of a database
25 and as a result I can understand the fears that have recently been expressed by some writers over the
26 threat this directive may pose to the public domain especially as moves to privatise and commercialise
27 previously publicly held information continue'. He added 'The expansion of the reproduction right to
28 cover temporary reproductions also causes concern as it apparently catches everything in the digital
29 world including RAM and a whole range of other copying activities that are central to the basic
30 processes in computing networks'.
31

32 The interviewee added 'obviously the digital environment allows perfect copies to be made and so does
33 raise the threat of piracy. Because of this, in my opinion it will in the end, be technical systems that
34 will be deployed to enforce rights and ensure remuneration. But these systems themselves raise further
35 problems for a copyright as a balance of rights and limitations, for example if a system for micro-
36 payments is devised why should a consumer be able to extract anything for free ? what will happen to
37 notions of insubstantial part, private copying etc..(i.e. everything becomes normal exploitation and so
38 within the scope of the rights holder exclusive rights).
39

40 The interviewee commented 'Unfortunately the rights holder industry will continue to push for greater
41 and greater protection regardless of the consequences for other participants in the information cycle.
42 This is very short-sighted especially given the fact that there are a number of historical examples that
43 have proved that if greater protection had been introduced it would have stifled the development of new
44 industries that far from endangering rights holders positions have ended up enhancing their profits. Two
45 examples are; the litigation brought by Columbia against Sony's video recorders. Here Columbia
46 argued that they would lose royalties. They lost the case and have been proved wrong as the video
47 industry has generated huge amounts of new business for them and the case brought by the BPI(British
48 Phonographic Industry) against Amstrad over the introduction of Amstrad's twin tape machines. Again
49 the industry was wrong to cry foul and push for further protection and has since made profits from sales
50 of cassettes both blank and pre-recorded. In both cases if further protection had been introduced the
51 industry itself would have been the loser. But the industry is apparently incapable of seeing this so they
52 continue to push for more and more protection'.
53

54 **14. How adequately do you think current European Information policy processes handle these**
55 **interrelationships?**
56

57 The interviewee commented that he didn't feel these issues were being addressed at a European level.
58

1 **15. In what ways might policy formulation at a European Level be improved ? Do you have any**
2 **concerns over the issues of democratic participation and accountability ?**
3

4 The interviewee commented that he didn't have any major concerns over the democratic aspects of
5 European policy-making.
6
7