The European Database Directive: Regional Stepping Stone to an International Model?

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The European Database Directive: Regional Stepping Stone to an International Model?

G. M. Hunsucker*

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* Copyright © 1997 by G. M. Hunsucker. Attorney-at-Law, Phelps Dunbar, L.L.P., Tupelo, MS; Corporate/Executive Database Designer. Valdosta University, B.S.Ed 1992; Vanderbilt University School of Law, J.D. 1996. This Article significantly expands the analysis set forth in a previous comment, Raising a Toll Fence to Protect the “Noncreative” Labors of Database Makers: The European Database Directive, awarded First Prize in 1996 Nathan Burkan Memorial National Competition at Vanderbilt University School of Law, sponsored by the American Society of Composers, Authors, and Publishers. The author thanks Professor Jerome H. Reichman for his comments on earlier drafts of the comment, and for discussion of the issues raised by the sui generis regimes.

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INTRODUCTION

Electronic databases provide information users with extraction tools enabling them to sort and arrange data in ways meaningful to them; extending the manipulative abilities of information users’ minds adds immense value to what would otherwise be a mass of incoherent, disparate data.  


2. The value of the global information industry could reach $3 trillion dollars by the early 21st Century. Statement on Dismantling the U.S. Department of Commerce: Testimony Before the Subcomm. on Government Management, Information and Technology of the House Comm. on Government Reform and Oversight, 104th Cong., 1st Sess. (1995) (statement of Ronald H. Brown, Secretary of Commerce). Note, however, that the “global information industry” referred to by the late Secretary Brown is much broader than the database market alone. A recent statement of the Co-Chair on High Performance Computing and Communications valued the “information technology” sector at $500 billion. Prepared Statement on Evolving the High Performance Computing and Communications Initiative to Support the Nation’s Information Infrastructure: Testimony Before the Science Subcomm. on Basic Research High Performance Computing and Communications Program of the House Committee on High Performance Computing and Communications, 104th Cong., 1st Sess. (1995) (prepared statement of Ivan E. Sutherland, Ph.D., Co-Chair,
Yet, in most of the world, these valuable business tools\(^3\) stand virtually naked in the marketplace,\(^4\) vulnerable to

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Committee on High Performance Computing and Communications, and Vice-President, Sun Microsystems). When the European Community ("EC") penned its Initial Proposal for the legal protection of databases in 1992, the EC database market was estimated at $10.2 billion, which amounted to approximately 30% of the world market. W. Joseph Melnik, A Comparative Analysis for the Legal Protection of Computerized Databases: NAFTA vs. The European Communities, 26 CASE W. Res. J. INT’L L. 57, 59 n.14 (1994).

3. See supra note 2 (discussing the dollar value of the information technology market); J. H. Reichman, Electronic Information Tools: The Outer Edge of World Intellectual Property Law, 17 DAYTON L. REV. 797, 806 n.45 (1992); Database Directive, supra note 1, recital 9, O.J. L 77/20, at 20 (1996) ("databases are a vital tool in the development of an information market within the Community"); WIPO Proposal, supra note 1, Preamble WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) ("databases are . . . an essential tool for promoting economic, cultural, and technological advancement"); see also 142 CONG. REC. E890-04 (daily ed. May 23, 1996) (statement of Sen. Moorhead) ("[D]atabases are an essential tool for improving productivity, advancing education and training, . . . creating a more informed citizenry[, and] . . . are also the linchpin of a dynamic commercial industry in the United States.").

4. Databases, like most forms of intellectual property, are saddled with "public goods" characteristics: they are indivisible, inexhaustible, and ubiquitous. See, e.g., J. H. Reichman, Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System, 13 CARDozo ARTS & Ent. L.J. 475, 486 (1995); see also J. H. Reichman & Pamela Samuelson, Intellectual Property Rights in Data?, 50 Vand. L. Rev. 51, 59 n.35 (1997); see infra notes 5, 8-10 and accompanying text (discussing vulnerability of databases). Practically speaking, this means that without some legal protection, parasitic competitors can access, copy, rearrange, and market a competing database at a fraction of the cost incurred by the original database maker. COMM. ON ISSUES IN THE TRANSBORDER FLOW OF SCIENTIFIC DATA, U.S. NAT’L COMM. FOR CODATA, COMM’N ON PHYSICAL SCIENCES, MATHEMATICS, AND APPLICATIONS, AND NAT’L RESEARCH COUNCIL, Bits of Power: Issues in Global Access to Scientific Data 1-52 (National Academy Press forthcoming 1997) [hereinafter GLOBAL ACCESS]. Although database makers can erect technological fences to protect their investments (e.g., encryption algorithms), those fences suffer limitations which render them less than optimal as a means of protection. See, e.g., Henry H. Perritt, Jr., Property and Innovation in the Global Information Infrastructure, 1996 U. Chi. LEGAL F. 261, 288 (1996) (discussing market, technological, and legal limitations as tools to protect intellectual property on the Internet). In addition, useable encryption technology forces only the first purchaser to pay for a key to decrypt the encoded information. Therefore, unless there is a fence, or other disincentive to prevent the first purchaser from repackaging the database maker’s investment, encryption suffers the same weakness as the two-party deal discussed infra in Part I.
parasitic competitors, users, and information Samaritans, unless the database maker renders the database less valuable, or more expensive, to the information user by creatively “selecting and arranging” enough disparate data to erect the fence afforded by copyright. erects the two-party

5. Information Samaritans refers to parties who, for noneconomic reasons, extract data from databases without paying the database maker and make it freely available to the public. Cf. United States v. LaMacchia, 871 F. Supp. 535, 536 (D. Mass. 1994). In LaMacchia, a federal grand jury indicted LaMacchia, a 21-year-old M.I.T. student, for devising a scheme in violation of 18 U.S.C.A. § 1343 (West Supp. 1996), the wire fraud statute, to defraud software manufacturers and vendors. Id. LaMacchia encouraged users to upload popular software and games to an electronic bulletin he named Cynosure, and transferred the programs to a second location where users with access to the Cynosure password could freely download the programs. Id. Because LaMacchia had apparently not acted for the purposes of securing “commercial advantage or private financial gain,” he could not be prosecuted under the criminal copyright statute, 17 U.S.C.A. § 506 (West Supp. 1996). Id. at 545; see also Copyright Law of the United States of America, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (current version at 17 U.S.C.A. §§ 101-810 (West Supp. 1996)). Citing, among other factors, the failure to allege violation of the criminal copyright statute, id. at 542-43, and relying heavily on the reasoning of Dowling v. United States, 473 U.S. 207 (1985), the district court granted LaMacchia’s motion to dismiss, but nonetheless noted that if the indictment was true, LaMacchia’s behavior was “at best heedlessly irresponsible, and at worst . . . nihilistic, self-indulgent, and lacking in any fundamental sense of values.” LaMacchia, 871 F. Supp. at 545. This Article does not discuss the conflicting policies presented by criminal prosecution of information Samaritans. See Teddy C. Kim, Taming the Electronic Frontier: Software Copyright Protection in the Wake of United States v. LaMacchia, 80 MINN. L. REV. 1255 (1996) (arguing that criminal prosecution of noncommercial copyright infringers is inappropriate). However, this Article does proceed on the assumption that extracting data from databases and making it freely available, regardless of the motive for such behavior, destroys incentives to invest in database creation. See GLOBAL ACCESS, supra note 4, at 8.

6. For example, to secure copyright protection, many database makers inject “value-added” data, which increases the price of the database to the information user without any corresponding increase in utility. See Jane C. Ginsburg, No “Sweat”? Copyright & Other Protection Works of Information, 92 COLUM. L. REV. 338, 344-47 (1992). The additional data adds “value” only in the sense that it enables the database maker to secure some degree of copyright protection. Id. at 347.


8. Copyright generally protects only the creative selection and arrangement of factual information. See Berne Convention for the Protection of Literary and
Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries), completed at Copenhagen on July 14, 1971, art. 2(5), 828 U.N.T.S. 221 [hereinafter Berne Convention] (protecting collections of works, which by reason of selection and arrangement of their contents, constitute intellectual creations); 17 U.S.C.A. §§ 101, 103 (West Supp. 1996) (protecting compilations of data that are selected, coordinated, or arranged in such a way that the compilation constitutes an original work of authorship). With regard to copyright protection, the Database Directive is in accord. See Database Directive, supra note 1, recitals 15-16, O.J. L 77/20, at 21, art. 3(1), O.J. L 77/20, at 25 (1996) (databases, which by reason of selection or arrangement of their contents constitute intellectual creations, shall be protected by copyright); Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Draft Treaty on New Copyright Developments, art. 5 WIPO Doc. CRNR/DC/89 (Dec. 20, 1996) (compilations of data, which by reason of selection or arrangement of their contents, constitute intellectual creations are protected), adopted by Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 20, 1996; see also J. H. Reichman, Universal Minimum Standards of Intellectual Property Under the TRIPs Component of the WTO Agreement, 29 INT'L LAW. 345, 373 (1995) (noting that the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") fails to offer the protection provided by the Database Directive’s sui generis regime). But see Copyright, Designs and Patents Act, 1988, 2 Eliz. 2, ch. 48, §§ 2-3 (Eng.) (protecting “sweat of the brow” databases in the United Kingdom); Reichman, supra note 3, at 804 n.33 (citing W. R. Cornish, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS 268-69 (2d ed. 1989) for the United Kingdom’s practice of extending copyright to small change literary productions they exhibit “skill, judgment, and labor”); see also Ginsburg, supra note 6, at 372 n.161 (noting that the Nordic Catalogue Rule provides protection to unoriginal compilations for 10 years). The Database Directive permits derogation from its terms so that databases protected under less-exacting EC copyright regimes on the Database Directive’s effective date will continue to enjoy that protection until their term expires. Database Directive, supra note 1, art. 14(2), O.J. L 77/20, at 27 (1996); cf. WIPO Proposal, supra note 1, art. 7(3) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (rights granted by treaty are independent of any protection afforded to the database maker by national legislation). Similarly, the sui generis rights granted by the three regimes are without prejudice to any other rights. See Database Directive, supra note 1, art. 13, O.J. L 77/20, at 27 (1996); H.R. REP. NO. 3531, supra note 1, § 9 (c); WIPO Proposal, supra note 1, art. 10(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).


10. J. H. Reichman, Legal Hybrids Between the Patent and Copyright Paradigms,


12. Cf. Gordon, supra note 7, at 855. Gordon argues that groups seeking new fences “should be prepared to show that their current fences are inadequate to provide adequate incentives.” Id. To justify their need for a new fence, database makers need only point to Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), and its implications. See Ginsburg, supra note 6, at 343 (“Feist . . . calls into question the ability of copyright . . . to secure meaningful coverage to those compilations that do meet the initial test of copyrightability.”). In Feist, the United States Supreme Court cloaked free riders who appropriate the “noncreative” labors of data collectors with constitutional protection by endorsing the thin copyright doctrine. Feist, 499 U.S. at 357-59. Apparently, only the creative selection and arrangement of facts deserve copyright protection. Unfortunately, for many database makers, the exercise of creativity in the selection and arrangement of data is constrained by societal expectations, notions of functionality, and “user-friendliness” considerations. See Ginsburg, supra note 6, at 343; Robert C. Denicola, Copyright in Collections of Facts: A Theory for the Protec-
Property in Respect of Databases ("WIPO Proposal"),\textsuperscript{19} would create \textit{sui generis} regimes\textsuperscript{20} protecting investment, as such, in databases.

Some commentators argue that the Database Directive, and the Proposals it has spawned, are arguably the “most deviant” examples of the trend toward \textit{sui generis} protection for intellectual property falling between the cracks of the mature paradigms of patent and copyright.\textsuperscript{21} These commentators also argue that the Database Directive is “one of the least balanced and most potentially anti-competitive intellectual property [regimes] ever created,”\textsuperscript{22} and join others who argue that the Database Directive will stifle access to information, retard competition in the database industry, and impede basic scientific research.\textsuperscript{23}

This Article argues that the Database Directive’s \textit{sui generis} regime, at least with respect to publicly or privately-
available data (“nonproprietary data”), serves some of the same procompetitive functions as does the law of trade secrets without requiring secrecy. While this Article recognizes that the Database Directive’s sui generis regime could result in de facto “fact monopolies,” or otherwise enable database makers to charge monopoly rents for sole-source or proprietary data, this Article argues that ameliorative measures available in the EC are sufficient to enable competition, the ultimate guardian of consumers in market economies, to perform its protective role in the EC, even in the case of sole-source data. However, the lack of an international competition law or other international sword, which

24. Nonproprietary data are data that can be independently generated, collected, or obtained from more than one source. Compare Initial Proposal, supra note 11, art. 8, O.J. C 156/03, at 9 (1992) with Council Directive Amended Proposal, art. 11, O.J. C 308/01, at 13-14 (1993) [hereinafter Amended Proposal] (defining “sole-source data” as data that cannot be “independently created, collected or obtained from any other source”).


26. Under the Database Directive, second comers seeking to extract data from a protected database must either obtain a license from the database maker to extract the data, or independently generate the data. See infra notes 244-54 and accompanying text; cf. Reichman, supra note 10, at 2438-40 (noting that trade secret laws force second comers to license unpatentable know-how or to obtain the know-how by proper means); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 490 (1974) (noting that trade secret law does not forbid independent creation, reverse engineering, or other fair and honest means).

27. See supra note 24 (defining “nonproprietary data”).

28. As the Supreme Court has explained: “Basic to the faith that a free economy best promotes the public wealth is that goods must stand the cold test of competition; that the public, acting through the market’s impersonal judgment, shall allocate the Nation’s resources and thus direct the course its economic development will take . . . .” Jefferson Parrish Hosp. v. Hyde, 466 U.S. 2, 12 (1984) (quoting Time-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953)); see also Digital Equip. v. Uniq Digital Technologies, 73 F.3d 756, 762 (7th Cir. 1996) (“Competition among manufacturers fully protects buyers who accurately calculate life-cycle costs.”); cf. Rockwell Graphic Sys., 925 F.2d. at 180 (discussing importance of trade secrets to preserve competition in intellectual property); Zeidenberg, 86 F.3d at 1453 (“Competition among vendors . . . is how consumers are protected in a market economy.”).

29. See Eleanor M. Fox, Trade, Competition, and Intellectual Property—TRIPS
would enable fair followers\textsuperscript{30} to compete directly, or indirectly with sole-source database makers in value-added markets, suggests a need to build a limitation into any international \textit{sui generis} regime protecting investment in databases.\textsuperscript{31}

This Article discusses and analyzes the EC Database Directive’s \textit{sui generis} regime,\textsuperscript{32} which, unlike copyright law, casts its protection based upon economic principles, rather than broad cultural policies.\textsuperscript{33} Part I examines briefly the general characteristics of the database markets and the protection afforded databases by existing legal regimes. Part II compares the substantive provisions of the Database Directive and the Proposals. Part III analyzes the Database Directive’s \textit{sui generis} regime, using the factual background of \textit{ProCD, Inc. v. Zeidenberg},\textsuperscript{34} a case whose facts demonstrate the vulnerability of databases to parasitic behavior, and concludes that the Directive adequately balances the public’s need for information access with the need for production incentives within the EC.


\textsuperscript{31} See infra note 35 and accompanying text.

\textsuperscript{32} See supra notes 1, 16.

\textsuperscript{33} See, e.g., \textit{Sony Corp. of Am. v. Universal City Studios, Inc.}, 464 U.S. 417, 429 (1984) (explaining that copyright law makes economic reward secondary to the higher public purpose of providing the public access to the author’s creative genius) (citations omitted); \textit{see also} Reichman, supra note 10, at 2452-53 (noting that copyright promotes cultural policies at the expense of efficient allocation of resources); \textit{see also} Pamela Samuelson, \textit{Comments on Gerald Dworkin’s Article on Copyright, Patent or Protection for Computer Programs}, in 1 \textit{FORDHAM INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY} 183 (Hugh C. Hansen ed., 1996) (noting that the Database Directive is based upon “competition policy, rather than on the . . . Romantic concepts of authorship embedded in . . . Continental European [copyright]”).

\textsuperscript{34} 908 F. Supp. 640 (W.D. Wis. 1996), rev’d, 86 F.3d 1447 (7th Cir. 1996).
Part IV argues that the Database Directive’s *sui generis* regime would, if modified by incorporating a compulsory license loosely modeled on the compulsory license United States copyright mandates for musical works, provide a sufficiently pro-competitive international model to protect the public’s interest in competition in the information market. So modified, the Database Directive’s *sui generis* regime would permit fair followers to follow by honest means, while protecting the “sweat of the brow” intellectual efforts and investments of database makers. Part IV then discusses the risks and opportunities to researchers who currently operate in noncompetitive, information-subsidized environments. Finally, this Article concludes by suggesting that a *sui generis* regime protecting investment in databases could


37. Notwithstanding *Feist’s* epistemologically erroneous incantation that facts merely exist and await discovery, and therefore cannot be original, *Feist*, 499 U.S. at 347-48, the author’s contributions are no more original than the researcher’s contributions: both translate and recombine data from the public domain. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1016 (1990) (arguing that facts do not exist until researchers “sift through available evidence, design new avenues of inquiry, choose among a myriad of conflicting indicia, and supply interpretive paradigms”); see also Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992); cf. Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945) (explaining that authors stand on the shoulders of the cultural giant). The analytical soundness of this conceptual truism is demonstrated by the narrow scope afforded *Feist*. See, e.g., CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 67 (2d Cir. 1994) (holding that the selection and arrangement of used car valuations was creative), cert. denied, 116 S. Ct. 72 (1995); Key Publications v. Chinatown Today Publishing Enters., 945 F.2d 509 (2d Cir. 1991) (holding that the selection of businesses to be included in a telephone directory was creative); Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991) (holding that the selection of categories in creating a baseball pitching form was creative).
effect a subtle, and perhaps favorable, shift in societal resources from the pursuit of entertainment to the pursuit of knowledge.

I. DATABASE PROTECTION UNDER EXISTING LEGAL REGIMES

Although most databases find some degree of protection under the veil of copyright law, between the two-party wall afforded by contract, or within the whimsical embrace of unfair competition law, many commentators agree that these legal regimes, both singularly and collectively, fail to provide protection adequate to ensure the certainty of return on investment required to enhance and stimulate worldwide production of databases. To reveal the gap-filling func-

38. See, e.g., Statement on the NII Copyright Protection Act of 1995: Hearings Before the Subcomm. on Courts and Intellectual Property House Comm. on the Judiciary, 105th Cong., 2d Sess. (1997) (statement of Barbara A. Munder, Senior Vice President, McGraw-Hill Companies, testifying on behalf of the Information Industry Association “IIA”) (“Information is literally and figuratively at the heart of the National Information Infrastructure. . . .”); id. (“[W]ithout effective protection, [producers of information content] cannot risk . . . investment in cyberspace where it is so easy to copy, retransmit and alter our property without our permission, and often without our knowledge.”). The Information Industry Association is a trade association of 550 companies that provides information products and services on a worldwide basis. See Bradford L. Smith, Creating the Global Information Society: Looking Ahead, in 2 FORDHAM INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY (Hugh C. Hansen ed., forthcoming 1997); Reichman & Saminole, supra note 4, at 7; Denicola, supra note 12, at 528-30; Ginsburg, supra note 6, at 340-42; Dennis S. Karjala, Copyright in Electronic Maps, 35 JURIMETRICS J. 395, 396 (1995) (arguing that a new approach, which may require either amending the Copyright Act or adopting a sui generis database protection statute, is needed to protect electronic maps); see also Database Directive, supra note 1, recital 12, O.J. L 77/20, at 20 (1996); WIPO Proposal, supra note 1, Note 1.05 WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (“[C]ontinued investment . . . in the development and refinement of databases . . . will not take place unless a stable and uniform regime of legal protection is established . . . .”); cf. 142 CONG. REC. E890-04 (daily ed. May 23, 1996) (statement of Sen. Moorhead) (introducing H.R. 3531 to “encourage continued investment in the production and distribution of valuable new databases”); cf. Rosler, supra note 11, at 107 (the inherent vulnerability of electronic databases amplifies the need for economic protection while preserving the “free flow of information”); Dennis S. Karjala, Misappropriation as a Third Intellectual Property Paradigm, 94 COLUM. L. REV. 2594, 2595 (1994) [hereinafter Karjala II] (suggesting a new approach to prohibit methods of acquiring information
tions that could be served by a *sui generis* regime designed to protect the investments of database makers, this part briefly examines various “database markets.” This part then explores the relative strengths and weaknesses of existing legal regimes that afford some protection to these valuable business tools.

A. General Characteristics of the Splintered Database Markets

Databases, and their respective commercial markets, vary as much as the needs and capabilities of the information consumers patronizing the database market. Although the commercial “database market” is difficult to define, the competitive battle for the information user’s patronage appears to be waged in at least three somewhat distinct, but overlapping, markets: the “one-stop-shopping” market; the “problem-focused” market; and the “industry-focused” market.

39. Databases range in size and complexity from the Internet, which is conceptually a database, to the Medicare and Medicaid Guide (CCH), a compilation of general and specific information relating to health care law, available in paper and electronic form, to simple tables of information.

Database vendors in the “one-stop-shopping” market offer general information content to a broad customer base. In contrast, database vendors in the “problem-focused” market offer specific information content, focused on particular problems, to industry-wide groups, while database vendors in the “industry-focused” market offer both general and specific information content to specific industry and professional markets such as medical, legal, government, public relations, and news.

Generally speaking, database vendors offering general information content serve a broad market and incur lower data collection costs, which permits those database vendors to charge lower fees while remaining competitive. Conversely, because database vendors offering highly specialized information content generally serve a narrower market and incur higher data collection costs, those database makers typically charge higher fees to earn a return on their investment. As a result, information users seeking specialized information (time and historical), marketing, credit, research, market-specific, legal/tax/public records, and general and business news. Id.  

41. See Fletcher, supra note 40 (noting that even within the broader market each vendor has its own relative subject matter strengths).  

42. Id. (citing LEXIS/NEXIS and Knight-Ridder’s Business-Base as examples); see also NEVIN, supra note 40, at 72 (listing Telerate as a provider of a database focusing on the price of government securities and bonds).  

43. Fletcher, supra note 40 (citing LEXIS/NEXIS’ AnswerPaks and KRI’s Science-Base as examples); see also NEVIN, supra note 40, at 75-76 (listing Equifax Insurance Information Services (insurance industry), T/SF Communications (trucking industry), and ARI Network Services (agriculture and environmental) as providers of market-specific databases).  

44. Griffith Interview, supra note 40; see also Perritt, supra note 4, at 288.  

45. Griffith Interview, supra note 40 (noting other factors driving costs in specialized markets such as increased collection costs because data are not as widely available, and higher data maintenance costs associated with dynamic data). According to one commentator, the cost of originating intellectual property can be expressed as:  

\[ co = cc + cc + cm + cr \]

where cc is the cost of creation, e.g. payments to the author; cc is the cost of preparing the information for publication; cm is the cost of marketing, including promotional expenses, distribution costs and costs of billing and collecting; and cr is the cost of copying (reproduction).
information will generally pay a higher price than information users seeking general information.\[^{46}\]

Information users also generally find pricing structure variations within each market segment.\[^{47}\] For example, subscription models may charge a basic fee for unlimited access, or a basic fee for a fixed level of access plus an additional time-based fee for access beyond the fixed level.\[^{49}\] Transactional pricing models may charge based upon the number of searches performed or upon the volume of information retrieved or extracted.\[^{50}\] Other pricing models allow free public access to a certain amount of information, and restrict access to more specialized information to paid subscribers.\[^{51}\] Finally, some pricing models incorporate features of both the subscription and transaction models and permit the information user to choose the pricing scheme that maximizes usability while minimizing costs.\[^{53}\]

\[^{46}\] Perritt, supra note 4, at 283-84.

\[^{47}\] Griffith Interview, supra note 40; Perritt, supra note 4, at 276.

\[^{48}\] See Perritt, supra note 4, at 284 (describing various pricing options available through Westlaw).

\[^{49}\] For example, CD-ROM subscriptions typically provide unlimited access to an optical disk, along with periodic updates, for a fixed fee; CCH CD-ROM and Online for Windows (CCH) offers the Medicare and Medicaid Guide along with various other health law materials on optical disk with monthly updates; and local Internet access providers, as well as some centralized dial-up services such as America Online, offer an option for purchasing unlimited access.

\[^{50}\] Griffith Interview, supra note 40. For example, the CCH product noted above offers access to an accompanying online service, charged on an hourly basis, that provides access to the latest health and tax law materials. See supra note 48.

\[^{51}\] Id.

\[^{52}\] For example, Environmental RouteNet, a service offered by Cambridge Scientific, focuses on environmental information. Routenet also engages in price discrimination: individual users may access for $50 per month, while institutional prices start at $8,000 per year for eight users. See Paul Blake, Database Traditions Get Caught Up in the Web, INFO. TODAY, Sept. 1, 1995, available in Westlaw, Allnewsplus File; see also United States Courts Southern District of Texas (visited May 6, 1997) <http://www.txs.uscourts.gov> (permitting free access to certain data via the Internet but imposing time-based fees via a stand alone BBS (PACER) for other data).

\[^{53}\] Examples include LEXIS/NEXIS and Westlaw.

\[^{54}\] Id.; see also John B. Kennedy & Shoshana R. Dweck, Publishers, Authors
Although variations in the database market structure and price models may reflect some degree of competition, commentators have noted that the market operates at a suboptimal level because of the failure of existing legal regimes to protect adequately the investment required to produce valuable, commercial databases.

B. Protection Afforded Database Makers by Existing Legal Regimes

Database makers and rightholders seeking to market their databases can obtain some degree of protection from existing legal regimes. This section briefly explores, in

_Battle Over Electronic Rights_, NAT'L L.J., Oct. 28, 1996, at C17 (noting that publishers are experimenting with tiered subscriptions, per-article, and time-based pricing mechanisms).

54. _But see_ Reichman & Samuelson, _supra_ note 4, at 69 (noting that anecdotal evidence suggests that database markets are “almost universally characterized by a distinct absence of competition”). While this proposition may be true of markets dominated by database makers who are also the sole source for the data sought, the pricing options available to customers seeking the same type of information, _see supra_ notes 47-53 and accompanying text, the high level of merger and acquisition activity in the business database market, and falling operating margins, indicate some level of competition in the database market. _See Nevin, supra_ note 40, at 81.

55. _See supra_ notes 5, 8; Reichman & Samuelson, _supra_ note 4, at 55 (noting that the risk of market failure tends to keep the production of information goods at suboptimal levels); _see also_ Reichman, _supra_ note 10, at 2491 (noting that copyright’s creativity requirement could “exclude many of the most commercially and scientifically important databases”).

56. Rights under the three _sui generis_ regimes initially vest in the database maker, but are freely transferable thereafter. _See Database Directive, supra_ note 1, art. 7(3), O.J. L 77/20, at 26 (1996); WIPO Proposal, _supra_ note 1, art. 4(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); H.R. REP. NO. 3531, _supra_ note 1, § 2 (defining “database owner”).

turn, the strengths and weaknesses of copyright, contract, and unfair competition law, three regimes that offer some protection to databases published in the marketplace.  

1. Protection Afforded by Copyright

One might expect that copyright, an institution designed to “promote the Progress of Science and useful Arts,” would embrace a form of intellectual property with the potential to enhance access to, and increase the availability of, information. Indeed, databases whose final form exhibits creative selection and arrangement secure protection “against the world.” However, as courts and commentators have recognized, the protection afforded by copyright law to databases, except in a few European countries, consists of little more than a thin veil that quickly unravels as content becomes more factual and necessary.

Some commentators have noted that creatively selecting and arranging a database may reduce data availability and accessibility. For example, creatively selecting data ex-

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58. In addition, the so-called Nordic “catalogue rule” protects “catalogues, tables, and similar compilations in which a large number of particulars have been summarized, including databases, for ten years after first publication.” See Reichman, supra note 10, at 2492-93 (quoting Gunnar Karnell, The Nordic Catalogue Rule, in PROTECTING WORKS OF FACT 67-68 (E. J. Dommering & P. B. Hugenholtz eds., 1991)) (internal quotes omitted).


60. Paradoxically, this very purpose is often cited as the basis for limiting copyright in factual information. See Feist, 499 U.S. at 354 (“Throughout history, copyright law has recognized a greater need to disseminate factual works . . . .”) (citation omitted).

61. See supra note 8.

62. See Zeidenberg, 86 F.3d at 1454.

63. See supra note 8.

64. See Glynn S. Lunney, Jr., Reexamining Copyrights’ Incentive Access Paradigm, 49 VAND. L. REV. 483, 567-71 (1996) (discussing copyright’s questionable premise that by limiting the scope of protection for necessary works, society will have greater access to such works); see supra notes 5, 12.

65. See Ginsburg, supra note 6, at 347-49; Denicola, supra note 12, at 530; see supra note 38.
cludes potentially desirable information, while creatively arranging data, assuming arrangement is not functionally-dictated, may frustrate information users. In addition, because many database makers add superfluous original, value-added data in an attempt to avail themselves of the cloak of copyright, the selection and arrangement criteria may increase the cost of databases without providing corresponding gains to database users.

Other commentators have recognized that because copyright rests in a large degree upon broad cultural policies, and not upon general economic considerations, copyright is ill-suited to protect functional business tools like databases that compete in the general market. That is, by linking the existence and degree of protection to the superficial final form of the product, rather than to total production costs, copyright fails to offer sufficient production incentives to encourage production of these valuable business tools, and effectively excludes “many of the most commercially and scientifically important databases.”

Copyright, then, leaves databases whose content is factual or necessary or is otherwise considered noncreative (especially comprehensive, electronic databases that defer

66. See Ginsburg, supra note 6, at 344-45 (noting that the selection criterion discourages comprehensive data collections); see also Reichman, supra note 10, at 2491.
67. See Ginsburg, supra note 6, at 344-45. Consequently, electronic database makers often forego imposition of selection and arrangement criteria in favor of permitting users to dynamically impose their own selection and arrangement criteria. Id.
68. Id. at 344-46.
69. Cf. Reichman, supra note 10, at 2452-53 (noting that copyright promotes certain cultural policies at the expense of economic efficiency); Reichman, supra note 3, at 806 n.45 (copyright deliberately subordinates the price-setting function of the market to broader cultural policies); see Denicola, supra note 12, at 516 (noting that “the very vocabulary of copyright law is ill-suited to analyze property rights in works of nonfiction[,]” such as databases).
70. See Denicola, supra note 12, at 530.
71. See Reichman, supra note 10, at 2491 (creativity requirement could exclude many of the most commercially and scientifically important databases).
completely to the information consumer’s judgment regarding data arrangement and selection) exposed to parasitic competitors and information Samaritans who extract and recompile the raw, unfiltered data to produce competing products.

2. Protection Afforded by Contract

Through mutually beneficial exchanges, contracts permit the private ordering of resources (risk-allocation) essential to the efficient functioning of a market economy. Database makers can obtain differing degrees of contractual protection, depending on whether they make the database publicly available or keep it under private control.

The limits of contractual protection for publicly-available databases are apparent after considering that unlike a copyright, which is enforceable against the world, a contract is enforceable only against the contracting parties. Thus,

72. See Ginsburg, supra note 6, at 345 (computerized databases are designed to permit users to impose their own arrangement and selection criteria).

73. See Reichman, supra note 10, at 2490-91. Information Samaritans might distribute the data and effectively destroy a large portion of the maker’s market, while parasitic competitors (“pirates”) might compete head-to-head with the database maker, or might produce and market a value-added product before the maker produces the product. Reichman & Samuelson, supra note 4, at 67-68. In the latter case, the pirate might capitalize on advantages otherwise held by the maker; e.g., established database makers have production facilities, managerial experience, distribution channels, and reputational advantages. See Perritt, supra note 4, at 279 (noting some of the market-related phenomena which tend to reduce the pirate’s ability to compete head-to-head with the maker).


75. See GLOBAL ACCESS, supra note 4, at 7-8 (discussing relative vulnerabilities of public and private databases). As used herein, “publicly-available” means that the database or its contents are physically available to the public in paper or electronic form.

76. See Zeidenberg, 86 F.3d at 1454.

unless the database maker can restrict redistribution, or control access to the database contents through technological mechanisms, publicly-available databases are susceptible to extraction and redistribution by parasitic competitors and information Samaritans who are not parties to the contract.78

On the other hand, privately-controlled databases—those databases to which access is restricted79—enable database makers to “track and charge for every instance of electronic access.”80 Although such a database maker can theoretically “reject the state-imposed cultural bargain”81 of copyright law and “impose monopoly prices and potentially oppressive terms on users,”82 there are several practical limits on her ability to do so.

First, unless the database consists of sole-source data,83 which in some cases could trigger antitrust scrutiny,84 the database maker faces the threat of market competition. Second, database makers who make their product available only through telecommunications devices necessarily limit their market to those with access to such devices.85
Third, contracts provide protection to databases, whether publicly-available or privately-controlled, only if the parties voluntarily abide by the contractual terms, or if the contractual terms are otherwise enforced by the judicial machinery.86 commercially-minded courts have recognized that enforcing private agreements is fundamental to market efficiency and stability,87 and that the enforcement of private agreements respecting intellectual property serves the “same procompetitive functions as does the law of trade secrets.”88 However, some courts have saddled the “unruly horse” of public policy89 and rejected the efforts of intellectual property producers to protect by contract that which copyright fails to protect.90

Contracts, then, leave databases exposed to parasitic competitors and information Samaritans not in privity of contract with the database maker,91 and to the risk that a particular court will, on public policy grounds, refuse to enforce a private contractual agreement regarding databases.92

3. Protection Afforded by Unfair Competition Law

Database makers who fail to obtain adequate protection from copyright and contract can sometimes obtain protection from the misappropriation branch of unfair competition

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86. See, e.g., 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.1, at 4 n.1 (2d ed. 1990) (citing RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (“A contract is a promise or set of promises for the breach of which the law gives a remedy . . . .”)).
87. American Airlines, 115 S. Ct. at 826.
88. See Zeidenberg, 86 F.3d at 1455.
90. See, e.g., ProCD v. Zeidenberg, 908 F. Supp. 640 (W.D. Wis.), rev’d, 86 F.3d 1447 (7th Cir. 1996).
91. Perritt, supra note 4, at 292 (“contract protection is unavailable except when privity of contract exists”).
92. See supra notes 89-90.
law.\textsuperscript{93} The tort of misappropriation protects investors from the malcompetitive behavior of free-riding competitors.\textsuperscript{94}

Unfortunately, the \textit{aegis} of unfair competition law ebbs and flows with the tide, a tide that follows not the moon, but the \textit{sub rosa} principles held by individual judges.\textsuperscript{95} The resulting unpredictability of the remedy renders unfair competition law less than an optimal means of protecting and stimulating investment in databases.\textsuperscript{96}

Unfair competition law, then, while affording some protection to database makers from malcompetitive free riders,\textsuperscript{97} does not protect database makers from information Samaritans,\textsuperscript{98} and does not, because of the uncertainty of a remedy, provide a predictable basis upon which to make an investment decision.\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{93}International News Serv. v. Associated Press, 248 U.S. 215 (1918) (giving birth to the tort of misappropriation in the United States); Denicola, \textit{supra} note 12, at 517 n.7 (collecting cases).
\item \textsuperscript{94} See C. Owen Paepke, \textit{An Economic Interpretation of the Misappropriation Doctrine: Common Law Protection for Investments in Innovation}, 2 \textit{HIGH TECH. L.J.} 55, 68-69 (1987) (describing three common elements as: (1) investment by the plaintiff in creating a product; (2) use of that investment or product in competition with the plaintiff; and (3) commercial damage to the plaintiff); Reichman & Samuelson, \textit{supra} note 4, at 132 (citing domestic and foreign authorities recognizing the tort); Restatement (Third) of Unfair Competition Law § 38. \textit{But see} Gary Myers, \textit{The Restatement’s Rejection of the Misappropriation Tort: A Victory for the Public Domain}, 47 \textit{S.C. L. REV.} 673, 678 (1996) (arguing that the Restatement (Third) of Unfair Competition Law rejects the tort of misappropriation as an independent cause of action).
\item \textsuperscript{95} See Reichman, \textit{supra} note 10, at 2476.
\item \textsuperscript{96} Reichman & Samuelson, \textit{supra} note 4, at 131; Paepke, \textit{supra} note 94, at 68-70 (noting that the tort lacks consistent formulation and application).
\item \textsuperscript{97} \textit{Id.}; see \textit{supra} note 93 (citing INS and a source collecting cases following the INS rationale).
\item \textsuperscript{98} \textit{But see} Paepke, \textit{supra} note 94, at 68-69 (noting that some courts have eliminated the element of competition); \textit{see generally} RALPH S. BROWN \& ROBERT C. DENICOLA, \textit{CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS} 580-83 (6th ed. 1995) (describing the reception and evolution of INS in the federal courts).
\item \textsuperscript{99} See Samuelson, \textit{supra} note 11, at 9 (noting that the drafters of the Initial Proposal regarded EC unfair competition law as insufficient to produce adequate incentives to invest in database production).
\end{itemize}
Thus, while the mosaic of these three legal regimes offers some protection to database makers from the malcompetitive or parasitic behavior of competitors, users, and information Samaritans, existing legal regimes, both singularly and collectively, leave database makers exposed to free riders who can market a competing product at a fraction of the database maker’s cost,\(^{100}\) and to parasitic users and information Samaritans who can wreak similar havoc to the database maker’s investments.\(^{101}\) As a result, many commentators have recognized the need for additional protection to increase incentives to produce databases, those valuable business tools that place information at the fingertips of the world,\(^{102}\) without extinguishing competition, the ultimate guardian of consumers in market economies.\(^{103}\)

In response to this perceived need to vindicate the competitive ethos in database markets, the EC adopted the Data-

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100. A database maker’s production costs can be expressed as \(P = dC + dP + dM + dR\), where \(P\) equals the sum of data collection, purchase, generation, and validation costs (\(dC\)); plus data compiling and presentation costs (\(dP\)); plus database marketing, distribution, billing and collection costs (\(dM\)); plus database reproduction costs (\(dR\)). See Perritt, supra note 4, at 277 (expressing the costs of an intellectual property originator). A database pirate’s production costs can be expressed as \(p = dA + dT + dM + dR + dL\); where \(p\) equals the sum of data acquisition costs in copying from the database maker (\(dA\)); plus data transformation costs (\(dT\)); plus database marketing, distribution, billing and collection costs (\(dM\)); plus database reproduction costs (\(dR\)); plus legal liability costs (\(dL\)). Id. (expressing the costs of an intellectual property pirate). Assuming database marketing (\(dM\)) and reproduction (\(dR\)) costs are equal for the maker and the pirate, the pirate cannot compete in the same market with the database maker on a price basis unless \(P > p\), or \(dC + dP > dA + dT + dL\). See id. However, as discussed above, head-to-head competition is not the only way a pirate can damage the maker’s investment. See supra note 73.

101. Id.; see also supra notes 45, 73 and accompanying text (discussing susceptibility of databases to information Samaritans).

102. See supra note 38 and accompanying text; see generally Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 Va. L. Rev. 149, 222-26 (1992) (describing a new tort of “malcompetitive copying” when defendants knowingly copy protected intangibles in markets exhibiting asymmetrical market failure that damage the creator’s market interests without providing an equal value to the creator in the long run).

103. See supra note 28.
base Directive, which prompted the United States and the World Intellectual Property Organization to advance similar proposals.

II. COMPARISON OF THE DATABASE DIRECTIVE WITH THE PROPOSALS

This part compares the U.S. and WIPO Proposals with the Database Directive (collectively referred to as “regimes”). While the WIPO Proposal generally tracks the Database Directive, the U.S. Proposal, H.R. 3531, differs in several significant respects. The first apparent difference lies in the broader definition of “database” found in H.R. 3531.

A. Scope of Protection

To understand the potential scope of protection afforded by the regimes, this section first compares the regimes’ definition of “database” and the operative terms which define and circumscribe the sui generis rights provided to database makers. This section then compares the protection afforded by the regimes to existing databases, and each regime’s affect on existing rights and obligations.

1. Database Defined

The Database Directive and the WIPO Proposal define “database” as a collection of independent works, data or other materials arranged in a systematic or methodical way capable of being individually accessed by any means. In contrast, H.R. 3531 defines “database” as “a collection, assembly or compilation, in any form . . . of works, data or other mate-

104. See Database Directive, supra note 1, recital 1, O.J. L 77/20, at 20 (1996) (databases are not sufficiently protected in Member States).
105. See supra notes 1, 14-20 and accompanying text.
106. See H.R. REP. NO. 3531, supra note 1, § 2.
107. See supra notes 13, 56.
rial, arranged in a systematic or methodical way.”

H.R. 3531’s failure to require works to be independent could sweep recordings of audiovisual, cinematographic, literary, or musical works under its protective cloak; works that the Database Directive and the WIPO Proposal expressly disclaim. Thus, initially, H.R. 3531 appears to define “database” more broadly than either the Database Directive or the WIPO Proposal.

However, H.R. 3531, like the Database Directive and the WIPO Proposal, extends its initial cloak of protection only to databases that are the product of a quantitative or qualitative substantial investment of financial or other resources in the “collection, assembly, verification, organization or presentation” of the contents of a database. Therefore, although H.R. 3531 may initially define “database” more broadly than the Database Directive or the WIPO Proposal, the substantial investment requirement, assuming it is interpreted similarly under each regime, reduces the potential definitional difference.


111. See H.R. REP. NO. 3531, supra note 1, § 3(a); WIPO Proposal, supra note 1, art. 2(4) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); cf. Database Directive, supra note 1, art. 7(1), O.J. L 77/20, at 25 (1996) (substantial investment in the obtaining, verification or presentation of database contents).

112. With the exception of the disclaimer regarding audiovisual works noted above, neither the Database Directive nor the Proposals define “substantial investment.” H.R. REP. NO. 3531, supra note 1, § 3(a); WIPO Proposal, supra note 1, art. 2(4) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); cf. Database Directive, supra note 1, art. 7(1), O.J. L 77/20, at 25 (1996).

113. But see Reichman & Samuelson, supra note 4, at 98-99 (arguing that the definition in H.R. 3531 is so broad that it might cover noncopyrightable components of computer programs and scientific or historical theories based on fact or data). However, H.R. 3531 flatly excludes computer programs from the scope of its protection. See H.R. REP. NO. 3531, supra note 1, § 3(d) (“computer programs are not subject to this Act, including without limitation any computer programs used in the manufacture, production, operation or maintenance of a database”). Moreover, the argument that H.R. 3531 defines “database” broadly enough to
2. *Sui Generis* Rights Granted

Assuming the database passes the substantial investment threshold, the database maker\(^{114}\) gains two complementary rights: (1) the right to prohibit extraction of, and (2) the right to prohibit reutilization of (the Database Directive), or utilization of (the WIPO Proposal), or use or reuse of (H.R. 3531), all or a substantial part of the database contents.\(^{115}\) Thus, to understand the breadth of the complementary rights, one must examine the definitions of “extraction,” “reutilization,” “utilization,”\(^{116}\) or “use” and “reuse,” as the case may be, and “substantial part.”\(^{117}\)

cover scientific or historical theories based on significant compilations of facts or data would apply equally to the Database Directive and the WIPO Proposal. With today’s digital technology, even three dimensional objects with appropriate sensing devices can be reduced to a series of ones and zeros that can be compiled and collected in a database that would find protection under each regime, provided the database meets the benchmark of protection—substantial investment. Although segments of scientific and historical theory, along with anything else (except computer programs) that can be reduced to a series of ones and zeros, can be compiled in database form and protected under either regime, the regimes require the second comer only to obtain those ones and zeros from other sources, or from the database maker by fair and honest means, for example, by purchasing a license.

114. See *supra* note 56.


116. Because the meaning of “utilization” as used in the WIPO Proposal is substantially the same as the terms “use” and “reuse” as used in U.S. Proposal, see *infra* note 122, for the reader’s and writer’s benefit, the term “utilization” is not referred to in the text hereinafter.

117. The “depth” of the complementary rights (i.e., the liability of downstream “innocent users” who may unknowingly reuse database contents made available by an initial infringer) is not addressed by either regime. However, knowledge is required to impose criminal liability under H.R. 3531. See H.R. REP. NO. 3531, *supra* note 1, §§ 8, 13.
a. The Extraction Right

The Database Directive and the Proposals define “extraction” as “the permanent or temporary transfer of all or a substantial part of the contents of a database” to another medium by any means or in any form. Although H.R. 3531 explicitly extends the extraction right to copies of a database, the extraction right provided by the Database Directive and the WIPO Proposal would also protect copies. Thus, the regimes define the extraction right substantively the same.

b. The Complementary Reutilization, or Use and Reuse, Right

The Database Directive and the Proposals define the complementary reutilization or use right differently in several respects. First, the Database Directive grants a right to prohibit only reutilization, while the Proposals grant a right to prohibit use and reuse. “reutilization” as defined by the Database Directive requires a positive act—

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118. See Database Directive, supra note 1, art. 7(2)(a), O.J. L 77/20, at 26 (1996); WIPO Proposal, supra note 1, art. 2(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); H.R. REP. NO. 3531, supra note 1, § 2.

119. See H.R. REP. NO. 3531, supra note 1, § 2.

120. A copy necessarily requires transfer of the entire contents of a database, an act prohibited by each regime. See supra note 115.

121. The Database Directive defines “reutilization” as “any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online, or other forms of transmission.” See Database Directive, supra note 1, art. 7(2)(b), O.J. L 77/20, at 26 (1996).

122. See supra note 116. The WIPO Proposal defines “utilization” as: [T]he making available to the public of all or a substantial part of the contents of a database by any means, including by the distribution of copies, by renting, or by online, or other forms of transmission, including making the same available to the public at a place and at a time individually chosen by each member of the public.


123. See Database Directive, supra note 1, arts. 7(1), 7(2)(b), O.J. L 77/20, at
transmission—while “use” as defined by the Proposals could theoretically occur without a positive act. Thus, based solely on the definition of this complementary right, the Proposals grant the database maker a broader right.

c. Breadth of the Sui Generis Rights

As noted above, the breadth of the right to prevent extraction and the right to prevent reutilization, or use and re-use, is linked to the meaning of “substantial part.” Here, the WIPO Proposal diverges slightly, and H.R. 3531 diverges significantly, from the Database Directive.

The WIPO Proposal defines “substantial part” as “any portion of the database, including an accumulation of small portions, that is of qualitative or quantitative significance to the value of a database.” The WIPO Proposal therefore provides more guidance to courts charged with interpreting it than does the Database Directive, which purposely left the definition of “substantial part” to the European Court of Justice. However, because the Database Directive specifically prohibits repeated and systematic extraction or reutilization of insubstantial parts of the contents of a database which conflict with the normal exploitation of the database or

25, 26 (1996); supra note 120.
124. See WIPO Proposal, supra note 1, arts. 2(6), 3(1) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (prohibiting use by making available to the public at a time and place individually chosen by a member of the public); see also H.R. Rep. No. 3531, supra note 1, §§ 2, 4(a)(1) (prohibiting use or reuse by providing access).
125. See supra notes 115-17 and accompanying text (the rights to prevent extraction and reutilization, or use and reuse, extends only to all or a substantial part of the database).
126. See infra notes 127-30 (explaining the regimes’ differing definitions of substantial part).
127. WIPO Proposal, supra note 1, art. 2(5) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).
128. See Jens-L. Gaster, The New EU Directive Concerning the Legal Protection of Data Bases, in 3 FORDHAM INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY, supra note 11, at 4 (explaining that the Commission deliberately left the task of defining “substantial part” to the European Court of Justice).
which unreasonably prejudice the legitimate interests of the database maker,\textsuperscript{129} a court could easily ascribe the same meaning to the term, whether interpreting the term as found in the WIPO Proposal or the Database Directive.

H.R. 3531, in contrast, implicitly defines “substantial part” by defining “insubstantial part” as “any portion of the contents of a database whose extraction, use or reuse does not diminish the value of the database, conflict with a normal exploitation of the database or adversely affect the actual or potential market, for the database.”\textsuperscript{130} Although one could argue that the legitimate interests of the database maker could include the potential market, the Database Directive prohibits only acts which “unreasonably prejudice” those legitimate interests,\textsuperscript{131} while H.R. 3531 broadly prohibits extractions, uses, and reuses that merely “adversely affect” the actual or potential market.\textsuperscript{132} H.R. 3531 illustrates its protective sweep by providing examples of extractions, uses, and reuses of database contents that would constitute infringement.\textsuperscript{133}

Some commentators have suggested that the foregoing provisions of H.R. 3531, coupled with its severe criminal penalties,\textsuperscript{134} have the “potential for impeding virtually any

\begin{itemize}
\item \textsuperscript{129} See Database Directive, \textit{supra} note 1, art. 7(5), O.J. L 77/20, at 26 (1996).
\item \textsuperscript{130} H.R. REP. NO. 3531, \textit{supra} note 1, § 2 (emphasis supplied).
\item \textsuperscript{131} See Database Directive, \textit{supra} note 1, arts. 7(5), 8(2), O.J. L 77/20, at 26 (1996).
\item \textsuperscript{132} H.R. REP. NO. 3531, \textit{supra} note 1, §§ 2 (defining “insubstantial part”), 4(a) (prohibited acts).
\item \textsuperscript{133} Infringing acts include extraction, use, or reuse of all or a substantial part of the database contents: (1) in a product or service directly or indirectly competing with a database from which it was extracted; (2) in a product or service directly or indirectly competing in any market in which the database owner has a demonstrable interest or expectation in licensing or otherwise; (3) in a product or service for customers who might otherwise reasonably be expected to be customers for the database; or (4) in an organization, by or for multiple persons within the organization, in lieu of an additional authorized use or reuse. H.R. REP. NO. 3531, \textit{supra} note 1, § 4(b).
\item \textsuperscript{134} H.R. REP. NO. 3531, \textit{supra} note 1, § 8 (providing for a fine of $250,000 or imprisonment for five years, or both, for first-time offenders who willfully, and
judge made ['fair use'] exceptions" and, more importantly, may cast a shadow on the availability of any pro-competitive "Magill-like" exceptions to the database maker’s “unbounded derivative work right.” Nevertheless, despite H.R. 3531’s potential breadth, it is narrower than the Database Directive and the WIPO Proposal in two significant ways.

First, H.R. 3531 expressly withholds protection for databases made by governmental entities, and by governmental

for commercial advantage or who cause $10,000 damage to the database owner in one calendar year, violate the database owners sui generis rights). The U.S. Proposal also provides a detailed set of civil remedies for violating the database makers’ extraction and reutilization rights. See H.R. REP. NO. 3531, supra note 1, § 12 (providing injunctive relief, impoundment, actual damages or statutory damages, costs, and attorneys’ fees in certain cases, and treble damages against persons adjudged a violator of §§ 10 or 11 within the previous three years). In contrast, violating the database makers’ extraction and reutilization rights under the Directive triggers “appropriate remedies.” See Database Directive, supra note 1, art. 12, O.J. L 77/20, at 27 (1996). Under the WIPO Proposal, Contracting Parties must provide “expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringement.” WIPO Proposal, supra note 1, art. 13 (Alternative B) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); see also id. (Alternative A incorporating the Annex).

135. Reichman & Samuelson, supra note 4, at 99.


137. See Reichman & Samuelson, supra note 4, at 101.

138. In addition, to the extent that the Commerce Clause, U.S. CONST. art. 1, § 8, cl.(3), retains any vitality, it places a jurisdictional limit on Congress’s ability to regulate databases. Cf. United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act of 1990 as beyond Congress’s ability to regulate under the Commerce Clause). Of course, any limit inherent in the Commerce Clause would not affect a properly executed treaty. Cf. Missouri v. Holland, 252 U.S. 416 (1920) (unless forbidden by the United States Constitution, the federal government can act in matters where a national interest exists that can only be protected by acting in concert with another nation).
agents in their official capacities. Second, H.R. 3531 insulates information users from liability for the “use or reuse of database contents lawfully extracted from a database[] prior to the effective date of th[e] Act.”

3. Rights and Obligations in Existing Databases

The Proposals diverge from the Database Directive in that the Proposals would sweep all existing databases under their cloaks of protection, while the Database Directive requires protection of only those databases made after January 1, 1983. The regimes converge in two respects. First, each regime provides that the sui generis rights are without prejudice to other rights or obligations in a database or its contents. Second, neither regime extends copyright-like protection to the contents of the database. Instead, each regime requires users or potential competitors either to collect the information independently, or to pay the database maker for the collected information. In essence, the regimes imbue

139. H.R. Rep. No. 3531, supra note 1, § 2. However, H.R. 3531 does not exclude databases merely because its contents have been obtained from a governmental entity. Id. § 3(c). To accommodate this derogation, the WIPO Proposal makes the matter of protection granted to databases made by governmental entity or their agents a matter for national legislation. WIPO Proposal, supra note 1, art. 5(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).

140. H.R. Rep. No. 3531, supra note 1, § 15 (providing that H.R. 3531 would become effective upon enactment). In contrast, the WIPO Proposal permits adoption of a limited two-year window, during which time copies lawfully made of databases before the effective date of the treaty may be distributed to the public, see WIPO Proposal, supra note 1, art. 11(2), while the Database Directive provides only that its sui generis regime “shall be without prejudice to any acts concluded and rights acquired” before the effective date. Database Directive, supra note 1, art. 14(4), O.J. L 77/20, at 27 (1996).

141. WIPO Proposal, supra note 1, art. 11(1) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); H.R. Rep. No. 3531, supra note 1, § 15.


databases with a portable toll fence.\textsuperscript{145}

B. \textit{Beneficiaries of Protection}

The Database Directive protects databases made by\textsuperscript{146} nationals and habitual residents of Member States;\textsuperscript{147} by companies and firms formed according to the law of a Member State and having their central administration or principal place of business within the EC;\textsuperscript{148} and by companies and firms having their registered office within the EC, provided the company or firm has a genuine economic link to a Member State.\textsuperscript{149} The Database Directive also protects databases manufactured in third countries by agreement of the Council of the European Union ("Council").\textsuperscript{150}

Similarly, the WIPO Proposal protects databases made by nationals and habitual residents of Contracting Parties;\textsuperscript{151} by companies, firms, and other legal entities having their central administration or principal place of business within a
Contracting Party;\textsuperscript{152} and by companies, firms and other legal entities having their registered office in the territory of a Contracting Party, provided its operations have a genuine and ongoing economic link to a Contracting Party.\textsuperscript{153} H.R. 3531, in contrast, protects databases made by natural and juristic persons,\textsuperscript{154} but, as noted above,\textsuperscript{155} specifically excludes governmental entities and certain governmental agents in their official capacities.\textsuperscript{156}

C. Term of Protection

Rather than providing a single initial term of protection, the regimes provide a two-stage initial term of protection.\textsuperscript{157} The Database Directive and the WIPO Proposal, alternative B,\textsuperscript{158} provide a fifteen-year term of protection, plus an additional fifteen years if the database is made available to the public before expiration of the initial term.\textsuperscript{159} In contrast,

\begin{itemize}
\item \textsuperscript{152} See id. art. 6(2), WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).
\item \textsuperscript{153} Id. Note, however, that unlike the Database Directive, which adopts a material reciprocity standard, see supra note 150, the WIPO Proposal adopts the standard of national treatment by requiring Contracting Parties to grant database makers who are nationals of other Contracting Parties the rights granted by the Treaty and other rights granted to the nationals of the Contracting Party. See WIPO Proposal, supra note 1, art. 7(1) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).
\item \textsuperscript{154} See H.R. Rep. No. 3531, supra note 1, § 2 (defining “juristic person” to exclude governmental entities).
\item \textsuperscript{155} See supra note 138 and accompanying text.
\item \textsuperscript{156} H.R. REP. NO. 3531, supra note 1, § 2.
\item \textsuperscript{157} See Database Directive, supra note 1, art. 10(1)-(2), O.J. L 77/20, at 26 (1996); WIPO Proposal, supra note 1, art. 8(1)-(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); H.R. REP. NO. 3531, supra note 1, § 6(a).
\item \textsuperscript{158} See WIPO Proposal, supra note 1, art. 8(1)-(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (alternative A provides a 25-year term, while alternative B provides a 15-year term).
\item \textsuperscript{159} The initial and second terms begin on January 1 of the year following the date on which the database meets the requirements for protection, or is made available to the public. See Database Directive, supra note 1, art. 10(1)-(2), O.J. L 77/20, at 26 (1996); WIPO Proposal, supra note 1, art. 8(1)-(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996). The Initial Proposal limited the term of protection to 10 years. See Initial Proposal, supra note 11, art. 9(3), O.J. C 156/03, at 9 (1992). Apparently, the term of protection was increased to 15 years as a result of industry lobbying. See Suzanne Perry, Longer Protection in Database Directive Proposed,
H.R. 3531 provides a potentially perpetual initial term of protection,\(^{160}\) plus an additional twenty-five years from the earlier of the date the database is made available to the public or is first placed in commercial use.\(^{161}\)

In addition to the initial two-stage term of protection, the regimes provide the database maker an opportunity to extend the toll fence perpetually.\(^{162}\) However, the Database Directive and the WIPO Proposal require the same showing to extend the fence as is required to erect the toll fence: a substantial investment.\(^{163}\) In contrast, H.R. 3531 requires only a “change of commercial significance” to extend the fence perpetually.\(^{164}\)

D. Exceptions: User Protections

The regimes protect legitimate users by providing exceptions to, and placing limitations on, the sui generis rights. For example, each regime avoids conferring a \textit{de jure} monopoly

\begin{footnotesize}
\begin{itemize}
  \item \footnotesize\text{H.R. Rep. No. 3531, supra note 1, § 6(a) (term of protection is triggered by placing in commercial use or making available to the public) with id. § 3(b) (databases qualifying for protection under the act remain protected regardless of whether they are made available to the public or placed in commercial use).}
  \item \footnotesize\text{Compare H.R. Rep. No. 3531, supra note 1, § 6(a) (term of protection is triggered by placing in commercial use or making available to the public) with id. § 3(b) (databases qualifying for protection under the act remain protected regardless of whether they are made available to the public or placed in commercial use).}
  \item \footnotesize\text{See id. § 6(a) (providing that databases remain subject to the act for 25 years after January 1 of the year following the earlier of the date on which the database is made available to the public or placed in commercial use).}
  \item \footnotesize\text{See Database Directive, supra note 1, art. 10(3), O.J. L 77/20, at 26 (1996); WIPO Proposal, supra note 1, art. 8(3) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); H.R. Rep. No. 3531, supra note 1, § 6(b).}
  \item \footnotesize\text{One can argue that the Database Directive and the WIPO Proposal do not offer “renewal” options, but rather offer protection only for “new” databases because the same investment is required to extend protection as to obtain initial protection. See Database Directive, supra note 1, art. 10, O.J. L 77/20, at 26 (1996); WIPO Proposal, supra note 1, arts. 8(3), 10 WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).}
  \item \footnotesize\text{See H.R. Rep. No. 3531, supra note 1, §§ 6(b), 2 (defining “change of commercial significance” as “a change that a reasonable user of a database would regard as affecting the quality, quantity or value” of the database contents as a whole).}
\end{itemize}
\end{footnotesize}
on facts or information, and provides that all other laws regarding databases or their contents—chief among them for purposes of this Article, competition law and laws in respect to access to public documents—shall remain unaffected by the respective regime.

Additionally, the Database Directive and the WIPO Proposal expressly permit Member States and Contracting Parties, respectively, to enact limited “fair-use” exceptions. H.R. 3531 does not expressly provide fair-use exceptions, but does follow the Database Directive in permitting lawful database users to extract, use, and reuse insubstantial amounts of data for “any purposes whatsoever.” The Database Directive strengthens this user protection by deeming contractual provisions to the contrary void, but qualifies the protection by prohibiting users from performing acts that either conflict with normal exploitation of the database or unreasonably prejudice the database maker’s legitimate interests.

In contrast, H.R. 3531 permits parties to contract

165. However, in the case of sole-source data, the regimes could result in a de facto monopoly on facts. See infra notes 262-70 and accompanying text.
167. See Database Directive, supra note 1, art. 9, O.J. L 77/20, at 26 (1996); WIPO Proposal, supra note 1, art. 5(1) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996). In this respect, the WIPO Proposal would permit broader “fair-use” exceptions than the Database Directive. Compare WIPO Proposal, art. 5(1) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (permitting exceptions to and limitations on the extraction and use rights in special cases that do not conflict with the normal exploitation of the database and do not unreasonably prejudice the legitimate interests of the database right-holder) with Database Directive, supra note 1, art. 9, O.J. L 77/20, at 26 (1996) (providing three specific enumerated exceptions which may be authorized by Member States). The Database Directive’s exceptions are discussed more fully infra notes 294-321 and accompanying text.
170. Id. art. 8(1)-(2), O.J. L 77/20, at 26 (1996).
around this potential user protection. H.R. 3531 also severely limits “any purposes whatsoever” by prohibiting users from performing or procuring acts that singularly or cumulatively, adversely affect the actual or potential market for the database. Considering this limitation and others noted above, “one is hard pressed to imagine a legitimate purpose for which a user could extract or use even an insubstantial amount of data from a database protected by H.R. 3531 without the database maker’s authorization.

E. The Proposals’ Provisions Regarding Protection-Defeating Devices and Database Management Information

The Proposals prohibit the importation, manufacture, or distribution of devices whose primary purpose or effect is to defeat or circumvent self-protection measures taken by database makers to prevent unauthorized extractions and utilizations. Violation of this prohibition triggers “appropriate and effective remedies” under the WIPO Proposal, and triggers a detailed set of civil remedies under H.R. 3531.

In addition, H.R. 3531 offers protection to database makers who mark their products with database management in-

171. See H.R. REP. NO. 3531, supra note 1, § 9(b) (permitting parties to freely contract with regard to databases and their contents).
172. See supra note 168.
173. H.R. REP. NO. 3531, supra note 1, § 4; see also supra notes 108-45 and accompanying notes (discussing the scope of protection).
174. See supra notes 108-45 and accompanying notes (discussing the scope of protection).
175. See Reichman & Samuelson, supra note 4, at 100.
176. Such self-protection measures might include encryption or password-protection systems.
178. WIPO Proposal, supra note 1, art. 10(2) WIPO Doc. CRNR/DC/6 (Aug. 30, 1996).
179. These are the same remedies triggered for violation of the extraction and use rights. See supra note 134.
formation. Knowingly providing false database management information, or knowingly altering or removing database management information without authority of the database maker, triggers both civil remedies and severe criminal penalties.

III. MAKING THE PARADIGMATIC SHIFT: LINKING INCENTIVES TO PRODUCTION COSTS

To explain the implications of the Database Directive’s _sui generis_ regime, this part analyzes the Database Directive in light of applicable EC law, using the factual background of a recent United States case, _ProCD, Inc. v. Zeidenberg_. This part also examines the balance the Database Directive strikes in the EC between the public’s need for information access and the database maker’s need for production incentives. Finally, this part responds to criticisms and concerns voiced by commentators.

Seeking to correct the imbalance of investment between the EC and the world, and between EC members in database production, the Database Directive seeks to harmonize existing European copyright law while simultaneously erecting a renewable, potentially perpetual, fifteen-year toll

181. _Id._ §§ 11, 13 (violation of § 11 with intent to defraud can be punished by fine of up to $500,000 or five years’ imprisonment, or both). Neither the Database Directive nor the WIPO Proposal explicitly address database management information.
182. Unless stated otherwise, this part addresses only the Database Directive, not the Proposals. So the reader will not have to refer back to Part II and wrest information, applicable only to the Database Directive, from the Proposals, some information previously discussed is repeated in this part.
183. 908 F. Supp. 640 (W.D. Wis. 1996), _rev’d_. 86 F. 3d 1447 (7th Cir. 1996).
184. _See supra_ notes 21-23 and accompanying text.
186. _But see supra_ note 5 (explaining that the Directive permits derogation for less exacting regimes).
that prohibits unauthorized extraction and reutilization of the whole or a substantial part of electronic and nonelectronic databases. Available to database makers

187. The sui generis regime creates a fence, rather than a wall, because the regime permits some leakage (e.g., it permits insubstantial extractions and permits Member States to enact ‘quasi-fair use’ exceptions). Database Directive, supra note 1, arts. 7-9, O.J. L 77/20, at 25-26 (1996). Theoretically, the 15-year fence can be extended perpetually; however, entitlement to another 15-year fence requires the same showing required for initial protection: a substantial new investment. Id. art. 10(3), O.J. L 77/20, at 26 (1996). As noted above in Part II, the initial term of protection under the Database Directive could approximate 30 years if the database maker withholds the database for almost 15 years before initial release to the public.

188. Extraction is “the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.” Database Directive, supra note 1, art. 7(2)(a), O.J. L 77/20, at 26 (1996). Reutilization is “any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online or other forms of transmission.” Id. art. 7(2)(b), O.J. L 77/20, at 26 (1996).

189. “Substantial part” may be evaluated quantitatively or qualitatively. Database Directive, supra note 1, art. 7(1), O.J. L 77/20, at 25 (1996). Though neither measure is defined by the directive, a lawful user “may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests” of the database maker. Id. art. 8(2), O.J. L 77/20, at 26 (1996); see also Gaster, supra note 128, at 6 (explaining that the Commission deliberately left the task of defining “substantial part” to the European Court of Justice); Rosler, supra note 11, at 120 (noting that many industry associations lobbied for actual percentage levels to determine infringement).

190. Database Directive, supra note 1, art. 1(1), O.J. L 77/20, at 24 (1996). The Initial Proposal, supra note 11, and the Amended Proposal, supra note 24, covered only electronic databases. The Council extended the scope of the Database Directive to nonelectronic databases because it obviated the need to draw a distinction between electronic and nonelectronic databases; because the Council deemed it inappropriate for a database distributed in both electronic and nonelectronic forms to receive different levels of protection; and because no such distinction is drawn in other international agreements. See Common Position, supra note 150, Statement of the Council’s Reasons 8, O.J. C 288/02, at 24 (1995). Another need for the extension, although not noted in the Database Directive, is that today’s high speed scanners and optical character recognition software make electronic conversion of nonelectronic databases almost as easy as electronic conversion of electronic databases. See Samuelson, supra note 11, at 3-4.

in Member States\textsuperscript{192} who can show a substantial investment\textsuperscript{193} in obtaining, verifying, or presenting the underlying data,\textsuperscript{194} the toll fence protects the commercial interests of database makers while attempting to accommodate the public’s interests.

The Database Directive accommodates the public’s interests by allowing insubstantial extractions from, and reuse of, the contents of databases made publicly available;\textsuperscript{195} by deeming public lending not an act of extraction or reutilization;\textsuperscript{196} by permitting Member States to enact “fair use” exceptions;\textsuperscript{197} and by extinguishing the database maker’s right to control resale after the first sale.\textsuperscript{198} Additionally, although the Database Directive does not mandate compulsory li-

\textsuperscript{192} See supra note 191.

\textsuperscript{193} Substantial investment in data collection can be measured qualitatively or quantitatively. Database Directive, supra note 1, art. 7(1), O.J. L 77/20, at 25 (1996). Although the Database Directive indicates that compilation of several recordings of musical performances on a compact disc is not a substantial enough investment to be eligible for \textit{sui generis} protection, id. recital 19, O.J. L 77/20, at 21 (1996), it fails to indicate the minimum level of investment required for such protection.

\textsuperscript{194} Database Directive, supra note 1, art. 7(1), O.J. L 77/20, at 25 (1996), recital 40, O.J. L 77/20, at 22 (1996). Obtaining/verifying data are self-explanatory concepts that apply equally to both electronic and nonelectronic databases. Presenting data is similarly self-explanatory in the context of nonelectronic databases; however, the concept of “presentation” in the context of electronic databases is generally inapplicable because users usually determine how such data is presented. See Ginsburg, supra note 6; Denicola, supra note 12, at 531. Obtaining, verifying, and presenting data will be collectively referred to hereinafter as “data collection.”

\textsuperscript{195} Unless repeated and systematic insubstantial extractions unreasonably prejudice the database maker’s legitimate interests. Database Directive, supra note 1, art. 8, O.J. L 77/20, at 26 (1996); see also id. art. 15, O.J. L 77/20, at 27 (1996) (making contracts to the contrary void).

\textsuperscript{196} Id. art. 7(2)(b), O.J. L 77/20, at 26 (1996).

\textsuperscript{197} See id. art. 9, O.J. L 77/20, at 26 (1996) (giving Member States the option to provide lawful users of publicly-available databases the right to privately reproduce nonelectronic databases; the right to use for noncommercial teaching/scientific uses; and the right to use for governmental security, administrative, or judicial purposes).

\textsuperscript{198} Id. art. 7(2)(b), O.J. L 77/20, at 26 (1996).
Member States can theoretically compel them when in the public’s interest, and, realistically, European courts seem ready to vindicate the public’s interest in competition when information producers abuse their dominant position. Finally, the Database Directive contemplates the

199. Previous proposals mandated compulsory licenses on “fair and nondiscriminatory terms” in the case of sole-source data. Sole-source data are data that cannot be “independently created, collected or obtained from any other source.” See Initial Proposal, supra note 11, art. 8, O.J. C 156/03, at 9 (1992); Amended Proposal, supra note 24, art. 11, O.J. C 308/01, at 13-14 (1993).

200. Database Directive, supra note 1, art. 13, O.J. L 77/20, at 27 (1996) (“This directive shall be without prejudice to . . . laws on restrictive practices and unfair competition . . . .”).

201. See, e.g., Radio Telefis Eireann v. Commission, Case 69/89, [1991] E.C.R. 485, 4 C.M.L.R. 586 (Ct. First Instance); British Broadcasting Corp. v. Commission, Case 70/89, [1991] E.C.R. 535, 4 C.M.L.R. 669 (Ct. First Instance); Independent Television Publications Ltd. v. Commission, Case 76/89, [1991] E.C.R. 575, 4 C.M.L.R. 775 (Ct. First Instance). In Magill, Magill TV Guide Ltd. (“Magill”) attempted to publish a comprehensive television program guide based upon weekly listings published in separate program guides by British and Irish broadcasters (no comprehensive listing was available to viewers in Ireland). Joined Cases, 241/91 & 242/91, [1995] E.C.R. 743, 812, ¶¶ 10. Availing themselves of the copyright protection afforded listings in Ireland and Great Britain, the broadcasters sought and obtained an injunction against Magill, who had already lodged a complaint with the European Commission. Id. at 812, ¶¶ 10-11. The Commission found that the broadcasters had abused a dominant position and ordered the broadcasters to supply their weekly listings to parties requesting them for a reasonable rate, effectively forcing a compulsory license. Id. at 812-13, ¶¶ 12-13. The European Court of Justice upheld the compulsory licensing order, finding that there was consumer demand for the comprehensive guide for which there was no available substitute, and held that the broadcasters’ refusal to supply the data prevented the appearance of a new product and the broadcasters’ had therefore abused a dominant position in violation of Article 86 of the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], Radio Telefis Eireann, [1995] E.C.R. at 824, ¶¶ 53-54. Although Article 86 is triggered only when abuse of a dominant position has the potential to affect trade between Member States, David Harbord, Barriers to Entry and Exit in European Competition Policy, 14 INT’L REV. L. & ECON. 411, 421 (1994), it is not necessary that the conduct in question have an actual, substantial effect on trade; rather, it is only necessary the conduct is capable of having such an effect. Radio Telefis Eireann, [1995] E.C.R. at 828, ¶ 69. Moreover, competition policy in the EC is converging. See generally LEAH DAVISON ET AL., THE EUROPEAN COMPETITIVE MARKET (1995) (explaining that national competition policy is beginning to reflect supranational competition policy). Furthermore, as markets within the Community become more European in character, it will be increasingly difficult to prove that a par-
public’s interest in free competition by mandating a triennial review of the *sui generis* regime to determine whether anti-competitive effects require the establishment of a compulsory licensing scheme.202

Yet, despite these seemingly broad protections of the public interest, many commentators, echoing the monocular vision of *Feist Publications v. Rural Telephone Service*,203 have expressed serious concerns about the negative effects of the Database Directive on the “free” flow of information,204 while others have argued that the Database Directive is anti-competitive and will retard long-term growth in the database industry.205 To determine whether these concerns are

202. Database Directive, *supra* note 1, art. 16(3), O.J. L 77/20, at 27 (1996) (“[E]very three years . . . the Commission . . . shall examine in particular the application of the *sui generis* right . . . especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify . . . the establishment of non-voluntary licensing arrangements.”).

203. See *supra* note 12. Feist’s myopic focus on the inability of facts to be original (an epistemologically erroneous view, see *supra* note 37), and almost singular concern over harming the public by creating a monopoly in public domain materials, “grossly neglect[ed] copyright’s incentive role.” See Ginsburg, *supra* note 6, at 350.

204. See Rosler, *supra* note 11, at 146 (the Database Directive’s most dangerous aspect is “its potential to stifle access to information”); Reichman & Samuelson, *supra* note 4, at 108-17, 123-24 (arguing that, by impeding the flow of information, the Database Directive and Proposals will put basic science and other public interest groups at risk); Academy Letter, *supra* note 23, at 1-2 (arguing that the pending WIPO Proposal “would seriously undermine the ability of researchers and educators to access and use scientific data, and would have a deleterious long-term impact on our nation’s research capabilities”); GLOBAL ACCESS, *supra* note 4, at 35 (summarizing the potential effects of an “overly protective database regime”).

205. See Rosler, *supra* note 11, at 108 (arguing that the Database Directive will fail both as an international trade mechanism and as an economic policy); see also Von Simson, *supra* note 23, at 766-68 (arguing that because the *sui generis* regime will reward lower-level economic behavior (data collection), compilers will have little incentive to invest higher-level creative activity that result in user-friendly features). However, this view ignores the pressure to provide user-
well-founded, it is useful to apply the Database Directive’s protections, and other offsetting ameliorative measures available to members of the EC, to a set of facts.

A. Vindicating the Competitive Ethos in Nonproprietary Data: Forcing Free Riders to Become Fair Followers

Aimed at increasing European market share in the database market, the transferable sui generis rights created by the Database Directive raise a legal barrier to misappropriation of database makers’ investment in data collection. Assuming a database maker can prove a substantial enough investment to secure protection, the sui generis regime affords the maker two complementary quasi-property friendly features inherent in the competitive market. See Digital Equip., 73 F.3d at 762 (“[P]igheaded refusal to satisfy customers’ preferences . . . leads to ruin as rivals step in to take the business.”) In addition, it ignores the fact that higher-level creative activity will still enjoy copyright protection under the Database Directive. See generally Database Directive, supra note 1, arts. 3-6, O.J. L 77/20, at 25 (1996).

206. See supra note 11. The lagging European market can be explained in part by fragmented nature of the European market and the economies of scale achieved in the larger United States market. See Melnik, supra note 2, at 60; see also Rosler, supra note 11, at 109-10 (noting that the United States retains many advantages in the database market, including a monolingual market, and economies of scale built upon years of industry experience and consolidation).

207. The sui generis rights may be transferred, assigned or granted under contractual license. Database Directive, supra note 1, art. 7(3), O.J. L 77/20, at 26 (1996).


209. “Data collection” is defined supra note 194.

210. See Database Directive, supra note 1, recitals 53-54, O.J. L 77/20, at 24 (1996) (burden on maker to prove substantial enough investment to secure protection). Unfortunately, like many key terms of the Database Directive, the substantial investment criterion is ill-defined. See supra note 193. Thus, the burden a database maker must carry to secure protection under the sui generis regime will remain uncertain until interpreted by the European courts.
the right to prevent extraction of the contents of the database and the right to prevent reutilization of the contents of the database. Of capital importance in assessing these rights is understanding, first, their linkage to the contents of the database, and second, that neither extends copyright protection to the underlying facts and data.

Rather than attempting to assess these rights in a theoretical vacuum, the following assessment is made in light of the factual background of ProCD v. Zeidenberg, a case that underscores the need for a sui generis regime to protect compilers from the malcompetitive behavior of free riders and information Samaritans, and provides a set of facts tailor-made for exploring the application and outer limits of the Database Directive’s sui generis regime.

1. The Facts of ProCD v. Zeidenberg

In creating a comprehensive, nationwide electronic phone directory, the database maker in Zeidenberg spent ap-
approximately $10 million215 compiling more than ninety-five million residential and commercial listings from approximately 3,000 telephone directories.216 After purchasing the listings on compact disc for less than $200, the free rider electronically extracted and recompiled twenty million listings from the maker’s database into his own database, and made “his” listings freely217 available over the Internet.218 On cross motions for summary judgment, the district court, while noting the database maker’s argument that the free rider’s conduct was unfair and commercially destructive had “substantial equitable appeal,” rejected the maker’s federal copyright claim, as well as the maker’s state law claims of breach of contract, misappropriation, and unfair competition.219 Thus, the district court’s holding left the free rider, and others like him, free to purchase the databases of others, to ignore the shrink-wrap license, to extract electronically the database’s contents at a fraction of the makers’ effort, and then to sell that content in a different wrapper for a lower price,220 or to

217. Although the free rider charged for advertising in this case, the Database Directive would prevent all free riders, whether commercially motivated or not, from engaging in such commercially destructive (incentive-reducing) behavior. See Database Directive, supra note 1, arts. 8-9, O.J. L 77/20, at 26 (1996).
218. See Zeidenberg, 908 F. Supp. at 646.
219. See id. at 643. The district court refused to treat the shrink-wrap license as a licensing agreement. Id. at 650-51. Instead, the court held the agreement unenforceable under the Uniform Commercial Code for lack of assent (the free rider was a graduate student who disregarded screen warnings that use of the product was subject to the license agreement). Id. at 655. Although the district court’s holding with regard to the federal copyright claim was a logical application of Feist, the court’s rejection of the shrink-wrap license was analytically unsound. G. M. Hunsucker, Raising a Toll Fence to Protect the “Noncreative” Labors of Database Makers: The European Database Directive 15 n.43 (May 1, 1996) (unpublished manuscript, on file with Professor J. H. Reichman, Vanderbilt University School of Law). Accordingly, the Seventh Circuit reversed on appeal. See supra note 25; see also National Basketball Ass’n v. Motorola, Inc., 1997 WL 34001, at *34010 (2d Cir. 1997) (approving the Seventh Circuit’s analysis of the state contract law claim).
220. See supra notes 5, 73 and accompanying text; see also Reichman, supra note 10, at 2452-53.
provide that content to others free of charge.\textsuperscript{221}

2. Protecting the Database Maker’s Investment from Free Riders and Information Samaritans

In the illustrative case, the free rider electronically extracted twenty million of the ninety-five million telephone listings contained in the maker’s database,\textsuperscript{222} downloaded them to his hard drive, and then recompiled the listings into his own database.\textsuperscript{223} Under the \textit{sui generis} regime created by the Database Directive, the free rider’s first act violated the database maker’s right to prevent extraction because he extracted\textsuperscript{224} the contents of the database and because that extraction was substantial.\textsuperscript{225} Similarly, when the free rider later made “his” database accessible via his Internet webpage, he violated the database maker’s right to prevent reutilization because he made a substantial part of the contents of the maker’s database publicly available.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{221} See \textit{supra} note 5.
\item \textsuperscript{222} \textit{Court Decision Goes Against Pro CD, ELECTRONIC MARKETPLACE REP., Jan. 23, 1996, available in Westlaw, Allnewsplus File}. To put this into perspective, if one amortizes the data collection costs to the database maker over the all 95 million listings, the free rider saved over two million dollars in data collection costs; or, to put it another way, the free rider appropriated over two million dollars of the maker’s investment in data collection.
\item \textsuperscript{223} See Zeidenberg, 908 F. Supp. at 645-46.
\item \textsuperscript{224} The free rider’s first act would have been an extraction whether he downloaded the data to his hard drive, printer, or any other medium. \textit{See supra} note 188 (defining “extraction”). Moreover, even if the free rider had accomplished the transfer by manually keying the data in, and had thus expended considerably more effort, it would still constitute an unauthorized extraction under the Database Directive. \textit{See supra} note 188.
\item \textsuperscript{225} Like many of the operative terms in the Database Directive, what precisely constitutes a “substantial part” of the contents of the database is not defined. Apparently, the Commission intended to leave the definitional task to the European courts. \textit{See Gaster, supra} note 128, at 6. However, it would defy common sense, as well as the policy to protect database makers from the misappropriation of their data collection efforts, to find that the free rider, who extracted 20 million of 95 million telephone listings contained in a maker’s database did not extract a substantial part of the contents of the database.
\item \textsuperscript{226} \textit{Id.}
\end{itemize}
Even if a court found that the free rider did not extract or reuse a substantial part of the database contents, the database maker could fall back on a second prong of protection—the right to prevent extraction or reutilization of insubstantial parts of the database—when those repeated insubstantial extractions or reutilizations unreasonably prejudice the maker’s rights.227 Here, the free rider’s database permitted extraction of 1,000 listings per search, and prior to the lawsuit was being accessed via the Internet approximately 20,000 times per day.228

With the explosive growth of Internet access providers,229 information-rich Web pages,230 and user-friendly interfaces that make “surfing the Net” easy even for neophytes,231 it seems reasonable to conclude that many users would forego the $200 price tag of the database maker’s product in favor of free access to the free rider’s product. Thus, by making the contents of the database maker’s product freely available to the public, the free rider’s actions unreasonably prejudiced the maker’s rights and interfered with the maker’s normal exploitation of the database. As a result, the theoretical EC database maker would be entitled to appropriate remedies.232

227. Although database makers cannot prevent lawful users from extracting/reutilizing insubstantial parts of the publicly-available databases, Database Directive, supra note 1, art. 8(1), O.J. L 77/20, at 26 (1996), lawful users must refrain from performing acts that unreasonably prejudice the legitimate interests of the database maker. Id. art. 8(2), O.J. L 77/20, at 26 (1996); see also id. art. 15, O.J. L 77/20, at 27 (1996) (making contractual provisions contrary to article 8 null and void).

228. See Zeidenberg, 908 F. Supp. at 646.

229. Cf. id. (noting that lawsuits concerning ownership of data distributed via the Internet is natural given the explosive growth of the Internet) (citing Jane C. Ginsburg, Putting Cars on the “Information SuperHighway”: Authors, Exploiters, and Copyright in Cyberspace, 95 COLUM. L. REV. 1466 (1995)).

230. See Cade Metz, The 100 Top Web Sites, PC MAG., Feb. 6, 1996, at 100.

231. See Rick Ayre & Thomas Mace, Just Browsing, PC MAG., Mar. 12, 1996, at 100.

232. See Database Directive, supra note 1, art. 12, O.J. L 77/20, at 27 (1996) (requiring Member States to provide appropriate remedies for infringements of
Thus, the Database Directive not only protects database makers from free riders who seek to gain a competitive advantage by extracting the contents of the maker’s database (and thereby avoid the costs of data collection), but also protects database makers from the market-destructive antics of information Samaritans. In this respect, the Directive fills two gaps left by existing legal regimes.

Moreover, long-term production incentives for database production are more sustainable under the Directive’s *sui generis* regime because the existence and degree of protection are linked to investment, rather than the superficial form of the final product hailed the linchpin of protection by copyright law. Furthermore, by jettisoning the paradoxical linchpins of arrangement and selection required for database protection under most copyright regimes, the Directive...

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233. See supra note 99; see also National Basketball Ass’n, 1997 WL 34001, at *34013-15 (rejecting the NBA’s claim that Motorola was free-riding by transmitting NBA game statistics almost contemporaneously, because Motorola was not free riding, but rather independently collecting, assembling, and transmitting the data). In *NBA v. Motorola*, however, the Second Circuit hinted that its analysis might differ if Motorola were collecting the facts (free riding) via a NBA data-feed. *Id.* at *34013-14.

234. See supra note 5.

235. See supra notes 57-101 and accompanying text.

236. See Denicola, supra note 12, at 530 (sufficient production incentives cannot be maintained without linking the existence and degree of protection to the total production costs). Although one can doubtless provide examples of databases that would be produced with far less than 15 years of protection provided by the Database Directive, even copyright and the law of trade secrets produce questionable results on their margins. Can one justify protecting a copyrighted work for an additional 74 years after it has netted the creator several million dollars in its first year? Eternal trade secret protection for a consumable item proven to cause physiological damage, which has no redeeming characteristics?

237. *Id.*

238. The linchpins are paradoxical because although both requirements purport to protect the public’s interest in public domain information, they also work against the public’s interest in promoting knowledge in several ways. See supra notes 65-71 and accompanying text; see generally Ginsburg, supra note 6, at 344-46; Reichman, supra note 10, at 2491.

rective’s *sui generis* regime avoids the perverse incentives that reduce the accessibility and usability of databases\(^{240}\) and ultimately work against the public’s interest in promoting knowledge.\(^{241}\)

Finally, this act of legal candor\(^{242}\) in recognizing that the compiler’s primary contribution to the promotion of knowledge is through investment in data collection,\(^{243}\) rather than data arrangement or selection, leaves courts free to focus on protecting the commercial interests of the database maker from parasitic competitors and other misappropriators who reduce incentives to produce commercially-valuable databases.

3. Protecting the Public’s Interest in Competition

Protecting the database maker’s commercial interests, however, does not mean that the misappropriation fence raised by the Database Directive completely insulates the database maker from all competition.\(^{244}\) On the contrary, because the fence prohibits only extraction and/or reutilization of the contents of databases, and does not extend copyright protection to mere facts or data,\(^{245}\) the fence merely prescribes one method of data collection;\(^{246}\) it does not empower database makers to remove data from the public domain.\(^{247}\)

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\(^{240}\) See supra notes 65-68 and accompanying text.

\(^{241}\) See supra notes 38, 65-71 and accompanying text.

\(^{242}\) Reichman & Samuelson, *supra* note 4, at 154 (“[T]he European Commission’s frank acknowledgment that the [Database Directive’s *sui generis* regime] would protect investment as such amounts to a refreshing act of legal candor.”).

\(^{243}\) See Denicola, *supra* note 12, at 530.

\(^{244}\) But see Reichman & Samuelson, *supra* note 4, at 90 (arguing that, under the Database Directive, the database maker obtains protection exceeded only by the protection afforded patent holders).


\(^{246}\) See Denicola, *supra* note 12, at 541.

\(^{247}\) See *supra* note 213.
It follows necessarily that fair followers\textsuperscript{248} remain free to create identical databases, so long as they do not create those databases by appropriating the contents from a protected database.\textsuperscript{249} Thus, under the Database Directive, the free-rider-turned-fair-follower can go forth, collect the same data, and compile and market an identical database or any variant thereof,\textsuperscript{250} without infringing the rights provided by the \textit{sui generis} regime to the database maker.\textsuperscript{251}

Alternatively, the fair follower can seek a license from the database maker.\textsuperscript{252} Although the Database Directive does not mandate licensing,\textsuperscript{253} the database maker risks price competition from more efficient fair followers if the maker

\footnotesize{\textsuperscript{248} See Reichman, \textit{supra} note 30.}
\footnotesize{\textsuperscript{249} This statement assumes the contents of, or the database itself, do not enjoy copyright protection. Professor Litman’s observation that this result is functionally indistinguishable from granting copyright protection to the underlying facts, Litman, \textit{supra} note 37, at 1016 \& n.289, holds true in the case of proprietary data, but not in the case of nonproprietary data. To illustrate, assume a copyright holder in a literary work, by definition expression not existing in the public domain, proves that a second comer who produced an identical work had access to the first work. Notwithstanding incantations that independent creation is a perfect defense in copyright, see, e.g., \textit{Sheldon v. Metro-Goldwyn Pictures Corp.}, 81 F.2d 49, 54 (2d Cir.), \textit{cert. denied}, 298 U.S. 669 (1936), it seems incredulous to suggest that the second comer could overcome the presumption of copying and the inherent skepticism of judges and juries. Now assume a similar situation for a database of nonproprietary facts protected under the \textit{sui generis} regime. Here, the second comer can more easily produce objective evidence demonstrating the data collection costs incurred in gathering public domain materials. As a practical matter, the second comer would have a lower burden of production under the \textit{sui generis} regime.}
\footnotesize{\textsuperscript{250} This statement assumes the data are freely accessible and not otherwise protected. Using the \textit{Zeidenberg} facts as an example, if the data were protected, the database maker would be in the same position \textit{vis-à-vis} the compilers of the 3,000 directories as the free rider was to the maker. The irony of the database maker’s suing the free rider, after cloaking himself with the constitutional protection afforded free riders by \textit{Feist} (the database maker copied unprotected data from 3,000 directories) was perhaps a, if not the, critical factor in the district court’s decision to deny relief. \textit{See Zeidenberg}, 908 F. Supp. at 658 (it is ironic that after obtaining the benefits of copyright, the plaintiff seeks to prevent others from obtaining those same benefits).}
\footnotesize{\textsuperscript{251} See \textit{supra} notes 13, 56.}
\footnotesize{\textsuperscript{252} See \textit{supra} notes 199-202 and accompanying text.}
\footnotesize{\textsuperscript{253} See \textit{infra} note 273.}
tries to extract too high a price for the license.\textsuperscript{254}

Similarly, because data are fungible, the database maker who overprices his product also risks price competition from more efficient fair followers who independently create identical databases.\textsuperscript{255} Consequently, competitive pressures in the nonproprietary database market should provide the database maker with an incentive to achieve greater efficiency in data collection: the more efficient the maker is in collecting the data, the harder it will be for fair followers to compete on a price basis.\textsuperscript{256}

Thus, unlike other intellectual property regimes, such as copyright and patent, which use a winner-take-all approach to overcome risk aversion,\textsuperscript{257} the \textit{sui generis} regime, at least with respect to nonproprietary data, serves the same “pro-competitive functions as does the law of trade secrets.”\textsuperscript{258} Without requiring actual secrecy,\textsuperscript{259} Therefore, with respect to nonproprietary data,\textsuperscript{260} the combination of market-imposed price limits and market inducements to achieve maximum efficiency in data collection should redound to the benefit of the information-using public in the form of more

\begin{flushleft}
\textsuperscript{254} Cf. \textit{National Basketball Ass'n}, 1997 WL 34001, at *34014 (explaining that the data collector producing the cheaper or otherwise superior product will prevail in the marketplace).
\textsuperscript{255} Id.
\textsuperscript{256} Other factors affect the fair follower’s ability to compete on a price basis. For example, data which is extremely difficult to collect may give the first database maker sufficient time to gain significant market share, which in turn may act as a barrier to entry. \textit{See supra} note 100. In addition, data accuracy is also a consideration that may affect an unknown fair follower’s ability to compete because data users may be unwilling to gamble on unknown data compilers when accuracy is critical. \textit{See} Roger Elliot, \textit{Chairman’s Report} (visited May 11, 1997) <http://www.grainger.uiuc.edu/icsu/confchmn.htm> (noting need for strict peer review of scientific data submitted for publication in electronic journals); \textit{cf.} Perritt, \textit{supra} note 4, at 273.
\textsuperscript{257} \textit{See} Reichman, \textit{supra} note 4, at 486.
\textsuperscript{258} Zeidenberg, 86 F.3d at 1455 (citing Rockwell Graphic Sys. v. DEV Indus., 925 F.2d 174, 180 (7th Cir. 1991)); \textit{cf.} Reichman, \textit{supra} note 10, at 2439-40.
\textsuperscript{259} \textit{See supra} note 57.
\textsuperscript{260} \textit{See supra} note 24.
\end{flushleft}
comprehensive and less costly databases.261

B. Criticisms of the Database Directive Regarding Sole-Source Data: Is the Sky Falling?

June 13, 2013:

Yesterday scientists discovered a method which stimulates the body’s immune system to a level sufficient to kill the AIDS virus . . . . Unfortunately the scientists have embodied these data within a database, have set the price of each treatment at one million dollars, and have refused to license the critical data.


Although perhaps a bit extreme, the hyperbole makes the point: extending the sui generis extraction and reutilization rights to database makers who are also data sources, or who are the exclusive licensee of data sources, creates the risk of data privatization,262 with its attendant risk of monopolistic pricing, for potentially perpetual fifteen-year renewable periods,263 rather than just legitimately protecting the investments of database makers.264 For that reason and several others, it initially appears that this Article’s working hypothesis, that the sui generis regime vindicates the competitive ethos, breaks down in the case of sole-source data.265

First, the implicit market limits that flow from the possi-

261. But see supra notes 204-05, infra note 362 (citing commentators who argue that regime will result in data monopolies, which will, in turn, stifle access to information).

262. See Reichman & Samuelson, supra note 4, at 84-85 (arguing that the Database Directive would eventually abolish public domain data).

263. See supra note 187 (noting that a “renewal” requires a substantial new investment).

264. Even the Directive’s harshest critics agree that database makers have legitimate interests in a new form of legal protection. See Reichman & Samuelson, supra note 4, at 55; GLOBAL ACCESS, supra note 4, at 24-25.

265. See supra notes 24, 198 (defining “sole-source data”).
bility of fair followers being more efficient data collectors are reduced, and in limited circumstances eliminated, in the case of sole-source data because the fence created by the *sui generis* regime effectively enables the first database maker to control dissemination of the raw data.\(^{266}\) This power to control the dissemination of sole-source data enables the first database maker not only to charge monopolistic fees for access to the database, but also to charge monopolistic licensing fees, if the database maker chooses to license at all, to fair followers seeking to use the sole-source data in a competing or value-added product.\(^{267}\)

Second, the *sui generis* regime creates an incentive to privatize data that in turn raises legitimate concerns over database makers’ ability to control the dissemination of information.\(^{268}\) Because anyone can make a database, including those in charge of conducting basic scientific research, this incentive could spill over into academia and reduce the indirect subsidies now provided to private research and development.\(^{269}\) Although privatizing data might result in more short-term basic research, privatization of data as such could stifle innovation by diminishing long-term research and development, particularly if database makers secure exclusive licenses and effect a cartelization of data sources.\(^{270}\)

The initial and amended versions of the Database Directive addressed these potential problems head-on by mandating compulsory licenses on fair and nondiscriminatory terms

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266. See *supra* note 213.

267. See Reichman & Samuelson, *supra* note 4, at 117-19 (*sui generis* regime will impede competition in the value-added market).

268. See Rosler, *supra* note 11, at 141-42. Although the *sui generis* regimes raise potential First Amendment issues, see, e.g., Reichman & Samuelson, *supra* note 4, at 79, those issues are beyond the scope of this Article.

269. See Reichman, *supra* note 10, at 2498; see also *infra* note 356 (discussing *spillover*).

in the case of sole-source data. However, the Common Position removed the compulsory licensing provision in favor of other ameliorative measures aimed at protecting the user. The next section examines these ameliorative measures in light of the criticisms regarding sole-source data noted above, to ascertain whether the Database Directive’s sui generis regime is underprotective, overprotective, or perhaps somewhere between the two extremes.

C. The Ameliorative Measures: Will They Protect the Public’s Interest in Competition?

The Database Directive not only provides swords that

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272. See supra note 150.

273. According to the Council, the compulsory licensing provision was no longer needed in light of the narrower scope of the sui generis rights and the exceptions provided in article 9. Common Position, supra note 150, Statement of the Council’s Reasons 15, O.J. C 288/02, at 26-27 (1995). Both justifications seem to contradict the terms of the Database Directive. First, although the sui generis rights, as positively stated in the Amended Proposal, extended to “part or all” of the database, see Amended Proposal, supra note 24, art. 10(1), O.J. C 308/01, at 13 (1993), the Database Directive still prohibits repeated and systematic extraction of insubstantial parts if that extraction conflicts with the normal exploitation of that database or unreasonably prejudices the maker’s rights. See Database Directive, supra note 1, art. 7(3), O.J. L 77/20, at 26 (1996); see also id. art. 8(2), O.J. L 77/20, at 26 (1996) (prohibiting users from performing any act; e.g., tampering with the database, that conflicts with the normal exploitation of that database or unreasonably prejudices the maker’s rights). Second, the “fair use” exceptions in article 9 are optional within the Member States. See id. art. 9, O.J. L 77/20, at 26 (1996). Nonetheless, the Council’s citation to them as a reason for removing the compulsory license indicates its intent that the exceptions be passed. See Common Position, supra note 150, Statement of the Council’s Reasons 15, O.J. C 288/02, at 26-27 (1995). Accordingly, even if a particular member state did not enact the exceptions, they would probably be significant factors in any appeal to the Commission regarding abuse of the sui generis rights. See infra notes 277-92 and accompanying text (discussing “swords”).

274. See supra notes 262-70 and accompanying text.

275. For example, a solution that approximates pareto optimality. “Pareto optimality” refers to the point at which no change can be implemented that will make someone better off without making someone else worse off. See VISCUSI, supra note 38, at 74-75.
enable fair followers to protect the public’s interest in competition, but also provides shields to users who are not seeking to compete, but are performing functions deemed sufficiently important to provide exceptions to the sui generis rights afforded database makers. While examining the swords provided by the Database Directive, to fully understand the potential swath fair followers can cut with these swords, one must simultaneously examine the arenas in which they can be drawn and the decision-makers who will determine whether these swords are required to protect the public’s interest in competition in a given case.

1. The Swords: The European Economic Community Treaty and Competition Law

Once fully implemented, the Database Directive’s sui generis regime will, like other laws passed pursuant to the European Economic Community (“EEC”) Treaty, take precedence over national laws. However, the sui generis rights are expressly limited by both national and Community rules of competition. As a result, a fair follower aggrieved by the anticompetitive behavior of a database maker can file a complaint not only with the Commission of the European Communities (“Commission”) if the anticompetitive behavior violates one of the EEC competition

276. See infra notes 294-318 and accompanying text.
278. See Corbet, supra note 29, at 330.
279. See Database Directive, supra note 1, recital 47, O.J. L 77/20, at 23 (1996). The EC rules of competition are reported in Corbet, supra note 29, at note 84.
280. The Commission investigates and adjudicates complaints under Articles 85 and 86 that address the distortion of competition and the abuse of a dominant position. Corbet, supra note 29, at 332. The Commission’s decision is appealable to the Court of First Instance of the European Communities, and questions of law are thereafter appealable to the Court of Justice of the European Communities. Id.; see also Radio Telefis Eireann, [1995] E.C.R. at 828, ¶¶ 67-68 (appeal to Court of Justice only on questions of law, not facts).
rules, but can also file a complaint in a national forum based on violation of the EEC Treaty or any national competition rule.

Perhaps the most powerful sword a fair follower can wield is the one provided by Article 86 of the EEC Treaty (“Article 86”). Article 86 prohibits the abuse of a dominant position within the common market, or in a substantial part of the common market, that affects trade between Member States. Value-added competitors have effectively wielded the sword afforded by Article 86 to force compulsory licenses even when copyright law buttressed the dominant position.

For example, in Radio Telefis Eireann v. Commission (“Magill”), the European Court of Justice upheld a compulsory licensing order forcing television broadcasters to supply their weekly program listings to a competitor who sought to produce a value-added product (a television program guide) not otherwise available on the market. If the European Court of Justice is willing to vindicate the public’s interest in competition for television program guides so the

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281. See Corbet, supra note 29, at 347. The EEC competition rules include articles 85-94 of the EEC Treaty, and other treaties. Id. at 348 n.84. Articles 85 and 86 of the EEC Treaty are by far the most important, id., and are the only ones of concern in this Article.

282. Although national forums may apply EEC law, they must refer questions of EEC law to the European Court of Justice for an interlocutory and binding (in the case and as precedent) ruling. See Corbet, supra note 29, at 330-32.

283. In this regard, the Commission has noted the tendency of Member States to redraft their national rules consistent with EEC law. See Davison et al., supra note 201, art. 86, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1.


public may “arrange [their] leisure activities . . . accordingly,” how much more willing will the Court be to vindicate that interest in areas vital to scientific and technical progress?

In addition, to attack database makers who secure exclusive licenses, or otherwise engage in collusive activity to thwart competition, fair followers can wield the sword provided by Article 85 of the EEC Treaty (“Article 85”). Taken together, Articles 85 and 86, and the “Excalibur-like” pro-competitive sword found in Magill along with the increasing willingness of European firms to abandon anticompetitive practices when challenged by the Commission, may be sufficient in and of themselves to protect the public’s interest in competition by forcing would-be data monopolizers to supply their data on reasonable terms. Yet the Database Directive goes further by mandating a triennial review of the sui generis rights to determine whether the public’s interest in free competition requires additional protective measures, including additional swords such as compulsory licenses, or additional shields such as the ones described below.

288. Id. at 795, ¶ 173.
289. Article 85 prohibits “all agreements between undertakings . . . and concerted practices” which may prevent, restrict, or distort competition within the common market. See EEC Treaty, supra note 201, art. 85, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1.
290. The swords available to fair followers in the EC are preserved by TRIPS. See Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, Annex 1C, art. 40 (2) [hereinafter TRIPs]; see also Fox, supra note 29, at 485 (“TRIPS reserves to nations the right to control anticompetitive practices.”).
291. See DAVISON ET AL., supra note 201, at 46.
292. The Commission, whose proposals contained a compulsory licensing requirement, see the Initial and Amended proposals, supra notes 11, 24 will be available to the fair follower as an initial adjudicative body capable of compelling the license. See Corbet, supra note 29, at 322-23.
293. See Database Directive, supra note 1, art. 16(3), O.J. L 77/20, at 27 (1996). The drafters of the Database Directive intended that the same pro-competitive
2. Mandatory and Optional Shields to Protect the User

Unlike the swords afforded fair followers in the interests of competition, the protections discussed in this section purport to act as shields to protect the legitimate rights of users and others. The Database Directive mandates two shields and permits Member States to enact three “fair use” shields. Although the Council based its decision to eliminate the compulsory licensing provision in part on the “fair use” shields, their adoption remains optional to Member States.

a. The Mandatory Shields

The first mandatory shield deems public lending not an act of extraction or utilization. Logically, this shield would

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principles be available to fair followers seeking to compete with *sui generis* rightholders. See Database Directive, supra note 1, recital 47, O.J. L 77/20, at 23 (1996). As explained in the Database Directive:

[1] In the interests of competition between suppliers of information products and services, protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution [sic] of new products and services which have an intellectual, documentary, technical, economic or commercial added value . . . .

Id. (emphasis added).


295. See supra note 150 and accompanying text.


297. See Common Position, supra note 150, Statement of the Council’s Reasons 15, O.J. C 288/02, at 26-27 (1995) and Database Directive, supra note 1, art. 9, O.J. L 77/20, at 26 (1996). The Parliament’s failure to require adoption of these optional shields conflicts with the professed harmonization goals of the EC in promulgating the Database Directive. See Common Position, supra note 150, Statement of the Council’s Reasons 4, O.J. C 288/02, at 23 (1995). Failure to mandate adoption of these shields by Member States could work especial hardships on academicians and scientists whose research knows no artificial territorial boundaries. See SCIENCE & ENGINEERING INDICATORS, supra note 23, at 7-4 (explaining that scientific and academic research is an international undertaking that knows now artificial geographic or political boundaries).
belong to libraries, but it appeared in the Common Position without comment or explanation.298

The second mandatory shield permits users to make insubstantial extractions and reutilizations for “any purposes whatsoever.”299 “Any purposes whatsoever” is limited by the correlative obligations imposed on users to refrain from committing acts that “conflict with a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.”300 Given the unabashed commercial focus of the Database Directive on the database maker’s investment interests,301 users hiding behind this shield should tread carefully when their use might prejudice those commercial interests.

On the other hand, the commercial focus of the Database Directive302 might aid those using database contents for non-commercial purposes. For example, a scientist recompiling insubstantial portions of old data for noncommercial purposes, from a database whose commercial value derives primarily from the timeliness of its data,303 could argue that

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298. See Database Directive, supra note 1, art. 7(2), O.J. L 77/20, at 26 (1996). However, logically library users would still be subject to limits of the Database Directive; else, this provision would allow competitors to circumvent the protections afforded by the sui generis regime by accessing databases through libraries.

299. See id. art. 8(1), O.J. L 77/20, at 26 (1996); see also id. art. 15, O.J. L 77/20, at 27 (1996) (making contrary contractual provisions null and void). Apparently, defining what constitutes an “insubstantial part” is a definitional task entrusted to the European Court of Justice. See Gaster, supra note 128, at 6.


303. Note, however, that the value/price of data varies based on factors other than just timeliness. For example, value-added features such as analyses, verification, or accompanying analytical tools increase the price of data. In addition, data, like any other commodity, are subject to basic economic principles such as the law of supply and demand. See generally ADAM SMITH, THE WEALTH
such activity does not prejudice the database maker’s legitimate, commercial interests.

Moreover, the commercial focus of the Database Directive may convince the European courts to examine the nature of the commercial interests affected when determining whether an extraction or reutilization is “substantial.” For example, a user extracting one week of old data can better argue that such an extraction was legitimate, or insubstantial, than can a user who extracted one week of current, timely data.

Thus, the commercial focus of the Directive, coupled with the Commission’s decision to leave the task of defining “substantial part” to the European Court of Justice, permits the European courts to view users through a commercial lens to determine whether their extraction or reutilization prejudices the database maker’s legitimate, commercial interests.

b. The Optional “Fair Use” Shields

The remaining “fair use” shields are optional and cannot be exercised in such a way as to prejudice the database maker’s rights. Some commentators argue that even if Member States adopt these optional shields, the Database Directive still fails to protect those advancing fundamental science.

304. See supra notes 193, 301.
305. But see note 303.
306. See supra note 128.
308. See GLOBAL ACCESS, supra note 4, at 13-14 (arguing that these shields are
Assuming the Member States adopt these shields, they collectively allow extraction of substantial parts of publicly-available databases for private purposes in the case of nonelectronic databases, and for illustration in teaching and for scientific research, provided the user indicates the source, to the extent justified by the noncommercial purpose; and extraction and reutilization of substantial parts for public security, administrative, or judicial purposes.\textsuperscript{309}

The first optional shield, which permits extraction of substantial parts of publicly-available databases for private purposes,\textsuperscript{310} illogically distinguishes between nonelectronic and electronic databases. By using high-speed scanners and optical character recognition software, nonelectronic databases can be electronically converted almost as easily as electronic databases.\textsuperscript{311} Moreover, the reasons given by the Council for extending the scope of the Database Directive to include nonelectronic databases apply equally here, but apparently received no consideration.\textsuperscript{312}

The second optional shield, which permits extraction of substantial parts of publicly-available databases for illustration for teaching or for scientific research,\textsuperscript{313} could go far in ameliorating the concerns of those decrying the Database Directive’s\textit{sui generis} regime because of its potential effect on research.\textsuperscript{314} Provided the user indicates the source, and can justify the use as noncommercial, only the database maker’s legitimate interests limit the user’s ability to use the contents of the database for the “purposes of illustration for teaching

\textsuperscript{309} Database Directive, supra note 1, art. 9, O.J. L 77/20, at 26 (1996). The third and final optional shield, permitting not only extraction, but also reutilization of substantial parts of the database, in the interests of public security, and for the purposes of administrative or judicial procedures, is not discussed herein.

\textsuperscript{310} Id. art. 9(a), O.J. L 77/20, at 26 (1996).

\textsuperscript{311} See supra note 190.


\textsuperscript{313} Database Directive, supra note 1, art. 9(b), O.J. L 77/20, at 26 (1996).

\textsuperscript{314} See supra note 23.
Some argue that this second optional shield is merely “fool’s gold,” which reinforces the overly protective thrust of the Database Directive. Under this view, the scientist can illustrate his or her conclusions, but cannot browse the database or use the collected data without succumbing to the monopoly power of the sole-source database maker. Although one could read the Database Directive in this manner, a careful, contextual reading supports the previous view: noncommercial uses of the database contents for the purposes of illustration for teaching or for scientific research is limited only by the legitimate interests of the database maker.

Even if the European courts follow the parsimonious view of the second optional shield, the fact remains that anyone, including individual academicians or collective scientific and technical institutions, can become database makers. This fact should not be dismissed lightly, either by legal or economic theorists, or by commercial data compilers, because, by wielding the rights afforded by the Database Directive’s sui generis regime, the information-producing aca-

315. Database Directive, supra note 1, art. 9, O.J. L 77/20, at 26 (1996); see supra note 305.
316. See Reichman & Samuelson, supra note 4, at 89-90.
317. Id. The latter view ignores the difference between the shield provided in the copyright domain and the shield provided in the sui generis domain. Compare Database Directive, supra note 1, art. 6(2)(b), O.J. L 77/20, at 25 (1996) (“for the sole purpose of illustration for teaching or scientific research”) (copyright domain) with Database Directive, supra note 1, art. 9(b), O.J. L 77/20, at 26 (1996) (for the purposes of illustration for teaching or scientific research) (sui generis domain) (emphasis added); cf. Gaster, supra note 128, at \( \text{\textsuperscript{128}} \) (noting that the exceptions “usually only relate to the extraction right . . . because re-utilization is predominantly of a commercial nature”).
318. Logically, the database maker’s legitimate interests will be broader vis-à-vis the academic or scientist if the database is designed for, and marketed to, the academic or scientific communities. However, the scientist or academic can still resort to the mandatory shields discussed above.
319. See supra note 13.
ademic and scientific communities\textsuperscript{320} could potentially become gatekeepers to the technical and scientific data market.\textsuperscript{321}

The significance of the scientific and academic communities fending for themselves in a commercialized information market is considered more fully in the context of the opportunities and threats to basic science discussed in Part IV of this Article. For now, it is sufficient to note that even if the second optional shield proves to be “fool’s gold,” the swords and shields available in the EC should ensure that the toll fence raised by the Database Directive remains a pro-competitive fence, not an insuperable monopolistic wall.\textsuperscript{322}

D. Effects within the European Community

Although the shadow of protection cast by the Database Directive’s \textit{sui generis} regime will remain uncertain until interpreted by the authoritative administrative and judicial bodies, to the extent that legal protections create incentives

\begin{footnotesize}
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\item[320] See, e.g., \textit{Science & Engineering Indicators}, \textit{supra} note 23, at 5-30 (noting that, in 1993 alone, 414,000 articles were published in the 4,681 peer-reviewed natural science and engineering journals recognized in the Institute of Scientific Information’s Scientific Citation Index).
\item[321] Indeed, the scientific community has begun to assume this role in some scientific disciplines. See, e.g., Paul Ginsparg, \textit{Winners and Losers in the Global Research Village} 3 (visited May 11, 1997) <http://www.lanl.gov/blurb/pg96unesco.html> (noting that automated online archives of physics research, contributed by the scientific community, has virtually supplanted conventional journals); see also J. C. Sens, \textit{Electronic Publishing via Scientific Societies} (visited May 11, 1997) <http://www.grainger.uiuc.edu/icsu/sens.htm> (outlining a proposal for a non-profit organization to provide unreviewed scientific articles free of charge, and to provide reviewed articles at a cost sufficient to finance the non-profit organization). If this trend continues, the “freedom of information” position taken by some in the academic and scientific communities will be put to the test, and we shall see precisely how “free” those communities believe information should be.
\item[322] But cf. Reichman & Samuelson, \textit{supra} note 4, at 90 (arguing that the protection afforded by the Database Directive to data is exceeded only by the protection granted by the classic patent paradigm); see also \textit{Global Access}, \textit{supra} note 4, at 35 (arguing that under “an exclusive rights model . . . a database owner[] [has an] absolute monopoly . . .”).
\end{itemize}
\end{footnotesize}
to produce, the sui generis regime should increase database production in the EC. At the same time, the United States Supreme Court has left diligent compilers in the United States vulnerable to the misappropriative efforts of parasitic competitors and information Samaritans. Unless the United States adopts a regime providing equivalent protection, the synergistic effect of these two factors, coupled with the increasing convergence of the European market, may indeed help the EC achieve their goal of gaining a larger share of the worldwide database market.

With respect to nonproprietary data, the Database Directive’s sui generis regime should increase information availability and accessibility within the EC by increasing production incentives. In addition, because protection is linked to production costs, rather than the superficial form of the final product, the Database Directive’s sui generis regime should operate without the price-distorting effects of an enhanced copyright regime.

While increased information availability and accessibility under the Database Directive’s sui generis regime will come at a certain price, absent adequate production incentives in-

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323. Perritt, supra note 4, at 261 (citing Locke and Blackstone); Karjala II, supra note 38, at 2594 (explaining that an absence of legal protection for intellectual property acts as a disincentive to invest); Lunney, supra note 64, at 486 n.5 (property rights are used to provide incentives to invest in intellectual property production); Ginsburg, supra note 6, at 349.
324. See Samuelson, supra note 11, at 6 (pointing out that the two countries with the biggest market share have historically protected “noncreative” labors of database makers through “sweat of the brow” and “industrious collection” rationales). However, the Database Directive’s sui generis regime could reduce incentives in Great Britain where ‘sweat-of-the-brow’ databases already enjoy protection under copyright law. See supra note 8.
327. See supra notes 236, 322-23.
328. See supra notes 67-68 and accompanying text; see also Denicola, supra note 12, at 530.
formation seekers still pay a price: instead of paying a fee to access an available database, information seekers pay in the form of lost-opportunity costs—costs incurred in the form of time and effort expended in finding the information,329 assuming the information can be found at all. Thus, in the case of nonproprietary data, the Database Directive will give information seekers an otherwise unavailable choice: pay the gatherer for her efforts and marshal their energies toward uses they deem more valuable, or gather their own data.330

In contrast, in the case of some proprietary or sole-source data, information seekers are not given a choice—they cannot practically go forth and gather their own data.331 However, the swords and shields available in the EC may inject enough legal uncertainty in the minds of would-be data monopolizers to encourage them to engage in reasonable behavior vis-à-vis competitors and others seeking licenses.332 In light of these mechanisms, and the Database Directive’s mandated triennial assessment of the sui generis rights concerning abusive and anticompetitive behavior,333 concerns regarding the Database Directive’s anticompetitive effects and effect on information flow within the EC,334 while not eliminated, are probably overstated.335

IV. THE DATABASE DIRECTIVE: STEPPING STONE TO AN

329. See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).
330. Because of the explosive growth of the Internet the latter choice is becoming increasingly available. See supra notes 230-31.
331. See supra note 199 (defining “sole-source data”).
332. Cf. Reichman & Samuelson, supra note 4, at 149 (arguing that the legal uncertainty arising from fair use requirements gives producers and users “maximum incentives to negotiate . . . licenses” on reasonable terms).
334. See supra notes 22-23, 205 and accompanying text.
335. It seems more plausible to assume that the EC will respond to problems associated with the Database Directive, than to assume that it will continue shooting itself in the foot after a problem is detected.
INTERNATIONAL MODEL

This part first proposes that any international *sui generis* regime modeled on the Database Directive be modified by incorporating a compulsory licensing mechanism to enable competition in the case of sole-source data. This part then examines the purported hazards lurking, and the opportunities awaiting, the scientific and academic communities in an environment that privately allocates information based upon price.

**A. Enabling Competition in a Commercialized Information Market**

Collectively, the Database Directive, along with supranational and national European competition laws ("European competition law"), provide ameliorative mechanisms sufficient to offset, or permit downstream adjustments to compensate for, the potential problems associated with a regime which may permit *de facto*, although not *de jure*, ownership rights in sole-source data.336 However, similar ameliorative mechanisms, like the pro-competitive "Excalibur-like" sword found in *Magill* and other pro-competition policies embedded in European competition law,337 are not available at an international level.338 Consequently, an international *sui generis* regime may require a mechanism to ensure that new and value-added information products are not kept off the market by those who refuse to license sole-source data.339

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336. *See supra* notes 211-13 and accompanying text.
337. *See supra* notes 277-92 and accompanying text.
338. *See, e.g.*, Fox, *supra* note 29, at 487-90 (noting the lack of any coherent international competition law and discussing five scenarios where the two major models, United States antitrust law and EC competition law, would likely differ in application).
1. Mandating Licenses in the Case of Sole-Source Data

One such mechanism, found in the sui generis regime initially proposed by the EC, is a compulsory licensing scheme.\textsuperscript{340} A compulsory licensing mechanism could be loosely modeled on the compulsory licensing mechanism copyright provides for nondramatic musical works.\textsuperscript{341} Properly designed, such a mechanism could enhance competition in a fully commercialized information market by ensuring that value-added products are not kept off the market by database makers who refuse to license sole-source data, and by ensuring that the specter of competition hovers as a potential restraint on those database makers inclined to seek monopolistic rents for sole-source data.

2. Compulsory Licenses Should Serve the Interests of the Database Maker and the Public

A compulsory licensing mechanism could be designed with a dual rate structure, one based on a statutory minimum rate, the other based upon the database maker’s actual costs. Such a rate structure could protect the public’s interest in competition in the sole-source data market without unduly prejudicing the commercial interests of the database maker.

As a starting point, the statutory rate could be determined by multiplying the number of bytes\textsuperscript{342} reused or ex-

\textsuperscript{340} See Initial Proposal, supra note 11, art. 8, O.J. C 156/03, at 9 (1992); Amended Proposal, supra note 24, art. 11, O.J. C 308/01, at 13-14 (1993) (mandating compulsory licenses on “fair and nondiscriminatory terms” in the case of sole-source data); cf. Reichman, supra note 10, at 2539-44 (proposing off-the-rack liability regime with built-in compulsory license); see also Samuelson et al., supra note 35, at 2412-14.


\textsuperscript{342} “Byte” is a term used to quantify data streams. See, e.g., THE AMERICAN HERITAGE COLLEGIATE DICTIONARY 194 (3d ed. 1993) (defining a “byte” as equivalent to one character or eight bits).
tracted times a small charge, such as a fraction of a cent, or other appropriate monetary unit.\textsuperscript{343} Alternatively, database makers should remain free to reject the statutory rate in favor of a second rate structure based upon actual costs.

Under this second rate structure, the database maker should bear the burden of proving actual costs associated with particular data, but could thereafter charge accordingly.\textsuperscript{344} This rate structure would legitimately enable database makers with high data-collection costs, or narrow markets over which to spread their data-collection costs, to recover a greater proportion of their costs from would-be competitors.

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\textsuperscript{343} Cf. 17 U.S.C.A. § 115 (covering mechanical copyright royalties). A further refinement of the compulsory licensing scheme might include a prohibition on substantial electronic extraction and conversion by competitors for a short blocking period designed to provide the maker with sufficient lead-time to recover her costs in the market. Cf. Samuelson et al., supra note 35, at 2412-14 (blocking period followed by compulsory license); see also Reichman, supra note 10, at 2544-51. In addition, a compulsory licensing mechanism might encourage formation of private collection societies which would permit interested parties to bargain around the statutory rate. Cf. Reichman & Samuelson, supra note 4, at 140 (noting that the Harry Fox agency acts as a “de facto collection society [for] . . . some 200,000 voluntary licenses . . . ”); cf. Kennedy & Dweck, supra note 53, at C17 (reporting that the Author’s Guild and the American Society of Journalists formed the Author’s Registry this year to represent freelance writers in an effort to impose usage-based royalties on publishers for electronic uses of their works). Professors Reichman and Samuelson suggest that a statutory rate be set by industry in light of two criteria: (1) the cost-recovery principle familiar to scientific agencies, which focuses on the reasonableness of profit margins, and (2) the value the licensed data adds to the fair follower’s product. See Reichman & Samuelson, supra note 4, at 140. They also suggest that a statutory rate would result in bargaining by users and producers, and would permit “a more nuanced schedule of royalties . . . than a statute could . . . institute.” Id. at 141.

\textsuperscript{344} Although the database maker might incur additional costs in proving actual costs, proving them should be less costly than triggering competition law because the maker need only produce reliable evidence of her data collection costs. Moreover, since each sui generis regime saddles the database maker with the burden of proving substantial investment, the prudent database maker will have adequate documentation of investment costs. See Database Directive, supra note 1, art. 7(1), O.J. L 77/20, at 25 (1996); H.R. REP. NO. 3531, supra note 1, §§ 2, 3(a), 6(a); WIPO Proposal, supra note 1, Note 2.07 WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (“[i]n any dispute, it is the burden of the maker of the database to demonstrate the necessary investment”); see also Gaster, supra note 128, at 12.
\end{flushright}
At the same time, users and competitors seeking to use the sole-source data should remain free to challenge database makers who opt for the second rate structure, and should reap the benefits of a successful challenge by obtaining the data at lesser of the statutory rate or the actual cost. Finally, to further encourage bargaining, and to finance the administrative mechanism to arbitrate actual cost disputes, the loser could be assessed costs, including costs incurred by the other party and administrative costs. Such a dual rate structure could accommodate a negotiated “menu of liability options” analogous to Professors Reichman and Samuelson’s proposal for a liability regime, without unfairly saddling database makers with the bill for subsidizing downstream data users.

3. Prohibiting Exclusive Licensing Arrangements

To further ensure that competition reigns in the data market, exclusive licensing arrangements with sole-source data producers could be deemed void against public policy. Thus modified by introducing liability principles, an international sui generis regime modeled on the Database Directive could ensure that competition performs its protective role even in the case of sole-source data.  

345. If the database industry chose to form a collection society to minimize transaction costs associated with licensing, the first appeal might lie within the collection society. See supra note 342. Thereafter, either party could appeal the actual cost determination to an appropriate court or, if the mechanism so provides, an arbitration committee.

346. Reichman & Samuelson, supra note 4, at 141.

347. Id.


349. Zeidenberg, 86 F.3d at 1453 (citation omitted) (noting that competition protects consumers in a free market economy).

350. See supra note 199 (defining “sole-source data”).
A compulsory licensing mechanism will not, however, aid competition in markets without sufficient demand to support additional competitors: neither will it aid competition in areas where information is provided under nonmarket conditions, the conditions under which some scientists perform basic research and development.351

B. Potential Effects on Basic Research and Development

Assessing the role research352 and development353 ("R&D") plays in technological innovation, and its resulting societal effects, is an extremely complex task.354 The complexity of the task stems in part from the complexity in fund-
ing the R&D process, from the difficulties in assessing the spillover effects of R&D, and from the difficulties in attaching value to the benefits derived from technological growth. This section does not attempt such a monumental task, but rather attempts only a general assessment of the potential effects of a sui generis regime which protects the investment of database makers, on a subcomponent of the R&D process: “basic research.”

According to some of those charged with conducting basic research, even if an international sui generis regime is not

355. In the United States, R&D is performed and funded by industry, government, and academia. See id. at 4-2. Of the $171 billion spent on R&D in the United States in 1995, 60% was spent on development, 23% was spent on applied research, and 17% (approximately $29.6 billion) was spent on basic research. See id. at 4-9. Although industry funds and performs the majority of overall R&D, the majority of industry funds are spent on applied research and development. See id. at 4-5 to 4-7 (reporting that, in 1995, industry provided approximately 59% of total R&D expenditures in the United States, and performed approximately 70% of the total R&D). In the area of basic research, the federal government provides the majority of funding, while the academic sector performs most of the basic research. SCIENCE & ENGINEERING INDICATORS, supra note 23, at 4-9 (reporting that federally-allocated funds comprised approximately 58% of the $29.6 billion spent on basic research); see id. (reporting that academia performed approximately 50% of basic research conducted in the United States in 1995). Although all three sectors have experienced a reduction in the rate of growth in dollars spent on research and development, academia is the only sector that has experienced a constant dollar increase since 1986. Id.

356. Because basic research is often shared among scientists, e.g., by publication in scientific journals and by private circulation among colleagues, it is difficult for those conducting the research to capture the ripple effects, or spillover benefits produced by the research. See id. at 8-6 to 8-7. In addition, initial research may find application (“spillover”) in other industrial sectors and scientific disciplines. See id. at 6-4, 8-6, to 8-7. Finally, the ripple effect of basic research conducted in academic institutions represents a “crucial component in training future scientists and engineers, many of whom will one day be working in [industrial] laboratories.” SCIENCE & ENGINEERING INDICATORS, supra note 23, at 4-10.

357. For example, the difficulties inherent in attaching a monetary value to technological breakthroughs that save human lives; or, in attaching a monetary value to the more general benefit of promoting a “culture of reasoned discourse.” See id. at 8-10 to 8-11.

358. Unlike “applied research,” which seeks to determine the means by which a particular, specified need can be met, “basic research” seeks to further scientific knowledge without regard to specific application. See id. at 4-9.
adopted, the Database Directive may cause a paradigmatic shift in the way basic research is conducted. This concern rests on the argument that because the Database Directive’s *sui generis* regime may create *de facto* property rights in basic research data, the “principle of full and open exchange” will give way to “mini-monopolies” which will in turn significantly diminish long-term R&D capabilities. The following subsection delineates those concerns.

1. Concerns Expressed by Those Conducting Basic Research

Opponents of the Database Directive’s *sui generis* regime, and of an international *sui generis* regime modeled on the Database Directive, cite three main concerns, all of which center on the effect of such a regime on the accessibility of data. First, they argue that an international *sui generis* regime will give database makers an absolute monopoly on data. Because of this exclusive right in data, critics claim, the database maker will either deny access or charge a price that science cannot pay.

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360. See GLOBAL ACCESS, supra note 4, at 14; Academy Letter, supra note 23, at 2; Reichman & Samuelson, supra note 4, at 91; Rosler, supra note 11, at 140-41.

361. However, even those opposing the current proposals agree that the “core idea underlying current *sui generis* proposals is sound, even if the mechanisms proposed to address the problem are flawed.” See Reichman & Samuelson, supra note 4, at 130. Additional concerns expressed by opponents were addressed previously with respect to Database Directive’s effects within the EC. See supra notes 277-321 and accompanying text.

362. See Academy Letter, supra note 23, at 1-2; Reichman & Samuelson, supra note 4, 90-102 (arguing that each regime grants monopoly rights); GLOBAL ACCESS, supra note 4, at 35 (arguing that under “an exclusive rights model . . . a database owner[] [has an] absolute monopoly”).

363. See Reichman & Samuelson, supra note 4, at 115-16; see also GLOBAL ACCESS, supra note 4, at 8-9. Although the *sui generis* regime may lead to higher data costs, in the form of fees or independent generation costs, charging for data is not a revolutionary concept. Information is not, nor has it ever been free—someone, whether it be the government, or other information users who sub-
Second, opponents argue that, because any entity can find protection under such a *sui generis* regime, foreign governments will enter the database markets and charge market prices for publicly-funded data previously supplied on a cost-recovery basis. Critics project that this development, coupled with the incentive to privatize data, will result in an ever-shrinking pool of public domain information.

Finally, opponents argue that the incentive to privatize data created by such a regime is antithetical to the principle of “full and open exchange” of scientific data. Critics speculate that the collective effect of this “parade of horribles,” which would follow adoption of such a *sui generis* regime, could have grave consequences to the United States’ ability to maintain its lead in technological innovation.

2. Potential Benefits to Those Conducting Basic Research

Although *de facto* property rights in data causes much concern to those whose lifeblood is data, a regime which
grants the commercial database maker a *de facto* property right in data grants the same right to the dedicated-researcher-turned-database-maker. Thus, while the potential negative effects demand careful attention by policy makers before adopting an international *sui generis* regime modeled on the Database Directive, policy makers should assess the potential negative effects in light of the potential benefits to those decrying the Directive and the Proposals it has spawned, and in light of the potential benefits to society as a whole.

a. Market Participation

Those conducting basic research and their employers, universities, for example, are not only data users, but are also data producers. As data producers, researchers can engage the market for protection. For example, the academic and scientific communities might collectively organize and form large databases fed continually by their respective communities. Given the sheer volume of information

371. Moreover, the term of the *de facto* monopoly will be determined by the difficulty of unearthing the data and the relevant database market. That is, the data collector will face price competition earlier, or data users will independently generate the data, if data are relatively easy to independently discover and generate. Conversely, if data are relatively difficult to discover or generate, the data collector may receive a longer term of protection.

372. These effects should also be considered by EC members when implementing the Database Directive. See Reichman & Samuelson, *supra* note 4, at 108 (noting that even if an international *sui generis* regime is not adopted, the Database Directive may force a paradigmatic shift in the way scientists, academics, and others operating in a noncompetitive or subsidized environment, conduct research and other information-intensive activities); see also *GLOBAL ACCESS, supra* note 4, at 25-26 (arguing that EC members should implement the Database Directive by freightig “data generated by public funds . . . with a built-in, cost-based discount for scientific research and education as a condition of further commercialization by others”).

373. Although this may require some logistical nimbleness, given today’s software tools, it takes relatively little programming expertise to form a database which would find protection under the Database Directive. Moreover, the academic research community typically has ready access to programming expertise and computer hardware. Griffith Interview, *supra* note 40. In addition, formation
produced by these communities, an international \textit{sui generis} regime might not only provide these communities with significant bargaining power in the commercial sector, but might also empower these communities to influence fundamental information policy.

Moreover, armed with this new-found bargaining power, the academic and scientific communities could engage the market in a number of ways. For example, they could engage commercial database makers in partnerships, providing data in exchange for innovative research tools and cost recovery access. Alternatively, the academic and scientific communities could choose to enter the market as database makers. As market participants, these communities could employ the resulting profits to replace ever-shrinking governmental funds, to pay for production costs, to pay for additional research and educational activities, or to pay individual researchers via a collection society.


374. See supra note 320.

375. See Reichman & Samuelson, supra note 4, 108-10; cf. SCIENCE & ENGINEERING INDICATORS, supra note 23, at 5-43 (noting that the strong upward trend in gross revenues generated by academic patenting indicates an awareness and willingness on the part of private industry to invest in academia) citing a 1994 survey conducted by the Association of University Technology Managers, Inc.

376. See Hunsucker, supra note 219, at 35-36; cf. SCIENCE & ENGINEERING INDICATORS, supra note 23, at 5-42 (noting that the sevenfold increase in the number of patents awarded to the academic sector between 1960 and 1980 suggests that the academic sector is attempting to capture some of the economic benefits associated with basic research).

377. See, e.g., id. at 4-21 (noting the decline, in real terms, of overall federal R&D expenditures).

378. Cf. BIERDERMAN, ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 526-27 (3d ed. 1996) (describing ASCAP, BMI, and SESAC, collection societies who collect and distribute fees generated by performing rights); see also Landry, supra note 373, at 642 (describing the Authors Registry, a collection society which collects royalties on electronic distribution of written articles).
b. An International Treaty Addressing Publicly-Funded Data

While some governmental data are not reproducible and may not be subject to the limits of a competitive market, many of these data are presently available on a cost-recovery basis pursuant to bilateral or multilateral treaties. Additionally, although foreign governments may use the sui generis regime to finance government-sponsored research efforts, or may discriminate against researchers in the United States, there are practical limits on the ability of foreign governments to do so.

Consider, for example, that the United States accounts for approximately forty-four percent of the world’s R&D investment, outdistancing the next four largest investors combined. Governments who discriminate against researchers in the United States, or who charge market prices for publicly-funded data, risk similar treatment from the United States. The threat of retaliation by the United States might act as an implicit limit on the price foreign governments charge for publicly-funded data.

Moreover, rather than face the wrath of its own citizens by charging market prices for publicly-financed data, the United States might exercise its strength in R&D to persuade

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379. For example, data provided via governmentally-operated satellites. See, e.g., GLOBAL ACCESS, supra note 4, at 22.
380. Id.; see also Bilateral Relations, Executive Summary 6 (visited Nov. 11, 1996) <http://www.itp/iip/bilat/summary.htm> (noting that “during FY-1995 there were 805 S&T [Science & Technology] agreements in force between the U.S. and 78 other countries.”) For a representative listing of the current bilateral agreements, see <http://www.itp/iip/bilat/nation1.htm> (visited Nov. 11, 1996). In addition, one should note that international scientific collaboration and cooperation is increasing. See SCIENCE & ENGINEERING INDICATORS, supra note 23, at 5-35-37 (noting greater international collaboration on scientific and engineering articles); 4-42-48 (noting increasing international collaboration in the public and private sectors).
381. See supra note 365.
382. SCIENCE & ENGINEERING INDICATORS, supra note 23, at 4-35 and tables 4-33-4-35 (note that these data reflect total R&D, not just basic research).
foreign governments to supply publicly-financed data to science on reasonable terms. Alternatively, foreign action regarding publicly-funded data which the United States perceives as unfair may precipitate a single international treaty addressing publicly-funded data.

c. Reducing Inefficiencies Masked by Hidden Subsidies

Subjecting basic research to the discipline of a commercialized data market may reduce hidden costs imposed by the systemic inefficiencies associated with research conducted under less-than-market conditions. For example, openly charging for data may give users a financial incentive to make decisions based upon actual need, which may result in more focused research.

In contrast, “free” access to information, which is not really free but rather subsidized by someone else, may encourage unnecessary and unfocused research on systems with finite capacities, which may render systems unavailable to others. Thus, attaching a market price to information may lead to wider data availability and accessibility by freeing what would otherwise be unavailable system capacity.

d. Not a Threat to Technological Innovation

Even if imposing additional costs on basic research, whether in the form of fees or of independent generation costs, shifts the focus of basic research from the discovery of knowledge for its own sake to the discovery of knowledge to solve a particular societal problem, it does not necessarily

383. See, e.g., GLOBAL ACCESS, supra note 4, at 27; see also supra note 351 (citing the Freedom of Information Act).

384. For example, an international treaty might require governments to supply their data on “fair and nondiscriminatory terms.” See supra note 338; cf. GLOBAL ACCESS, supra note 4, at 25 (arguing that publicly-funded data should come freighted with a built-in discount for science).
follow that such a shift will reduce the number of technological breakthroughs. On the contrary, some empirical evidence suggests that technological breakthroughs are just as likely to precede, rather than follow, basic research.385

Thus, while the Database Directive’s *sui generis* regime, or an international *sui generis* regime modeled on the Database Directive, poses risks to academic and scientific researchers, it also presents many opportunities to those same researchers (or those making the substantial investment in database production), including the opportunity to recover some spillover subsidies they currently provide to the industrial sector.386

C. Potential Benefits to Society

Like the railroad of yesteryear, information is the engine that drives commercial innovation and social advancement;387 it is the cornerstone of electronic commerce.388 Mil-

385. *See supra* note 350 (regarding linear/nonlinear innovation models); *see also* SCIENCE & ENGINEERING INDICATORS, *supra* note 23, at 4-9 (citing Donald Stokes forthcoming book, *PASTEUR’S QUADRANT*, which sets forth examples of real world technological breakthroughs accomplished by those such as Pasteur, Faraday, and Kelvin, whose research focused on both fundamental understanding and potential application; *see also id.* at 5-42 (noting that the academic sector, which performs most of the basic research, is increasingly focusing on commercially relevant technologies).

386. *See supra* note 354.

387. *See WIPO Proposal, supra* note 1, Preamble WIPO Doc. CRNR/DC/6 (Aug. 30, 1996) (“[D]atabases are a vital element in the development of a global information infrastructure and an essential tool for promoting economic, cultural, and technological advancement . . . .”; 142 CONG. REC. E890-04 (daily ed. May 23, 1996) (statement of Sen. Moorhead) (“[D] atabases . . . the linchpin of a dynamic commercial industry in the United States.”); Database Directive, *supra* note 1, recital 9, O.J. L 77/20, at 20 (1996); cf. Rockwell Graphic Sys. v. DEV Indus., 925 F.2d 174, 180 (7th Cir. 1991) (“The future of the nation depends in no small part on the efficiency of industry, . . . [which in turn] depends in no small part on the protection of intellectual property.”); *see also* Samuelson, *supra* note 363, at 367 (“In the information age, information becomes the primary economic commodity, the source of greatest wealth”); *see generally*, Jared Sandberg, Microsoft Plans to Spend Big on the Internet, WALL ST. J., Nov. 15, 1996, at B3 (reporting that Microsoft plans to spend $400 million this year to development information content for its Internet services).
lions of information users, including scientists, professionals, scholars, consumers, and businessmen and women, make decisions based upon information every day. To the extent that a sui generis regime protecting investment in databases increases the production of databases, a tool that enhances information users’ ability to retrieve the kernel of information needed to solve a particular scientific, legal, economic, or medical problem, the regime would enhance society’s problem-solving abilities, increase productivity and decrease lost-opportunity costs, advance education and training, and facilitate the creation of a better-informed citizenry.

Additionally, a sui generis regime protecting investment in databases could produce profound long-term societal benefits if such a regime subtly shifts macroeconomic incentives from fictional works to more necessary factual works having higher social utility. That is, assuming that legal protections create or protect incentives to produce, to the extent protection afforded factual works approaches or exceeds the protection afforded fictional works, societal resources

390. The lost opportunity costs consist of costs suffered by society in the form of nonproductive time spent searching for information. See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).
392. Although one could correct the imbalance by reducing the protection currently afforded traditionally copyrightability works to little more than protection against wholesale copying, that solution seems unlikely given the vested interests in the copyright regime. See generally Glynn S. Lunney, Jr., Reexamining Copyrights’ Incentive Access Paradigm, 49 VAND. L. REV. 483 (1996).
393. By according factual works only a thin veil of copyright protection because of their high degree of social utility, society has implicitly, if not explicitly, deemed factual works more valuable than fictional works. See Lunney, supra note 65, at 568-70.
should be redirected toward production of factual works.\textsuperscript{394} Society would thus reap the benefit of increased production of more necessary factual information.

**CONCLUSION**

Market-destructive appropriators, commercially-motivated or not, skew incentives to invest in information generation and compilation. The EC took a bold, intellectually-honest step forward by adopting a *sui generis* regime to protect investment in databases. The Directive’s *sui generis* regime does not create exclusive legal property rights in data, but does protect the investment of labor and capital, made by diligent compilers, in their compilations. By linking protection to the investment of capital and labor, the Database Directive’s *sui generis* regime should increase, or at least preserve, incentives to collect and compile information in the EC. Because independent creation and imitation remain, as they should, perfectly legitimate means of competition, the Directive’s *sui generis* regime protects compilers without unnecessarily suspending the principles of free competition in the nonproprietary data market.

At the same time, this Article recognizes the risk of impeding competition in the sole-source data market and the incentives to privatize data that such a regime creates. Nonetheless, there are sufficient ameliorative measures available to those within the EC to offset these risks, not the least of which is the fact that European courts will, if following the spirit of the Directive, focus on the legitimate commercial interests of the database maker when defining infringement. On the other hand, because of the lack of similar ameliorative measures at the international level, this Article suggests that an international *sui generis* regime modeled on

\textsuperscript{394} See id. at 655-56; see Ginsburg, *supra* note 6, at 349 (the extent of copyright protection for databases influences the initial investment decision); see also *supra* note 323.
the Database Directive be modified by incorporating a compulsory mechanism to protect the public’s interest in competition in the sole-source database and information markets.

However, this Article does not agree with those who believe information should be free. Society gains little by making information free if, by so doing, it reduces the quantity and quality of information produced, or reduces the monetary value attached to socially-productive behavior like basic research.

On the other hand, if increasing the price of data results in greater remuneration to information producers, for example, those engaged in basic research and science, society may attach a higher value to such socially-productive behavior, which in turn could result in more scientists and researchers, who could in turn produce more information. Thus, greater remuneration to researchers and scientists may result in spillover effects that could have far-reaching social implications. What, for example, might children think if society paid the next dedicated researcher laying the foundation for the next Salk or Pasteur as much as the next Danielle Steele, John Grisham, or Theodore Geisel?

395. Geisel is better known as Dr. Seuss; Steele and Grisham are successful contemporary novelists.