Dear Sir or Madam


I write on behalf of the Libraries and Archives Copyright Alliance (LACA) in response to your invitation for comment on the Commission’s Consultation on the review of EC legislation on copyright and related rights.

LACA is an alliance, convened by CILIP: the Chartered Institute of Librarians and Information Professionals, of the major professional organisations in the UK representing the librarianship, archivist and information science professions, plus The British Library, the Royal National Institute of the Blind (RNIB) and the Educational Copyright Users Forum (ECUF). The full list of our membership can be seen below in the footer to this page. LACA monitors and lobbies about copyright and related rights on behalf of these professions as well as on behalf of all users (or ‘consumers’) of copyright works through library, archive and information services. Some of our members may also be making their own separate responses to this consultation focussing on their own constituencies.

We welcome the European Commission’s proposal to review the existing legislation in the field of copyright and neighbouring rights. We see such a review as an opportunity to improve the coherence of the legislative framework and identify inconsistencies in the definitions, or rules on exceptions and limitations, between the different Directives which hamper the operation of the Acquis Communautaire, or impact harmfully on the fair balance of rights and other interests such as those of users of information.

We are generally in accord with the Commission’s view in para. 2.1.1 of its working paper, that in order not to upset the delicate balance of compromises reached at the time of the negotiations of the different Directives, it should just tidy up inconsistencies in the Acquis in copyright through minimum intervention. In many cases the conclusions reached by the Commission that there should be no amendments are the right ones.
Our view is that there is a certain lack of coherence in the existing legislative framework, particularly with regard to the inconsistencies between the Database Directive and the Term Directive, and between the Database Directive and the Information Society Directive. We would draw the Commission’s attention to the following specific issues:

Software Directive vis à vis the Information Society Directive
We agree with the reasons for aligning the Software Directive with Information Society Directive Art. 5(1) set out in para. 2.1.3.2 of the working paper, and that Software Directive Art. 4(c) should be clarified (para. 2.1.2). The current text of Art. 4(c) refers to exhaustion of distribution right by the first sale within the Community which is now not at all consistent with the meaning of ‘any form of distribution to the public’ contained in the broader term of ‘communication to the public’ used in the Information Society Directive.

Term Directive
We are not alone in believing the life +70 term of protection for authors’ rights conferred by the Term Directive to be far too long. Referring to the extension of the term of protection in Europe which in turn led to the USA’s Sonny Bono Term Extension Act 1998, Professor James Boyle, William Neal Reynolds Professor of Law and Faculty Co-Director of the Center for the Study of the Public Domain, Duke University Law School, USA wrote in a paper1 which laid the foundation for the September 2004 Geneva Declaration on the Future of the World Intellectual Property Organisation,2 “The most recent retrospective extensions, to a term which already offered 99% of the value of a perpetual copyright, had the practical effect of helping a tiny number of works that are still in print, or in circulation. Estimates are between 1% and 4%. Yet in order to confer this monopoly benefit on a handful of works, works that the public had already "paid for" with a copyright term that must have been acceptable to the original author and publisher, they deny the public access to the remaining 96% of copyrighted works that otherwise would be passing into the public domain.”

The life+70 term of copyright protection restricts the educational and creative use of works long after the author and producer have received sufficient return on their investment in effort and resources and the continuance of this excessive term of protection is prejudicial to the development of the Information Society. Therefore we **strongly agree** with the Commission that **no term of protection should be extended**.

Term Directive vis à vis the Database Directive
The Database Directive protects databases in two ways: original databases are copyright protected (for the term of author’s life + 70 or, if anonymous or corporate works, for 70 years since creation); furthermore all databases created within the EU are protected by *sui generis* right or database right for 15 years since creation. However, the nature of many databases is such that they usually are updated – often daily or hourly. Art. 10(3) of the Database Directive provides that any substantial change to the content of the database creates a revised database resulting from that investment, which then qualifies for its own term of protection as though it were a brand new database, whether or not the structure of the database has also been revised. Yet it is substantially changing the structure which in reality creates a ‘new’ database, not the mere updating of the content, and the Commission should revisit the definition in Art. 10(3).

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2 http://www.futureofwipo.org/futureofwipodeclaration.pdf
The provision in Art. 10(3) is being interpreted by some rights owners to mean that it gives the database owner perpetual protection under both copyright and sui generis right. This is surely against the spirit of the Berne Convention and moreover conflicts with the term of protection for author’s rights laid down by the Term Directive. Additionally any extension to the term of protection for sui generis right beyond the initial 15 years since first creation of the database, in respect of updating or modifying the database content, should only be permitted for further periods of 15 years (or less) up to a total of 70 accumulated years since first creation of that database. This would keep the protection of sui generis right in line with the Term Directive.

**Database Directive**

We note the Advocate General’s Opinions in the Fixtures Marketing cases that ‘re-utilisation’ extends to data in the public domain and from independent sources, and that the Berne Convention interpretation cannot be transferred to Art. 7(5) of the Database Directive (eg Case C-338/02 Opinion paras. 104, 106 & 116). This seems to add to the case that the further examination of the alignment of the exceptions promised in para. 2.2.4.3 of the Commission’s working paper is urgently required.

**Database Directive vis à vis the Information Society Directive**

Regretfully we can not agree with the Commission that several issues relating to the Database Directive should be left to be dealt with in the Report made pursuant to its Art. 16(3), which is to be submitted by the Commission. The Nauta Dutilh Study made for the Commission on the Legal Protection of Databases appeared about two years ago, yet the Commission’s report is still not forthcoming. To wait any longer on the Report introduces yet more delay before any action might be taken, when there is a pressing need amongst the library, information and archive professions for immediate guidance from the Commission on the issues identified below. These matters are not only causing unnecessary confusion but are already harming the legitimate interests of users and of libraries and archives which are themselves major producers of databases.

1. **‘Lawful user’**
   
   We would like the Commission to consider the inclusion of a definition of ‘lawful user’ in the codification of the Database Directive. The Database Directive introduced the concept of ‘lawful user’ but the term is not clearly defined. On the other hand the Information Society Directive merely refers to ‘users’ which is a broader concept. This has created confusion for users and owners of databases. Most database owners seem to regard a ‘lawful user’ in a very narrow sense, being only a person or organisation who has obtained a licence for access to and use of the database. They do not accept that use of the database may also be made on the basis of a statutory exception or right and that this should also be included in any definition of a ‘lawful user’. In order for Database Directive Arts. 6.1 and 15 to be properly interpreted and effective, the term ‘lawful user’ therefore needs a definition which includes a user who makes use of the database under a statutory exception.

2. **Extending the exception for temporary acts of reproduction**
   
   We agree with the Commission’s view in para. 2.1.3.2 of its working paper that the respective provisions of the Database Directive be aligned with Art. 5(1) of the Information Society Directive.
3. ‘Normal use’
Art. 6 of the Database Directive lists the exceptions to the provisions of Art. 5: Art. 6(1) covers the ‘normal use’ exception and Art 6(2) the limitations such as the use of a database for private purposes and research purposes. However, it is not clear what ‘normal use’ is. Nor is it clear why the limitations in Art. 6(2) do not qualify as ‘normal use’. Art. 15 says that only the ‘normal use’ of the database content can not be overridden by contract law. The codification of the Database Directive provides a useful opportunity to either make clearer the distinctions between ‘normal use’ in Art. 6(1) and the limitations in Art. 6(2), or alternatively to also apply Art. 15 to Art. 6(2).

This issue has particular importance since journal and book publishing has changed dramatically in the last few years. Nowadays most publications are available both in print and as electronic databases. This is particularly the case with scientific, technical and medical (STM) publishing and is increasingly so with the advent of e-books in all levels of the educational and more popular markets. Indeed journals are now increasingly only available as electronic databases.

Art. 1 of the Information Society Directive states that its provisions shall in no way effect existing Community provisions such as the Database Directive. Yet according to Recital 20, the Information Society Directive develops the principles and rules of the Database Directive and places them in the context of the Information Society. These statements appear contradictory and the result is confusion, particularly since a number of the products purchased by libraries for use by their users simultaneously qualify as databases and as literary works of a different category.

5. Exception for the benefit of disabled
LACA fully supports the Commission’s proposal in para. 2.2.4.1 of its working paper to bring the Database Directive in line with Art. 5(3)(b) of the Information Society Directive by adding a specific exception for the benefit of disabled people to the Database Directive which will apply to all databases, whether protected by both copyright and *sui generis* right, or by *sui generis* right alone.

6. Introducing further exceptions into the Database Directive
LACA welcomes the Commission’s conclusion that consideration should be given to introducing a further exception to the reproduction right (similar to Information Society Directive Art. 5(2)(c)) for the benefit of libraries under the copyright chapter of the Database Directive. It is in the interests of the Information Society that this further exception is achieved, since the intellectual property barriers to the preservation of material in the digital age have become a very serious problem, which is already compromising and endangering our heritage.

However, we also firmly believe that at the same time consideration really must be given to introducing another exception into the Database Directive which will correspond to Information Society Directive Art. 5(3)(n). This is necessary because the provisions of Arts. 5(2)(c) and 5(3)(n) are very closely related. The adoption of Information Society Directive Art. 5(3)(n) into the Database Directive would provide libraries and archives with the possibility to make those databases, created as a result
of the reproductions made on the basis of Art. 5(2)(c), accessible to the public on-site for private study and research purposes. This is extremely important for national libraries and research centres and would make the whole exercise much more worthwhile for those libraries, as there would then be an output to the benefit of the educational and research community and society as a whole.

The digital preservation and archiving of cultural heritage is very expensive and it would be unreasonable if such institutions were to need additional permission from rights owners and have to pay an additional fee in order to provide access to the materials that they archived. Indeed it would make the purpose of archiving. Indeed it would nullify the purpose of archiving as there is no point in digital archiving if no access can be provided. Not to have the provisions of Information Society Directive Art. 5(3)(n), in conjunction with those of Art. 5(2)(c), in the Database Directive would be especially unfair since the libraries would have already paid for the material included in the database and as well as incurring the cost of archiving of such material. It would be inequitable, and against the interests of the Information Society, if they were to have to pay for the same product again: they need to be authorised to make it accessible within their own institution.

Yours sincerely

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and Secretary to LACA