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Database Protection at National and International Level

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Introductory remarks and summary

Analysis of current legal situation
The Netherlands has implemented European Directive 96/9 EC of 11 March 1996 on the legal protection of databases, which intends to harmonise the protection of databases in the European Union by introducing a sui generis right. In the Netherlands, databases may also be protected by copyright, if the selection of the data is original and reflects the personal views of the maker. Non-original compilations of data, that do not require a substantial investment, may also be protected by a form of copyright (semi-copyright protection). Non-original compilations that do require a substantial investment are specifically excluded from semi-copyright protection. Databases are protected only if the acquisition, control, or presentation of the content is the result of a substantial investment. However, the level of investment required for protection is unclear. The producer (i.e. the person bearing the risk of the investment) has the right to prohibit extraction and re-utilization of all or part of the database, subject to limitations and exceptions. The protection basically applies for 15 years, but can be extended for an additional 15 years each time a substantial change is made. The possible alternatives to the sui generis right are limited. There is some case law with respect to “sweat of the brow” protection, but the Dutch Supreme Court has held that such protection should be applied restrictively. Other means of protection, such as under copyright law as mentioned above, and also under patent law may apply.

Proposals for adaptation of uniform rules
Given the differences per country with respect to the legal protection of databases, harmonisation through an international treaty would be preferable. Special attention should be given to the question what level of investment would be required for protection. Copyright protection should remain available for databases that are original and reflect the personal views of the maker, however, consideration should be given to the question whether protection of non-original databases is required. A sui generis regime for the protection of databases seems suitable and if applied appropriately, may enhance investments in the development of databases. A registration system to secure sui generis protection does not seem practical given the frequent modifications of databases.
There should be a possibility to obtain cumulative *sui generis* protection also for original databases protected by copyright as both systems of protection relate to different aspects of a database and can protect different subjects. The right granted should enable a database owner to commercially exploit the database and thereby create a return on his investment. The scope of protection should, however, be clearly defined. The right to prohibit extraction or reuse of all or a substantial part of the database and the repeatedly and systematically extraction of non-substantial parts should be covered. What is substantial will depend on the specific circumstances and will have to be decided on a case-by-case basis. There seems no need for other limitations or exceptions then those already provided for under the European Directive and the Dutch Database Act, nor for any compulsory licensing provisions. The *sui generis* protection should be long enough to create return on the investments made. A period of 15 years as applied under the European Directive seems suitable. The possible alternatives to a *sui generis* system may create less legal certainty than a *sui generis* system. There is some concern and discussion within the Dutch legal community and among IP practitioners with respect to the level of investment required for a database to be protected and with respect to the scope of protection.

1. Analysis of the current legal situation.

1.1 Legislation

*Is there any legislation in your country specifically dealing with databases? If so, please describe it.*

Yes. On 21 July 1999 the Dutch Database Act implemented into Dutch legislation European Directive 96/9/EC of 11 March 1996 on the legal protection of databases (hereinafter referred to as the ‘Directive’). The Dutch legislature chose to implement the Directive in two different acts: the Database Act (Article I), which contains the *sui generis* right, and the Dutch Copyright Act of 1912 (hereinafter referred to as the ‘Copyright Act’), which was amended in order to provide for copyright protection of databases within the meaning of the Directive (Article II of the Database Act). The Database Act and the Copyright Act specifically deal with databases.

1.2 Definition of Database

*Is there any definition of the term ‘database’ in your country’s legislation or case law? If so, does it extend both to electronic and non-electronic databases?*

Pursuant to the Database Act, a database is a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means, for which the acquisition, control or presentation of the content, evaluated qualitatively or quantitatively, attests to a substantial investment (Article 1(1)(a) of the Database Act). This definition extends to both electronic and non-electronic databases.
1.3 Copyright Protection of Databases

1.3.1 Subject Matter

Does your country’s law provide for copyright protection of compilations? If so, does it cover only collections of literary and artistic works or does it also cover compilations of data or material other than literary and artistic works?

Dutch law provides for copyright protection of compilations. A distinction can be made between protection of original compilations and non-original compilations, that do not require a substantial investment. Copyright protection of databases within the meaning of the Directive is provided for in Article 10(3) of the Copyright Act. Pursuant to Article 10(1)(1) of the Copyright Act, literary, scientific or artistic works include books, pamphlets, newspapers, periodicals and all other writings. The Copyright Act protects works that are the author’s own intellectual creation, but also works that lack such originality, which are referred to as ‘impersonal works’ (all other writings). Examples of such impersonal works can be found in case law and include telephone books, stock-exchange lists, music lists and lists of television programmes. This leads to the conclusion that copyright protection under Dutch law covers compilations of data comprising literary and artistic works, but also compilations other than literary and artistic works.

1.3.2 Criteria for Protection

If your country’s law provides for copyright protection of compilations, is the protection limited to compilations which “by reason of the selection or arrangement of their content constitute intellectual creations”? Are there any supplementary criteria with respect to selection and arrangement? What is the level of originality required for a compilation to be considered a work? Does hard work in gathering data, also known as “sweat of the brow”, qualify a compilation as original?

Pursuant to Dutch law, protection of compilations is not limited to compilations that ‘by reason of the selection or arrangement of their content constitute intellectual creations’. Under paragraph 1.3.1 of Article 10(1) of the Copyright Act, such protection can also extend to works that lack any originality (i.e. non-original compilations in so far as they do not require a substantial investment).

The criterion under Dutch law to determine whether a compilation is eligible for copyright protection is whether the selection is original and reflects the personal views of the maker of the compilation. Pursuant to the Directive, no criteria other than originality in the sense of the author’s intellectual creation should be applied to determine the eligibility of the database for copyright protection; in particular no aesthetic or qualitative criteria should be applied (Article 3(1) of the Directive). Although this criterion is not exactly the same as the criterion that developed under Dutch case law, it can be considered similar in nature.

The exact level of originality required for a compilation to qualify as a copyright-protected work (original compilation) has been determined in case law. In the case of Romme v. Van Dale (HR, 4 January 1991, NJ 1991, 608), the Dutch Supreme Court held that a collection of...
key words in alphabetical order taken from a Dutch dictionary does not meet the requirement of originality, unless the selection reflects the personal views of the maker. The Supreme Court remitted the case to the Court of Appeal of The Hague. This court decided that copyright protection is available to above collection of keywords as it was held to be a combination of subjective choices that reflected the personal views of the maker (Court of Appeal, The Hague, 1 April 1993, AMI 93/7, p. 134).

In general, the level of originality required is rather low.

Hard work in gathering data does not, in and of itself, qualify a compilation as original.

1.3.3 Scope of Protection

What is the scope of copyright protection of a compilation? To which extent can a compilation be copied without infringing the copyright in the compilation?

The scope of protection of an original compilation is the exclusive right of the author or maker to communicate it to the public and to reproduce it, subject to the limitations laid down by law.

The scope of the protection of non-original compilations has been developed in the case law of the Dutch Supreme Court (Radioprogramma’s I, II and III, HR 17 April 1953, NJ 1954, 211; HR 27 January 1961, NJ 1962, 355; HR 25 June 1965, NJ 1966, 116). Such protection is limited to direct derivations from the non-original compilation and only if the compilation has been made public or is destined to be made public.

1.4 Sui generis Protection of Databases

1.4.1 System of Protection and Subject Matter

Does your country’s law provide for sui generis protection of compilations of data such as databases? If so, is registration of the database required to secure sui generis protection? Does your country’s sui generis system only cover databases which do not meet the criterion of originality or is there cumulative sui generis protection also for original databases protected by copyright?

Dutch law provides for sui generis protection of databases (see paragraph 1.1 above). Registration is not required for protection.

Cumulative protection under the Database Act and the Copyright Act applies to original compilations of data such as databases (Article 10(3) of the Copyright Act and Article 2(2) of the Database Act). However, for non-original compilations of data that do require a substantial investment such as databases, cumulative protection is excluded under Article 10(4) of the Copyright Act.
1.4.2 Criteria of Protection

If your country's law provides for sui generis protection of databases what are the criteria of protection? If “substantial investment” is one of the criteria of protection, what is the level of investment required for an investment to be considered substantial?

A database qualifies for protection under the Database Act if it is a collection of works, data or other independent elements that are systematically or methodologically organized and separately accessible by electronic means or otherwise, with respect to which the obtaining verification or the presentation of the content qualitatively or quantitatively shows a substantial investment (Article 1(1)a of Database Act).

Pursuant to recital 40 of the Directive, in addition to financial investments, investments of time, effort and energy can also qualify (see also President of District Court of Rotterdam, Algemeen Dagblad a.o. v. Eureka, 22 August 2000). Under recital 19 of the Directive and in the Dutch explanatory memorandum (see memorie van toelichting bij de aanpassing van de Nederlandse Wetgeving aan Richtlijn 96/9/EG van het Europees Parlement en de Raad van 11 maart 1996 betreffende de rechtsbescherming van databanken, 26 108, page 8), compilations of musical recordings on a carrier (e.g. CD) do not meet the requirement of being a substantial investment. Under Dutch case law, what is substantial is decided on a case-by-case basis.

Furthermore, according to the explanatory memorandum, the Dutch legislature is of the opinion that the investment must be aimed at the database and not at something else from which the database results as a 'spin-off'. Whether that view is correct is subject to debate (for an overview, see P.B. Hugenholtz, ‘De spin-off theorie uitgesponnen’, AMI 2002-5, p. 161-66).

Dutch courts have rendered differing opinions with respect to the validity of this spin-off argument. For instance, the Court of Appeal of Arnhem held that a telephone directory was protected under the Database Act, although the listed subscriber information was a spin-off of a larger database. (Court of Appeal of Arnhem, April 15 1997, AMI 1997/10, p. 218.)

In Algemeen Dagblad a.o. v. Eureka, on the other hand, the headlines of articles published in a newspaper were held to be a mere spin-off of the newspaper publishing activities and therefore did not reflect a substantial investment (President of District Court of Rotterdam, 22 August 2000).

In NOS v. De Telegraaf (Court of Appeal of The Hague, 30 January 2001), the spin-off argument was followed as well. In that case, database protection was denied to broadcasting data, since the compilation of programme listings involved no substantial investments other than those involved in the broadcasting of programmes itself.
In a decision dated 22 March 2002 (NVM v. De Telegraaf), the Dutch Supreme Court held that if a database is used for several different purposes there is no requirement that there be a separate substantial investment for each purpose and ruled that the spin-off argument was irrelevant in this respect. Thus, the Supreme Court found that the spin-off argument did not apply to the case at hand and did not rule on the validity of the spin-off argument as such.

The following cases that are currently before the European Court of Justice provide a further explanation of the requirement of a substantial investment, in particular with respect to the validity of the spin-off argument:

- **Fixtures Marketing Ltd. v. AB Svenska Spel**, Supreme Court of Sweden (Högsta Domstolen), 10 September 2002 (pending as case C-338/02);
- **Fixtures Marketing LTD v. Oy Veikkaus Ab District Court**, Vantaa (Finland), 1 February 2002 (pending as case C-46/02); and

### 1.4.3 Rights granted and Scope of Protection

If your country's law provides for sui generis protection of databases, what are the rights granted to the database maker? If “extraction” and “re-utilisation” are covered by any right, how are those notions defined? What is the scope of the sui generis protection? If “substantial part” is relevant in determining the scope of protection, how is this concept defined?

The ‘database maker’ has no rights. However, pursuant to Article 2(1) of the Database Act the producer (i.e. the person bearing the risk of the investment) has the right to grant permission to:

- extract or reuse of all or a substantial part of the content of the database (Article 2(1)(a) of the Database Act); and
- repeatedly and systematically extract non-substantial parts of the content of a database (Article 2(1)(b) of the Database Act).

Extraction is the temporary or permanent transfer of the content of all or part of a database to another carrier (Article 1(1)(c) of the Database Act). Re-utilisation is making available to the public the content of all or part of a database, in any form, by means of distribution of copies, rental, on-line transmission or transmission in another manner (Article 1(1)(d) of the Database Act).

The producer of the database can prohibit others from extracting or reusing all or a substantial part of the content of the database or repeatedly and systematically extracting non-substantial parts of the content of a database, subject to the limitations provided for by law (see paragraph 1.4.4 below with respect to limitations on that right).
Note that the producer of a database cannot prohibit, on the basis of his *sui generis* right, the manufacture of a similar database by a third party who does not use data from the producer’s database, since in that case no extraction or re-utilisation would be involved. The producer may have cause of action based on copyright (see paragraph 1.3.1 above).

‘Substantial part’ is not further defined in the Database Act. In *NVM v. De Telegraaf* (President of District Court of The Hague, 12 September 2000), the Court held that the extraction of even small amounts of data qualifies as a ‘substantial part’, since just a few search results might be of great value to end users. In that case, the data related to houses for sale extracted from a database produced by real-estate agents.

In the Supreme Court decision in the same case (see paragraph 1.4.2 above), the Court held that a database can be composed of several sub-databases, each of which may, in principle, be eligible for protection under the Database Act. This implies that extracting or re-utilising an insubstantial part of a large database can constitute a substantial part of a sub-database and therefore may be an infringement.

Note that in all of the cases before the European Court of Justice referred to in paragraph 1.4.2 above, the Court of Justice has also been requested to further explain the term ‘substantial part’.

**1.4.4 Limitations and Exceptions**

*If your country’s law provides for sui generis protection of databases, are there any limitations or exceptions? If so, what are they? Are there any compulsory licensing provisions under your country’s sui generis protection regime?*

Yes. The lawful user of a database that is made available to the public in any manner whatsoever may extract or re-utilize a substantial part of the content of the database without the authorisation of the producer of the database if:

a. the extraction of the content of a non-electronic database is for private purposes;

b. the extraction is for illustrative purposes in connection with teaching or scientific research, provided that the source is indicated and insofar as the extraction is justified by the non-commercial purpose to be achieved; or

c. the extraction or re-utilisation is for purposes related to public security or an administrative or judicial procedure.

There is no specific compulsory licensing provision under the Dutch *sui generis* protection regime. Nevertheless, a decree of the Dutch Competition Authority can effectively result in compulsory licensing. Abusing a dominant position is prohibited under Dutch competition law (and European Competition Law). Recital 47 of the Directive also makes clear that *sui generis* protection may not promote abuse of a dominant position and that Community and national competition laws may be employed to avoid such abuse. Whether a refusal to grant a licence will be regarded as abuse under Dutch competition law will depend on the circumstances of the case.
Taking advantage of a dominant position is not abuse *per se*. Enforcing an intellectual property right will be regarded as abuse only in exceptional circumstances.

1.4.5 *Duration of Protection.*

*How long is the duration of the sui generis protection?*

The *sui generis* protection commences on the date on which the database is completed and expires after 15 years. That 15-year term commences on 1 January of the year following the date of completion. If a database is made available to the public before the date of completion, the *sui generis* right expires after 15 years commencing on 1 January of the year following the date on which the database was first made available to the public.

Note that if any substantial change is made to the content of a database resulting in a (new) database of which the change of the content shows a substantial new investment, the database resulting from that investment will qualify for a new *sui generis* right.

1.5 *Possible Alternatives for a sui generis System*

1.5.1 *Unfair Competition Law*

*Does your country have a law of unfair competition? If so, does it have a role in the protection of databases? If so, to what extent?*

There is no specific law of unfair competition, in the Netherlands, but acts of unfair competition can – under certain conditions – qualify as tortious under the general rules on tort (Article 6:162 of the Dutch Civil Code). However, its role in relation to the protection of databases is very limited. In the Netherlands there is a doctrine of misappropriation, which provides a form of ‘sweat of the brow’ protection that could be applied to databases. This doctrine is applied with great restraint.

There is some case law with respect to ‘sweat of the brow’ protection based on unfair-competition rules. However, such protection is granted only in special circumstances, after weighing the relevant social interests. In the *Holland Nautic v. Decca* decision (HR 27 June 1986, *NJ* 1987, 191), the Dutch Supreme Court held that such protection should be applied restrictively. The protection granted should – in essence – differ from the protection granted by an exclusive intellectual property right. Furthermore, entitlement to such protection would at least require that unjust advantage is being taken from an achievement that can be put on par with an achievement that would qualify for intellectual property protection.

Nevertheless, database protection seeks to protect a (substantial) investment in a database and, as such, could be seen as a clear example of ‘sweat of the brow’ protection.

When implementing the European Database Directive into Dutch Law, the legislature considered implementing the database right as an unfair-competition rule (see *memorie van toelichting bij de aanpassing van de Nederlandse Wetgeving aan Richtlijn 96/9/EG van het Europees Parlement en de Raad van 11 maart 1996 betreffende de rechtsbescherming van databanken*, 26 108, nr. 3), but decided to implement the database right as an exclusive right, as was done in many other European jurisdictions.
Therefore we conclude that now the misappropriation doctrine is (i) applied with great restraint and (ii) *sui generis* protection already has been provided for in the Database Act, the role of unfair competition in the protection of databases will be (very) limited.

### 1.5.2. Other means of Protection

*Does your country provide for any other means of protecting databases? If so, in which legal areas and by which mechanisms (e.g. contract law)?*

**semi-copyright protection for non-original compilations**

As noted in paragraph 1.3.1 above, the Copyright Act provides non-original compilations that do not require a substantial investment protection against derivation if the compilations have been made public or are destined to be made public.

**patent protection**

A database may also be protected by means of patent provided that the database satisfies the requirements of patentability, such as novelty and ‘inventive step’. Although the presentation of information is excluded as such from patent protection in the Netherlands (Article 2(2)(d) of the Dutch Patent Act of 1995 and Article 52(2)(d) of the European Patent Act), the structure of a database is not excluded if that structure in conjunction with a computer has a technical effect, such as a reduced use of memory or easy access to data. Accordingly, such a database structure may be protected under patent law. For instance, in case T 1194/97, *Picture Retrieval System*, OJ 2000, 525, the Board of Appeal of the European Patent Office held that a record carrier on which line numbers, coded picture lines and addresses (constituting a database) were stored was patentable because it provided, together with a suitable reading device, a novel and inventive picture retrieval system.

### 2. Proposals for adoption of uniform rules

#### 2.1 Legislation

*Should legislation be enacted to deal specifically with databases? If so, should national legislation be enacted or is there a need for an international treaty on the protection of databases?*

The Member States of the European Union (including the Netherlands) have already implemented legislation that specifically addresses databases. Harmonisation by way of an international treaty could enhance reciprocity and limit conflicts with respect to the question of what databases should be protected. Furthermore, since databases have gained importance in our modern information society, it is essential that producers of databases be given some degree of protection so that they are entitled to remuneration of their investments and efforts as provided in the Database Act. With regard to a need for reciprocity, the Database Act protects only producers of databases that are established in the EEA. Since e.g. the USA does not recognise any form of *sui generis* protection of databases, we are currently in a situation in which US companies with subsidiaries in the EEA might benefit from protection under the Directive. European companies, on the other hand, do not benefit from any form of *sui generis* protection of databases in the USA. An international treaty could resolve this.
2.2 Definition of Database
If you think that legislation should be enacted to deal specifically with databases, what should the definition of “database” be? Should it extend to both electronic and non-electronic databases?

The definition in the Directive seems clear. However, the interpretation of ‘substantial investment’ leaves room for discussion. In this respect, the spin-off issue in the Netherlands, discussed above, should be taken into consideration. It is questionable whether a database derived from other activities qualifies as a substantial investment (see paragraph 1.4.2 above).

The definition should extend to both electronic and non-electronic databases. The same information can be included in an electronic database as well as in a non-electronic one (e.g., a database on paper), and it would be illogical if two legal regimes would apply in that case. Also, the TRIPs-Agreement does not distinguish between electronic and non-electronic databases.

2.3 Copyright Protection of Databases
Do you think that copyright protection should be granted to databases? If so, what should the criteria for protection be? Do you think that the level of originality required for a database to be copyrightable should be low, so that “sweat of brow” databases qualify as copyrightable? What should the scope of copyright protection be?

Since copyright law provides for the protection of the structure (format) and selection of the database (and not to the data themselves), it should apply in addition to the *sui generis* protection. The criteria provided for in the Directive are similar to those provided for in Dutch case law (see paragraph 1.3.2 above).

The substantial-investment criterion provides for a balance between the principle of free flow of information and the author’s entitlement to remuneration for (substantial) works. In this respect the required level of originality can be fairly low.

The current scope of copyright protection on databases as provided for in the Copyright Act (see paragraph 1.3.3 above) in combination with the *sui generis* protection as provided for in the Database Act sufficiently protects the interests of the authors of databases.
2.4  **Sui generis Protection of Databases**

2.4.1  **System of Protection and Subject Matter**

*Do you think that sui generis legislation should be enacted to protect databases?*

*If so, should there be a registration system to secure sui generis protection?*

*Should the sui generis system only cover un-original databases or should there be the possibility to obtain cumulative sui generis protection also for original databases protected by copyright?*

A *sui generis* regime seems suitable, as appropriate database protection is difficult to implement within existing Dutch intellectual property law and protection as ‘sweat of the brow’ may not provide sufficient protection under current Dutch law.

Registration is not a practical requirement, since for each adaptation or modification the producer would have to register again in order to qualify for protection for the modified database. Given the frequent modification of databases (especially electronic databases), this would lead to a great deal of effort being required in order to obtain protection.

Copyright and database rights relate to different aspects of a database, have different purposes and can protect different subjects (the ‘maker’ versus the ‘producer’). Accumulation should therefore be possible insofar as it relates to original databases. For non-original compilations that do not require a substantial investment, it is questionable whether protection as a ‘non-personal writing’ under the Copyright Act should be available, since that may confer a double standard of protection with differing terms of protection (*i.e.*, 15 years for non-original compilations that do require a substantial investment) as opposed to 70 years after the maker’s death for non-original compilations that do not require a substantial investment).

2.4.2  **Criteria of Protection**

*If you think that sui generis legislation should be enacted to protect databases, what should be the criteria of protection? If you think ‘substantial investment’ should be one of the criteria of protection, what should be the level of investment required for an investment to be considered substantial?*

The legislation should protect databases that are collections of works, data or other independent elements that are systematically or methodologically ordered and separately accessible by electronic means or otherwise and that bear witness to a substantial investment.

It is difficult to establish by a general rule what level of investment qualifies as substantial and this may have to be determined on a case-by-case basis. However, the level required for a substantial investment should be such that it imposes a significant requirement. Preliminary questions on this subject have been put to the European Court of Justice (see paragraph 1.4.2 above).
2.4.3. Rights granted and Scope of Protection
What rights should be granted to the database maker? If you think that “extraction” and “re-utilisation” should be covered by the rights to be granted, how should these notions be defined? If you think that “substantial part” should be relevant in determining the scope of protection, how should this concept be defined?

The rights granted should enable the database owner to commercially exploit the database. The database owner should therefore have the right to authorize the extraction or re-utilisation of all or a substantial part of the content of the database, and the repeated and systematic extraction or re-utilisation of insubstantial parts of the content of a database, if that does not conflict with the normal exploitation of that database or unreasonably prejudice legitimate interests of the producer of the database.

Extraction can be defined as the permanent or temporary transfer of part of the content of a database to another medium by any means or in any form.

Re-utilisation can be defined as any form of making available to the public all or a part of the content of a database by distributing copies, by renting, on-line or by other forms of transmission.

A further definition of ‘substantial part’ may not be required. As a small part of a database may be of particular value, whether a part is substantial should be determined on a case-by-case basis in light of the specific circumstances of the case.

2.4.4 Limitations and Exceptions
Should limitations or exceptions be granted? If so, which ones?
Should there be any compulsory licensing provisions?

No. Apart from the already in the Database Act inserted limitations or exceptions there does not exist an urge for additional limitations and exceptions. An existing Dutch exception worth mentioning is the fact that in the Netherlands, the public authorities do not have a sui generis right (or copyright) with respect to databases that they produce comprising laws, decrees, bylaws, or civil or administrative verdicts.

Compulsory licensing provisions are not necessarily required, as an unjust refusal to licence can be reviewed under civil and competition laws. The competition-law method, which has been pointed out by the Commission as the method to break open an information monopoly, does have several disadvantages. After the Bronner judgment, doubts must be cast on the possibility of properly obtaining a licence by means of the essential facilities doctrine. Although the Dutch courts and the Dutch Competition Authority have adopted a ‘big-hearted’ attitude in this respect, obtaining a licence through the correct application of the Magill/Bronner method appears to be possible only in a very limited group of cases. Another point of criticism with respect to the competition approach is its length. Several cases show that obtaining a licence on the basis of the competition law method is a long-winded route. That certainly does not promote new information products, which is one of the purposes of the Database Directive.
Nevertheless, if correctly applied in terms of breaking open an information monopoly there is a great advantage in following the competition-law method supplemented with the Court’s interpretation of this method in the *Magill*¹ and *Bronner*² cases. The exclusive right is predominant and abuse of a dominant position is not assumed on the mere ground that the person holding the power decides not to issue a licence. Only if there are exceptional circumstances can the intellectual property right be violated. This means that the formulation is general and open and therefore ‘future proof’. In addition, in exceptional circumstances Article 10 of the ECHR can be invoked to obtain a compulsory licensing provision.

Therefore, we conclude that there is no necessity to implement a compulsory licensing provision.

2.4.5 *Duration of Protection*

*How long should the sui generis protection be?*

Fifteen years. Please note that there is some uncertainty regarding the possibility of acquiring a *de facto* infinite *sui generis* right by substantially changing the content of an existing database (see paragraph 1.4.5).

2.4.6 *Assessment of existing sui generis Systems*

*If your country already provides for sui generis protection of databases, do you think the system should be revised? If so, why and in what ways?*

Although some practitioners in the IP legal community are of the opinion that protection under unfair competition rules are preferable, most seem to prefer the *sui generis* system. That being said, the existing *sui generis* system does raise some serious concerns (see paragraph 3 below).

2.5 *Possible Alternatives to a sui generis Systems*

*If your country does not have unfair competition rules or if your country’s unfair-competition law does not have a role in the protection of databases, do you think your law should be changed, so as to provide database protection on the basis of unfair-competition law? Should there be any other means of protecting databases, which your country does not offer or not fully take into account? If so, which ones?*

Although, acts of unfair competition can – under certain conditions – be qualified as tortious (see paragraph 1.5.1 above), it is uncertain whether those rules provide effective protection of databases.

¹ European Court of Justice, 6 April 1995
² European Court of Justice, 26 November 1998
The current protection of databases, which is based on the Directive, seems to be sufficient. Furthermore, as Dutch law also provides for ‘semi’ copyright protection for non-original works that do not require a substantial investment, a separate amendment to the law so as to provide database protection on the basis of unfair-competition law does not seem to be necessary.

3. Miscellaneous

There is some concern and discussion within the Dutch legal community and among IP practitioners with respect to the level of investment required for a database to be protected and with respect to the scope of protection.

Both the Directive and the Database Act are unclear on the concept of substantial investment and seem to leave open the possibility that virtually any compilation of data can be protected. More specifically, the question regarding a spin-off of a database (which may not require any investment) is undecided. It is to be expected that the European Court of Justice will give some guidance on this matter in the near future (see paragraph 1.4.2 above).

The scope of protection also raises some concerns, as it is unclear whether the use of search engines and linking could – under certain circumstances – qualify as illegal extraction or re-utilisation of a database. Assuming that placing a database on the Internet does not imply implicit consent to use that database and that no technical means are available to avoid re-utilisation or extraction, the use of a search engine could infringe upon database rights.