

# EU Public consultation on the Data Act

## Submission by Creative Commons

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### Introduction

Creative Commons (CC) welcomes the opportunity to provide feedback to the European Commission (EC) [Public consultation on the Data Act](#). The present document summarizes CC's provisional position on the issues raised in the consultation, with a focus on the review of the Directive 96/9/EC on the legal protection of databases (the "[Database Directive](#)"). Creative Commons further supports the submissions by the COMMUNIA Association for the Public Domain and Wikimedia Deutschland.

### Background

According to the EC, the objective of the Data Act is to propose measures to create a fair data economy by ensuring access to and use of data. Under this initiative, a review of the 1996 Database Directive is planned in order to ensure continued relevance for the data economy. To recall, the Database Directive aimed to harmonize the treatment of databases under copyright law and introduced the [sui generis database right](#) for non-original databases. *Sui generis* database rights are separate from copyright. They protect the "sweat of the brow" of the person who has made a substantial investment in obtaining, verifying, or presenting the contents of a database.

### Comments

#### **The *sui generis* right creates an enclosure of the commons of information**

Public domain data that could otherwise be accessed and reused is virtually locked down by this right; this poses serious threats to the fundamental rights to access to information and freedom of expression and deprives citizens of reuse opportunities of valuable creative content, thereby undermining innovation and creativity and restricting legitimate activities such as research and heritage preservation.

#### **There is no evidence that this right fostered innovation or enhanced competition**

This level of protection of databases is not economically justified. There is no empirical evidence that the *sui generis* right has helped to create additional incentives in the production of databases in the EU. The EC released evaluation reports on the impact of the Database Directive in [2005](#) and [2018](#). It found that there was no evidence that the *sui generis* right had

improved EU competitiveness by increasing the production of databases. To the contrary, the presence of the *sui generis* right has produced a confusing legal environment in which users do not know if (or how) their uses are subject to the *sui generis* right. This fact is clearly acknowledged in the 2005 and 2018 evaluation reports of the Directive, both noting that there is no empirical evidence that the *sui generis* right has encouraged growth in the European database industry or significantly contributed to the competitiveness of the EU in the database industry market (especially against the US). In fact, the existence of this right seems to have no influence in the majority of database owners' decision "to invest in collecting and generating data, in setting up the database or in verifying its content" (see fig. 3, 2018 report).

### **The *sui generis* rights hinders open access efforts**

The Database Directive has failed to give database producers that wish to make their databases available on an open access basis the choice to opt out of the *sui generis* protection or a way to communicate conditions for reuse. This has led to some projects (such as [Wikidata](#) and [Europeana](#)) to simply sidestep the right altogether by releasing their data into the public domain using the [CC0 Public Domain Dedication](#), thus neutralising copyright and *sui generis* rights to ensure that their data is freely (re)usable. The most recent iteration of the Creative Commons suite (version 4.0 released in 2013) licenses *sui generis* database rights alongside copyright, but the extent of the use of the 4.0 licenses as a tool primarily to address the *sui generis* right is unclear.

For the above-stated reasons, Creative Commons is of the firm view that the EC should (1) not introduce new exclusive rights over data; (2) repeal the *sui generis* database right and withdraw the right for future cases; and (3) improve access and use of protected databases.

#### 1. No new exclusive rights in data

The Data Act (including a possible review of the Database Directive) must not introduce any new exclusive rights over data. The introduction of the *sui generis* database right has shown that there are no societal or economic benefits in granting new exclusive rights over data. It has also shown how difficult it is to retract new rights even when there is no evidence that they contribute to the objectives that they initially aimed to attain. In line with CJEU case law, databases that are the by-products of the main activity of an organisation must remain outside the scope of the *sui generis* right.

#### 2. Withdrawal of the *sui generis* database right for future cases

The *sui generis* right should be withdrawn for all future cases (grandfathered), since it imposes additional restrictions to the use of data and information without demonstrating any societal benefit. By protecting basic data and information as property, this right essentially creates a barrier to access and reuse. Hence, activities that depend on the availability of data and information, including academic and research activities as well as the activities of GLAMs (galleries, libraries, archives, and museums) are negatively impacted by this additional layer of

rights. The two-tier approach of the Database Directive produces a chilling effect on users, where they simply do not attempt to use databases out of confusion or fear that they may be infringing on a right that is difficult to understand. Uses that are outside the scope of the *sui generis* right are unjustifiably restricted to “lawful users.” Ambiguities around the concept of “lawful user” create legal uncertainty around the interplay with existing exceptions, which are also too restrictive.

### 3. Improve access to databases that are protected under existing *sui generis* rights

Due regard for established or acquired rights is one of the core principles of EU law. Therefore, existing databases should continue to benefit from *sui generis* protection until the expiry of the term of protection established under Article 10(1), subject to the following conditions:

#### **No additional terms of protection**

Article 10(3) should be repealed. The Directive should set a maximum, non-renewable term so that there cannot be perpetual extensions. Substantial changes to databases that have been grandfathered in should not benefit from an additional term of protection, as that would enable such databases to be protected in perpetuity, preventing them from ever entering the public domain. The possibility of continuously renewing a right is a threat to the commons of information and has devastating consequences for the public domain and the innovation that stems therefrom.

#### **Delete the “lawful user” condition from Article 8(1)**

Article 8(1) should be amended. The *sui generis* right only applies to substantial parts of a database. The act of extracting and reusing insubstantial parts of a database is outside the scope of protection of the *sui generis* right. This means that any user — and not only “lawful” users, as foreseen in Article 8(1) — can perform such acts.

#### **Improve the exception regime of the *sui generis* right**

Article 9 should be updated. The *sui generis* exceptions should be expanded and made mandatory. The private use exception in Article 7(a) should not be limited to non-electronic databases. The teaching and scientific research exceptions should cover the acts of reutilization. Member States should be able to apply to the *sui generis* right all the exceptions and limitations contained in Article 5 of the InfoSoc Directive. Furthermore, all the exceptions to the *sui generis* right should be protected from contractual overrides.

#### **Public sector databases should be made freely available for all to use and reuse without restrictions**

Existing databases that were produced in the exercise of public tasks or with recourse to public funds should be available to the public without any restriction.

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