Regulatory Policy Committee

The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2018 - *sui generis* database rights

Department for Business, Energy and Industrial Strategy

RPC rating: fit for purpose

Description of proposal

Sui generis database rights were introduced by the EU database directive in 1996 to prevent the use of or extraction of data from a database without the permission of its creator. They protect any database, the creation of which involved a significant investment of time, money, or effort. The rights exist alongside copyright protection for databases, which were harmonised by the directive. However, copyright protection extends only to any 'original' elements of a database such as the choice of data. The rights have since been extended across all EEA states. The directive was transposed into UK law by the Copyright and Rights in Databases Regulations 1997.

The regulations specify that the *sui generis* right is available only for nationals, residents, and businesses of the EEA. If the UK leaves the EU without an agreement on *sui generis* database rights, these rights would be provided in the UK to EEA nationals, residents, and businesses, but not to UK nationals, residents, and businesses. Amendment of UK law is necessary to ensure that the rights continue to be provided in the UK to those in, or from, the UK and to ensure a level playing field between UK and EU/EEA database creators. The Intellectual Property Office's (IPO's) impact assessment (IA) considers the impact of potential contingency changes to be made to UK law should the UK leave the EU without an agreement on *sui generis* database rights.

The IA considers four options:

- *Status quo* (option 0.1).
- Do nothing (option 0.2).
- Provide new *sui generis* rights to UK databases only and cease to protect new EEA databases but with *sui generis* rights acquired in the UK prior to exit for EEA (including UK) databases maintained (option 1).
- Do not provide any protection for new UK or EEA databases after leaving the EU, i.e.UK law is amended to remove the provision for new *sui generis* rights entirely (option 2).

Option 1 is preferred and is described as providing the greatest continuity and clarity for UK stakeholders - it amends the regulations by replacing references to the EEA or EEA states with the UK. The rest of the regulations would be maintained, such that the scope of protection for new databases is unchanged.

Impacts of proposal

The IPO reviews evidence on the impact of the current *sui generis* database right. This is used to inform the possible impacts of this right being limited to UK databases (option 1) or withdrawn entirely (option 2).

Scope of impact of existing regulations

The IPO describes the impacts of the directive as, in principle, wide-ranging. Databases may be used or created by virtually anyone. Groups that may use databases frequently include academics and other researchers, businesses, governments, libraries, and schools. Initial stakeholder engagement and literature review found that database rights are held by mapping firms (such as Ordnance Survey), the software sector, price comparison sites, London Stock Exchange, other exchanges (those based overseas but developing databases in the UK), trading products based on database rights, sports fixtures services and benchmarking services. It is unknown how many databases are protected by the rights in the UK because databases do not need to be registered to qualify and the Gale Directory of Databases data is not broken down by country. The IPO reports that there is believed to be significant investment in databases by UK businesses; with the geospatial database management system owned by Ordnance Survey, for example, being worth £25 million in 2016.

Nature of impact of existing regulations

Rights holders benefit from the regulations through increased scope of protection across the EU, enabling them to commercialise and market their databases or prevent competitors exploiting their work. It should be noted, however, that the scope of *sui generis* rights often overlaps with that provided by other forms of protection, such as copyright, licensing agreements, and confidentiality, which firms have indicated that they can use to protect their databases. The effect of the right on database consumers is ambiguous. While increased incentives to create databases should affect consumers positively through increased choice, their access to, and use of, those databases is restricted and may require the payment of licencing fees.

The IPO states that there is little quantitative information on how stakeholders are affected by the directive. The most comprehensive assessments of its impact are two European Commission evaluations undertaken in 2005 and 2018. These

involved a public consultation across all member states. It was found that the Directive had harmonised the level of protection for databases across the EU effectively and provided legal clarity, both for copyright and the *sui generis* database right. Responses to the consultations suggested that rights holders valued the right for the extended scope of protection and its legal clarity, though database users – particularly those in academia and research – felt that the directive did not fairly balance their interests with those of right holders. The IPO has drawn on this evidence to conclude that there is, presently, insufficient evidence to support the entire removal of *sui generis* rights (option 2).

Impact of preferred option (option 1)

Benefits

The IPO describes option 1 as maintaining the pre-exit *status quo*, as far as is possible, for UK database creators and consumers in the UK. Databases produced in the UK post-exit will continue to receive the same level of protection in the UK, providing certainty and continuity to creators and users of databases. Databases produced after the UK leaves the EU by those in, or from, the EEA will not be protected in the UK. This could open-up access for UK database users to databases produced in the EEA. It is possible, however, that EEA-based database creators will restrict access to their databases and it is not known, therefore, to what extent database users in the UK will benefit by database rights no longer being offered to EEA creators, if at all. The option should, however, avoid UK industries that create or rely on databases being disadvantaged relative to their EU counterparts.

Costs

Database creators. The primary affected party will be database creators in the EEA, whose ability to commercialise their works in the UK will be weakened. These costs, falling outside the UK, are outside of the scope of the IA.

If no agreement is reached with the EU on continued recognition of the *sui generis* database right between the EU and UK, EEA member states will be under no obligation to protect databases produced by those in the UK post-exit. It is considered likely that member states would, therefore, cease to offer this protection. The loss of this protection would have a negative impact on database creators in the UK, whose ability to commercialise their databases in the EEA, or to prevent EEA-based competitors exploiting their databases, would be weakened. The IPO states, however, that these costs to UK database creators do not arise as a result of the present policy proposal; rather they arise as a result of the UK and EU not providing mutual recognition of *sui generis* database rights.

Database users. The IPO refers to familiarisation costs for UK consumers of EEA databases if the creators of those databases introduce new licensing practices with which UK consumers would need to familiarise themselves. The IPO states that these familiarisation costs may not be trivial if EEA database creators use bespoke licensing arrangements but is unable to estimate this because it would depend on the potential future behaviour of EEA database creators.

The IPO also acknowledges potential costs to UK citizens or businesses that currently buy (or buy exclusive licences to) and exploit the database rights to databases produced elsewhere in the EEA. However, the IPO does not expect this to result in significant costs because it is not aware of any UK businesses that currently engage in this practice and, even if there are, these businesses could still be able to do so if those databases are protected by copyright or by contractual agreements.

Small and micro business assessment

The IA states that database creators of any sort are entitled to receive the *sui generis* right and that, consequently, a significant proportion of rights holders are likely to be small and micro businesses. The IA states that option 1, in maintaining the *status quo* as far as possible, will be of particular benefit to small businesses, who may find it costlier to adapt to changes in the law. The IA states further that 'do nothing' and option 2 could impact disproportionately on small businesses, since database creators use of alternative protection for databases could place a higher burden on them. The IPO describes how it is minimising familiarisation costs to businesses by engaging with stakeholders, publishing 'no deal' technical notices and holding a series of roundtable meetings with industry.

Quality of submission

The IA provides a comparison of the policy options against both the *status quo* and do nothing. This is appropriate and consistent with government guidance on appraisal of EU exit measures. The *status quo* is the appropriate baseline for the assessment of business impacts for better regulation framework purposes; the comparison against do nothing is important in demonstrating the case for the policy option. The IPO has provided a qualitative description of business and wider impacts against these counterfactuals. This assessment is sufficient on the basis that:

- the proposal, in effectively restoring the *status quo* for UK database creators as far as possible, appears to have limited impact on them;

- while the impact on UK users (including businesses) of EEA databases appears potentially more significant, the IA provides a discussion of possible costs and benefits and explains how they would depend on the future behaviour of EEA database creators; and

- estimating numbers of UK database creators and users is particularly difficult given their wide-ranging nature and the lack of available data.

The IPO's assessment would, however, be improved significantly by addressing the following comments.

Indication of the scale of the number of businesses, other organisations and individuals affected

Whilst accepting that the potential wide-ranging nature of impact make robust monetisation more difficult, the IA would benefit from some indication of the likely number of businesses affected or further discussion of why this is not possible or proportionate to provide. The IA refers to "*initial stakeholder engagement and literature review*" and the IA should discuss the potential for further engagement and evidence-gathering in providing useful information on scale of impact and justifying why this has not been undertaken.

Indication of scale of costs/benefits

The IPO describes the overall costs of the policy option as minimal (page 8). Whilst this appears to be a reasonable assessment for UK database creators, the impact on UK consumers of EEA databases seems more uncertain and, for example, the IA states that familiarisation costs "…*may not be trivial*…" (page 2). The IA would benefit from providing further discussion and greater clarity on the scale of impact, particularly on UK markets and UK business consumers of EEA databases.

Monitoring and evaluation plan

The IA would benefit from including a brief outline of how the proposal would be monitored and evaluated This would be helpful to facilitate a proportionate post-implementation review, should this be required.

Small and micro business assessment

The s*mall and micro business assessment* (SaMBA) would be improved by providing some indication of the scale of the number of small and micro businesses affected or explaining why this is not possible or proportionate to provide. The SaMBA should also provide a comparison of the impacts against the *status quo* counterfactual.

Risks and assumptions

The IA states that it is assumed that acquired database rights, i.e. database rights acquired in the EEA (including the UK) prior to the UK leaving the EEA, continue to exist in both the EEA and the UK post-exit. The IA would benefit from explaining why this assumption is reasonable, whether it is negotiation dependent and, if not, exploring the impacts should this assumption not hold.

Impacts of UK and EU not providing mutual recognition of sui generis database rights

The IA discusses, briefly, negative impacts on UK database creators but the assessment appears to be limited because they arise as a result of the UK and EU not providing mutual recognition of *sui generis* database rights, rather than because of the proposal. The IA would benefit from further discussion of impacts on UK businesses, subject to government guidelines on appraisal of EU-exit cases, and explaining where these impacts will be assessed and accounted for elsewhere.

Departmental assessment

Classification	Non-qualifying provision (EU withdrawal)
Equivalent annual net direct cost to business (EANDCB)	N/A
Business net present value	N/A
Societal net present value	N/A

RPC assessment

Classification	Non-qualifying regulatory provision (EU withdrawal)
Small and micro business assessment	Sufficient

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