Six years have passed since Directive 96/9 on the legal protection of databases ("the Directive") was enacted and it is already four years since its implementation deadline. [FN1] The European Commission is now in the process of evaluating the impact of the Directive. [FN2] It is thus an appropriate moment to review how the United Kingdom has implemented the Directive. The subject of this article is to examine whether the United Kingdom has complied with the Directive's definition of a database through its implementation of the Directive. The definition of a database is important for two reasons. The definition of a database is one of the most important aspects that set the boundaries of the protection available for databases. In other words, it is the first "requirement" that excludes some aspects from the scope of the protection. Secondly, the definition, like other aspects of the protection, also strikes the balance between rightholders' rights and users' rights.

To comply with the Directive, the United Kingdom amended its Copyright Act (the Copyright, Designs and Patent Act of 1988 s.3) through the Copyright and Rights in Databases Regulations 1997 [FN3] ("the Regulations"). A close look at sections 3 and 3A of the CDPA as amended by the Regulations, raises a number of so far unanswered questions that may reveal conflicts with the Directive's definition. First, section 3 keeps two separate categories of copyrightable works, namely "tables and compilations" and "databases". The question is whether these are different and if so, in which respect. If they are different, it is also necessary to examine whether their protection differs. Once this is established, there is a further need to assess whether the Database Directive allows for this differentiation in treatment. Secondly, the CDPA does not specify whether a database can qualify as a computer program and/or as other types of protected material (such as broadcast or cable programme). Thirdly, the CDPA on its face, seems to classify databases as literary works and require fixation. This article will analyse whether the CDPA complies with the Directive in these three respects. The conclusion will summarise why the three issues violate the Directive and will make suggestions to remedy them.

The implementation of the Directive by the United Kingdom has peculiarities that do not exist in other Member States. This is mainly because the United Kingdom has had a tradition of protecting works under specified categories and under a low level of originality. Tables and compilations have thus been protected under a specific copyright [FN4] category for years. Two main types of problems created by the implementation of the definition of a database in the United Kingdom can be identified. First, what are the implications of the distinction the CDPA makes between
compilations and tables on the one hand and databases on the other hand? (This will be discussed under the two first sections entitled "Problems Created by Section 3 of the CDPA" and "Conformity of U.K. copyright law with E.C. law as regards the protection of tables and compilations"). Secondly, what are the implications of the inclusion of the word "database" in two separate Articles of the CDPA? (These implications will be discussed in two sections, namely "Other problems arising under the CDPA -- "Protection-Shopping" and Over-protection" and "Problems Arising from Section 3A (1) and (2) as Read with Section 3 (1)").

Problems created by Section 3 CDPA

In order for a work to benefit from copyright protection in the United Kingdom, it has to fit in one of the categories of the CDPA. This is why the U.K. statute has a long list of different categories of works generally accompanied by a definition of what these works are. Before the implementation of the Directive, the relevant parts of section 3 of the CDPA stated:

Section 3: Literary, dramatic and musical works.
3. (1) In this Part
"literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes
(a) a table or compilation,
(b) a computer program ...

Compilations and tables were already protected as literary works under the previous versions of the Copyright Act and there have been quite a great number of decisions. [FN5] If something could fit into the category "table or compilation" and was original, i.e. had not been copied and displayed sufficient skill, judgment and labour, it was protected.

The current relevant parts of sections 3 and 3A read as follows:

Section 3: Literary, dramatic and musical works.
3.-(1) In this Part
"literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes
(a) a table or compilation other than a database,
(b) a computer program; and
(c) preparatory design material for a computer program; and
(d) a database ...

Section 3A: Databases
3A.-(1) In this Part "database" means a collection of independent works, data or other materials which--
(a) are arranged in a systematic or methodical way, and
(b) are individually accessible by electronic or other means.
(2) For the purposes of this Part, a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation.

It has been suggested that if tables and compilations were retained in the CDPA in a separate category, it is because they are different from databases as defined in the Directive and subsequently implemented in section 3A (1) of the CDPA. [FN6] First, section 3 (1) (d) simply means that databases are literary works. Secondly, section 3 (1) (a) would mean that compilations and tables which do not fit the database definition in section 3A of the CDPA, are literary works protected under traditional U.K. copyright. [FN7] This seems a logical consequence from the structure and wording of the statute. Indeed, why would the British legislator have kept the three different concepts if it did not wish to make a distinction between them? The first question is whether there are differences between compilations and tables on the one hand and databases on the other. [FN8] If there are none, the CDPA should be revised by deleting section 3 (1) (a) and (d). If there are, then a second question is whether tables and compilations can still remain protected under traditional U.K. copyright without violating the Directive.
Differences between tables, compilations and databases

To discover whether there are differences between databases, tables and compilations, the meaning of "table" and of "compilation" must be first determined. While there is a legal definition of "database", tables and compilations are not defined in the CDPA. It has been said that "'table' implies the inclusion of tabulations of facts or data and other non-works with an element of selection or arrangement; 'compilation' implies elements of selection or arrangement or both". [FN9] A table is defined by the Oxford English Dictionary as "a tabulated arrangement or statement. An arrangement of numbers, words, or items of any kind, in a definite and compact form, so as to exhibit some set of facts or relations in a distinct and comprehensive way, for convenience of study, reference, or calculation ...". [FN10] The definition of a compilation can be broadly summarised as follows: a (written) work made out of already existing materials or materials originating from other places. [FN11] First, it seems that the concepts of table and compilation do not exactly mean the same. There is room to argue that there is a difference between a table and a compilation whereas the first is more functional than the second. The difference would be that a compilation does not in all cases need to be arranged as long as there is some selection (e.g. an unarranged selection of poems) whereas a table always needs to be arranged. It has been decided that subject-matter which would be random or have no meaning, cannot be a literary work, as it needs to be understood at least by a class of persons. [FN12] It is possible that an unarranged compilation of selected poems can be understood by at least a class of people. There is no need of a particular arrangement of the poems in order for them to be read and understood. It is submitted that, for tables at least, there is a need for arrangement. Selection is not sufficient. What would be the use of a table if it were not arranged in some way? Nobody could use it. If it is not arranged, it is doubtful it would be called a table, but it could perhaps be seen as a compilation or an artistic work. Thus it is submitted that there is a difference between tables and compilations.

In order for a table or a compilation not to be a database but still be protected under the CDPA, it would have to miss at least one of the three conditions of the Directive's definition: independence, systematic or methodical arrangement and individual accessibility of the elements. If a table or a compilation fulfils the three conditions, it automatically falls under the category of a database. [FN13] What could these "non-database"-tables or compilations be? It is possible to identify seven possibilities of "non-databases" which nonetheless may continue to be protected as tables or compilations under the CDPA. These possibilities are expressed in Figure 1. [FN14]

Figure 1: Possibilities of non-database tables

<table>
<thead>
<tr>
<th>Independent accessible</th>
<th>Systematically or methodically arranged</th>
<th>Individually arranged</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 NO</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>2 NO</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>3 YES</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>4 NO</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>5 YES</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>6 NO</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>
In other (slightly more complicated) words,
--"tables and compilations which are collections of works, data or other materials not themselves being mutually independent"; [poss. 6]
--"collections of works, data or other materials, whether mutually dependent or independent, which are not arranged in a systematic or methodical way; and" [poss. 2, 3, 7]
--"collections of works, data and other materials, whether or not mutually dependent or independent and whether or not arranged in a systematic or methodical way but which are not individually accessible by electronic or other means". [FN15] [poss. 1, 3, 4, 5]
For the purpose of the demonstration, it is sufficient to review only examples of tables or compilations where only one element is missing. If all three elements are missing, it is submitted it would be extremely difficult to classify something as a compilation or a table. This is explained by the lack of the fundamental element: systematic or methodical arrangement.

Lack of systematic or methodical arrangement

To begin with, neither the Directive nor its Recitals does give a definition of "systematic or methodical arrangement", independence or individual accessibility. Nor does the CDPA. It is not the subject of this article to examine these requirements in detail. [FN16] For the purposes of this article, it is sufficient to summarise in a few words what these requirements mean.

The systematic or methodical arrangement requirement is a low standard [FN17] (meaning that it will only exclude haphazard collections [FN18]) and should be read broadly. [FN19] Therefore any type of arrangement as long as understood by a class of persons (e.g. skilled in the art) is systematic or methodical. It is difficult to see how an arrangement can be sufficiently understandable by at least a class of persons if it lacks some sort of system or method. If on the one hand, a compilation were to miss the systematic or methodical arrangement criterion, it could be a collection of independent materials individually accessible by electronic or other means. It has been suggested that a long shopping list (whether on paper or electronic medium) with the individual grocery items entered in no particular order could be such a table or compilation. [FN20] However, this could not be a table because it would not be arranged but it could perhaps be seen as a compilation as long as the elements were selected. It is, on the other hand, difficult to find a concrete example of a table lacking system or method.

In sum, in theory, highly personal (not explained to others by its compiler) arranged lists of information could possibly be protected as a compilation if they fulfil the skill, judgment and labour criterion. Alternatively or additionally, as some would only make sense for one individual or a few individuals, they could possibly be treated or seen as artistic works by others and protected as such under the CDPA.

If the table or compilation lacks either of the two other criteria (independence or individual accessibility), it is easier to find examples which could definitely fit in these categories and be protected as such under the CDPA.

Lack of independence of the elements

To summarise, "independent" means that an element makes sense by itself; its meaning does not depend on another element, another piece of information. It would not be information if it did not make sense by itself. In addition, Recital 17 makes clear that recordings, audiovisual, cinematographic, literary or musical works as such cannot be seen as databases because their components are not independent. If only the criterion of independence was missing, examples of what could be
protected as a table or compilation include (stock price) information which is dependent on the information from which it is calculated [FN21] (for example figures in a Microsoft Excel Spreadsheet). It is submitted that a collection containing only information which is interdependent or a sufficient percentage of it (i.e. more than 50 per cent) could be seen as a table or compilation in U.K. copyright law. Another illustration could perhaps be a table of contents. If one takes out one or more elements of a table of contents, say of a book, the table of contents no longer makes sense. Even if it is not in itself a story, there is a sequential flow, there is a beginning and an end to a table of contents. It is more or less linear. It is difficult to imagine that the table would still make sense if some of its elements were withdrawn from it. It can very well be argued that the elements are interdependent or in any case, most of them. In this sense, a table of contents can be distinguished from an index or a bibliography. Thus tables of contents or lists of interdependent numbers or figures would be classified as tables or compilations.

Lack of individual accessibility of the elements

Finally, the requirement of individual accessibility could be missing. It is quite obscure what exactly the Directive means by this requirement. There is also controversy in the literature as to whether this term is actually a synonym of "independence" or means something else and therefore adds a condition for a database to exist. [FN22] A few speculations as to its meaning can be made. The requirement could mean that elements cannot be "tied-in". So, if the only element that was missing was individual accessibility, a compilation or table could exist if the compiler or author of the table would tie-in elements together so that the user could only access one element together with others. As an example, one could imagine a compilation in electronic form where if the user asked the software to retrieve a particular item, the item could only be retrieved together with other items. [FN23]

The requirement of individual accessibility could also mean that the (reasonable) user is to be able to access the items in the database within a reasonable amount of time or at reasonable cost. Then if the number of items is so great or if the systematic or methodical arrangement is not practical (e.g. a museum collection only organised by chronological date of the museum's acquisition of each item), each item will not be individually accessible because the user must spend a considerable amount of time or endure considerable costs to find a particular item. [FN24] In that case, the collection will be a table or compilation. These hypotheses as to the meaning of the requirement only stand if this is the meaning to be attributed to the term "individually accessible" in the Directive.

Conclusion

In conclusion, there will be very few (if any), tables or compilations lacking the systematic or methodical arrangement criterion for the reasons discussed above. Thus possibilities 1, 2, 3 and 7 will rarely be classified as tables or compilations. If Figure 1 is taken as an example, a "table" or "compilation" under possibility number seven could be expressed as follows in Figure 2. [FN25]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

However there could still be tables or compilations under possibilities 4, 5 and 6, such as the examples given above.

Conformity of U.K. Copyright Law with E.C. Law as Regards the Protection of Tables and Compilations

The second question can thus be tackled: does the Directive allow for such tables or compilations to remain protected under copyright law? It is true that on its face, the Directive does not prevent any country from protecting by copyright law works which do not fit in the Directive's definition. [FN26] This is mainly because the Directive does not explicitly provide that the protection is exclusive of any other protection under copyright or other right of subject- matter which does not fit in the definition of a database but is close to it (i.e. "neardatabases" such as tables and compilations).
Even if the definition was meant to be broad, [FN27] it seems that on a literal construction of the text, the Directive does leave out of its scope tables and compilations such as those described above. The reason of this situation is perhaps that the drafters thought that the definition was broad enough to encompass all such works that could be protected under the Member States copyright laws or in other words did not envisage that there could be any other type of "database" that could not fit their definition. However it is submitted that this literal interpretation of the Directive is absurd. A close look at the Recitals and the preparatory materials shows a more rational interpretation is to be followed. The first four Recitals, together with Recital 13 (the Directive protects collections, sometimes called "compilations") and 52 are strong evidence in favour of the aim of total harmonisation as regards the definition of the subject-matter. [FN28]

The aim of the Directive was to harmonise the protection of databases in the Member States, because the then current protection differed in the several states and in some, it was not sufficient (Recital 1). This created direct negative effects on the functioning of the internal market which would be reinforced if states were independently to introduce new legislation in this area (Recital 2). The differences had to be removed and new differences had to be avoided, while those differences which did not affect the functioning of the internal market could be left untouched (Recital 3). This is again restated in Recital 4. This harmonisation purpose was already iterated markedly throughout the Explanatory Memorandum. [FN29] The high number of Recitals and the repetition of the same idea over and over especially at the beginning of the Directive is striking. Clearly the aim was to remove any possibility of having different laws in this area that would affect the functioning of the internal market (the laws were thought to have such an effect, e.g. the protection of databases was stronger or easier in the United Kingdom because of its low originality criterion [FN30]). Finally although Recital 52 states that Member States having a right close to the sui generis right can retain existing exceptions it does not mean that they can continue protecting subject-matter other than databases through this type of right.

Behind the question of full harmonisation for all compilations and collections by the Directive, lies the heavy shadow of originality defined in the Directive as "the author's own intellectual creation". It has been argued that original collections cannot fit in the database definition because the criterion of systematic or methodical arrangement excludes any originality and thus, such collections or compilations are still protected under traditional national copyright laws. [FN31] As the author understands it, this finding entails that there would be three categories of subject-matter: purely "sui *471 generis-protected" databases (i.e. databases that respect all the requirements of the definition and are not original), original collections which do not fulfil the criteria of the definition of a database because they miss the systematic or methodical arrangement and tables/compilations (i.e. subject-matter which does not fulfil the criteria of the definition of a database because they miss one or more criteria (except the criterion of systematic or methodical arrangement)). This submission clashes with the Directive's intention to harmonise copyright also for databases which are original. This finding would mean that as regards copyright, the Directive misses out on because no database could ever be copyright (because of the systematic or methodical arrangement criterion). It cannot be so. There will be, even if only a few, original databases. [FN32] There are thus two possibilities of interpreting the Directive and the intention of the Community legislator. Either the combined reading of the criterion of systematic or methodical arrangement and the provisions on copyright including especially the harmonisation of the originality criterion means that (1) the Directive has harmonised the law only for non-original databases (i.e. purely "sui generis- protected" databases) or that (2) the Directive has subtly harmonised the law as regards the originality criterion for all collections (be they databases or not in the sense of the Directive).

On a rational interpretation of the Directive, the second interpretation must be preferred. If the first interpretation were to be chosen (i.e. the Directive were to be construed to have only harmonised the law as regards databases and not all collections or compilations in general), it would have the following absurd consequence. The Directive would not have harmonised anything. The copyright provisions of the Directive would be useless, as if they did not exist. The United
Kingdom would not need the sui generis right at all because all original (in the U.K. sense of the word) "non-databases" collections can benefit from traditional U.K. copyright law. But, because the Directive is implemented in the United Kingdom, both the sui generis right and the copyright sensu stricto (s.s.) nevertheless co-exist. So under U.K. law, shrewd rightholders could choose to apply the provisions either of the database right or of copyright as they please (i.e. when the provisions of one or the other law is more favourable to them) and vice versa on the user side. This is mainly because the application of the three criteria of a database is often problematic owing to their vague meaning. The distinction between databases and non-databases can in practice be difficult to make. Obviously, if the Directive has this consequence, it does not achieve its harmonisation goal. Even if it could be said that the Community legislator did not intend to harmonise over and above the strict boundaries of the definition itself, and consequently left the United Kingdom with its copyright on tables and compilations, it is absurd because the result is that the free movement of goods and services (that Art. 95 of the Treaty of Rome favours through the enactment of harmonisation directives) is not achieved.

Notwithstanding this second preferred interpretation of the Directive, the inexplicit way that the Directive expresses itself has resulted in the United Kingdom following the opposite direction. The end-result is that U.K. copyright law still provides for the copyright protection of tables and compilations other than databases, be they computer-generated or not, [FN33] as long as they show enough skill, judgment and labour. It has been argued that it is a policy issue whether "it is desirable for the United Kingdom to continue to recognise literary work copyright protection for collections which are not databases in terms of the Directive's definition". [FN34] As shown, this "policy issue" should not even arise as the Directive's definition should be all-encompassing.

It is submitted that the CDPA should be revised to withdraw copyright s.s. protection for tables and compilations for the following reasons. First, the current situation is arguably against the Directive's total harmonisation goal. A revision would put the United Kingdom in line with the other Member States. [FN35] Secondly, British copyright law is still stronger than the sui generis right in its most important features: the protection is longer and the criterion of originality easy to fulfil, arguably easier than the database right's substantial investment criterion. The result is that works less sophisticated than databases (where one or more of the three definition conditions are missing) would be protected with generally less effort. This is arguably against the aims of the Directive. Even if it can be argued it is not against the aims of the Directive, then it cannot be denied that the Directive does not achieve harmonisation. The only way to clarify the issue fully would be to take a new Directive to clarify the matter.

Other Problems Arising under the CDPA---"Protection-shopping" and Overprotection

Databases can also fall under other categories as provided in the CDPA. [FN36] These classifications add up to *472 the protection already provided for in the Directive. [FN37] Online database services could be cable programmes, because they are services which consist wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system (other than by wireless telegraphy) for reception at two or more places or for presentation to members of the public (s. 7 (1) of the CDPA). [FN38] Although originally this provision did not target online databases, now that those databases are defined by the Directive, they could fall into this category. [FN39] Databases transmitted by wireless means (for example through a mobile phone connection or satellite TV, such as sports results from a ticker or stock market information) could also be protected as broadcasts (s. 6 of the CDPA). A database could arguably also qualify as a recording under section 5A because a recording could be a collection of independent (series of) sounds [FN40] arranged in a systematic or methodical way and individually accessible.

To these categories, one can also add the possible copyright protection of the database or parts of it as a computer program. [FN41] As regards computer programs, this problem of choice or overlap is reinforced by the fact that computer
programs still enjoy the lower standard of originality, as the higher standard of the "author's own intellectual creation" has not been implemented in the United Kingdom (and this, contrary to European law [FN42]).

These classifications entail important consequences: if those databases can be protected under copyright law, the duration is longer, the rights and exceptions are different than under the Directive, etc. In short the regime of protection is different. Databases such as Westlaw or Lexis-Nexis for example, as they are online, benefit from the protection both from copyright law and the database right as a cable programme service and a database. If they are sent through a satellite or a mobile device, they will benefit from the copyright law and the database right as a broadcast and a database.

This overlap obviously creates problems and legal uncertainty. Even if as regards broadcasts the subject-matter which is protected is only the signal and thus there is in principle no overlap with its content (i.e. the database), it remains that in the other cases (qualification as a database, computer program, recording and cable programme), there would be overlap as regards the subject-matter. What regime applies if something can be classified as a cable programme, a recording, a computer program and a database? Would it be copyright (sweat of the brow, duration of 50 or 70 years after life, etc.) or database right (necessity of substantial investment, 15 years duration (renewable), less exceptions, etc.) or both?

A rational construction of the CDPA would be to exclude the protection of a database under sections 5A, 6 and 7 if it qualifies as a database under section 3A, thus not allowing cumulative protection and avoiding problems of clashes of protection. Unfortunately, on its face, the CDPA does not suggest a clear solution in either direction. The cases which have been decided concerning the classification of works in different categories, although not precisely in the hypotheses described above, do not clear the matter either. In cases involving circuit diagrams, High Court judges have decided in divergent directions, thus leaving the question uncertain. In Anacon Corporation v. Environmental Research Technology, [FN43] Jacob J. suggested that a circuit diagram was both a literary and an artistic work. In Aubrey Max Sandman v. Panasonic U.K. Ltd, [FN44] Pumfrey J. agreed with Jacob J. On the other hand, in Electronic Techniques (Anglia) Ltd v. Critchley Components Ltd, [FN45] Laddie J. decided that the same creative effort could not qualify under two copyright categories. Finally, in Norowzian v. Arks, [FN46] the Court of Appeal stated that a film can sometimes be a dramatic work. However, the decision leaves the question open whether it allows more overlaps or only this particular one. As the law stands now, it is far from clear whether a work (except those expressly excluded, see n. 36 above) can qualify in two or more categories. The CDPA is unclear, and the case law and the literature are in disagreement about the issue. [FN47]

It is submitted that even if it is theoretically conceivable to protect one subject-matter by two regimes, this issue cannot technically and in reality stand [FN48]: the Directive was adopted to harmonise the law, not to keep or create further complications. The principle of "Lex specialis generalibus derogat" [FN49] must apply. The Directive considers databases as a distinct category with distinct rules. [FN50] Perhaps the most appropriate way of dealing with this issue is to adopt Laddie J.'s ruling, which states that although different copyrights can protect simultaneously a particular product and an author can produce more *473 than one copyright work during the course of a single episode of creative effort, it is quite another thing to say that a single piece of work by an author gives rise to two or more copyrights in respect of the same creative effort. In some cases the borderline between one category of copyright work and another may be difficult to define, but that does not justify giving to the author protection in both categories. In the case of a borderline work, I think there are compelling arguments that the author must be confined to one or other of the possible categories. The proper category is that which most nearly suits the characteristics of the work in issue. [FN51]

As regards computer programs, an answer can be given. Even if the United Kingdom has not explicitly implemented Article 1.3. of the Directive, it does not really matter as U.K. law must be read in conformity with the Directive. Thus databases could not be protected under software copyright other than what the interpretation of the
Directive allows. [FN52] In this regard, if the CDPA were interpreted by courts as protecting computer programs used in the making or operation of a database under database right or database copyright, it would be contrary to the Directive and thus to European law. [FN53] Despite this, precedents show that British courts have already flirted with the idea of protecting a computer program by database right ... [FN54] In conclusion, the current state of the law is that collections and databases can be qualified under different headings in the CDPA as different types of work (database, broadcast, cable programme, recording, computer program). First, the CDPA makes it possible to choose between copyright (s.s.) (other than copyright for a database) and sui generis right protection. This is because of the practical difficulty to draw a fine line between the definition of a table/compilation and a database. Additionally, if a database is not creative as to qualify under the new copyright provisions for databases, then it can be protected under broadcast etc. Secondly, it is possible to choose inside copyright protection which category suits the right holder or user best or even combine copyright protection under different categories. In other words, there are choices and additions of protection at two different levels (at the level of the specific type of right and at the level of copyright, inside the different categories). It is possible to choose between different types of rights (copyright s.s. and database right) and between different copyright s.s. categories as well as it is possible to add different types of rights and add the protection of different copyright s.s. categories. This does not only create (potential?) overprotection but also complexity and high legal uncertainty. Whereas it is reassuring to see the first British decision considering the database right state that U.K. law complies with the Directive and thereupon only apply the Directive, [FN55] it is nonetheless not sufficient to eliminate this "protection-shopping". This cannot be what the Community legislator intended. Perhaps as a final note, owing to the overall uncertainty in both the Act and the case law in this regard, the legislature could decide to clarify this issue in a more general way for all copyright categories of works. [FN56]

Problems Arising from Section 3A (1) and (2) as Read with Section 3 (1)

Sections 3 (1) and 3A raise another problem: can databases only be literary works and as a result, do they need to be fixed in order to be copyright protected, and if so, is this contrary to the Directive? While it can be said without much doubt that there is no major difference between the definition of a database in section 3A and the Directive, so that the wording of section 3A in itself should comply with the Directive, the U.K. implementation arising from the combination of section 3 and section 3A arguably conflicts with the Directive. The approach taken by the British legislator was to preserve the status quo as much as possible [FN57] but in doing so, it has actually created problems. Section 3 is entitled "Literary, dramatic and musical works". Section 3A is not entitled "literary works" but simply "databases". Does this mean that databases are however included in the category of literary works? The answer is most probably affirmative because as it is included in the definition of a literary work in section 3 (1) (d), a "database" is a type of literary work. [FN58] This is so despite the fact that the definition, similar to the Database definition, can include on its face any type of material (be it literary or not). Section 3A is the definition of database, term and type of work which is itself included in section 3. Section 3A (2) seems to confirm this. Thus all databases must fit in the concept of literary work and must be written, spoken or sung. While databases of pure information will generally be written even in numbers and symbols so that they can qualify as literary works, this means that in the United Kingdom no databases can consist for instance of artistic, dramatic or musical *474 works, or be mixed: i.e. composed of less than a majority of literary works and the rest of artistic, musical or dramatic works. [FN59] In short, there cannot be non-literary databases. Under the Directive, however, [FN60] databases can be literary works, but can also be works composed of artistic or musical works only; in brief, they can be composed of any type of work or material. If the meaning of the CDPA is that non-literary databases cannot benefit from copyright law protection, it contradicts the Directive. On the other hand, if the opposite construction is sustained (databases can consist, e.g., also of artistic and musical works), then a conflict with the Directive arises
because of the criterion of originality. Because of section 3A (2), only literary databases would need to reach the "intellectual creation" originality criterion. That would mean that non-literary database works remain protected if they show skill, judgment and labour and not the author’s intellectual creation. Hence this would breach the Directive because the latter does not make a distinction between literary and non-literary databases: the "author’s own intellectual creation" criterion applies to both.

If, as in the first interpretation, databases could only be literary works under the CDPA, they would also need to be fixed in order to be protected. Although the Directive is not explicit as to whether protection exists in verbal form, the interpretation of "any form" suggests strongly that they are. This would mean that the United Kingdom would in the two hypotheses breach the Directive. In the first hypothesis, although the United Kingdom would respect the originality criterion, it would not respect the inclusion of all types of databases nor the absence of fixation requirement. In the second hypothesis, although the United Kingdom would respect the fact that any database including non-literary databases can be protected and that a database does not need to be fixed (because the Directive does not require fixation and it is not clear in the United Kingdom), the CDPA would still not be conform to the European originality criterion for those non-literary databases.

Conclusion

The incompatibilities drawn from this analysis of the CDPA after implementation of the Directive can be summarised and suggestions to remove these incompatibilities can be made as follows:

(1) The CDPA contradicts the Directive because it keeps the compilation/table category. Compilations and tables can still be protected under the traditional British copyright originality standard whereas the Directive sought to harmonise the law regarding all compilations of information. The solution would be to remove copyright s.s. protection for tables and compilations (i.e. delete s. 3 (1) (a)) and install droit d’auteur originality for those tables or compilations which do not fit into the database definition without classifying them into a predefined category.

(2) By not specifying that a database cannot be classified as a computer program (at least those used in the making or operation of a database), a recording, a broadcast or a cable programme service, the CDPA potentially leaves the door open to protection-shopping and overprotection by way of possible double or triple classification and regime for databases. This situation is further complicating the law and it is unnecessary and over-protective. The CDPA should be revised as to exclude cumulative protection of a database under section 3A and alternatively sections 5A, 6 and 7 following the principle of "Lex specialis generalibus derogat". A solution would be to include a section stating that if something can be classified as a database it will only be protected under that category and (to avoid any doubt) not under any other category, such as recording, cable programme service, broadcast or computer program (at least those used in the making or operation of a database). Databases should be seen as a category à part, a new category of works (if it should be a category at all ...) dealt with under section 3A.

(3) The interpretation of the CDPA reveals that it most probably categorises databases as literary works and requires fixation. This conflicts with the Directive. Even if such a construction is not correct, U.K. law would nevertheless protect non-literary databases under its lower originality threshold, i.e. skill, judgment and labour. This is inconsistent with the Directive too. Section 3 (1) (d) and the words "a literary work consisting of" in section 3A (2) should be deleted. The British legislator should modify the CDPA to remove these ambiguities and contradictions with European law. A great opportunity could be readily seized (if this is not already too late) as this could be done when implementing the Copyright Directive. [FN61]

FN This article is based on a paper the author gave at a conference in London in March 2002 at the British Association of Canadian Studies ("BACS") Legal Studies Group, International One Day Conference on "Rights in Information: Canadian and UK
Perspectives". She wishes to thank Simon Hughes for his careful reading and comments on an earlier version of this article. Her thanks also go to Lionel Bently and Jonathan Griffiths for their helpful observations after giving the talk. All potential mistakes remain the author's.


FN2. The report as required by Art. 16.3 of the Directive should be released this year by the Commission.

FN3. Copyright and Rights in Databases Regulations 1997, No. 3032, December 18, 1997, in force January 1, 1998. The Regulations provide for the sui generis right for databases under the name "database right".

FN4. Unless otherwise specified, the word "copyright" will be used in its broadest sense (sensu largo, "s.l."), referring to intellectual property in the restricted sense of literary and artistic property (as opposed to other kinds of intellectual property rights (such as patents, trade marks etc.)). In this sense it will encompass both copyright sensu stricto, "s.s." (common law system) and author's right or "droit d'auteur" (civil law system).


FN7. By "traditional U.K. copyright", it is meant that works are protected under the skill, judgment and labour criterion as opposed to the "intellectual creation" criterion.


FN9. Chalton, n. 6 above, at 278-279. See also K. Garnett, J. James and G. Davies, Copinger and Skone James on Copyright (14th ed., 1999) p. 65, 3-18; P. Torremans, n. 8 above, p. 183. Contra: For H. Laddie, P. Prescott, M. Vitoria, A. Speck and L. Lane, The Modern Law of Copyright and Designs (3rd ed., 2000) p. 1065, 30-22, a compilation does not need to be arranged. They submit, however, that the effect of such an interpretation of the CDPA was obviously not intended by the Community legislator and if it were to be interpreted that way in the United Kingdom, the ECJ could very well arrive at the opposite conclusion.

FN10. See www.oed.com last visited February 20, 2002: the dictionary goes on stating: "Now chiefly applied to an arrangement in columns and lines occupying a
single page or sheet, as the multiplication table, tables of weights and measures, a table of logarithms, astronomical tables, insurance tables, timetables, etc. But formerly sometimes merely: an orderly arrangement of particulars, a list.--b. absol. = table of contents (content n. 2b): a concise and orderly list of contents, or an index ....--c. A statement of particulars or details in a concise form, so as to be exhibited at one view, as in a broadside; a synoptical statement; a document embodying such a statement ... A sketch, plan, scheme." It is also defined as "a collection of numerical data presented in a way that it can be easily consulted (demographic table, logarithmic table) or an inventory presented in the form of a list or board and recapitulating a collection of information (genealogical table, table of contents)". See Le Petit Larousse Illustre 1999 (1998) (translation by the author).

FN11. See e.g. the Oxford English Dictionary, prepared by J.A. Simpson and E. Weiner (2nd ed., 1989): Compile: To put together, collect. 1. With reference to literary work and the like. 1. To collect and put together (materials), so as to form a treatise; to collect into a volume. 2. To make, compose or construct (a written or printed work) by arrangement of materials collected from various sources. 3. To compose as original work (esp. a work of definite form or structure, e.g. a sonnet) ...

FN12. See D.P. Anderson v. Lieber Code Company [1917] 2 K.B. 469; see also Apple Computer v. Computer Edge [1984] F.S.R. 481 at 495 Fed. Ct Australia, which held that a work which is written but has not intelligible meaning (to anyone) cannot be a literary work.

FN13. Contra: Torremans, n. 8 above, p. 185, who argues that the criterion of originality is included in the definition. He thus concludes that a subject-matter that fulfills the three requirements can be protected as a compilation or table by sweat of the brow.

FN14. Compiled by the author. This table of possible non-data-bases is actually a database: the intangible elements are independent (this is the seven lines from each other, not the 21 elements as such), are arranged in a systematic or methodical way and are individually accessible by the eye. Substantial investment and originality are separate issues not considered here.

FN15. Chalton, n. 6 above, p. 280.


FN17. Laddie, Prescott, Vitoria, Speck and Lane, n. 9 above, p. 1065, 30-21.


FN19. G. Lea, paper handed at a lecture of the Digital Millennium course, as part of the LLM at Queen Mary, University of London, (2000-2001), on file with the author.

FN20. Lea, n. 19 above.

FN21. Chalton, n. 6 above, at 280: examples of works, data or other materials which are not mutually independent might include successive and related records of sales and purchases of marketable securities which are computer-generated.

FN22. V. Bouganim, "The legal protection of databases, from copyright to dataright", thesis submitted to Queen Mary and West-field College, University of London (1999),
at 65; P. Gaudrat, "Droit des nouvelles technologies"(1998) 51/3 R.T.D. Com. 603: "if the elements do not stay independent in the base (even if they are organised), it is not possible to access them individually, which is another criterion of existence of the base".

FN23. For instance, an article only retrievable together with a picture or an advertisement embedded in it whereby the picture or advertisement bears no relation to the article, or one song only retrievable together with another song.


FN25. Compiled by the author. In this example, there is no software which would arrange the data/information in order for it to make sense as in the compiled table represented in Figure 1.

FN26. See e.g. Chalton, n. 6 above, at 279, stating that the Directive does not, in principle, prevent the CDPA from continuing to protect, as literary works under the United Kingdom's copyright law, tables and compilations (computer-generated or not) which do not conform to the Directive's definition of a database. M. Leistner, Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht, Eine untersuchung zur Rechtlinie 96/9/EG und zu ihrer Umsetzung in das deutsche Urheberrechtsgesetz (2000), p. 54, seems to agree that the definition allows the United Kingdom and Ireland to retain their copyright for compilations which are not arranged in a systematic or methodical way.


FN28. This is so even if Recital 13 cannot be read without the further descriptive Recital 17. Contra: Chalton n. 6 above, at 279: "The Directive is not concerned with collections, or other literary works or productions, as such but only with collections which fall within the Directive's definition of a database. This may be an important distinction in relation to computer-generated tabulations of, for example, related stock market transaction data which may be protected by copyright as tables under the CDPA but not as databases under the Directive."


FN30. Even if this is not written in black and white in Recital 1, it is the idea behind it and this was expressed in very explicit terms in the Opinion of the Economic and Social Committee on the Proposal for a Council Directive on the Legal Protection of Databases of the Economic and Social Committee, adopted on November 24, 1992, C/19/02, January 25, 1993, under 1. Summary of the Commission's Proposal (point 1.2.).


FN32. Systematic or methodical does not equate to banal. Something highly personal
hence original can be systematic or methodical.

FN33. ss. 9 (3) and 178 of the CDPA.

FN34. Chalton, n. 6 above, at 279.

FN35. Most Member States are of droit d'auteur tradition (even the Scandinavian states, which still have the catalogue rule and the Netherlands, the 'geschriften bescherming'). Since the new Act (Copyright and Related Rights Act 2000), Irish copyright law further departs from British law to resemble more droit d'auteur countries or at least the Directive in this regard. For instance, a "literary work" is defined in s. 2 as not including an original database, while "work" includes an original database. So an original database is not categorised as a literary work but is a category in itself. In addition, the criterion of originality is now set in the statute (as opposed to the CDPA). See also s. 17 (2) (a) and (d), 83 and Part V (s. 320 et seq.) of the Act. Perhaps the most striking feature it still shares with U.K. law is the requirement of fixation, which is explicitly expressed for original databases in s. 18.

FN36. See e.g. Garnett, James and Davies, n. 9 above, chap. 3--Requirements for Copyright Protection, 2. Subject Matter of Protection, A. Introduction: Copyright Works at n. 3-04, B. Literary Works (ii)--Literary works in general at 3-07 and C. Dramatic Works (ii)--Under the 1988 Act at 3-23: Mutual exclusivity of categories. Whereas some categories of works are mutually exclusive (e.g. a literary work cannot be a dramatic or musical work, and a photograph cannot also be part of a film), there are works which can fall in several categories.

FN37. Bouganim, n. 22 above, p. 143.

FN38. See Dun & Bradstreet v. Typesetting Facilities [1992] F.S.R. 320. Traditionally, cable programmes exclude interactive systems. However, since the Shetland Times case [1997] F.S.R. 604, it is not so clear which types of online cable programmes are excluded. Certainly, on the basis of this case, databases such as Westlaw and Lexis-Nexis could qualify as the user does not add or modify the information provided. See Bently and Sherman, n. 8 above, p. 76.

FN39. For an analysis, see Bouganim, n. 22 above, pp. 139-144; C. Tapper, "Copyright in databases" (1986) C.L.&P. 20.

FN40. Note that Recital 19 makes it a principle that compilations of several recordings of musical performances on a CD are not within the scope of the Directive. But it does not exclude CDs consisting of tracks, each of them being a recording of a series of sounds (e.g. a CD consisting of several tracks of bird songs or train whistles).

FN41. Bently and Sherman, n. 8 above, p. 58, are of the opinion that it seems possible for parts of computer programs to be protected by the sui generis right.

FN42. See e.g. Torremans, n. 8 above, pp. 185-186.


FN47. As regards the possibility to classify a work as a dramatic work and a film, see the conflicting views of I. Stamatoudi, 'Joy' for the claimant: can a film also be protected as a dramatic work" [2000] I.P.Q. 117 and R. Arnold, "Joy: A Reply" [2001] I.P.Q. 10 both discussing the Norowzian case.
FN48. See e.g. Stamatoudi, n. 47 above, who opines that a film should not qualify as a dramatic work.

FN49. A specific legal provision overrides general legal provisions.

FN50. Bouganim, n. 22 above, pp. 148-149.


FN52. Contra: Chalton, n. 26, above.


FN54. See John Richardson Computers Ltd v. Flanders [1993] F.S.R. 497, esp. at 521, 541, 549, 557, 558 (even if this case only applied compilation copyright to parts of software running databases, but not yet database right as it did not then exist, it showed a willingness to do so); Mars UK Ltd v. Teknowledge Ltd, Ch. D. [2000] E.C.D.R. 99 (June 11, 1999) found that Mars's database rights in its computer programs had been infringed. "One of the difficulties with the decision in the Mars case is that the defendant conceded that it had infringed the database rights of the plaintiff and relied upon an alleged common law defence to justify its actions. The court refused to acknowledge the existence of that defence and hence found for the plaintiff" (Davison, n. 27 above, p. 86). The issue of protection of a computer program by a database was therefore not discussed in detail. This case illustrates the confusion as to whether the law as regards databases also protects computer programs.


FN58. Bently and Sherman, n. 8 above, p. 58.

FN59. Currently these tables or compilations cannot be composed exclusively or mainly of artistic works (because they are not written). A. Monotti, "The Extent of Copyright Protection for Compilations of Artistic Works", [1993] E.I.P.R. 161. She adds that the definition of musical work seems broad enough to encompass compilations, mainly because such works can be expressed in music notes (ibid., n. 75). See also Torremans, n. 8 above, p. 180. Contra: Bently and Sherman, n. 8, above, p. 59, think however, that it seems unavoidable, in view of the definition of a database that compilations of artistic works or sound recordings will be protected as literary works.

FN60. See esp. Recital 16.

FN61. The draft of the implementing statute has not yet been officially released. See
EIPR 2002, 24(10), 466-474

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