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AUDITION

le
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relative à la

proposition de directive du Conseil
concernant la protection juridique des bases de données

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Database Directive - Europarliment hearing on 17 March

1. Express Thanks

I would first of all like to express my thanks to the Committee on Legal Affairs and Citizen's Rights of the European Parliament for organizing today's hearing, and for inviting me to speak on behalf of Dun & Bradstreet.

I would also like to apologize for the fact that I was not able to send you the text of my presentation here before today, to help the interpreters. I shall try to compensate for this omission by keeping my comments as simple as...the subject allows.

2. Describe Dun & Bradstreet

2.1. Let me begin with a brief description of my company's business. Dun & Bradstreet is an international provider of business information. We operate in over 60 countries. We have 55,000 employees worldwide, of whom some 15,000 are EC nationals. This makes us one of the largest European businesses in our field. The main kinds of database-dependent business information provided by Dun & Bradstreet are:

- commercial-credit information services, with operations in 27 countries and worldwide databases covering more than 25 million businesses. Nearly 12 million of these businesses are in Europe.
- receivables-management and business-marketing services worldwide, including companies directories.
- marketing-research: to measure consumer purchases, and the factors which influence consumers, in 28 countries for manufacturers and retailers of groceries, health-and-beauty aids, and other packaged and durable goods; also television-audience research and household-panel information services.
- marketing-research and services to the worldwide pharmaceutical industry, measuring the consumption of prescription drugs and evaluating the prescribing patterns of physicians in over 60 countries.
- market research to the high-technology and heavy-equipment industry sectors worldwide

2.2. To support these international businesses, Dun & Bradstreet has created a number of databases, which are physically located in different countries, both inside and outside the EC. The databases for the same type of business activity are linked together.

For example, commercial-credit information on businesses is held in several regional databases: in the EC, in the USA, in the Asia-
Pacific region. Each D&B company, and customers, can access from any country the data stored anywhere in this international database network. For example, a German customer can obtain information not only on another German company with which it wishes to do business, but also on that company’s parent company and grandparent company, which may be located in the Netherlands and USA respectively. Dun & Bradstreet can deliver this information on European businesses with automatic translation into several languages: Dutch, English, French, German, Italian, Portuguese, and Spanish. These also include "French" French and Belgian French, Netherlands Dutch and Flemish.

2.3. Dun & Bradstreet’s databases are created from data which is input by its employees in many different countries, including all EC Member States. Much of the data is from publicly-accessible sources, much is not.

2.4. Dun & Bradstreet's databases are often multi-functional. This means that the data which they contain can be accessed, extracted and presented in different ways for different purposes (“sliced and diced”). For example, from its files on 25 million businesses used for commercial-credit information, Dun & Bradstreet can also provide information about how timely a business is paying its bills, or provide a list of businesses of a specified size operating in a specified line of business, for direct-marketing purposes.

2.5. Dun & Bradstreet’s databases can be accessed by customers on-line. Through this same on-line facility, a customer can order the data to be delivered automatically by fax within minutes. Dun & Bradstreet also delivers data from its databases on magnetic media and, in some cases, on CD-ROM.

2.6. Dun & Bradstreet’s databases are updated continually and, to a large extent, daily. For example, we have data on nearly 12 million European businesses in our databases, and the data on between 20,000 and 30,000 of these businesses is updated every day.

2.7. From this brief description of some of Dun & Bradstreet’s activities, you can see that:

(a) the information business of Dun & Bradstreet is international, and covers both Europe and the rest of the world;

(b) databases and the data stored in them represent a huge investment in money, effort and expertise - to create them, to maintain and update them, and to develop and enhance them.

(c) the improvements in technology which improve delivery to authorized customers for authorized purposes also facilitate unauthorized use of databases.
3. Why is a Directive needed to provide Harmonized Legal Protection of Databases?

3.1. The Directive states in its introduction, or preamble, that "database development requires the investment of considerable human, technical and financial resources, and that a stable and uniform legal protection regime is necessary to encourage such investment".

The Commission's Explanatory Memorandum also states that "Divergencies and anomalies exist in the legislation of the Member States on the question of the legal protection of databases" (p.4).

Dun & Bradstreet agrees with both these statements.

3.2. In its attempt to create a uniform legal protection regime, Article 2.3. of the draft Directive first confirms that copyright shall protect a database which is original in the sense that it is a collection of works or materials whose selection or arrangement constitutes the author's own intellectual creation. No other criteria are to be applied to determine the eligibility of a database for copyright protection. This therefore excludes copyright protection for databases and their contents based on the theory of "sweat of the brow" (or "industrious collection") which currently exists in the UK and Ireland. Under the "sweat of the brow" theory, the investment of money and effort in creating a database containing pre-existing factual material can be protected by copyright.

3.3. Copyright law which does not extend to the "sweat of the brow" theory cannot, on its own, give adequate legal protection to databases, because it does not protect factual material. However, the Commission considers that "it would be an unacceptable extension of copyright and an undesirably restrictive measure if simple exhaustive accumulations of works or materials arranged according to commonly used methods or principles could attract protection on the same basis as other literary works" (EP,p.24).

3.4. The Commission does not explain why such an extension of copyright is unacceptable. However, this approach does now appear to be consistent with the law in the United States, following the decision of the US Supreme Court in March 1991 in the Feist case. This case confirmed that a compilation or collection of facts may be protected by copyright, if it is an original selection or arrangement of facts. But the court also emphasized that copyright may not protect the facts contained in the compilation, and rejected the "sweat of the brow" theory. As a result of the Feist case, protection of computerised databases by copyright in the United States is less than was previously thought. Feist confirms that "copyright rewards originality, not effort" - as does the draft Directive.

3.5. It is interesting to note that the US Supreme Court, which in the Feist case rejected the "sweat of the brow" theory as a
basis for copyright protection, described it as a theory of unfair competition. Under the current law of the UK and Ireland, the rationale for copyright protection based on "sweat of the brow" is indeed to protect entrepreneurs against unfair competition. The introduction to the draft Directive acknowledges that several Member States have unfair competition laws, but rejects this as a basis for a uniform legal protection regime, stating that "in the absence of a harmonized system of unfair competition law in the Member States, other measures are required to prevent unfair extraction and re-utilization of the contents of a database".

4. The Right to Prevent Unauthorized Extraction and Reutilization

4.1. So let us now look at the "other measures" of protection which the Directive proposes in order to supplement the limited and unharmonized copyright protection. The draft Directive proposes a right to prevent unauthorized extraction and re-utilization of data from a database. The Commission says that "This protection against parasitic behaviour by competitors, which (protection) would already be available under unfair competition law in some Member States but not in others, is intended to create a climate in which investment in data processing can be stimulated and protected against misappropriation. It does not prevent the flow of information, nor does it create any rights in the information as such" (EP,p25).

Dun & Bradstreet is in basic agreement with this broad statement of intention.

4.2. However, in order to achieve the draft Directive's objectives, it is essential that the new right satisfies at least two criteria:

(1) it must provide adequate and harmonized additional protection for database contents; and

(2) it must not create new uncertainty about the scope of protection, and use, of databases. In particular, this means that producers of databases and their customer-users must be clear about their respective rights and obligations, based on the contracts signed between them, including the price agreed for the defined use rights.

4.3. The new right as proposed is defined in three main provisions: Article 2.5, Article 8 and Article 9. I would like to comment on each of these in turn.

4.4. Under Article 2.5, "Member States shall provide for a right for the maker of a database to prevent the unauthorized extraction or re-utilization, from that database, of its contents, in whole or in substantial part, for commercial purposes". I have the following comments on this:
(a) Why does the new right not also include the right to prevent unauthorized access to a database?

(b) Who is the maker of a database? Article 11 recognizes that the maker may be a company, where its employees have created the database. However, the company whose employees create a database may then sell the database: is the purchaser of a database whose employees did not create it also entitled to the benefit of the right to prevent unauthorized extraction? The answer to this question must be yes, because the purchase of a database is an investment which also deserves to be protected by the new right. There is no reference to this in the draft Directive.

(c) "Unauthorized": sometimes "unfair" is used instead. The wording should be made consistent. Also, "unauthorized" should be defined, for example, "without the express authorization of the maker or other owner (or rightholder) of the database, and not expressly authorized by this Directive".

(d) "Substantial part": this appears to be an expression borrowed from copyright law. For example, under the 1988 UK Copyright Act, there is infringement of copyright if there is copying of the whole of a work, or of a substantial part. The legislation does not define the expression, but the courts decide in each case. To quote one judgment: "What is a substantial part of a work is a question of degree, depending on the circumstances, and it is settled law that the quality of what is taken is usually more important than quantity".

These notions of quality and quantity are important, but they only appear in a different definition in the Directive, the definition of "insubstantial part". We suggest that a definition of "substantial part" be added to the Directive, because this is a new right, and some guidance is needed - both for the Member States who have to implement it, and for the courts who will have to interpret it. This definition could be similar to the definition of "insubstantial part", but after removing the word "not".

(e) (extraction or re-utilization) "for commercial purposes": this implies that anyone, whether or not an authorized user, can extract or re-utilize the whole or a substantial part of the contents of a database, if this is not done for commercial purposes. Why this exception to the new right of protection? What is the meaning of "commercial purposes" as opposed to non-commercial purposes? Does it for example depend on whether a user is a company or individual carrying on a business, as opposed to organizations or individuals who are not considered to carry on a business? Does it mean only re-sale or rental for money, or also internal use by a business?

We suggest that the words, "for commercial purposes", should be removed.

(f) As a general comment on Article 2.5, we feel that the scope of the new right needs to be clarified, and the words which
dilute it should be removed.

4.5. Article 8. contains two further exceptions to the new right to prevent unauthorized extraction which we wish to comment on:

(a) Firstly, under Article 8.4., the lawful user of a database may, without authorization of the database maker, extract and re-utilize insubstantial parts of works or materials from a database for commercial purposes, provided that acknowledgement is made of the source.

Dun & Bradstreet is concerned that this article may significantly weaken the new protection, and we have the following comments:

(i) Again, the words "for commercial purposes" are not defined. This could include extraction and re-utilization in order to compete. As mentioned earlier, the Commission stated in its Explanatory Memorandum on the draft Directive that this new right is intended to protect against "parasitic behaviour by competitors". Dun & Bradstreet is not convinced that this intention is adequately reflected in this Article, even with the definition which is given to the expression "insubstantial part".

Insubstantial part is defined as "parts of a database whose reproduction, evaluated quantitatively and qualitatively in relation to the database,...can be considered not to prejudice the exclusive rights of the maker of that database to exploit the database".

If for example, the competitive advantage which one database has over another database is, in terms of quantity and quality, an insubstantial part of that database, then a competitor may be legally able to extract the information which it needs.

The Commission's Explanatory Memorandum (page 52) comments as follows: "Where the user of a database requires to produce small extracts from a database, by quotation or by reference to the information, it should be possible for him to do so, provided that he is a lawful user, and that the source is acknowledged". We feel that this intent is not reflected in Article 8.4. nor in the definition of insubstantial part. These are capable of a much wider interpretation, and should be amended to reflect the concept of "small extracts".

(ii) It is not clear whether Article 8.4. is subject to the specific conditions of the contract between the database owner and the user, whether the contract is signed before or after the Directive. This may be the intention of Article 8.6, which refers to prior rights or obligations. And it may also be the intention of Article 12.1, but the words "this Directive shall be without prejudice to...the law of contract applicable to the database itself or to its contents" are not clear on this point. Furthermore, Article 12.2 refers only to contracts concluded prior to the date of publication of the Directive.

(b) Secondly, under Article 8.1, if [and to the extent that] the
works or materials contained in a database which is made publicly available [are not protected by copyright or neighbouring rights and] cannot be independently created, collected or obtained from any other source, the right to extract and re-utilize works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms.

(i) The Commission’s Explanatory Memorandum (page 50) states that a compulsory licence can be demanded only when the contents of the database in question are not protected by copyright or neighbouring rights. This should therefore be expressly stated in Article 8.1.

(ii) The Commission’s Explanatory Memorandum also states that the works or materials in question may be the subject of contractual arrangements, which may mean that a compulsory licence is not possible. This is echoed in Article 8.6, which states that a compulsory licence shall apply only to the extent that it does not conflict with any other prior rights or obligations. We assume that this means rights or obligations which exist prior to a demand for a compulsory licence, rather than prior to the Directive.

(iii) The Commission’s Explanatory Memorandum (page 51) states that “the request for a licence may not be made for reasons of commercial expediency such as a saving of time or financial resources”. Thus the relevant test is what is possible, not what is commercially realistic.

However, Article 8.1. should distinguish between the raw data contained in a database but obtained from an outside source, and the added value which the database owner gives to such data by combining it with other data, or updating it through its own efforts, or re-arranging it so that it can be used more easily. This added value element (which may or may not comprise trade secrets or other confidential information), often gives a database owner its competitive edge, and should be expressly excluded from compulsory licensing.

(iv) In the introduction to the draft Directive, Paragraph 31 states that if works or materials are made available under compulsory licence, such works or materials should be “used in the independent creation of new works”. This should be made clear in Article 8.1. itself.

(v) Article 8.1. should also exclude from compulsory licensing, data which could have been obtained by anyone at a particular date, but which was only obtained by one database owner. That is to say, if only one database owner took advantage of a commercial opportunity which was in principle available to anyone, then those who failed to take the same commercial opportunity should not subsequently be allowed to claim a compulsory licence.

(vi) Article 8.1. does not explain when a database is "made publicly available". If only available to users who sign a contract, is this considered to be publicly available? If so,
then we suggest that the words "whether by contract or otherwise" should be added.

(vii) As a general comment on Article 8, we feel that some of the concepts need clarification, and changes are also needed to ensure that this Article does not excessively weaken the new right under Article 2.5.

4.6. Article 9 is the third Article which defines the new right to prevent unauthorized extraction.

(a) Article 9.3. states that the right to prevent unfair extraction [and re-utilization] shall run from the date of creation of the database and shall expire...10 years from the date when the database is first lawfully made available to the public.

We see several problems here:

(i) The 10-year period of protection runs from when the database as a whole is made available to the public. However the protection applies to the database contents. These contents in most cases are continually being added to, updated and replaced, which represents a substantial investment in money, effort and expertise. Indeed, this investment would in most cases exceed the investment in the initial creation of a database in a relatively short time. (I have already mentioned the 20-to-30,000 changes daily which are made to some of Dun & Bradstreet's European databases). Much of this essential ongoing investment, therefore, would not be protected under the draft Directive: each day's investment would receive a shorter period of protection than the previous day's investment. This will not encourage the development of the database industry.

(ii) This discouraging approach is confirmed by Article 9.2: insubstantial changes to the contents of a database shall not extend the original 10-year period of protection of that database by the right to prevent unfair extraction. Because of the way in which the expression "insubstantial change" is defined, normal but essential updating of a database will not extend the period of protection. In order to extend the 10-year period, the database would have to be made to function in a significantly new way (arrangement), or there would have to be a significant change in selection criteria: for example, to include all magazine articles as well as newspaper articles on subjects already covered.

(iii) No reason has been given for proposing a 10-year protection period. This period is the same as the protection period available in Denmark and other Scandinavian countries for catalogues, timetables, telephone directories and similar works which are not necessarily protected under copyright. We do not consider that these so-called "catalogue rules" are appropriate as the basis for a legal protection regime intended to encourage the development of the database industry in Europe.
(iv) The Commission's Explanatory Memorandum (page 54) states that the right to prevent unfair extraction is similar to "unfair competition or parasitic behaviour legislation", and the similarity has also been noted. However, a significant advantage of unfair competition is that its remedies are not limited in time.

(v) It is doubtful whether 10 years is long enough to allow the recovery of investment in even the initial creation of many databases. In addition to which, there is the considerable investment in updating and in delivery technology. We therefore strongly urge that the basic period of protection be significantly increased, for example, to at least 25 years. However, this should be without prejudice to 10 years protection for any material, to run from the date of its inclusion in its latest form in a database, or verification of its accuracy, if such 10-year period expired later than the basic 25-year period protecting the database contents as a whole.

Different types of databases will have different possibilities of "date-stamping" their contents: some may do it by "groups" of data, instead of applying it to each individual piece of data. If database owners know that date-stamping allows them to enhance the protection of their investment, they can over time increasingly incorporate date-stamping techniques in their development plans. This may complicate distinguishing between dated and undated material in the event of a dispute, but it would also (to quote the Commission) help to "create a climate in which investment in data processing can be stimulated and protected against misappropriation". We feel that it would be worthwhile for the EC legislators to explore with industry the possibility of drafting guidelines for date-stamping.

(b) We are also concerned about protection for existing databases. The only reference to existing databases in the draft Directive is in Article 12.2. This merely states that "Protection pursuant to...this Directive shall also be available in respect of databases created prior to the date of publication of the Directive". The Commission's Explanatory Memorandum (page 54) states that "The one finite period of protection begins on incorporation of the work or material into the database and continues for a period of 10 years from the time when the database was made publicly available".

So, if we apply the proposed 10-year protection period now, it appears that all databases made available to the public before March 1983 will have no protection under the new right. It also appears that they can never obtain protection under the new right: Article 8.4. implies that substantial changes to a database can extend the original period of protection. However, if there never was protection, because a database was created too long ago, then it does not appear that substantial changes can create protection under the new right. Such a situation cannot encourage the development of a strong database industry. Furthermore, it is particularly inequitable for databases in the UK and Ireland. As we have seen, the draft Directive proposes to
abolish the copyright protection which they have under the "sweat of the brow" principle. Thus many existing databases in these countries would lose existing protection and still not be protected under the new right in the draft Directive.

As for more recent existing databases, they would receive a very short period of protection, being the unexpired balance of 10 years from when the databases were made publicly available.

To rectify this unsatisfactory situation, we suggest that, for existing publicly available databases, the protection period should begin from the date when the Directive is adopted. This would also avoid complications from database owners who claim that, prior to the Directive, their protection period has already been extended as a result of substantial changes.

(c) As a general comment on the period of protection, we feel that 10 years is seriously inadequate to protect the investment in both new and existing databases, including their ongoing updating and enhancement.

5. Other General Comments

5.1. "Author, rightholder, maker" of a database.

(a) Article 3 of the draft Directive defines the author of a database for copyright purposes. It also uses the word "rightholder" where the author is considered to be a legal person, not a natural person, and this word "rightholder" also appears elsewhere, for example, in Articles 4.1 and 5(d). We feel that it is confusing and unnecessary to use "rightholder": it would be preferable to amend the definition of author in Article 3, to make clear that in certain cases a legal person can be the copyright owner.

(b) Computer-generated databases should be covered: for example, "in the case of a database or part of a database which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken".

(c) "Maker" of a database is used to designate the beneficiary of the right to prevent unfair extraction. We wonder why there is no definition of "maker", whereas a whole Article - Article 3 - is used to define "author". We also feel that it should be made clear that "maker" can include the successors-in-title of the maker, such as a purchaser. In the national laws of the Member States, it is of course possible to transfer copyright. However, the right to prevent unauthorized extraction is a completely new right, and so the draft Directive should make clear that successors-in-title of the maker can exercise the new right. Indeed, it may be preferable to use the expression "owner" of a database, instead of maker.

(d) Article 11 excludes from the benefit of the right to prevent unauthorized extraction, databases produced outside the EC.
Agreements may be made by the EC with third countries to extend the new right to databases produced there, subject to reciprocity. However, if the maker of a third country database is a company with a registered office in the EC and an effective link with a Member State, it can benefit from the new right. The Commission has indicated informally that most third country databases will in practice be able to benefit under the new right by setting up a company presence in the EC. Therefore, the Commission suggests, this reciprocity principle should not create many problems with third countries. If the Commission is right, why prejudice the EC's relations with its trading partners with such a reciprocity clause? Particularly when the database information industry is becoming more and more international and inter-dependent? And when there is no evidence that denying the benefit of the new right to third country producers will push them into making their own unauthorized extraction laws?

Dun & Bradstreet does not feel that the reciprocity clause is helpful, and suggests that it be replaced by the rule of national treatment.

5.2. Under Article 2.4 of the draft Directive, only the owners of copyright in copyrighted works contained in a database are entitled to enforce such copyright. However, for effective protection of database contents as a whole, the database owner should also be given the right to enforce the copyright in copyrighted works contained in the database.

5.3. We have already mentioned Articles 8.6 and 12, which state that the Directive shall be without prejudice to various prior rights and obligations and legal provisions. We feel that the different wording used is confusing, and should be reviewed. We are particularly concerned to know which parts of the Directive will override contracts between database owners and users, and which parts will be subject to such contracts.

6. Conclusion

I hope that my remarks today have conveyed the impression which I wished to convey. We feel that the objective of the draft Directive, to create a uniform legal regime throughout the EC for the protection of the enormous investments which databases represent, deserves support. However, we feel that more work is needed on the draft Directive in order that it may achieve this objective. We have offered our comments in a desire to be constructive. Our comments reflect our concerns as owners of existing and future databases which we wish to expand and enhance to meet the needs of our customers in the EC and worldwide. Our comments also reflect our concern to be able to operate in a clear legal environment which facilitates making decisions about the future direction of our business, and which facilitates doing business with our customers. Given the time allotted here today, our comments have not been exhaustive. We hope that they have been helpful. And we shall be pleased to continue to be associated with your reflections on the draft Directive.