3 June 1993

OPINION

of Committee on Economic and Monetary Affairs and Industrial Policy

for the Committee on Legal Affairs and Citizens' Rights

on the Commission proposal to the Council for a directive on the legal protection of databases
(COM(92) 0024 - C3-0271/92 -SYN 393)

Draftsman: Mr Klaus WETTIG
OPINION
(Rule 120 of the Rules of Procedure)
by the Committee on Economic and Monetary Affairs
and Industrial Affairs
for the Committee on Legal Affairs and Citizens' Rights
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At its meeting of 17 June 1992 the Committee on Economic and Monetary Affairs
and Industrial Policy appointed Mr Wettig draftsman of its opinion.

At its meetings of 5 to 7 May and 2 and 3 June 1993 it considered the draft
opinion.

At the latter meeting it adopted the conclusions unanimously.

The following took part in the vote: Beumer (chairman), Wettig (draftsman),
Bofill Abeilhe, Braun-Moser (for Friedrich), de la Camara, Caudron,
Christiansen, Delorozoy (for Gasoliba I Böhm pursuant to Rule 111(2),
Ernst de la Graete, Fourcans, Hermans, Nielsen (for Riskaer Pedersen), Speciale
and Thyssen.
I. The content of the proposal for a directive

The proposal on the legal protection of databases follows the adoption of the software directive (protection of computer programmes) as yet another step towards completing the internal market as regards intellectual property in the area of technology.

In its explanatory statement the Commission gives two overriding aims it wishes to secure with the directive. Firstly, the legal uncertainty in relation to the compiling of databases and the distortions of competition that arise from discrepancies in the provisions governing the protection of databases in the different Member States should be removed; secondly, an impetus should be given to boosting investment in the area of databases.

To that end the Commission is creating a new additional right that will extend protection to databases not already protected by the law of copyright in the Member States from unauthorized extraction.

II. The need for a directive: the economic importance of the sector

The need for Community rules arises in the Commission's opinion from a number of factors:

1. Databases have become much easier to access in recent years. CD-ROMs, increasingly popular as a computer storage medium, are becoming available to users of ordinary personal computers in addition to the standard diskette. This simultaneously increases the possibilities for their abuse and for pirating. The losses caused by pirating are not, however, exactly quantifiable at this time.

2. The on-line information sector is acquiring a steadily increasing economic and social importance in our information-oriented society. According to Commission estimates, its total economic turnover for 1992 should amount to some 3.5 billion ECU Europe-wide.

In 1990 the increase in turnover over the previous year was in the region of 13%. But total European share as a proportion of turnover by hosts (database providers) having their seat in the EC was only 6%!

3. One other important feature of the sector within the Community is its extremely high concentration. Thus in 1990 database producers in the United Kingdom recorded a total turnover of 2.68 billion ECU, whereas France managed only 403m, Italy 166m, Germany 49.3m and the Netherlands 31.5m.

The underlying reason for the dominance of British suppliers is that the leading European database producer and biggest worldwide supplier of real-time information services has its headquarters in London, and the big US hosts have also established their European subsidiaries there.

4. In France the widespread acceptance of the Teletel-System appears to have contributed substantively to the success of professional information services. In Italy real-time information services providing stock-exchange data hold the biggest market share, but the use of CD-ROM products is also growing. In Germany the real-time information market is dominated by the big European...
suppliers from the UK, while credit information services (e.g. Schimmelpfeng) also tend to be predominantly UK based.

In 1990, 70% of turnover arising from the use of services from EC suppliers was generated in the EC itself. Of the remaining 30%, 12% was generated in the USA.

5. Although growth has fallen compared with previous years, both as a consequence of a certain saturation as well as of growing recessionary pressures generally, a dynamic development of the sector can still be look forward to in most Member States with relatively undeveloped markets hitherto.

6. In the area of off-line products CD-ROM products in particular are playing a part that is as yet hard to estimate. Turnover in these products grew at all events by 30% between 1989 and 1990. It nevertheless remains reasonable to assume that these products are still at a relatively early stage of market development. The dominance of US suppliers in this area is clearly illustrated by the fact that of 1 522 titles published worldwide only 487 come from EC suppliers.

7. As regards subject matter the dominant area within the EEC is financial and stock exchange information, at 70%, with economics/transport/patents at 25%, while such areas as science/technology/medicine, or politics/law/press-services account for only 1.9% and 1.6% of user take-up respectively.

In 1990 a total of 58% of turnover was accounted for by on-line information from real-time information services, which also accounts for the pre-eminent position of British large-scale suppliers.

III. Assessment of the Commission proposal and justification of the amendments

1. Given the economic significance and growth potential of the sector, an approximation of legislation appears appropriate, in particular to strengthen the international competitiveness of the Community.

2. The Commission's intention of creating greater legal security in order to boost investment activity, is appropriate as an initial approach. But if that aim really is to be achieved it is necessary to consider whether the Commission's proposal for a directive does in fact remove the existing legal uncertainties. It will also be important to determine whether the removal of distortions of competition arising from non-uniform legal systems might not lead to disruption of the conditions needed by fully functional and competitive undertakings, eventually having a negative impact on worldwide competitiveness.

3. The advantage enjoyed by suppliers located in the United Kingdom is in part accounted for by the fact that Anglo-Saxon copyright law applies, and that this allows the application of copyright protection to databases, while dispensing with more stringent criteria of originality. On the other hand, the protection introduced against unfair extraction Article 2(5) - as it were as compensation for smaller and medium-sized data base producers from the other Member States in which no such protection is laid down under copyright law and available to them on that basis - introduces a right hitherto virtually unknown in the Community, the full impact of which will only be observable on implementation by the Member States.
4. The Commission fixes the duration of this right at 10 years (Article 9(3)) and stipulates that 'insubstantial changes' to the content of database shall not extend the original period of copyright protection (Article 9(4)). Yet the commercial viability of a database frequently depends precisely on its being regularly updated, which requires repeated additions of new data to that already stored. Since Article 1(4) lays down only an extremely vague definition of an 'insubstantial change', it can be expected that clarifying what does or does not constitute an 'insubstantial change' will lead to repeated conflicts of interpretation and the bringing of legal proceedings through which database producers will try to demonstrate that regular updating represents a 'substantial change', allowing the period of protection to be extended.

5. Administrative difficulties and costly resort to the national courts consequently are built in. To claim to speak in terms of more legal certainty in such circumstances is highly questionable. In the present state of technological development there is nothing whatsoever to prevent the re-location of database production outside the Community. The need to lay down a positive definition of a 'substantial change' consequently seems inescapable.

6. Similar arguments apply to the exemptions laid down in Article 8(4) and (5). These authorize the lawful user of a database to extract and re-utilize 'insubstantial parts' of works or materials from a database for commercial purposes, but do so in terms such that too little attention is paid to the possibility of commercial use being made by competitors of what may at first sight appear to be 'insubstantial parts'.

7. Much more restrictive utilisation contracts could subsequently be negotiated that would restrict the right of access to information. Bigger producers would be in a more favourable position than small ones.

The Commission seeks to combat this danger by making it compulsory to issue a licence pursuant to Article 8(1) and (2). The purpose of requiring a licence to be issued is to help ensure that monopoly positions are not abused. However, the licence must not be allowed to lead to a de facto expropriation of the database producer. A more precise stipulation of the criteria for issuing licences consequently is necessary. Although in recital 33 the Commission asserts that such licences should not be requested for reasons such as economy of time, effort or financial investment, this is not specifically stipulated in the main text of the directive.

8. There must also be a re-think on the question of the period of protection under the new additional right. In the unanimous opinion of the parties concerned the period of 10 years proposed by the Commission in Article 9(3) is too short. This is further complicated by the fact that no allowance is made for regular updating which, as already stated, is precisely what makes many databases economically viable to their suppliers. The dating of each new contribution entered in the database would, given a successful claim that these represented 'substantial changes,' result in the term of protection being renewed repeatedly, in effect affording permanent protection. At the same time conversion to such a system could entail high costs, by which the producers of smaller and medium-sized databases would be hardest hit. An extension to the proposed time period consequently provides the more pragmatic solution, one that would also be directly compatible with the 50-year period for databases protected by copyright law. This term however should not exceed that laid down for works with their own original intellectual component. An appropriate form
of protection for database producers can be expected in connection with the need to lay down a definition of a 'substantial change' in Article 1.

9. Although the proposal for a directive as a whole is undoubtedly a welcome first step by the Commission, it nevertheless raises problems of detail the precise impact of which cannot be anticipated. The economic situation in the database sector at present is such that urgent actions are not as yet required.

In the final provisions it should therefore be clearly stipulated that a review of the directive is provided for if administrative difficulties and cost increases due to problems of interpretation arising from the new additional right of protection turn out to be excessive. The Commission is therefore asked to conduct a review of the situation five years after the entry into force of the directive. By that time it will also be possible to make a more accurate assessment of separate market segments in the database area.

IV. Conclusion

The Committee on Legal Affairs and Citizens' Rights, as the committee responsible, is requested pursuant to Article 120(5) of the Rules of Procedure to accept the following amendments:
Notwithstanding the right provided for in Article 2(5) to prevent the unauthorized extraction and re-utilization of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilize, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and nondiscriminatory terms.

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The right to prevent unfair extraction shall run as of the date of creation of the database and shall expire at the end of a period of ten years from the date when the database is first lawfully made available to the public. The term of protection given in this paragraph shall be deemed to begin on the first of January of the year following the date when the database was first made available.

The right to prevent unfair extraction shall run as of the date of creation of the database and shall expire at the end of a period of fifteen years from the date when the database is first lawfully made available to the public or substantially changed. The term of protection given in this paragraph shall be deemed to begin on the first of January of the year following the date when the database was first made available or substantial changes were made to the database.
(Amendment No. 3)
Article 13(3) (new)

Not later than at the end of the fifth year after implementation of this directive and every two years thereafter the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this directive and, where necessary, shall submit proposals for its adjustment in line with developments in the area of databases.