SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 15 and 16 July 1993

No. prev. doc.: 7998/93 PI 67 CULTURE 89
No. Comn prop.: 6919/92 PI 64 CULTURE 61

1. At its meeting on 15 and 16 July 1993, the Working Party was informed by the Commission representative of the amendments to the above proposal which had been adopted by the European Parliament on 23 June 1993 (7630/93 PE-RESOL 35, Part II, point 5), and of the Commission's intentions with regard to these amendments.

General remarks

2. The Commission representative indicated that the European Parliament had not proposed any amendment to the basic approach of the proposal for a Directive, which was to combine copyright rights with a sui generis right.

The United Kingdom delegation, supported by the Irish delegation, reminded the Working Party that they could not accept this approach, particularly as regards the nature of the copyright rights, the nature of the sui generis right and the relationship between them. These delegations were not convinced that there was any need to oblige Member States whose present systems worked well to abandon these systems in favour of the
approach proposed by the Commission. They called for further
discussion of the basic approach proposed.

3.  The Commission representative indicated that the
Commission would reconsider the order in which the various
provisions should appear when preparing its amended proposal.

Article 1(1)

4.  The Commission representative informed the Working Party
that the European Parliament had not adopted an amendment
proposed by its Committee on Legal Affairs and Citizens' Rights which would have extended the scope of the Directive to
cover non-electronic databases. However, should such a proposal
reappear at a later stage, the Commission was prepared to
consider it, providing that its implications for all aspects of
the Directive were taken into account.

5.1.  The European Parliament had proposed replacing the terms
"collection of works or materials" by the terms "collection of
a large number of data, works or other materials" (Amendment
No. 3). The Commission was able to accept the part of the
amendment which contained the clarification that the term
"materials" used in the Commission proposal included data; on
the other hand, it did not accept the part of the amendment
which referred to "a large number", in view of the difficulty of
determining how many items constituted a large number. It
felt that it should be left to the courts to determine whether
or not a given number of data, works or other materials was
sufficient to constitute a collection.

5.2.  The Italian delegation questioned what materials, other
than data and works, could be collected in an electronic
database. The Commission representative replied that "other
materials" would include anything which could be stored in
electronic form.

5.3.  The Italian delegation considered that data in an
electronic database should not be inert, but should be
interoperative. The Commission representative advised against
the introduction of terms such as "inert" and "interoperative", which would require definition, and considered that the concern of the Italian delegation was met by the fact that an electronic database allowed random access to the data stored in it.

6. The Irish delegation asked whether the definition in Article 1(1) would cover a literary work stored on a CD-ROM which could be used in conjunction with software which could search for certain categories of words.

The Commission representative pointed out that a single work could not constitute a collection, and therefore would not be covered by the definition of a database in Article 1(1).

The Irish delegation stated that an electronic compilation of words or sentences taken from a single work would be protected by copyright under Irish law, and considered that it should also be protected under this Directive.

The Commission representative pointed out that what could be protected under the law of one Member State could not necessarily be protected under the law of another Member State; whether or not a particular collection of material could be protected as a database under this Directive would depend on whether or not it met all the criteria laid down in the Directive as finally adopted.

7. The Belgian delegation asked whether the term "computer program used in the making or operation of the database" should be defined to make clear the difference between this software and "the materials necessary for the operation of the database such as its thesaurus, index or system for obtaining or presenting information".

The Commission representative considered that it was not necessary to define something which was excluded from the scope of the Directive.
8. The Commission representative indicated that, in the light of discussions within the World Intellectual Property Organization (WIPO) on the question whether or not a phonogram which was a collection of earlier recordings constituted a database, Member States might wish to consider whether or not such phonograms with on-line access should be excluded from the definition in Article 1(1).

Article 1(1a) and (1b)

9.1. The European Parliament had proposed adding to Article 1 a new paragraph 1a defining "author of a database" (Amendment No. 4) and a new paragraph 1b defining "owner of a database" (Amendment No. 5).

The Commission was not able to accept the proposed Article 1(1a), as it conflicted with Article 3, to which the European Parliament had not proposed any amendment. It was able to accept the proposed Article 1(1b) as a useful clarification of the relationship between the author of a database and the owner of the sui generis right, but considered that the term "owner of the rights in a database" would be more appropriate than "owner of the database"; the Commission representative drew attention to differences between the various language versions of the European Parliament's amendment in this and other respects.

9.2. The German and Irish delegations agreed with the Commission representative that the proposed Article 1(1a) was unacceptable, particularly in the light of Article 3.

9.3. The Netherlands delegation considered that the proposed Article 1(1b) was unsatisfactory, as it implied that where the author of a database transferred the sui generis right to another person, that person would also become the owner of the copyright.

The Belgian delegation suggested that this provision would be clearer if it were to state that the owner of the rights in
a database would be the author where the database qualified for copyright protection, but would be the maker of the database where the database qualified for **sui generis** protection only.

The German delegation considered that the amendment proposed by the European Parliament would not cover the case where a database qualified for **sui generis** protection only.

The French and Italian delegations also expressed doubts with regard to this amendment, the French delegation stating a preference for the terms "author" ("auteur") and "holder of the specific right" ("titulaire du droit spécifique").

**Article 1(2)**

10.1. The **Commission representative** explained that the amendment to Article 1(2) proposed by the **European Parliament** (Amendment No. 6) contained three elements:

(a) The Commission's proposal used both the term "unfair extraction" and the term "unauthorized extraction"; for the sake of consistency, the European Parliament had proposed the use of the term "unauthorized extraction" throughout the Directive. The Commission could accept this amendment, in particular since "unfair extraction" could create confusion between the **sui generis** right and unfair competition law.

(b) The European Parliament had replaced "maker of a database" by "owner of a database", using the same term as in the new Article 1(1b). The Commission could accept this change in principle, again preferring the term "owner of the rights in a database" (see point 9.1. above).

(c) The European Parliament had made it clear that the **sui generis** right concerned extraction and re-utilization not only of all of the material from the database, but also of part of this material. The Commission could accept this amendment.
10.2. The French delegation considered the systematic use of "unauthorized extraction" to be an improvement.

The German delegation considered the term "right to prevent unauthorized extraction" to be tautological.

The Danish delegation considered that the sui generis right should not be a right to prevent unauthorized extraction, but should be a right to authorize certain acts.

Article 1(2a) and (2b)

11.1. The European Parliament had proposed adding to Article 1 a new paragraph 2a defining "commercial purposes" for the purposes of Article 8(4) and a new paragraph 2b defining "non-commercial purposes" for the purposes of Article 8(5) (Amendment No. 7).

The Commission intended to include the new paragraph 2b in its amended proposal, subject to drafting improvements, but did not intend to include the new paragraph 2a. The Commission representative indicated that the European Parliament had not explained the meaning of use for purposes of humanitarian aid in this context.

The remarks of the delegations were confined to the proposed new paragraph 2b.

11.2. The United Kingdom delegation considered that it was unnecessary to add this definition, Article 8(5) being sufficiently clear without it.

The Irish delegation entered a reservation on this proposed new paragraph, considering that if any clarification of Article 8(5) was necessary, the concept of "fair use" or "fair practice" should be used.

The German delegation considered that any definition of "non-commercial purposes" should be included in Article 8(5), rather than in Article 1. In its view, the provisions of
Article 8(4) and (5) should be subject to any contractual clauses to the contrary.

11.3. The German and Netherlands delegations considered that the terms "domestic and non-collective" in Article 1(2b)(a) were unclear. The Netherlands delegation suggested replacing "non-collective" by "personal".

The Spanish delegation considered that domestic and non-collective use of a database would be difficult to control.

11.4. The French and Italian delegations expressed reservations on Article 1(2b)(b).

The United Kingdom delegation also expressed a negative reaction to this provision, pointing out that material extracted from a database for non-profit-making purposes could subsequently be used in a way which led to profit.

11.5. The Spanish delegation considered that where material from a database was used for research purposes, acknowledgement of the source should be required. The Netherlands delegation considered that acknowledgement of the source should be required where such material was used for either teaching or research purposes.

The Danish delegation, supported by the Belgian and Portuguese delegations, considered that material extracted from a database and used for teaching or research purposes should be the subject of an exemption from the sui generis right and should benefit from a provision equivalent to Article 7(1) of the proposal for a Directive, which was based on Article 10(2) of the Berne Convention.

The Danish and United Kingdom delegations were invited to submit papers explaining how the use for teaching or research purposes of material extracted from a database was dealt with in their respective systems.
Article 1(3)

12. The European Parliament had proposed transferring the definition of "insubstantial part" from Article 1(3) (Amendment No. 8) to Article 8(5a), with amendments to the definition (Amendment No. 20).

It was agreed to discuss this definition in the context of Article 8(5a).

Article 1(4) and (4a)

13. The European Parliament had proposed amendments to the definition of "insubstantial change" in Article 1(4) (Amendment No. 9) and had proposed adding a new paragraph 4a defining "substantial change" (Amendment No. 10).

It was agreed to discuss these definitions in the context of Article 9 (see points 31.1. to 31.7. below).

Article 2

14. The Working Party noted that the European Parliament had not proposed any amendments to the copyright provisions of Article 2. It agreed to postpone discussion of the amendment to Article 2(5) until it had considered the other amendments concerning copyright protection.

Article 3

15. The Working Party noted that the European Parliament had not proposed any amendments to Article 3 (see points 9.1. and 9.2. above).

Article 3a

16.1. The European Parliament had proposed adding a new Article 3a (Amendment No.12) which was based on Article 3 of Council

The Commission could accept this addition.

16.2. The Danish, German, French, Italian and Netherlands delegations considered that this addition was not necessary.

The Irish delegation was in favour of this addition. In its view, it would empower courts to decide whether or not the authorship requirements of a Member State were compatible with the Berne Convention.

Article 4

17.1. The European Parliament had proposed changing the order of the two paragraphs of Article 4, as well as proposing clarifications of the substance of both paragraphs.

The Commission representative indicated that the Commission:

(a) could accept the change of order of the paragraphs, whereby the general rule was stated before the exceptions to it;

(b) could accept the clarifications proposed in the new paragraph 1;

(c) could accept the clarification proposed in the new paragraph 2 to the effect that the abstracts referred to had been specially produced for the database;

(d) intended to make it clear that the requirement of Article 10(3) of the Berne Convention to indicate the name of the author and the source concerned quotations but did not concern bibliographical references or abstracts specially produced for the database;

(e) did not intend to accept the words "for the purposes of indexing", which it considered were confusing.

17.2. The Spanish, French and United Kingdom delegations approved the new order of paragraphs in this Article.

17.3. The Netherlands delegation doubted whether the new paragraph 1 was necessary, particularly in the light of Article 12.

17.4. While considering that the new paragraph 2 was an improvement on paragraph 1 of the Commission's proposal, the French and United Kingdom delegations reserved their positions on the need for this paragraph.

The Danish, German and Irish delegations considered that this paragraph was unnecessary.

The Spanish and Netherlands delegations reserved their positions on this paragraph until the Commission presented its amended proposal.

The Commission representative pointed out that if the new paragraph 2 were to be deleted as superfluous, the new paragraph 1 alone would imply that there were no exceptions to the general rule, and this paragraph too would therefore have to be deleted.

17.5. The French delegation expressed the view that the requirement to indicate the name of the author and the source should apply not only to quotations, but also to bibliographical references and abstracts.

The Commission representative pointed out that bibliographical references would per se indicate the name of the author and the source; however, to include in the Directive a requirement to indicate the name of the author and the source in respect of these references and in respect of abstracts would imply that there was an obligation under copyright law to make these indications in their respect,
while the obligation under Article 10(3) of the Berne Convention concerned quotations only.

17.6. The French delegation expressed the view that if the new paragraph 2 were to remain, the words "for the purposes of indexing" proposed by the European Parliament should be included.

Article 5

18. The European Parliament had proposed replacing the term "author" by "owner" (Amendment No. 14), in accordance with its proposal for Article 1(1b) (see points 9.1. to 9.3. above).

The Commission could accept this amendment subject to the same drafting considerations as expressed in relation to Article 1(1b) (point 9.1. above).

The French delegation, supported by the Belgian, German, Italian and Netherlands delegations considered that the term "author" was more appropriate in the context of Article 5.

19. The Netherlands delegation considered that it should be stated that Article 5 was without prejudice to any rights subsisting in the materials contained in the database, by analogy with Article 6(3).

20. The French delegation expressed doubts whether the author of a database should have an exclusive copyright right in respect of the electronic materials (second indent of Article 5).

The Commission representative pointed out that without these electronic materials, the contents selected and arranged in the database could not be used, and that therefore the copyright protection should extend to these electronic materials (17th recital).

21. The French delegation expressed doubts with regard to the word "adaptation" in Article 5(b).
The Commission representative pointed out that the wording of Article 5(b) followed that of Article 4(b) of Directive 91/250/EEC and that of Article 12 of the Berne Convention.

22. The French delegation expressed doubts with regard to the distribution right in Article 5(d).

The Commission representative pointed out that this provision was based on Article 4(c) of Directive 91/250/EEC.

23. In connection with Article 5(d), the Netherlands delegation asked whether the European Parliament had considered the question whether or not public lending should be excluded from the scope of the Directive, as it had been excluded from the scope of Directive 91/250/EEC (16th recital of that Directive).

The Commission representative stated that the European Parliament had not proposed any amendment in this respect.

24. The German delegation suggested that the words "the right to control further rental" in Article 5(d) be replaced by the words "the right to authorize or prohibit further rental".

25. The French delegation expressed doubts with regard to the various terms used in Article 5(e).

Article 6

26. The European Parliament had proposed an amendment to Article 6(1) (Amendment No. 15).

The Commission did not intend to include this amendment in its amended proposal.
Article 7

27.1. The European Parliament had proposed a number of clarifications to the wording of Article 7 (Amendment No. 16).

The Commission could accept these clarifications.

27.2. The United Kingdom delegation welcomed particularly the first clarification proposed by the European Parliament in Article 7(1).

The Netherlands delegation considered that this clarification could be further improved by referring not only to the rights of the author of a work contained in a database, but also to the rights of a holder of a right related to copyright in materials contained in a database.

27.3. The Netherlands delegation considered that reference should be made in Article 7(1) not only to Article 10(3) of the Berne Convention, but also to Article 9(2) of that Convention.

28. It was pointed out that the adjective "exclusive" in Article 7(1) should apply to "copyright" only, not to "other rights".

The United Kingdom delegation felt that this adjective was redundant if it qualified "copyright" only.

29. The Danish delegation considered that Article 7 should also contain an exception to Article 5 in respect of reproduction for private purposes of materials contained in a database.

Article 9

30. The European Parliament had proposed removing from Article 9(1) the reference to future Community harmonization of the term of protection of copyright and related rights
(Amendment No. 21) in the light of the progress made on the corresponding proposal for a Directive(2).

The Commission could accept the removal of this reference.

31.1. The European Parliament had proposed a drafting amendment to Article 9(2) (Amendment No. 22) as well as the addition of a new paragraph 2a to make clear that a substantial change to the selection or arrangement of the contents of a database would give rise to the creation of a new database, for which a new period of copyright protection would begin to run (Amendment No. 34). The amendment to Article 1(4) (Amendment No. 9) and the new Article 1(4a) (amendment No. 10) were related to Amendments Nos. 22 and 34.

The Commission could accept these amendments. The Commission representative suggested reversing the order of Article 9(2) and the new Article 9(2a).

31.2. The French and United Kingdom delegations questioned the need for the new Article 9(2a) in the light of existing copyright law. The French delegation feared that such a provision could lead to a contrario interpretations in respect of categories of works other than electronic databases.

The Commission representative pointed out that for other categories of works, in which the selection or arrangement of the contents was static, it was evident when a new work had been created. In the case of electronic databases, the contents of which could be constantly updated, this was less evident and the new Article 9(2a) together with the new Article 1(4a)(a) proposed by the European Parliament provided a useful clarification of the situation.

31.3. The Spanish delegation questioned whether the definitions in Article 1(4)(a) and 1(4a)(a) were sufficient to make it

(2) The Council adopted a common position on this proposal on 22 July 1993 (7831/93 PI 64 CULTURE 83 PRO-COOP 35 + COR 1(f) + COR 2(en) + COR 3(nl + COR 4(dk))).
clear at what stage the updating of an electronic database resulted in the creation of a new database. It considered that this was too important a question to be left to the courts to decide.

31.4. The French delegation questioned the appropriateness of the term "edition" in Article 1(4a)(a) proposed by the European Parliament; since Article 9(2a) used the term "a new database", it considered that it was confusing to describe this new database in Article 1(4a)(a) as "a new edition of that database" (i.e. of the original database).

31.5. The German delegation questioned whether "a substantial change to the selection or arrangement of the contents of a database" was sufficient to give rise to the creation of a new database (Article 9(2a)), suggesting that the criterion of Article 2(3) should also be applied.

31.6. The United Kingdom delegation pointed out that the definition of a database in Article 1(1) required not only a collection of data, works or other materials, but also the materials necessary for the operation of the database; it questioned therefore whether a substantial change to the selection or arrangement of the contents of a database was sufficient to give rise to the creation of a new database in the absence of any corresponding change to the materials necessary for the operation of the database.

31.7. The Netherlands delegation considered that the Directive should also regulate the relationship between an existing database and the new database resulting from the changes made to it.