EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 22 October 1993
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SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 4 and 5 October 1993

No. prev. doc.: 8345/93 PI 70 CULTURE 96
No. Cion prop.: 9219/93 PI 89 CULTURE 113

Subject: Amended proposal for a Council Directive on the legal protection of databases

General remarks

1. At its meeting on 4 and 5 October 1993, the Working Party(1) examined Articles 1 to 5 and began an examination of Article 6 of the Commission's amended proposal (9219/93 PI 89 CULTURE 113).

2. The Commission representative explained that the amended proposal had grouped together all the Articles of the original proposal which related to the copyright right in Chapter II and those which related to the sui generis right in Chapter III, in order to make the amended text more comprehensible.

The Belgian delegation, while welcoming this new structure, suggested that the new Articles 5 and 8 be removed

(1) The Greek delegation was not represented at this meeting.
from Chapter II and put together in a separate chapter.

It was agreed that this suggestion would be examined when these Articles were considered.

3. The Commission representative pointed out that two amendments which had been proposed by the European Parliament’s Committee on Legal Affairs and Citizens’ Rights had not been adopted by the Plenary. These amendments concerned:

(a) the extension of the scope of the Directive to cover non-electronic databases (7998/93 PI 67 CULTURE 89, Annex I);(2)

(b) "date-stamping" of the items included in a regularly updated database (7998/93, Annex III).

Although the Commission had not included these amendments in its amended proposal, it was open to discussion on both points.

4. The Commission representative considered that it was desirable that the Council reach a common position on the proposal for a Directive before the European Parliament suspended its work in May 1994 in preparation for the forthcoming elections. Ongoing work in the World Intellectual Property Organization (WIPO) and the need to transpose the results of the GATT Uruguay Round, which it was hoped would soon be concluded, were further reasons for seeking a common position on this proposal early in 1994.

The Chair indicated that it was the intention of the Presidency to hold a policy debate on this proposal at the

(2) See also point 8 below.
Council session (Internal Market) to be held on 16 December 1993.

The German, United Kingdom, Netherlands and Danish delegations expressed doubts whether such a debate at the political level would not be premature, unless it were to be limited to general issues and unless considerable work were done in the meantime on clarifying the nature and the object of protection resulting from the proposed Directive.

The Portuguese delegation suggested that one of the subjects of such a policy debate might be the question whether or not the Directive was necessary, and entered a provisional reservation on the whole Directive.

5.

It was noted that some of the language versions contained inaccurate translations of the Commission's amended proposal. Delegations were invited to draw such errors to the attention of the Commission services, with a view to the publication of corrigenda.

**Article 1(1)**

6.

The French delegation suggested that the term "collection" in the French-language version be replaced by "recueil", which was the term used in Article 2(5) of the Berne Convention for Protection of Literary and Artistic Works.

The Commission representative pointed out that the term "collection" had been chosen (in both English and French) as a neutral term which would cover data, works or other materials; the English term "compilation" or the French term "recueil" on the other hand might be construed as being applicable to works only. However, the Commission services were prepared to reconsider the terms used in the various
language versions.

7. In its amended proposal, the Commission had accepted an amendment proposed by the European Parliament(3) replacing "works or materials" by "data, works or other materials". The Commission representative explained that the addition of the word "data" had been accepted as a useful clarification; moreover, it brought the text closer to the "TRIPs" text (see 11185/92, page 6) and was consistent with efforts in the WIPO.

The Danish, Spanish, French and United Kingdom delegations approved the addition of the word "data", and the Netherlands delegation could also accept it.

The French delegation questioned whether this addition made the term "other materials" redundant.

The Commission representative explained that "other materials" covered anything which was not covered by "data" or "works" and preferred to keep this term, unless "data" were to be given a broad meaning covering everything other than "works".

The Netherlands and United Kingdom delegations were also in favour of keeping the term "other materials".

8. With regard to the terms "arranged, stored and accessed by electronic means", the Danish and Netherlands delegations spoke in favour of extending the Directive to cover databases in all forms, rather than limiting it to electronic databases as proposed by the Commission. The Luxembourg delegation also expressed doubts as regards the limitation to electronic databases.

The Belgian, German, French, Irish, Italian and Portuguese delegations reserved their positions on this question.

9. The United Kingdom delegation queried whether the terms "arranged, stored and accessed by electronic means" were appropriate in the light of the possibility of a database in paper form being converted into an electronic database or vice versa, and put forward for consideration the alternative wording "not directly readable by a human observer".

The Commission representative explained that under the Directive as proposed, a database in paper form would not be covered, nor would the question whether or not the conversion of that database to an electronic database would infringe the rights in the paper database; however, the resulting electronic database would be covered by the Directive. Where an electronic database was converted into a database in paper form, the electronic database would be covered by the Directive and its conversion into a database in paper form would be a restricted act under the Directive, while the resulting paper database would not be protected under the Directive.

10. In reply to a question whether or not databases on CD-ROMs would be covered by the terms "arranged, stored and accessed by electronic means", the Commission representative drew attention to an earlier working document(4) which had demonstrated that the information contained in databases on CD-ROMs was stored and accessed by electronic means.

11. In its amended proposal, the Commission had accepted an amendment proposed by the European Parliament replacing "the electronic materials necessary ..." by "the materials

necessary ..."(5).

Several delegations indicated their approval of this amendment.

12. The United Kingdom delegation considered that it was far from clear whether the Directive would protect the database as such, or its various parts as such, or the interface between the various parts mentioned in Article 1(1).

In this context, the German and United Kingdom delegations questioned whether protecting a database's thesaurus, index and system for obtaining or presenting information would not be dangerously close to protecting ideas or principles, rather than expression, contrary to the rule that only expression is protected by copyright, and that ideas and principles are not; they drew attention in this respect to Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs(6).

The Commission representative pointed out that the thesaurus, index or system for obtaining or presenting information would not necessarily be protected by copyright under the Directive; these elements might be covered by the sui generis right only, or they might be covered by a combination of the sui generis right and the copyright right.

The Danish, Spanish and French delegations considered that it was important that the thesaurus, index and system for obtaining or presenting information should be protected under the Directive.

The United Kingdom delegation gave the example of an

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(5) This amendment is not reflected accurately in the Spanish-language version of the Commission's amended proposal.
electronic database listing all the streets in a particular city, with a thesaurus grouping together all the streets which had particular characteristics, such as one-way streets, streets with shopping precincts, etc. He asked whether a person who made a second electronic database which listed all the streets of a different city but used exactly the same criteria for grouping streets together in the thesaurus would infringe the right in the first database.

The Commission representative replied that if the thesaurus were to be protected by the copyright right as part of the database, there would be infringement if the expression of the thesaurus were copied; if the thesaurus were protected by the sui generis right, there would be infringement if a substantial part were copied for commercial purposes.

13. The Belgian delegation asked for clarification as to the difference between "the materials necessary for the operation of the database" and "any computer program used in the making or operation of the database".

The Commission representative explained that a computer program was a series of instructions which caused the hardware to perform a function; the materials necessary for the operation of a database were the tools which allowed the information stored in the database to be retrieved in an orderly and efficient manner (see also 7964/93, point 31, in this respect).

The Belgian delegation also asked whether a computer program which had been specifically created for the management of a particular database could be protected under the Directive.

The Commission representative explained that while the thesaurus, index and system for obtaining or presenting
information were operated by computer programs, they were not themselves computer programs; the computer programs which operated them would not be protected under this Directive.

14. The Danish delegation asked whether a database which was commercialized in conjunction with another database would be considered as eligible for separate protection under Article 1(1).

The Commission representative replied that this would depend upon the circumstances, in particular the terms of the contract regulating the relationship between the databases concerned.

**Article 1(2)**

15. The Commission representative explained that this provision resulted from an amendment proposed by the European Parliament (Amendment No. 5) which the Commission had accepted subject to drafting improvements. The intention of this provision as set out in the Commission's amended proposal was to provide a single term which would cover both the author of a database in cases where the database was eligible for copyright protection (Article 1(2)(a)) and the maker of the database in cases where the database was not eligible for copyright protection but was protected by the sui generis right (Article 1(2)(c)); it also covered the situation where the author of the database was also entitled to the sui generis right (for example, where the database contained not works but data and fulfilled the criterion of originality under Article 2(3)), but authorized another person to exercise this right.

16. The Italian delegation suggested that it would be more logical to reverse the order of subparagraphs (b) and (c).
17. The Netherlands delegation considered that the wording of subparagraph (b) was misleading, as it implied that where the author of a database authorized another person to exercise the sui generis right, that person automatically became the owner of the copyright too.

The Italian delegation also pointed out that it was illogical for subparagraph (b) to cover the case where the exercise of the sui generis right by another person was authorized by the author of the database, but not the case where there was no copyright right and the authorization was given by the maker of the database.

In the light of the above observations, the Commission representative suggested the following alternative wording for Article 1(2):

"2. "Owner of the rights in a database" means:

(a) the author of a database or his successor in title;

(b) where the database is not eligible for protection by copyright, the maker of the database or his successor in title."

18. The Belgian delegation doubted whether Article 1(2), either as set out in the Commission’s amended proposal, or under the above alternative wording, would allow for the case where national law provided for the copyright right to be exercised by the author of the database, but for the sui generis right to be exercised by a legal person.

The Commission representative suggested that this question be considered in the context of Article 3.

**Article 2(1)**

20. This provision gave rise to no observations.

**Article 2(2)**

21. Delegations pointed out that their positions on this provision depended on the question whether or not the Directive was extended to cover non-electronic databases (see point 8 above).

22. The German delegation expressed doubts whether, in the event of the Directive remaining limited to electronic databases, this provision should provide that non-electronic databases would remain protected to the extent provided for by Article 2(5) of the Berne Convention.

The Danish delegation, supported by the Spanish, Irish, Netherlands and United Kingdom delegations, considered that in that event the reference to Article 2(5) of the Berne Convention should be replaced by a reference to national law. The possibility was also mentioned of transferring this paragraph as so adapted to the recitals.

The Commission representative entered a reservation on the changes suggested.

**Article 2(3)**

23. The United Kingdom and Irish delegations reiterated their reservation on this paragraph in conjunction with Article 1(1) and Article 6 of the Commission's amended proposal.

The French delegation also reserved its position on this paragraph.
24. The Commission representative pointed out that Article 1(3) of Directive 91/250/EEC(7) and Article 6 of the common position on the proposal for a Directive harmonizing the term of protection of copyright and certain related rights(8) contained the criterion for copyright protection that the work concerned be original in the sense that it is the author's own intellectual creation, as proposed in Article 2(3) of this Directive. She asked whether the United Kingdom and Irish delegations considered that different criteria should apply to different categories of works.

The United Kingdom and Irish delegations replied that their reservation concerned not so much this criterion as the further requirement that the author's own intellectual creation be considered in terms of the selection or arrangement of the contents of the database.

25. The Commission representative also asked how the United Kingdom and Ireland fulfilled their obligations under the Berne Convention if they applied a standard of originality which was different from that laid down in the Berne Convention.

The United Kingdom and Irish delegations replied that the level of protection required by the Berne Convention was a minimum level; their laws provided a higher level of protection than this minimum and than the level of protection which would result from the proposal for a Directive.

The United Kingdom delegation explained that under its law, copyright protection was available for any compilation or tabulation that constituted an original literary work. While "original" was not defined in the copyright law, case-law had shown that in order to be original, a work must not

(8) 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35.
be copied from any source and required a certain amount of skill and effort. The expression of the work, not the ideas and principles underlying it, was protected. Copyright protection of the work would be infringed if a substantial amount of the work was reproduced; "a substantial amount" could be evaluated in either quantitative or qualitative terms. The United Kingdom delegation interpreted Article 2(5) of the Berne Convention as providing for protection of collections as such, not as providing for protection of the selection or arrangement of their contents.

The Irish delegation added that the situation in Ireland was similar to that described by the United Kingdom delegation, much of Ireland's case-law being derived from case-law in the United Kingdom. However, under Irish law, collections of works were protected as works in their own right under Article 2(1) of the Berne Convention, while collections of data were protected as original works.

The Commission representative questioned whether the United Kingdom did not in fact apply the test of whether the work was the author's own intellectual creation, since it had considered that it was not necessary to transpose Article 1(3) of Directive 91/250/EEC on the grounds that this resulted already from its case-law. She also questioned whether "skill and effort" were sufficient criteria for granting copyright protection. Since the copyright protection of the expression of a novel was based not on the individual words used but rather on the way in which they were selected or arranged, the copyright protection of the expression of a collection of data, works or other materials in an electronic database should be based not on these data, works or other materials as such, but on the way in which they were selected or arranged. With regard to the protection of databases in Ireland under Article 2(1) of the Berne Convention, the Commission representative pointed out that this could have the
undesirable effect of protecting facts or pieces of data. In the Commission's view, the only equitable basis for protecting an electronic database by copyright was under Article 2(5) of the Berne Convention, whereby it would be protected only if its author had made an intellectual contribution by selecting or arranging its contents; it would not be equitable to protect by copyright an electronic database in its entirety, including works which were no longer protected by copyright in their own right, or including data or other materials which, as such, had never been eligible for copyright protection.

26. The Portuguese delegation asked whether a database containing a list of authors in alphabetical order would be protected by copyright.

The Commission representative replied that a collection arranged by a method that was not well-known would normally attract copyright protection, but a collection arranged in alphabetical or chronological order would normally not attract copyright protection.

27. The German delegation questioned whether the second sentence of Article 2(3) was necessary. The Commission representative replied that it had been included for avoidance of doubt.

28. The German delegation asked why the Commission had not included in its proposal a provision corresponding to Article 1(2) of Directive 91/250/EEC, making clear that copyright protection would apply to expression but not to ideas and principles.

The Commission representative replied that Article 1(2) of Directive 91/250/EEC had been included for avoidance of doubt. The Commission had not considered it necessary to
include such a provision in the present proposal, but if the Member States were in favour of doing so, the Commission services would not oppose its inclusion.

**Article 2(4)**

29. **The Commission representative** gave the following examples to illustrate this provision:

(a) In the case of a database containing a collection of learned articles which were protected by copyright as literary works, the copyright protection given by the Directive to the collection would in no way affect the copyright protection of the articles.

(b) In the case of a database containing a collection of learned articles which were no longer protected by copyright as literary works, this protection having expired, the copyright protection given by the Directive to the collection would not revive the copyright protection of the articles.

(c) In the case of a database containing a collection of names, addresses and telephone numbers, the copyright protection given by the Directive to the collection would not confer any copyright protection on the names, addresses or telephone numbers as such.

**Article 3**

30. **The Commission representative** drew attention to the fact that Article 3 was based closely on Article 2 of Directive 91/250/EEC.

31. **The German delegation** entered a reservation on the whole of Article 3, considering that it had no harmonizing effect.
It expressed a particular reservation on paragraph 4.

**Article 3(1)**

32. This provision gave rise to no observations.

**Article 3(2) and (3)**

33. The Commission representative explained that Article 3(2) concerned the situation where a database was made by a number of persons whose individual contributions could not be easily distinguished, whereas Article 3(3) covered the situation where a database was made by a number of persons whose individual contributions were readily distinguishable. She further pointed out that Article 3(2) did not create any obligation on those Member States whose legislation did not recognize collective works to create such a category of works.

34. The Netherlands delegation considered that it should be stated in Article 3(3) that in the event of infringement of the copyright in a database, each rightholder should be entitled to take legal action.

**Article 3(4)**

35. The Danish, German and French delegations entered reservations on this provision. The Danish and German delegations considered that it was not necessary to include a provision of this nature in the Directive, preferring to leave this matter to be settled by national law, particularly as their national laws provided that in the absence of contractual provisions to the contrary, the economic rights were exercised by the natural person who had created the database. These delegations did not consider it necessary to follow Directive 91/250/EEC in this respect. The Danish delegation also pointed out that in the event of the Directive
being extended to cover non-electronic databases, the rule proposed by the Commission might not be appropriate to those databases.

Article 4

The Commission representative explained that this Article, which was based on Article 3 of Directive 91/250/EEC, had been added following a proposal to this effect by the European Parliament (Amendment No. 12). She added that since Article 13 of the amended proposal (Article 11 of the original proposal) specified the beneficiaries of protection under the sui generis right, it was useful to include a provision specifying the beneficiaries of protection under copyright.

The Belgian, German, Spanish, French, Italian and Netherlands delegations expressed reservations on this provision, which they considered to be unnecessary. Their reservations concerned more particularly the reference to international agreements, which they considered to be vague, and which was not contained in the corresponding provision of Directive 91/250/EEC. Moreover, they considered that the part of the explanatory memorandum which concerned this provision did not correspond to the text proposed. These delegations indicated that they would be prepared to discuss a provision which corresponded closely to Article 3 of Directive 91/250/EEC.

The Belgian delegation, supported by the Spanish, French and Italian delegations, also considered that it would be premature to accept, by such a reference to international agreements, that the copyright protection of databases was subject to national treatment under Article 5 of the Berne Convention before this matter had been settled in negotiations in the WIPO.
Article 5

38. The Belgian, Danish, German, Spanish, French, Netherlands, Portuguese and United Kingdom delegations questioned the need for this Article, a number of these delegations asking whether any problems had arisen which made harmonization desirable in this respect.

The Commission representative indicated that problems had arisen in respect of the incorporation of abstracts into databases.

Article 5(1)

39. The Netherlands delegation questioned the need for this provision in the light of Article 15(1) of the amended proposal.

The Commission representative suggested that this question be considered when Article 15(1) was examined.

40. The Italian and Spanish delegations suggested that rights related to copyright be mentioned specifically in Article 5(1).

41. The German and Netherlands delegations asked for clarification of the reference to "obligations" in this provision.

The Commission representative explained that there could be obligations of confidentiality or secrecy in respect of certain pieces of data; where the maker of a database intended to incorporate such data into his database, any such obligations should be transferred to him.

The Netherlands delegation expressed doubts whether
obligations incumbent upon a supplier of data could be made applicable to a maker of a database.

42. Following the observations made in respect of Article 5(1), the following revised wording was put forward for consideration:

"The incorporation into a database of any data, works or other materials shall remain subject to the authorization of the owner of any copyright, related rights or other rights and shall remain subject to any obligations incurred in those data, works or materials."

**Article 5(2)**

43. The Danish, German and United Kingdom delegations expressed reservations with regard to the words in brackets in respect of abstracts.

The Commission representative explained that this qualification was intended to make it clear that there had to be reasonable limits on what constituted abstracts. Moreover, the abstracts referred to in this paragraph were abstracts made by the maker of the database, not abstracts made by the author of the original work.

44. The United Kingdom delegation asked whether the Commission had considered the possibility of harmonizing the conditions under which an abstract made by the author of the original work could be incorporated into a database.

The Commission representative replied that there was no reason for harmonizing the conditions under which such abstracts could be incorporated into a databases without the authorization of the owner of the abstract, without considering similar harmonization in respect of other categories of documents, such as legislative texts. Moreover, the purpose of this provision was not to remove certain categories of work from copyright protection, but to make it
clear that there should be no impediment to the incorporation of material into a database where that incorporation involved no infringement of copyright.

45. The Italian delegation drew attention to the danger that where the maker of a database made an abstract of a work by another author and incorporated it into his database, the author of the work might consider the abstract to be a distortion of the contents of his work, and therefore an infringement of his moral rights in that work.

46. The Danish and German delegations pointed out that Article 10 of the Berne Convention referred to "quotations", not to "brief quotations".

The Commission representative explained that the adjective "brief" had been included in order to make it clear that there should be reasonable limits on the length of quotations included in databases without authorization.

47. The Danish delegation considered that Article 5(2) would not necessarily be applicable to databases in paper form in the event of the Directive being extended to cover non-electronic databases.

48. The German delegation questioned the need for Member States to be required to legislate on the incorporation of the items referred to in Article 5(2) into databases in the absence of corresponding legislation on the incorporation of those items into other works, such as encyclopaedias.

49. The Belgian delegation drew attention to the problem of how authors of the works concerned could obtain the correction of any errors made when bibliographical references, abstracts or quotations were incorporated into databases.
Article 6

50. The Netherlands delegation considered that the text of this Article should be prefaced by the words: "Notwithstanding any exclusive rights in the contents of the database, ...".

51. The Netherlands, French, Italian and Belgian delegations considered that it would be preferable in the context of this Article to replace the words "the owner of the rights in a database" by "the author of a database".

The French delegation suggested the alternative wording: "the author of a database or his successor in title".

52. In connection with its reservation on Articles 1(1) and 2(3), the United Kingdom delegation asked whether the exclusive right provided for in Article 6 was dependent upon both the expression of the selection or arrangement of the contents of the database (first indent) and the expression of the electronic material referred to in point 1 of Article 1 used in the creation or the operation of the database (second indent) being sufficient to merit copyright protection.

The Commission representative replied that copyright infringement would occur if the expression of the database were copied, irrespective whether what was copied was the expression of the selection or arrangement of the contents referred to in the first indent, or the expression of the electronic material referred to in the second indent.

53. The Portuguese delegation asked why it was necessary to mention both temporary and permanent reproduction in subparagraph (a).

The Commission representative replied that the exclusive right should cover both temporary reproduction, which would
occur for example when the database was accessed "on-line", and permanent reproduction, which could be made from a temporary reproduction of the database.

54. In the light of the explanations given in respect of Articles 1(1) and 2(3), and in particular of the explanations set out under point 12 above, the United Kingdom delegation questioned whether it was appropriate to refer in subparagraph (a) to "reproduction of the database ... in whole or in part".

The Commission representative replied that unauthorized reproduction of a substantial part of the database would inevitably involve reproduction of a substantial part of the selection or arrangement of the contents and therefore would infringe the copyright in the selection or arrangement of the database; unauthorized reproduction of the thesaurus, index or system for obtaining or presenting information would infringe the copyright in the electronic material used in the operation of the database, including where this material was reproduced to operate a different set of data in a different database. It was therefore appropriate to refer not only to "reproduction of the database ... in whole", but also to "reproduction of the database ... in part".

55. The Netherlands delegation questioned whether it was appropriate to refer to "any other alteration" in subparagraph (b).

The Commission representative pointed out that this wording corresponded to that of Article 4(b) of Directive 91/250/EEC.

56. The German delegation queried the reference to subparagraph (a) in subparagraph (c), pointing out that the result of this reference would be "reproduction of the results
of an act of reproduction", and drawing attention to the fact that there was no corresponding reference in the corresponding provision of Article 4 of Directive 91/250/EEC.

The Netherlands delegation considered that the whole of subparagraph (c) was superfluous.

The Commission representative, while preferring to leave subparagraph (c) unchanged, was prepared to consider removing the reference to subparagraph (a), but was not prepared to delete the part referring to subparagraph (b).

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Other business

57. The Commission representative informed the Working Party of the stage reached by the European Parliament's Committee on Legal Affairs and Citizens' Rights in its second reading of the proposal for a Directive harmonizing the term of protection of copyright and certain related rights, following the adoption of the Council's common position on 22 July 1993 (7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35). The Working Party held a brief informal exchange of views on the information given.