SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 25 October 1993

No. prev. doc.: 9142/93 PI 87 CULTURE 110
No. Cion prop.: 9219/93 PI 89 CULTURE 113

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

1. At its meeting on 25 October 1993, the Working Party continued its first reading of the Commission's amended proposal (9219/93 PI 89 CULTURE 113), examining Articles 7 to 9 and beginning an examination of Chapter III. (1)

Article 7

2. The Danish delegation indicated its readiness to accept this Article in the light of the discussions which had been held on the corresponding Article (Article 5) of Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. (2)

3. The Greek delegation questioned whether it should be made clear whether or not the "contractual arrangements" referred to it in Article 7(1) and (2) had to be written.

The Commission representative replied that it was not the purpose of this Directive to determine the conditions for validity of a contract.

(1) The numbering of Chapters, Articles and paragraphs is that of the Commission's amended proposal, which differs from that of the original proposal.
Article 7(1)

4. The German and French delegations questioned whether this paragraph had any harmonizing effect. These delegations, together with the Italian and Netherlands delegations, also questioned the need for this provision.

The Commission representative explained that, since under Article 6 all acts of reproduction of the database would be subject to authorization, this provision was necessary to enable a lawful user of a database to use that database in accordance with the terms of his contract, without having to seek the authorization of the rightholder each time such use involved any of the restricted acts set out in Article 6.

5. In reply to questions, the Commission representative explained that this provision applied equally to a database which was accessed on line and a database which was made available in the form of a CD-ROM.

Article 7(2)

6. The Commission representative explained that the purpose of this provision was to ensure that the lawful acquirer of a copy of a database who had not concluded any contractual arrangements with the rightholder would be able to perform any of the restricted acts set out in Article 6 which were necessary for the normal use of the database, without having to seek the authorization of the rightholder. In the light of the broadness of this exception, this provision could be considered to be an incentive to rightholders to make clear contractual arrangements with users as to how the database could be used.

7. The Spanish delegation considered that it would be dangerous to provide such a broad exception.
8. The Netherlands delegation asked whether the Commission intended that this exception should apply solely to the lawful acquirer of a database, or be applicable to any user of the database.

The Commission representative replied that it would not be reasonable to allow any user other than the lawful acquirer to benefit from the broad exception set out in Article 7(2).

The Italian delegation on the other hand considered that Article 7(2) should be applicable to any lawful user; it considered in particular that where the lawful acquirer of a copy of a database was a public authority and that authority made that copy of the database available to an educational or research establishment, the exception provided for in Article 7(2) should be broad enough to cover use of the copy of the database by that establishment. It proposed the following wording for this provision:

"In the absence of any contractual arrangements in respect of use of a database, the performance by the lawful user of (a copy of) a database of any of the acts listed in Article 6, which is necessary in order to gain access to the contents of the database and use thereof, shall not require the authorization of the rightholder."

The Commission representative pointed out that the restricted acts set out in Article 6 concerned the selection or arrangement of the contents of the database; she did not consider it necessary for an educational or research establishment to reproduce the selection or arrangement in the circumstances described by the Italian delegation. Use of the contents of a database for the purposes of teaching was a separate matter which was regulated in Article 8.

9. The Netherlands delegation questioned whether it would be licit for the lawful acquirer of a copy of a database in the form of a CD-ROM to lend the CD-ROM privately.
The Commission representative pointed out that, since the exception provided for in Article 7(2) applied solely to the lawful acquirer of a copy of the database, performance by any other person, including a person to whom that copy had been lent privately, of any of the acts listed in Article 6 which was necessary to use the database would remain a restricted act.

The German delegation considered that private lending should not be regulated by the Directive, and that this should be stated clearly.

10. Several delegations asked for clarification of the term "use thereof", which they feared could be construed too broadly.

The Commission representative indicated that the term was intended to refer to use of the database, rather than to use of the contents.

Article 7(3)

11. This provision gave rise to no observations.

Article 8(1)

12. The German delegation, supported by the Italian delegation, questioned the need for this provision, since all the Member States were bound by Article 10 of the Berne Convention for the Protection of Literary and Artistic Works.

The Commission representative explained that the purpose of this provision was to ensure that, where Member States had allowed exceptions provided for in Article 10 of the Berne Convention to copyright rights, the exclusive rights of the author of a database under Article 6 of the amended proposal could not be invoked to prevent the application of those exceptions where the works concerned were incorporated in a database.

13. It was agreed that the words "or other rights" could be deleted, as neighbouring rights were dealt with in Article 8(3).
14. The Netherlands and United Kingdom delegations considered that the reference to the author of a work contained in a database should also mention his successor in title.

15. In reply to questions concerning the meaning of the terms "for the purpose of teaching" and "compatible with fair practice", the Commission representative pointed out that these terms were used in Article 10(1) and (2) of the Berne Convention.

16. The Danish delegation considered that this provision should refer not only to Article 10(3) of the Berne Convention, but to the whole of Article 10 of that Convention.

17. The Danish and Netherlands delegations considered that this provision should also cover any exceptions allowed by Article 9(2) of the Berne Convention provided for in the laws of the Member States. They entered a reservation in this respect.

18. The Italian delegation considered that where the law of a Member State allowed exceptions in respect of the use of illustrations for purposes other than teaching, for example for the purpose of literary or artistic criticism, such exceptions should also be applied where the works concerned were incorporated in a database.

The United Kingdom pointed out in this context that its law made provision for such exceptions for the purposes of research and private study, and considered that this provision of the Directive should not affect the rights of users in this respect.

Article 8(2)

19. The German and Danish delegations expressed doubts as to the need for this provision, considering that this matter could be left to contractual arrangements.

The Commission representative explained that the purpose of this provision was to ensure that, where derogations to the exclusive rights of the author of a work were allowed, the
exclusive rights of the author of a database under Article 6 could not be invoked to prevent the application of those derogations where the works concerned were incorporated in a database. In the absence of this provision, contractual negotiations were likely to result in the user of a database being deprived of the benefits of such derogations where the works were incorporated in a database.

20. **The United Kingdom delegation** considered that reference should be made not only to the author of a work, but also to his successor in title.

21. **The Commission representative** drew attention to problems which could arise where the law of a Member State allowed derogations in respect of the reproduction of a particular category of works, and where the repeated application of Article 8(2) to a database containing a collection of works of that category could lead to the reproduction of a sufficient number of those works to infringe the rights in the selection or arrangement of the contents of the database. **The Danish and United Kingdom delegations** shared this concern.

**Article 8(3)**

22. **The Commission representative** explained that, since Article 8(1) and (2) had been limited to copyright rights in the amended proposal, neighbouring rights were dealt with in this third paragraph.

23. **The German delegation** expressed a reservation on this paragraph in the light of its doubts on the need for paragraphs 1 and 2.

24. **The German delegation** also pointed out that, in the event of this paragraph being maintained, the words "mutatis mutandis" would have to be included, as the rights of owners of neighbouring rights differed from the rights of authors.
25. In reply to a question from the French delegation, the Commission representative stated that this paragraph was not limited to those neighbouring rights harmonized in Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.\(^3\)

**Article 9(1)**

26. The French, German and Danish delegations considered that this provision was unnecessary in the light of Article 2(1) of this proposal for a Directive and Directive 93/98 of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.\(^4\)

The Commission representative suggested that this provision be maintained in square brackets pending the final adoption of the latter Directive.

**Article 9(2) and (3)**

27. The French, German and Danish delegations expressed doubts as to the need for these provisions. They considered that the criteria for the copyright protection of a database, as set out in Article 2, were the only relevant criteria for determining whether or not a new database had been created. The German delegation was particularly opposed to definitions of "substantial change" and "insubstantial change" that could overlap each other or leave gaps.

The Commission representative considered that, where databases were constantly updated, it was not easy to determine at what point the changes made to an existing database were sufficient for it to be considered that a new database had been created. It was necessary for the Directive to lay down criteria in this respect, in order to avoid this matter being left to the courts, which might adopt different criteria.

\(^3\) OJ No L 346, 27.11.1992, p. 61.
28. **Several delegations considered** that it was unnecessary to define both "substantial change" and "insubstantial change". The Netherlands delegation felt that Article 9(3) was superfluous in the light of Article 9(2).

The Commission representative considered that a definition of at least one of the two terms was necessary. In the light of the various criticisms made, she was prepared to consider a definition which contained the criterion of a substantial change to the selection or arrangement of the contents of the database, and which referred to the criteria contained in Article 2.

29. The Netherlands delegation considered that there should be greater consistency between Article 9 and Article 12.

**Chapter III**

30. The Commission representative explained the reasons why a sui generis right had been proposed in addition to copyright protection for electronic databases. Copyright protected the selection or arrangement of the contents of a database, but not the information contained in it nor the investment made to create the database. Since there was little, if any, original selection or arrangement involved in making many fact-based databases, copyright protection alone was not sufficient to protect the investment made by makers of such databases. It was doubtful whether copyright protection could be extended at Community level to cover information or investment, and even if this were possible, it was highly unlikely that this would be accepted by third countries. The majority of makers of fact-based databases sought a specific protection for their investment, and were prepared in return to accept a short term of protection and licensing conditions.

31. The Belgian, Danish, German, Greek, Spanish, French, Italian and Netherlands delegations accepted that copyright was insufficient to protect the investment involved in making many fact-based databases.

The United Kingdom delegation needed to understand more
clearly the precise scope of copyright protection of databases under the Directive before deciding whether or not this was sufficient.

The Irish delegation entered a reservation on the need for any protection in addition to copyright protection.

The Portuguese delegation reserved its position on this question.

32. The Danish, Greek, Spanish, French and Netherlands delegations were prepared in principle to accept a sui generis right as the means of providing additional protection for the makers of databases.

The Belgian, German, Italian and United Kingdom delegations suggested that consideration should also be given to other means of protection. The Belgian, German and Italian delegations mentioned unfair competition law as a possible alternative solution and the Belgian and United Kingdom delegations mentioned the possibility of a neighbouring right.

The Commission representative considered that unfair competition law would not be suitable for a number of reasons: not all Member States had unfair competition laws; unfair competition law concerned the relationship between competitors, not the relationship between rightholders and users; the advisability of attempting to harmonize those specific aspects of unfair competition law which would be relevant for the purpose of this Directive was questionable in the absence of any initiative to harmonize unfair competition law in general. The French delegation also doubted the appropriateness of unfair competition law for resolving this problem at Community level.

The Commission representative also considered that a neighbouring right would not be appropriate: there was no internationally accepted definition of a neighbouring right; neighbouring rights were limited to prohibiting certain acts, which would not be sufficient to take account of the legitimate needs of database makers; in the case of a neighbouring right,
national treatment would have to be accorded to third countries rather than reciprocity; by analogy with other matter benefitting from neighbouring rights protection, a 50-year term of protection would be indicated, whereas the Commission considered that a considerably shorter term would be sufficient for the additional protection envisaged.

33. The Netherlands delegation questioned why the sui generis right should not apply to the contents of a database where these were works already protected by copyright or neighbouring rights (Article 10(2), last sentence).

The Commission representative explained that the compulsory licence provisions could not apply to works protected by copyright. However, she was prepared to consider the possibility of making the sui generis right applicable to contents which were works protected by copyright, provided that compulsory licences were not applicable to such works.

34. The Danish delegation, while approving the principle of a sui generis right, since Danish law already provided for sui generis protection which could be applied to databases, and which had proved satisfactory, expressed doubts with regard to the sui generis protection as proposed by the Commission. It was particularly concerned by the provisions on compulsory licences, there being no comparable provisions in Danish law. It had serious doubts as to the feasibility of a system whereby compulsory licences would be applicable to the contents of some databases but could not be applied to the contents of other databases by virtue of the Berne Convention.