II
(Preparatory Acts)

COMMISSION


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(Submitted by the Commission on 15 April 1992)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2), 66, and 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

1. Whereas databases are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

2. Whereas such differences in the legal protection offered by the legislation of the Member States have direct and negative effects on the establishment and functioning of the internal market as regards databases and in particular on the freedom of individuals and companies to provide on-line database goods and services on an equal legal basis throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation on this subject, which is now taking on an increasingly international dimension.

3. Whereas existing differences having a distortive effect on the establishment and functioning of the internal market need to be removed and new ones prevented from arising, while differences not at the present time adversely affecting the establishment and functioning of the internal market or the development of an information market within the Community need not be addressed in this Directive;

4. Whereas copyright protection for databases exists in varying forms in a number of Member States according to legislation or case-law and such unharmonized intellectual property rights, being territorial in nature, can have the effect of preventing the free movement of goods or services within the Community if differences in the scope, conditions derogations or term of protection remain between the legislation of the Member States;

5. Whereas although copyright remains an appropriate form of exclusive right for the legal protection of databases and in particular an appropriate means to secure the remuneration of the author who has created a database, in addition to copyright protection, and in the absence as yet of a harmonized system of unfair competition legislation or of case-law in the Member States, other measures are required to prevent unfair extraction and re-utilization of the contents of a database;

6. Whereas database development requires the investment of considerable human, technical and financial resources while such databases can be copied at a fraction of the cost needed to develop them independently;

7. Whereas unauthorized access to a database and removal of its contents constitute acts which can have the gravest economic and technical consequences;

8. Whereas databases are a vital tool in the development of an information market within the
Community; whereas this tool will be of use to a large variety of other activities and industries;

9. Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry requires investment in all the Member States in advanced information management systems;

10. Whereas a correspondingly high rate of increase in publications of literary, artistic, musical and other works necessitates the creation of modern archiving, bibliographic and accessing techniques, to enable consumers to have at their disposal the most comprehensive collection of the Community's heritage;

11. Whereas there is at the present time a great imbalance in the level of investment in database creation both as between the Member States themselves, and between the Community and the world's largest database-producing countries;

12. Whereas such an investment in modern information storage and retrieval systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of authors of databases and the repression of acts of piracy and unfair competition;

13. Whereas this Directive protects collections, sometimes called compilations, of works or other materials whose arrangement, storage and access is performed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;

14. Whereas the criteria by which such collections shall be eligible for protection by copyright should be that the author, in effecting the selection or the arrangement of the contents of the database, has made an intellectual creation;

15. Whereas no criteria other than originality in the sense of intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;

16. Whereas the term database should be understood to include collections of works, whether literary, artistic, musical or other, or of other material such as texts, sounds, images, numbers, facts, data or combinations of any of these;

17. Whereas the protection of a database should extend to the electronic materials without which the contents selected and arranged by the maker of the database cannot be used, such as, for example, the system made to obtain information and present information to the user in electronic or non-electronic form, and the indexation and thesaurus used in the construction or operation of the database;

18. Whereas the term database should not be taken to extend to any computer programme used in the construction or operation of a database, which accordingly remain protected by Council Directive 91/250/EEC (*)

19. Whereas the Directive should be taken as applying only to collections which are made by electronic means, but is without prejudice to the protection under copyright as collections, within the meaning of Article 2 (5) of the Berne Convention for the Protection of Literary and Artistic Works (text of Paris Act of 1971) and under the legislation of the Member States, of collections made by other means;

20. Whereas works protected by copyright or by any other rights, which are incorporated into a database, remain the object of their author's exclusive rights and may not therefore be incorporated into or reproduced from the database without the permission of the author or his successors in title;

21. Whereas the rights of the author of such works incorporated into a database are not in any way affected by the existence of a separate right in the original selection or arrangement of these works in a database;

22. Whereas the moral rights of the natural person who has created the database should be owned and exercised according to the provisions of the legislation of the Member States consistent with the provisions of the Berne Convention, and remain therefore outside the scope of this Directive;

23. Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the availability of his work to unauthorized persons;

(*) OJ No L 122, 17. 5. 1991, p. 42.
24. Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database, for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;

25. Whereas if the user and the rightholder have not concluded an agreement regulating the use which may be made of the database, the lawful user should be presumed to be able to perform any of the restricted acts which are necessary for access to and use of the database;

26. Whereas in respect of reproduction in the limited circumstances provided for in the Berne Convention, of the contents of the database by the lawful user, whether in electronic or non-electronic form, the same restrictions and exceptions should apply to the reproduction of such works from a database as would apply to the reproduction of the same works made available to the public by other forms of exploitation or distribution;

27. Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be downloaded and re-arranged electronically without his authorization to produce a database of identical content but which does not infringe any copyright in the arrangement of his database;

28. Whereas in addition to protecting the copyright in the original selection or arrangement of the contents of a database this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment incurred in obtaining and collecting data by providing that certain acts done in relation to the contents of a database are subject to restriction even when such contents are not themselves protected by copyright or other rights;

29. Whereas such protection of the contents of a database is to be achieved by a special right by which the maker of a database can prevent the unauthorized extraction or re-utilization of the contents of that database for commercial purposes; whereas this special right (hereafter called 'a right to prevent unfair extraction') is not to be considered in any way as an extension of copyright protection to mere facts or data;

30. Whereas the existence of a right to prevent the extraction and re-utilization for commercial purposes of works or materials from a given database should not give rise to the creation of any independent right in the works or materials themselves;

31. Whereas, in the interests of competition between suppliers of information products and services, the maker of a database which is commercially distributed, whose database is the sole possible source of a given work or material, should make that work or material available under licence for use by others, providing that the works or materials so licensed are used in the independent creation of new works, and providing that no prior rights in or obligations incurred in respect of those works or materials are infringed;

32. Whereas licences granted in such circumstances should be fair and non-discriminatory under conditions to be agreed with the rightholder;

33. Whereas such licences should not be requested for reasons of commercial expediency such as economy of time, effort or financial investment;

34. Whereas in the event that licences are refused or the parties cannot reach agreement on the terms to be concluded, a system of arbitration should be provided for by the Member States;

35. Whereas licences may not be refused in respect of the extraction and re-utilization of works or materials from a publicly available database created by a public body providing that such acts do not infringe the legislation or international obligations of Member States or the Community in respect of matters such as personal data protection, privacy, security or confidentiality;

36. Whereas the objective of the provisions of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means of securing the remuneration of the author who has created the database, is different from the aims of the proposal for a Council Directive concerning the protection of individuals in relation to the processing
of personal data (1), which are to guarantee free circulation of personal data on the basis of a harmonized standard of rules designed to protect the fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to the data protection legislation;

37. Whereas, notwithstanding the right to prevent unfair extraction from a database, it should still be possible for the lawful user to quote from or otherwise use, for commercial and private purposes, the contents of the database which he is authorized to use, providing that this exception is subject to narrow limitations and is not used in a way which would conflict with the author's normal exploitation of his work or which would unreasonably prejudice his legitimate interests;

38. Whereas the right to prevent unfair extraction from a database may only be extended to databases whose authors or makers are nationals or habitual residents of third countries and to those produced by companies or firms not established in a Member State within the meaning of the Treaty if such third countries offer comparable protection to databases produced by nationals of the Member States or habitual residents of the Community;

39. Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unfair extraction from a database;

40. Whereas in addition to the protection given under this Directive to the database by copyright, and to its contents against unfair extraction, other legal provisions existing in the law of the Member States relevant to the supply of database goods and services should continue to apply,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Definitions

For the purposes of this Directive:

1. ‘database’ means a collection of works or materials arranged, stored and accessed by electronic means, and the electronic materials necessary for the

operation of the database such as its thesaurus, index or system for obtaining or presenting information; it shall not apply to any computer programme used in the making or operation of the database;

2. ‘right to prevent unfair extraction’ means the right of the maker of a database to prevent acts of extraction and re-utilization of material from that database for commercial purposes;

3. ‘insubstantial part’ means parts of a database whose reproduction, evaluated quantitatively and qualitatively in relation to the database from which they are copied, can be considered not to prejudice the exclusive rights of the maker of that database to exploit the database;

4. ‘insubstantial change’ means additions, deletions or alterations to the selection or arrangement of the contents of a database which are necessary for the database to continue to function in the way it was intended by its maker to function.

Article 2

Object of protection: copyright and right to prevent unfair extraction from a database

1. In accordance with the provisions of this Directive, Member States shall protect databases by copyright as collections within the meaning of Article 2 (5) of the Berne Convention for the Protection of Literary and Artistic Works (text of the Paris Act of 1971).

2. The definition of database in point 1 of Article 1 is without prejudice to the protection by copyright of collections of works or materials arranged, stored or accessed by non-electronic means, which accordingly remain protected to the extent provided for by Article 2 (5) of the Berne Convention.

3. A database shall be protected by copyright if it is original in the sense that it is a collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied to determine the eligibility of a database for this protection.

4. The copyright protection of a database given by this Directive shall not extend to the works or materials contained therein, irrespective of whether or not they are themselves protected by copyright; the protection of a database shall be without prejudice to any rights subsisting in those works or materials themselves.

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

(1) OJ No C 277, 5. 11. 1990, p. 3.
Article 3

Authorship: copyright

1. The author of a database shall be the natural person or group of natural persons who created the database or, where the legislation of the Member States permits, the legal person designated as the rightholder by that legislation.

2. Where collective works are recognized by the legislation of a Member State, the person considered by that legislation to have created the database shall be deemed to be its author.

3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

4. Where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract.

Article 4

Incorporation of works or materials into a database

1. The incorporation into a database of bibliographical material or brief abstracts, quotations or summaries which do not substitute for the original works themselves shall not require the authorization of the rightholder in those works.

2. The incorporation into a database of other works or materials remains subject to any copyright or other rights acquired or obligations incurred therein.

Article 5

Restricted acts: copyright

The author shall have, in respect of:

— the selection or arrangement of the contents of the database, and

— the electronic material referred to in point 1 of Article 1 used in the creation or operation of the database,

the exclusive right within the meaning of Article 2 (1) to do or to authorize:

(a) the temporary or permanent reproduction of the database by any means and in any form, in whole or in part;

(b) the translation, adaptation, arrangement and any other alteration of the database;

(c) the reproduction of the results of any of acts listed in (a) or (b);

(d) any form of distribution to the public, including rental, of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the database or a copy thereof;

(e) any communication, display or performance of the database to the public.

Article 6

Exceptions to the restricted acts enumerated in Article 5: copyright in the selection or arrangement

1. The lawful user of a database may perform any of the acts listed in Article 5 which is necessary in order to use that database in the manner determined by contractual arrangements with the rightholder.
2. In the absence of any contractual arrangements between the rightholder and the user of a database in respect of its use, the performance by the lawful acquirer of a database of any of the acts listed in Article 5 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.

3. The exceptions referred to in paragraphs 1 and 2 relate to the subject matter listed in Article 5 and are without prejudice to any rights subsisting in the works or materials contained in the database.

**Article 7**

Exceptions to the restricted acts in relation to the copyright in the contents

1. Member States shall apply the same exceptions to any exclusive copyright or other rights in respect of the contents of the database as those which apply in the legislation of the Member States to the works or materials themselves contained therein, in respect of brief quotations, and illustrations for the purposes of teaching, provided that such utilization is compatible with fair practice.

2. Where the legislation of the Member States or contractual arrangements concluded with the rightholder permit the user of a database to carry out acts which are permitted as derogations to any exclusive rights in the contents of the database, performance of such acts shall not be taken to infringe the copyright in the database itself provided for in Article 5.

**Article 8**

Acts performed in relation to the contents of a database — unfair extraction of the contents

1. 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 non-discriminatory terms.

2. The right to extract and re-utilize the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so.

3. Member States shall provide appropriate measures for arbitration between the parties in respect of such licences.

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.

5. The lawful user of a database may, without authorization of the database maker, and without acknowledgement of the source, extract and re-utilize insubstantial parts of works or materials from that database for personal private use only.

6. The provisions of this Article shall apply only to the extent that such extraction and re-utilization does not conflict with any other prior rights or obligations, including the legislation or international obligations of the Member States or of the Community in respect of matters such as personal data protection, privacy, security or confidentiality.

**Article 9**

Terms of protection

1. The duration of the period of copyright protection of the database shall be the same as that provided for literary works, without prejudice to any future Community harmonization of the term of protection of copyright and related rights.

2. Insubstantial changes to the selection or arrangement of the contents of a database shall not extend the original period of copyright protection of that database.

3. The right to prevent unfair extraction shall run from the date of creation of the database and shall expire at the end of a period of 10 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 1 January of the year following the date when the database was first made available.

4. Insubstantial changes to the contents of a database shall not extend the original period of protection of that database by the right to prevent unfair extraction.
Article 10

Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

Article 11

Beneficiaries of protection under right to prevent unfair extraction from a database

1. Protection granted pursuant to this Directive to the contents of a database against unfair extraction or re-utilization shall apply to databases whose makers are nationals of the Member State or who have their habitual residence on the territory of the Community.

2. Where databases are created under the provisions of Article 3 (4), paragraph 1 above shall also apply to companies and firms formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community. Should the company or firm formed in accordance with the legislation of a Member State have only its registered office in the territory of the Community, its operations must possess an effective and continuous link with the economy of one of the Member States.

3. Agreements extending the right to prevent unfair extraction to databases produced in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of this procedure shall not exceed that available pursuant to Article 9 (3).

Article 12

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to copyright or any other right subsisting in the works or materials incorporated into a database as well as to other legal provisions such as patent rights, trade marks, design rights, unfair competition, trade secrets, confidentiality, data protection and privacy, and the law of contract applicable to the database itself or to its contents.

2. Protection pursuant to the provisions of this Directive shall also be available in respect of databases created prior to the date of publication of the Directive without prejudice to any contracts concluded and rights acquired before that date.

Article 13

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 14

This Directive is addressed to the Member States.