SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (copyright)
on: 16 September 1994

No. prev. doc.: 8987/94 PI 58 CULTURE 50
No. Cion prop.: 9219/93 PI 89 CULTURE 113


1. The Working Party(1) discussed questions 3 to 8 of the questionnaire contained in the invitation to the meeting, on the basis of the third consolidated text of the proposal.(2)

Question 3: Can Article 3(4) be dropped and national copyright rules continue to apply to the employer/employee relationship?

2. The Spanish and Italian delegations were in favour of keeping this provision. They pointed out that this provision corresponded to Article 2(3) of Directive 91/250/EEC(3), and considered that the absence of such a provision in this Directive would give rise to doubt as to the rule to be applied in the absence of contractual provisions regulating the employer/employee relationship.

(1) The Greek delegation was not represented at this meeting.
(2) The main observations of the representatives of the acceding countries are set out in the Annex.
(3) OJ No L 122, 17.5.1991, p. 42.
3. The Danish, German, Irish, Luxembourg, Portuguese and United Kingdom delegations were in favour of deleting this provision. The following reasons were put forward:

- problems had been encountered in implementing the corresponding provision of Directive 91/250/EEC, and it was preferable to avoid similar problems in the context of the present Directive;

- this provision interfered with well-established practices in the Member States;

- since there was no problem relating to the operation of the internal market which required harmonization of the rules in this respect, this matter was best left to national law;

- in the absence of contractual provisions in this respect, the presumption should be in favour of the employee, not the employer;

- if the scope of the Directive were to be extended to cover non-electronic databases, it would be even more difficult for these Member States to accept this provision;

- if the scope of the Directive were to remain restricted to electronic databases, application of this provision to a database in electronic form but not to the same database in paper form would give rise to considerable difficulties.

4. The Belgian delegation withdrew its reservation on this provision, without prejudice to the eventual solution to be found.

5. The Netherlands delegation was able to accept either retention or deletion of this provision.

6. The French delegation reserved its position at this stage.
Question 4: Is harmonization of the rules on the incorporation of information in databases necessary (Article 5)?

7. The Danish, German, Italian, Netherlands, Portuguese and United Kingdom delegations were in favour of deletion of Article 5 for the following reasons:

- since this Article did not concern the legal protection of databases, it was out of place in this Directive;

- since it repeated the contents of Article 10 of the Berne Convention, it was unnecessary;

- to the extent that it attempted to provide harmonization beyond the contents of Article 10 of the Berne Convention it was dangerous.

8. A suggestion by the Italian delegation that the recitals to the Directive contain a reminder of the principles of Article 10 of the Berne Convention was welcomed favourably by the German and Portuguese delegations.

9. The French delegation, while agreeing that Article 5 was unnecessary to the extent that it repeated the contents of Article 10 of the Berne Convention, considered that an exception concerning brief quotations was worth further examination, provided that it did not jeopardize copyright protection and did not conflict with the provisions of the Berne Convention.

Other delegations expressed doubts as to the use of the term "brief quotations", which did not appear in the Berne Convention.

Question 5: Do delegations consider the rules laid down in Article 7 and 8 necessary?

10. With regard to Article 7, the Commission services explained that, since Article 6 created a new exclusive right, it would not be possible for Member States to make provision for any
exceptions to that right unless they were specifically provided for in the Directive. In the absence of any exceptions, a lawful user of the database would not be able to use the database without infringing the restricted acts set out in Article 6. It was therefore necessary for Article 7 to provide for exceptions to the exclusive right contained in Article 6.

11. Apart from the Spanish delegation, which indicated an open position, all delegations considered that Article 7(1) was unnecessary and should be deleted.

12. The German and United Kingdom delegations expressed a preference for the deletion of Article 7(2), as they were not aware that any problems had arisen in the Member States in cases where there had been no contractual arrangements in respect of the use of a database. They considered that if Article 7(2) were to be retained, its wording would have to be reconsidered from a number of aspects, including the drafting suggestion in footnote 41 in 7617/94.

13. The Belgian, Spanish, French, Irish and Italian delegations considered that Article 7(2) was a useful provision, but needed clarification. In particular, several of these delegations considered that the term "use of the database" should be clarified, possibly being replaced by "interrogation of the database".

14. The Belgian and German delegations considered that it should be made clear that the exception provided for in Article 7(2) was not the only possible exception to the exclusive rights of the author of the database.

15. The Netherlands and United Kingdom delegations pointed out that Article 7(2) would have to be reconsidered if the scope of the Directive were to be extended to cover non-electronic databases.

16. The Danish delegation considered that Article 7(2) could be subsumed into Article 8.
17. **For several delegations**, their position with regard to Article 7(3) was dependent upon the solution finally adopted for Article 7(2). At this stage, the Danish delegation was in favour of its deletion, while the Belgian and Italian delegations considered it useful. The German and Netherlands delegations expressed doubts in respect of this provision, as they considered that it would be practically impossible to distinguish between the contents of a database and their selection or arrangement.

18. **All delegations** expressed a preference for the deletion of Article 8. The Commission services reserved their position in respect of this deletion.

**Question 7(4)**: What should the object of protection of the sui generis right be (Article 10)?

19. There was general agreement that the purpose of the sui generis right was to protect the investment made in compiling a database.

20. **The Commission services**, supported by the French and Irish delegations, considered that the object of protection of the sui generis right should be the contents of the database in whole or in part, with the exceptions to this right including exceptions in respect of insubstantial parts of the contents.

The Belgian, Danish, German, Italian, Portuguese and United Kingdom delegations on the other hand supported the view expressed in the note from the Belgian delegation (8987/94 PI 58 CULTURE 50) that the object of protection of this right should be the contents of the database in whole or in substantial part, since they considered that it would be out of proportion to the purpose of the right to extend protection to each item of information.

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(4) This question was discussed before question 6.
The Netherlands delegation considered that the object of protection of the sui generis right should be the contents of the database in whole or in essential part.

The Spanish delegation considered that it was unclear what was meant by a substantial part of the contents of a database.

The United Kingdom delegation considered that substantiality should be evaluated both quantitatively and qualitatively.

21. The German, Irish, Italian and Netherlands delegations considered that the protection conferred by the sui generis right should cover not only commercial use but any use, although the German delegation pointed out that distinctions should be made in the exceptions to the right between commercial use and other uses.

22. The Danish, German, Irish, Netherlands and United Kingdom delegations considered that the sui generis right should also apply to the contents of a database where these were works protected by copyright or subject matter protected by rights related to copyright.

The French delegation on the other hand supported the third sentence of Article 10(2), and indicated that it would have to reserve its position if this sentence were not maintained.

23. The Netherlands delegation considered that it should be made clear that it was not intended that Article 10 be implemented by provisions of criminal law.
Question 6: Do delegations consider it necessary to introduce compulsory licences under the sui generis right or is the existing system laid down in Articles 85 and 86 of the EC Treaty sufficient?

24. The Belgian, Danish, German, Spanish, Irish and Netherlands delegations were not in favour of compulsory licences under the sui generis right. The Belgian, German and Spanish delegations considered that the system laid down in Articles 85 and 86 of the EC Treaty was sufficient and more appropriate. The Irish and Netherlands delegations were not in favour of attempting to codify in the Directive the case-law of the Court of Justice as it stood at a particular time. The Danish delegation drew attention to the position it had expressed at the previous meeting (8858/94 PI 55 CULTURE 49, point 5.2.) and pointed out that this position would be strengthened if the scope of the sui generis right were to be extended to cover works protected by copyright contained in a database (see point 22 above).

The French and Italian delegations and the Commission services were in favour of introducing compulsory licences under the sui generis right. The Commission services considered that these would provide a more rapid and less costly mechanism than the system laid down in Articles 85 and 86. They also pointed out that there was no case-law in respect of a sui generis right which did not yet exist, and that the case-law of the Court of Justice in respect of copyright law would not necessarily be relevant to this sui generis right.

The United Kingdom delegation reserved its position on the question of compulsory licences at this stage.

25. The French delegation considered that if compulsory licences were to be introduced under the sui generis right, public and private bodies which were the sole source of the information concerned should be treated in exactly the same way.
Question 8: How should the question of protection under the sui generis right be set up, including the transitional question?

26. The Danish, French, Netherlands and United Kingdom delegations considered that protection under the sui generis right should begin when the database was created.

The Spanish and Italian delegations considered that this protection should not begin until the database was made available to the public. The Italian delegation considered that if this protection were to begin when the database was created, there would have to be a system of registration for reasons of legal security.

The German and Irish delegations were prepared to consider either solution at this stage.

27. The German, Spanish and French delegations were in favour of a term of protection of 15 years. The Netherlands delegation was also in favour of this term, but in the event of a majority of delegations favouring a longer term, it would be able to go along with that majority.

The Danish delegation considered that the term of protection should expire 15 years from the creation of the database; for a database which was made available to the public it should expire 10 years from when the database was made available to the public, but no later than 15 years from creation.

The Irish delegation was in favour of a term of 50 years, considering that 15 years would be too short.

The United Kingdom delegation was in favour of a term of 50 years from the creation of the database, or 50 years from the publication of the database provided that publication took place within 50 years from creation.
28. The Spanish delegation was in favour of a system of date-stamping which could be used for purposes of calculating term of protection.

The German delegation considered that date-stamping should not be used for purposes of calculating term of protection.

The Netherlands delegation considered that if date-stamping were to be used for purposes of calculating the term of protection of data items, it would be unnecessary to provide for a term of protection for the contents of the database as a whole.

29. The Danish, German and Irish delegations considered that where there was a substantial change to the contents of a database which would result in the database being considered to be a new database, there should be a new term of protection.

The French delegation considered that there should be a new period of protection where there was a substantial change to the contents of the database; it also considered that the term of protection could be renewed where it was ascertained that the contents of the database were still valid, subject to a maximum of 45 years of protection.

The Italian delegation considered that the only time at which it should be possible to renew the term of protection of the sui generis right should be shortly before the expiry of the term or after a minimum number of years.

The United Kingdom delegation was not in favour of any possibility of renewing protection, in view of the length of the term which it proposed.
The Commission services pointed out that the problem which needed to be solved was not whether or not the term of protection under the sui generis right could be renewed, but under what circumstances the contents of a database had been changed to the extent that it could be considered that a new database had been created which qualified for its own term of protection.

30. The Spanish, Italian and United Kingdom delegations considered that when the Directive entered into force or was transposed, existing databases should enjoy a full term of protection from that date under the sui generis right.

The Danish delegation considered on the other hand that such databases should enjoy only the remainder of the normal term from that date. The Netherlands delegation shared this view on the assumption that date-stamping would be used for the purpose of calculating the term of the sui generis right.

The German delegation reserved its position on this question.
Main observations of the representatives of the acceding countries

Question 3

The representatives of Norway, Finland and Sweden were in favour of deleting Article 3(4) for the same reasons as those put forward by other delegations (point 3).

Question 4

The representative of Finland was in favour of deleting Article 5 for the same reasons as those put forward by other delegations (point 7) and for the reasons he had put forward at the Working Party's previous meeting (Annex I to 8858/94 PI 55 CULTURE 49).

Question 5

The representative of Finland considered that Article 7 could be subsumed into Article 8. He was not aware of any problems which made necessary a provision such as Article 7(2). If that provision were to be retained, it should be made clear that it did not constitute the only possible exception to the rights of the author of the database.

The representative of Sweden considered that Article 7(1) and (3) were unnecessary and should be deleted. He reserved his position in respect of Article 7(2).

Question 7

The representative of Finland agreed with the other delegations as to the purpose of the sui generis right (point 19). He also considered that the protection of information was alien to intellectual property law.
Question 6

The representative of Sweden was not in favour of compulsory licences under the sui generis right, considering that the system laid down in Articles 85 and 86 of the EC Treaty was sufficient.

The representative of Finland, while indicating that the final position of his delegation would depend on the eventual scope of the sui generis right and on the exceptions to it, expressed a certain sympathy for introducing compulsory licensing provisions.

Question 8

The representative of Sweden agreed with the positions taken by the Danish delegation on the various aspects of this question.