SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 10, 11 and 12 October 1994

No. prev. doc.: 9523/94 PI 67 CULTURE 54
No. Cion prop.: 9219/93 PI 89 CULTURE 113


1. The Working Party⁽¹⁾ discussed the questions whether the scope of the Directive should be extended to cover non-electronic databases, and whether the scope of the Directive should be extended to collections or should be restricted by means of the definition of database. It then examined the third consolidated text (7617/94 PI 37 CULTURE 39), taking into consideration the replies to these questions and to the questions considered at its previous meeting (9523/94 PI 67 CULTURE 54)⁽²⁾.

Question 1: Should the scope of the Directive be extended to cover non-electronic databases?

2. The Belgian, Danish, German, Spanish, Irish, Italian, Netherlands and United Kingdom delegations were in favour of extending the scope of the Directive to cover non-electronic

⁽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 Annex I.
databases. The following reasons were put forward for such an extension:

(a) this would be in line with international commitments, in particular under Article 10(2) of the Agreement on trade-related aspects of intellectual property rights (TRIPS Agreement);

(b) a régime of protection which was specific to one particular technology (electronic databases) might well prove to be inappropriate as technology developed;

(c) the application of a régime of protection to electronic databases which was different from the régime applied to non-electronic databases could give rise to difficulties, since the same database could be produced in electronic and non-electronic versions, and could be converted easily from one form to the other.

3. The French delegation was opposed to the extension of the scope of the Directive to cover non-electronic databases. It gave the following reasons:

(a) there was a clear need to ensure protection for electronic databases, but a similar need in respect of non-electronic databases had not been proved;

(b) extension of the directive to cover non-electronic databases would delay unduly the adoption of the Directive.

4. Of those delegations which were in favour of extending the scope of the Directive to cover non-electronic databases, the Danish, Irish, Netherlands and United Kingdom delegations considered that this extension should apply
to both the copyright chapter and the sui generis chapter of the Directive;

- the German, Spanish and Italian delegations were not convinced that this extension should apply to the sui generis chapter;

- the Belgian delegation considered that this extension should not apply to the sui generis chapter.

The Irish and United Kingdom delegations pointed out that if the copyright chapter but not the sui generis chapter of the Directive were to be extended to non-electronic databases, many non-electronic databases which were at present protected in their countries would be deprived of protection; they therefore requested that provision be made for both chapters to be extended to cover non-electronic databases in their countries at least, even if there were to be no corresponding obligation in respect of the other Member States.

**Question 2: Should the scope of the Directive be extended to collections or should it be restricted by means of the definition of database?**

5. The Danish, German, Spanish and United Kingdom delegations considered that extension of the scope of the Directive to cover non-electronic databases would imply extension of the scope of the Directive to collections, on the understanding that the term "collections", used in Article 2(5) of the Berne Convention for the Protection of Literary and Artistic Works, was to be considered synonymous with the term "compilations", used in Article 10(2) of the TRIPS Agreement.

The Belgian, Italian and Netherlands delegations were not convinced that the scope of the Directive should be extended
to all collections, the Italian delegation preferring it to be limited to databases.

The French delegation, which was opposed to the extension of the scope of the Directive to non-electronic databases, was also opposed to its extension to collections.

6. Several delegations considered that if the scope of both chapters were to be extended to collections, consideration should be given to some limitation of the categories of collections to which the sui generis chapter should apply.

7. In the light of the discussion on questions 1 and 2, it was decided to continue work on the Directive on the working hypothesis that its scope would be extended to collections.

The Danish delegation expressed doubts concerning the need for the copyright chapter of the Directive on the basis of this working hypothesis.

The Commission representative drew attention to the desirability of Community rules harmonizing the copyright protection of collections beyond the minimum rules of the Berne Convention and the TRIPS Agreement.

Article 1

8. This Article was discussed after Article 2. In the light of the working hypothesis referred to in point 7 above, and in the light of the discussion of Article 2, the Working Party agreed provisionally that no definition of "collections" was necessary in Article 1, although a definition of "collections" for the purpose of sui generis protection might be necessary in the sui generis chapter.
Article 2

9. The Presidency suggested the following text which would combine paragraphs 1 and 3 of Article 2 of 7617/94 in a new paragraph 1, paragraph 2 being deleted and the contents of paragraph 3a being transferred to a recital:

"1. In accordance with the provisions of this Directive, collections of works, data or other materials which by reason of the selection or arrangement of their contents constitute intellectual creations [constitute the author's own intellectual creation] shall be protected by copyright as such. No other criteria shall be applied to determine their eligibility for this protection."

10. After discussion, it was agreed to redraft this paragraph as follows, subject to the reservations set out below:

"1. In accordance with the provisions of this Directive, collections in any form of works, data or other materials which by reason of the selection or arrangement of their contents constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for this protection."

11. The Belgian and French delegations expressed reservations and the Italian and Portuguese delegations expressed scrutiny reservations on this text.

12. The United Kingdom delegation expressed a reservation and the Spanish delegation expressed a scrutiny reservation on the words "the author's own intellectual creation", which depart from the wording of the TRIPS Agreement but correspond to the wording of Article 1(3) of Directive 91/250/EEC(3) and Article 6 of Directive 93/98/EEC(4).

13. The Irish and United Kingdom delegations expressed a scrutiny reservation on the second sentence pending the outcome of discussions on the sui generis right.

14. The Working Party agreed that "database" should be replaced by "collection" in Article 2(4) of 7617/94, subject to a reservation by the French delegation and a scrutiny reservation by the Italian delegation.

Article 3

15. The German, Netherlands and United Kingdom delegations, while not being convinced of the need for Article 3(1) and (3), were prepared to accept these paragraphs if the majority of delegations were in favour of keeping them. The French delegation continued to consider them unnecessary.

16. The Italian delegation was prepared to support the suggestion by the Portuguese delegation that the terms "to have created the database" in paragraph 2 be replaced by the terms "to be the rightholder".

17. With regard to Article 3(4), it was noted that only the Netherlands and the United Kingdom had presumptions in their national law corresponding to that contained in this provision.

The Spanish, Italian and United Kingdom delegations were opposed to the deletion of this provision, the Belgian and Netherlands delegations were prepared to be flexible in this respect, and all the other delegations were in favour of its deletion.

Article 4

18. All Member States were in favour of deleting Article 4.
The Commission representative entered a reservation on this deletion.

Article 5

19. The French delegation stated that it was prepared to follow the majority position in favour of deletion of this Article.

The Commission representative entered a reservation on this deletion.

Article 6

20. Only the Netherlands delegation was in favour of opening this Article with the words "Notwithstanding any exclusive rights in the contents of the collection,"

21. The majority of delegations and the Commission representative were in favour of the introductory wording of this Article reading as follows (variant 2 of 7617/94):

"The author of a collection shall have, in respect of the copyrightable expression of the collection, the exclusive right within the meaning of Article 2(1) to do or to authorize:"

22. The Spanish delegation suggested the alternative wording:

"The author of a collection within the meaning of Article 2(1) shall have the exclusive right to do or to authorize:"

23. The Netherlands delegation expressed a reservation with regard to the reproduction right in subparagraph (a) to the extent that this right was applicable to the copyrightable expression of the collection but not to the contents of the collection, since it considered that it would be difficult to
distinguish between infringement of the selection or arrangement of a collection and infringement of its contents.

24. The Italian and United Kingdom delegations considered that "in whole or in part" in subparagraph (a) should read: "in whole or in substantial part".

25. The German delegation expressed doubts with regard to the possibility of reproducing part of the expression of a collection.

26. Several delegations considered that subparagraph (c) was superfluous. However, the Spanish and United Kingdom delegations were opposed to its deletion.

27. The Commission services put forward for consideration a non-paper suggesting new wording for subparagraph (d). This new wording is set out in Annex II. All delegations entered scrutiny reservations on this non-paper.

28. All delegations expressed considerable doubts as to the inclusion of on-line delivery or delivery in immaterial form under the distribution right. Most delegations would have preferred it to be left to Member States to decide under which right (reproduction, distribution or communication to the public) delivery in immaterial form could be included; the German delegation suggested that a recital be prepared to that effect.

The United Kingdom delegation considered that it was inappropiate to attempt a fundamental reinterpretation of the distribution right in such a small area of copyright, and drew attention to the danger of a contrario interpretation of previous Community directives in the copyright field. The Danish delegation felt that such an attempt should be left to a horizontal Directive covering the whole field of copyright.
Several delegations considered that distribution of a physical copy and delivery in immaterial form should not necessarily be subject to the same rules in respect of exhaustion of rights.

The Commission representative considered that, although it had been stated less clearly, delivery in immaterial form had been included under the distribution right in Directive 91/250/EEC.

29. The Spanish and Italian delegations considered that it was unnecessary to refer to rental in the first sentence of subparagraph (d), since rental was regulated by Directive 92/100/EEC.

30. The Danish, Spanish, Italian and Portuguese delegations would also like it to be made clear that public lending was outside the scope of this Directive.

31. The Belgian, Danish, Irish, Italian, Netherlands and Portuguese delegations expressed considerable doubts with regard to the last sentence of the non-paper. The German delegation expressed a scrutiny reservation in this respect.

The French delegation on the other hand agreed with the contents of this sentence.

32. Following discussion of this non-paper, the Commission services put forward a revised version (Annex III).

33. While several delegations welcomed the removal of references to rental from this provision, reactions in other respects were much the same as to the first version.

Most delegations maintained scrutiny reservations on this version too, while the Portuguese delegation entered a
The question whether subparagraphs (d) and (e) should be merged and the question whether broadcasting should be mentioned specifically in subparagraph (e) were left in abeyance pending further discussion of subparagraph (d).

Article 7

Following discussions at its previous meeting (9523/94, points 10 to 17), the Working Party agreed to delete Article 7(1) and (3).

The Commission representative suggested that, in the light of the working hypothesis referred to in paragraph 7 above, "use of the database" in Article 7(2) should be replaced by "examination of the collection".

The French delegation considered that "interrogation" was the appropriate term with regard to electronic databases (see 9523/94, point 13), and that Article 7(2) was irrelevant with regard to collections other than electronic databases.

The German and United Kingdom delegations maintained their doubts as to the need for Article 7(2).

Several delegations and the Commission representative were in favour of keeping Article 7(2).

The Belgian, Danish, Italian, Netherlands and Portuguese delegations considered that Article 7(2) should be supplemented by a provision allowing Member States to maintain other exceptions to the restricted acts listed in Article 6 which were permissible under the Berne Convention. The German and United Kingdom delegations would support this view if Article 7(2) were to be maintained. Mention was made of the
following possible exceptions: photocopying in return for remuneration; teaching purposes; judicial review; criticism or review of a collection; quotations; archives.

The Commission representative considered that any attempt to harmonize the optional exceptions permitted under the Berne Convention would delay unduly the adoption of the Directive.

39. In the event of Article 7(2) being maintained, the Danish delegation would support the suggestion by the United Kingdom delegation that the opening wording of this provision should read: "In the absence of any contractual arrangements to the contrary, ..." (footnote 41 in 7617/94).

**Article 8**

40. At the Working Party's previous meeting, all delegations had expressed a preference for the deletion of Article 8 and the Commission services had reserved their position in respect of this deletion (9523/94, point 18).

The Danish delegation pointed out that its agreement to the deletion of Article 8 was dependent upon Article 7 containing a reference to exceptions in national law permitted under the Berne Convention.

41. The Belgian delegation suggested that the contents of Article 8 be included in a recital. It was invited to draft a recital to that effect.

**Article 9**

42. The Working Party agreed provisionally to keep Article 9(1), as it had no harmful effect.

43. The Working Party agreed to delete Article 9(2) and (2a).
Article 10

44. The Commission services put forward a non-paper intended to clarify the text of Article 10(2) of 7617/94 (Annex IV).

45. There was general agreement that it should be made clear that the sui generis chapter covered collections of works, data or other materials.

46. The Danish delegation suggested that "collections" be defined in exactly the same way for the sui generis chapter as for the copyright chapter.

The Commission representative pointed out that the purpose of the sui generis chapter was to provide protection for certain collections which failed to qualify for protection under the copyright chapter; this purpose would be defeated if exactly the same definition were to be used for both chapters.

47. The French delegation considered that there was no need for the sui generis chapter to extend to collections other than electronic databases.

The Danish delegation on the other hand considered that the scope of the sui generis chapter should be the same as that of the copyright chapter.

The Irish and United Kingdom delegations drew attention to their position set out under point 4 above.

48. The Belgian and German delegations considered that the words "in whole or in substantial part" should be added to point 10.1 of the non-paper.
The Irish delegation was prepared to accept point 10.1 of the non-paper without that addition in the light of point 10.2, provided that it was made clear in Article 11 that exceptions were allowed in respect of unsubstantial parts.

The Commission representative pointed out that the exceptions to the sui generis right were regulated in Article 11.

49. The German, Italian and Netherlands delegations considered that the sui generis right should be a right to prevent acts of extraction or reutilization, rather than acts of extraction and/or reutilization.

The Spanish delegation considered that it should be a right to prevent acts of extraction and reutilization.

50. The Danish delegation considered that it would be preferable to replace the terms "extraction" and "reutilization" by terms familiar in copyright law, such as "reproduction" and "distribution", in order to make it easier to apply the exceptions provided for in the Berne Convention to these acts.

The Commission representative pointed out that, since the sui generis right was intended to be distinct from a copyright right, it was preferable to avoid terminology which could lead to confusion between the two rights.

51. The Danish and Italian delegations considered that point 10.2 of the non-paper was unnecessary.

The French, Irish and Netherlands delegations considered it useful.
52. The Danish, German, Spanish, Irish, Italian and Netherlands delegations were in favour of point 10.3 of the non-paper, including the contents of the square brackets.

The Belgian and French delegations on the other hand were opposed to the contents of the square brackets. The French delegation considered that the sui generis protection should apply solely to those works contained in a database which were not protected by copyright or a related right; if the same work were to be protected by both a copyright right and the sui generis right, problems would arise as to which rightholder could act in the event of infringement.

53. The Spanish, Irish and United Kingdom delegations agreed to the criterion of investment as proposed in point 10.4 of the non-paper.

The Belgian and German delegations doubted whether this criterion was sufficient, since they considered that it would not be easy to assess how much investment a collection demonstrated.

The Danish delegation considered that the main criterion should be the quantity of works, data or other material contained in a collection.

The Belgian delegation preferred a combination of quantitative and qualitative criteria.

The Italian delegation considered that in addition to the investment criterion, there should be a further criterion of the contents of a database being selected or arranged in such a way that they could be accessed easily and rapidly.
54. The German and Netherlands delegations questioned whether the contents of point 10.4 should not be in a recital rather than in the body of the Directive.

55. The French delegation suggested that points 10.1 and 10.4 might be combined in a single provision.

56. The Belgian, Danish, German, Spanish, Italian and Netherlands delegations considered that the contents of point 10.5 of the non-paper would be placed more appropriately in a recital.

The French and Irish delegations took an open position in this respect.

57. The German and United Kingdom delegations considered that the reference to lawful accessing in point 10.5 was inappropriate.

Article 11

58. The Commission services put forward a non-paper replacing Article 11(1) to (4) and (10) (Annex V).

59. The Portuguese delegation maintained its reservation on Article 11 on the grounds that the exceptions to the sui generis right should be left to national law.

60. The French, Italian and United Kingdom delegations as well as the Commission representative were in favour of provisions concerning compulsory licensing in respect of the sui generis right, as they considered that recourse to Articles 85 and 86 of the Treaty would not be sufficient for this purpose.
The Spanish delegation indicated a flexible position in this respect.

Other delegations referred to their positions as recorded in 9523/94, point 24.

61. The Irish delegation suggested that "could not have been created" in point 11.1 of the non-paper should read "could not have been or cannot be created".

The Commission representative was prepared to accept this change.

62. The French delegation suggested that the words "whatever the means of dissemination" be added at the end of point 11.1, as proposed by the French delegation in Variant 2 of 11(1) in 7617/94.

63. The Portuguese delegation considered that the second part of point 11.2 of the non-paper was superfluous in the light of the last part of point 11.1.

64. The French and Netherlands delegations expressed reservations on the need for a specific provision relating to public bodies (point 11.4 in the non-paper).

The United Kingdom delegation would prefer a different criterion to be applied, namely that the information concerned has been supplied by a third party under a legal obligation to do so.

65. The Portuguese delegation entered a reservation in respect of point 11.4, on the grounds that competition and liberalization of the information market were not the purposes of this Directive.
It considered that if a provision of this nature were to be maintained, provision should be made for exceptions on the grounds of "ordre public" and security.

The Commission representative drew attention in this respect to Article 11(9) of the Commission's amended proposal (9219/93), which in the view of the Commission services should still form part of Article 11.

66. The Spanish delegation considered that point 11.5 of the non-paper should be deleted.

The Commission representative considered on the other hand that it should not be possible to grant compulsory licences in respect of collections which had not been made publicly available.

67. The Belgian delegation asked whether a contractual clause disapplying Article 11 would be valid.

The Commission representative stated that such a clause would not be valid.

The Netherlands delegation expressed reservations in respect of such a situation.
ANNEX I

Main observations of the representatives of the acceding countries

Question 1

1. The representatives of Norway, Finland and Sweden were in favour of extending the scope of the Directive to cover non-electronic databases (point 2 of the main report).

   The representative of Austria expressed an open position on this question.

2. The representatives of Norway and Finland considered that this extension should apply to both the copyright chapter and the sui generis chapter of the Directive (point 4).

   The representative of Austria expressed doubts whether this extension should apply to the sui generis chapter.

Question 2

3. The representative of Austria considered that extension of the scope of the Directive to cover non-electronic databases would imply extension of the scope of the Directive to collections, but that if the scope of both chapters were to be so extended, consideration should be given to some limitation of the categories of collections to which the sui generis chapter should apply (points 5 and 6).

Article 3

4. The representatives of all the acceding countries were in favour of the deletion of Article 3(4) (point 17).
Article 6

5. The representative of Austria expressed doubts whether "translation" in subparagraph (b) was relevant to databases, and considered that subparagraph (c) was superfluous (point 26).

6. The representatives of all the acceding countries entered scrutiny reservations on the wording for subparagraph (d) set out in the non-paper reproduced in Annex II (point 27).

The representative of Austria expressed considerable doubts as to the inclusion of on-line delivery in immaterial form under the distribution right, preferring that it be left to Member States to decide under which right delivery in immaterial form could be included (point 28).

The representative of Austria considered that distribution of a physical copy and delivery in immaterial form should not necessarily be subject to the same rules in respect of exhaustion of rights.

The representatives of Austria and Sweden expressed considerable doubts with regard to the last sentence of the non-paper (point 31).

Article 7

7. The representative of Austria considered that Article 7(2) should be supplemented by a provision allowing Member States to maintain other exceptions to the restricted acts listed in Article 6 which were permissible under the Berne Convention (point 38).
Article 10

8. The representative of Austria agreed with the Danish delegation that "collections" be defined in exactly the same way for the sui generis chapter as for the copyright chapter (point 46).

9. The representative of Finland agreed with the Belgian and German delegations that the words "in whole or in substantial part" should be added to point 10.1 of the non-paper reproduced in Annex IV (point 48).

10. The representative of Austria considered that the sui generis right should be a right to prevent acts of extraction or reutilization (point 49).

11. The representative of Finland agreed with the Danish delegation that it would be preferable to replace the terms "extraction" and "reutilization" by terms familiar in copyright law, such as "reproduction" and "distribution" (point 50).

12. The representative of Austria considered that point 10.2 of the non-paper was unnecessary (point 51).

13. The representative of Austria was in favour of point 10.3 of the non-paper, including the contents of the square brackets (point 52).

14. The representatives of Austria and Finland considered that the criterion of investment proposed in point 10.4 of the non-paper should be combined with a quantitative criterion (point 53).
15. The representative of Austria considered that the contents of point 10.5 of the non-paper would be placed more appropriately in a recital (point 56).

Article 11

16. The representative of Austria agreed with the Portuguese delegation that the second part of point 11.2 of the non-paper in Annex V was superfluous in the light of the last part of point 11.1 (point 63).
d) any form of distribution to the public, including [the on-line delivery] [delivery in immaterial form] and the rental of the database or of copies thereof. The first sale in the Community of a copy of the database by the right holder or with his consent, including the sale of a right for the receiver of [an on-line delivery] [a delivery in immaterial form] of a work to make a copy, shall exhaust the author's right to control further re-sale of that copy within the Community. It shall not exhaust his right to control all other forms of distribution, including the rental and the [on-line delivery] [delivery in immaterial form] to third parties. The distribution right within the Community shall not be exhausted by any act of distribution committed outside the Community, including acts committed with the rightholder's consent.
New text for Article 6 (paragraph d) - 2nd version

d) any form of distribution to the public, including making available in immaterial form 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, including the sale of a right for the person to whom the database is made available to make a copy, shall exhaust the author's right to control further re-sale of that copy within the Community.

It shall not exhaust his right to control all other forms of distribution, including the making available in immaterial form to third parties.

The distribution right within the Community shall not be exhausted by any act of distribution committed outside the community, including acts committed with the rightholder's consent.

Rental and lending of databases remain exclusively dealt with in Directive 92/100.
New text for Article 10(2) clarifying existing text

10.1 Member States shall provide for a right for the maker of a collection to prevent acts of extraction and/or re-utilisation of the contents of that collection.

10.2 This right is subject to the limitations set out in Article 11.

10.3 It shall apply irrespective of the eligibility of the collection for protection under copyright [and irrespective of the eligibility of the contents of the collection for protection by copyright or by other rights].

10.4 [The right to prevent acts of extraction and/or re-utilisation shall apply only to those collections which demonstrate an investment in either the obtaining, verification or presentation of their contents].

10.5 [The purpose of the right shall be to ensure protection of that investment for the limited duration of the right by preventing the use of the contents of that collection to make competing products and by preventing acts by users going beyond lawful accessing, examination and limited re-utilisation of the contents of that collection].
Text of Article 11 incorporating text of French delegation

11.1 Notwithstanding the right provided for in Article 10 a licence for commercial, research or educational purposes relating to the whole or substantial part of the works, data or other materials shall be granted if those works, data or other materials could not have been created, collected or obtained from any other source.

11.2 The person requesting the licence shall undertake to add value to the works, data or other materials thus obtained and not to have made the request for reasons solely of economy of time, effort or financial investment.

11.3 The licence shall be granted on fair and non-discriminatory terms.

11.4 Licences shall also be granted in the same circumstances and under the same terms and conditions by public authorities or public corporations or bodies which are either established or authorised to assemble or to disclose information pursuant to legislation, or are under a general duty to do so, and by firms or entities enjoying a monopoly status by virtue of a concession by a public body.

11.5 The licences referred to in this Article shall only be granted where the collection has been made publicly available in the sense that it may be [interrogated] [examined] by anyone [against payment or free of charge] and the whole collection may be so [interrogated] [examined].
11.6 Member States shall provide appropriate measures for making mediation available to the parties in respect of licences provided for in accordance with this Article, without prejudice to the access of parties to the courts.

Paragraphs 5 and 6 on pages 22 and 23 of consolidated text 7617/94 of 22/6/94 remain.

New paragraph 6bis

6bis The repeated or systematic extraction and/or re-utilisation of insubstantial parts of the contents of the collection amounting to acts which conflict with a normal exploitation of the collection or which unreasonably prejudice the legitimate interests of the maker of the collection shall not be permitted.