
(93/C 19/02)

On 18 June 1992, the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 6 November 1992. The Rapporteur was Mr Moreland.

At its 301st Plenary Session (meeting of 24 November 1992), the Economic and Social Committee adopted the following Opinion unanimously.

1. Summary of the Commission's proposal

1.1. This Draft Directive is designed to protect electronic databases through the medium partly of the law of copyright and partly through a specific new right to prevent 'unfair extraction' from a database.

1.2. Existing legislation in the Member States varies. The United Kingdom which has the largest share of the Community market [estimates vary but the UK share may be a high 60% with 37% of UK production being used elsewhere in the Community (see speech by D.R. Warlock, London 7 May 1992)], provides comprehensive copyright protection for databases and most databases qualify for protection. In Spain, databases are protected as such and there is an elaborate definition of precisely what qualifies as a database. In other Member States the level of protection is less and in some cases in need of clarification.

1.3. In this proposal, a database must be electronic to be protected at all. To enjoy copyright protection it must also be 'original', that is, its 'selection or arrangement' must constitute the author's own intellectual creation. It is the selection or arrangement which must be original, not the contents of the database.

1.4. The Commission does provide some protection for databases that are not 'intellectual creation' (i.e. often referred to as 'sweat of the brow'). As regards the contents of a database, there is an unfair extraction right which permits the maker of a database to prevent others from making extracts from the database for commercial purposes without the maker's consent. This applies whether or not the database itself is protected by copyright but does not apply if the contents of the database are themselves protected by copyright.

1.5. For example, white pages telephone directories are protected under the law of copyright in some Member States. If, as frequently happens, these white pages directories are made available on CD-ROM as databases, the databases themselves would not be protected as 'original' databases (because there would be no intellectual creation in transposing them from paper to the electronic medium) and would not be the subject of the unfair extraction right because, at least in some Member States, there would be copyright in the underlying materials.

1.6. Where the contents of a database which is made publicly available are either:

a) unobtainable from any other source; or

b) made available by a public body under a duty to gather and disclose information,

extraction of such contents must be licensed on fair and reasonable terms, but the proposal does not state how the 'fair and reasonable terms' should be determined.

1.7. The unfair extraction right lasts for ten years (in contrast to the copyright in a database which qualifies for copyright protection, which lasts for at least 50 years pma).

2. General comments

2.1. Although the Committee advocates changes in the Directive, it welcomes the Commission's initiative on this subject in order to ensure that the Community has a strong database industry, able to compete against its competitors in third countries. The Committee believes that in assessing this proposal the Council should keep as its paramount objective the need for a

strong database industry. Consequently, examination should focus on ensuring that the legal protection envisaged leads to this objective and, equally, on the extent to which it does not hinder new entrants to the market. The Council should resist being sidetracked into a debate on legal philosophies which underlie the Directive, particularly on the subject of 'originality'.

2.2. The experience of the United Kingdom in attracting a substantial database industry (particularly vis-a-vis the United States) indicates that the development of a strong local database industry correlates with a high level of intellectual property protection. Any effective weakening of existing intellectual property protection may cause the Community to run the risk that potential database creators will look to third countries (e.g. Canada) where protection may be stronger, to create databases in future.

2.3. In this context the proposed 'unfair extraction' protection does have limitations in ensuring that the database industry is strong.

a) First, only if the contents themselves of a database are not protected by copyright do EC nationals have the benefit of protection.

b) Secondly, the term of the right is too short. More importantly, it is unclear as to when the term of either the unfair extraction right or the copyright begins. Databases are constantly being updated. The extent to which the term has been 'restarted' depends on whether a change is 'insubstantial', because an 'insubstantial' change does not start the term of protection running again. It will be difficult to judge objectively the concept of insubstantiality.

c) Thirdly, the borderline between a database from intellectual creativity or 'sweat of the brow' will be difficult to define giving rise to the risk of extensive (and expensive) legal action. This begs the question as to whether a distinction is important. Databases, which others would like to copy commercially may have involved much effort and expense without meeting the originality criteria. Yet, they would only be protected by the limited unfair extraction right.

2.4. Consequently, the Committee believes that the unfair extraction right may prove inadequate in providing the protection needed for a strong Community database industry and for those whose efforts need protection against copying.

2.5. The Committee believes that the Council should consider the following alternatives.

2.6. One choice would be for the unfair extraction right to be removed from the draft Directive as a separate right and that a right to prevent unfair extraction be inserted as one of the restricted acts under the copyright in a database. The Committee's reasons for this recommendation are as follows.

2.6.1. The unfair extraction right is a sui generis right. So far, in its proposals on the harmonization of intellectual property questions, the Commission has rejected the concept of new sui generis rights and the Council has followed this approach in its decision-making. It should be noted in particular that the Council followed this approach in respect of the recent Directive on the Protection of Computer Programs (the 'Software Directive'). This approach has also been endorsed by this Committee in the past.

2.6.2. It would be wrong to compromise on the question of whether or not something should be protected by allowing a measure of short-term intellectual property protection with a compulsory licence. It is preferable to take a decision on whether something qualifies for protection and, if so, then to grant intellectual property protection of a high standard.

2.6.3. It may be said that to include the unfair extraction right as one of the rights of the copyright owner is inconsistent with the philosophy that copyright protects the rights of authors. However, the concept of copyright as an economic right which is important in an industrial context has already been accepted in the Software Directive and the approach to copyright set out in the Software Directive has been widely welcomed throughout the Community.

2.7. The second choice is to accept the unfair extraction right as a sui generis right, but should ensure that it is as effective a right as it would be if it were a restricted act under the copyright in the database. In other words, the unfair extraction right should not be as limited as it is in Article 2.5 in respect of its term and the compulsory licensing provisions in Article 8.1 should be curtailed. Granted the increasing sophistication of the Community's laws ensuring fair competition, any misuse by its proprietors of this exclusionary right can be dealt with by the application of those laws.

3. Specific comments

3.1. Preamble

The Committee welcomes the practice of numbering paragraphs in the Preamble but wonders if is really
necessary to have 40 paragraphs of often repetitious wording.

3.2. Article 1.1

The draft is confined to 'electronic' databases. The Committee is concerned that this will mean that different legal regimes will apply to the same database if it is stored both electronically and otherwise. This would not only complicate the law but could lead to undesirable practical consequences.

3.3. Article 1.4

The use of the phrase 'insubstantial changes' as a means of defining when a database becomes a new 'original' database for the purposes of the term of protection (Article 9.2) is unsatisfactory. It is difficult to imagine changes made to the selection or arrangement of the contents (as opposed to the contents themselves) which would be insubstantial.

3.4. Article 2.1

The significance of the reference to the Berne Convention is that by protecting databases in this way Member States will be obliged to protect databases emanating from other countries of the Convention (in particular, the USA). The same would also be true of the unfair extraction right if it were made a restricted act under the copyright in the database. However, that is not, in the opinion of the Committee, a serious obstacle: this dichotomy between the rights granted in the USA and the rights granted in certain Member States already exists to no significant detriment to the database industry in the Member States concerned.

3.5. Article 2.5

If the unfair extraction right survives as a sui generis right it should be made clear that it applies to unauthorised access as well as to extraction and re-utilisation.

3.6. Article 3.1

As in the case of the Software Directive, the draft does not oblige Member States to protect computer-generated databases (i.e. databases which have no human author). This is an issue which will have to be addressed at some time.

3.7. Article 4.1

This appears to require an alteration to the laws of the Member States relating to the copyright in the underlying works which make up a database, rather than relating to rights in databases themselves. In the opinion of the Committee this is something which should await the harmonization of the general law of copyright.

3.8. Article 5

The exclusive rights are substantially the same as in the Directive on the protection of computer programs. This is the correct approach.

3.9. Article 7

It may be appropriate to extend the exceptions referred to in Article 7.1 to cover the reporting of, for example, current affairs and other exceptions normally made to the exclusive rights of the copyright owner in the laws of most Member States.

3.10. Article 8.1

It may be appropriate to make it clear that the compulsory licensing provisions under the unfair extraction right (if it is considered appropriate to have compulsory licensing at all, which would not be permissible if the unfair extraction right were part of the general law of copyright) only apply to the right created by Article 2.5 and not to the copyright (if any) in the database or its contents.

3.11. Article 8.2

The definition of 'public body' needs to be made more precise, bearing in mind in particular the need to ensure consistency in the type of activity which is to be the subject of these provisions throughout the EC.

3.12. Article 8.3

This is very vague. Is it intended that all Member States should be required to set up (if they do not have it already) a body equivalent to the UK Copyright Tribunal? If so, the powers and duties of such a tribunal, and the principles upon which it is to operate, should be specified in much greater detail.

3.13. Article 9.3

It is not clear why the specific term of ten years for this right was selected. As stated in section 3.4 above, it
does not appear that existence of the equivalent of an unfair extraction right as part of the copyright in some Member States has impeded the growth of the industry.

3.14. Article 9.4
The definition of 'insubstantial changes' in Article 1.4 refers to changes to the selection or arrangement of the contents of a database. As currently drafted, this is not an appropriate phrase to use in relation to the contents themselves for the purposes of determining when the unfair extraction right begins to run. Further, the Committee would repeat its criticisms of this Article as set out in section 2.3b) above. The Committee suggests that a more practical means of determining the start of a fresh term of protection would be for each item of data in the database to be electronically or otherwise 'date-stamped' on its incorporation into the database. Each piece of data would be protected for the appropriate term from the date of its date-stamp.

3.15. Article 10
The Council should consider whether it is appropriate to include a provision similar to Article 7.1 (c) of the Software Directive, namely a requirement that devices designed to circumvent technical protection of databases are unlawful.

3.16. Article 11.3
This will mean that the Commission would negotiate on this issue with third countries.

3.17. Article 13
The date specified of 1 January 1993 is wholly unrealistic. This issue is not one that was covered in the 1985 Single Market White Paper.

3.18. The Committee notes that the Council has, in previous Directives, asked for regular reports on aspects of copyright to be produced by the Commission. If similar action is incorporated in the final Council Decision on this proposal, the Committee looks forward to being an official recipient of such a report.


The Chairman of the Economic and Social Committee
Susanne TIEMANN