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WORKING DOCUMENT

of the Committee on Legal Affairs and Citizens' Rights

on a Commission proposal for a Council directive on the legal protection of databases
(COM(92)0024 final - SYN0393)

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1. **Introduction. Relation between copyright protection and the right to prevent unauthorized extraction of material from databases**

The Commission's proposal for a directive aims to provide a harmonized and stable legal regime to protect and encourage the creation of databases in the Community.

The draft directive will demand no less than the introduction of new laws in most Member States. Very few countries, apart from Britain and Spain, make specific provision in their intellectual property law for databases. Many databases in paper form - and even some electronic databases - have enjoyed protection in the Member States as literary or -intellectual works, as 'compilations'. In France, electronic databases were protected under the old law of 1957 and as a result of a liberalization of the law, as 'works of information', a concept not recognized by the old French law on intellectual property (see case law on the Montfort case, 1987 judgment of the Court of Cassation).

Nor could the authors of the Berne Convention foresee in their day the advent of new technologies, linked to the expansion of information, which were to give rise to new forms of literary creation and communication with the public.

This is why the addition of a protocol to the Berne Convention, which would cover the creation of electronic databases and computer programmes, is currently under discussion.

In both types of creative activity, however, the expression of the author's personality is largely overshadowed by the technology used to record the works in question. It is nevertheless undeniable that in many cases the creation of databases demands an intellectual effort involving ordering and selection, which requires copyright protection.

The draft directive does not provide copyright protection for all electronic databases as such, but only for those which fulfil the requirements of 'originality' laid down in Article 2 of the directive.

The great challenge which this measure represents is to strike a balance between Anglo-Saxon principles on intellectual property - which have provided protection for many of the databases currently operating on the Community market - and the continental system, which is far more stringent as regards verification of originality, without undermining Community criteria in the field established by other Community directives and, in particular, by the directive on computer programs.

In other words, the laws of the Anglo-Saxon countries have enabled many databases to enjoy protection as literary works, giving precedence above all to 'the technical work of the compiler', by contrast with other, more stringent criteria of originality laid down in the legislation and case law of certain Member States. British copyright law has even been used to protect exhaustive or virtually exhaustive lists or catalogues of data, which would not meet the criterion of originality laid down by the draft directive.
One thus needs to ask whether the application of certain of the directive's provisions (particularly those on 'originality' in Article 2(3), in conjunction with the provision laid down in Article 12(2) on the temporary application of the directive with retroactive force, might not result in a loss of the protection which certain databases enjoy in certain Member States today. Loss of protection could have clearly adverse effects on business within the Community, by, for instance, introducing a disincentive for production and reducing investment in this sector. The Commission seems to have been aware of this problem in establishing a double system of protection in its draft directive; databases which do not, in themselves, meet the requirements of originality laid down by the directive, in that they are not original by reason of their selection or their arrangement, may nonetheless enjoy special protection against parasitic use of their material. Consequently, the maker of the databases will be entitled to prevent the unauthorized extraction or re-utilization for commercial purposes of the whole or part of the material contained in the databases.

Any databases protected under copyright may thus become gradually eligible for this sui generis right, as regards their material, except where such material is already protected under other intellectual property rights.

The purpose of this right is to protect the investment necessary for the creation and development of a database, the introduction of this sui generis right, which does not apply to intellectual property, would seem logical in principle.

However, ten years after the publication of the database, some databases may have increased their commercial value considerably. At the end of this period, such databases would be unprotected and would pass into the public domain. It would therefore be advisable to consider the possibility of extending the period for which this sui generis right of protection applies.

2. Consideration of a number of aspects of the proposal for a directive

2.1. Scope

This draft directive applies only to 'electronic' databases. It does not, therefore, cover databases 'in paper form' or databases incorporated into other types of support. The Commission's Explanatory Memorandum, however, states that if in practice divergent interpretations of the Berne Convention should arise in respect of databases in paper form, it might be possible to extend the directive to cover all databases in future. However, written databases will continue to enjoy protection as literary works in the Member States under Article 2(5) of the Berne Convention.

It is also important to mention that Article 1(1) of the draft directive clearly establishes that it does not apply to any computer program used in the making or operation of the database.

The first question which arises is thus whether it would be appropriate to extend the scope of the directive to include all databases. If so, it would be necessary to examine whether each and all of the provisions laid down in the directive could apply to databases in paper form.
2.2. Object of protection

The draft directive does not extend copyright protection to all databases as such, but only to those which are 'original'. Such databases enjoy protection equal to that accorded by the Member States to collections or anthologies, pursuant to Article 2(5) of the Berne Convention.

Not all collections of data are 'original' and thereby eligible for protection; only those which, by reason of their selection or their arrangement, constitute the author's own intellectual creation. At all events, the copyright protection for which databases which meet the requirements laid down in Article 2(3) are eligible can never extend to material contained therein, that is, to the works or materials which make up the collection. If this were not so, it would be possible under certain of the directive's provisions to grant obligatory licences for works accorded copyright protection.

Their contents, however, enjoy permanent protection under the new sui generis right to prevent unfair extraction for commercial purposes, except where the said contents are already protected by other intellectual property rights.

2.3. Acts performed in relation to the contents of a database - unfair extraction of the contents

Article 8 of the draft directive is one of the most problematic in the document.

The Commission's intention in incorporating this article in the draft directive seems to have been to prevent rightholders from abusing a dominant position and to avoid a negative impact on free competition. This article states that if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained independently from any other source, the right to extract and re-utilize them for commercial purposes shall be licensed.

A licence shall also be issued if the database is made publicly available by a public body which is established to assemble or disclose information. It would, however, be advisable to think carefully about this provision, which will particularly affect commercial competition relations between undertakings.

In principle, it seems sensible to apply a provision of this type where public bodies, or even undertakings operating on the market as semi-monopolies, are concerned. However, should it be applied generally in a normal competition situation? Should it be applied to all competitors, when the directive in question lays down a general principle of free contracting between producers, users and competitors? Might this obligatory licence, applied across the board, not function as a kind of private expropriation of the rightholder's exclusive rights?

The Commission itself acknowledges in recital 33 (although this does not seem to be reflected in the rest of the text) that it is not legitimate to apply for such licences for reasons of commercial expediency, i.e. because they save time, effort or financial investment.
Another problem raised by this article is the possibility that the lawful user may extract and re-utilize 'insubstantial parts' of works or materials contained in a database. 'Insubstantial parts' are 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.

This concept, however, is vague and too broad, and it seems likely to give rise to a considerable number of disputes in the Member States.

One must recognize that it is difficult to establish specific or percentage-based criteria to determine when the extraction of an insubstantial part is 'legitimate' under the directive, or when it constitutes a parasitic act which infringes the rightholder's exclusive rights.

One should therefore examine the need to establish other criteria to define this concept, or, on the contrary, to determine whether its interpretation should be left once and for all to the courts of the Member States.

It does, however, follow from the various provisions of Article 8 and the arguments set out that there is a need to include in the directive a specific definition of the phrase 'commercial purposes'.

2.4. Period of protection

Article 9 poses another of the draft directive's major problems.

When the Commission's committee on legal affairs examined this proposal in December 1992, the Commission stated that its aim in this context was to apply to databases a system similar to that applied to new editions of books. It should, however, be reiterated here that copyright protection applies only to databases deemed original by reason of the selection or arrangement of the materials they contain. Consequently, only extensive changes in the selection or arrangement of databases, to the extent that such databases constitute a new edition, could justify extension of the period of protection. Insubstantial changes in the selection or arrangement (such as simply inputting more data), on the other hand, would not necessitate extension of the period of protection.

The problem does not arise so much in connection with databases protected by copyright, as in connection with those whose contents are protected solely by the sui generis right. The problem is even more acute where 'dynamic' databases, which need to be constantly updated, are concerned.

The constant input of new material may considerably increase the economic value of the contents and, in the long term, give rise to far-reaching changes in the substance which constitutes the database's contents.

Article 9(4) clearly states that insubstantial changes to the contents of a database shall not extend the original period of protection of that database by means of the right to prevent unfair extraction.
Moreover, the directive does not define such 'insubstantial changes' in relation to the contents protected by the right to prevent unfair extraction. Article 1(4) of the directive merely defines insubstantial changes as additions, deletions or alterations which may be made to the selection or arrangement of the contents, which are protected by copyright, not by the sui generis right. Such insubstantial changes shall not extend the period of protection under copyright, since changes in the selection or arrangement of the content are necessary for the database to continue to function in the way intended by its maker.

Some thought should be given to the period of protection to be accorded to the content of a database which is constantly updated, without this necessarily implying preference for permanent protection.

Accordingly, some of the sectors consulted have raised questions about the way in which the duration of the right to protection would be calculated.

During the exchange of views in the Commission's committee on legal affairs held in December 1992, the Commission stated that it had discussed two possible options in this connection:

- Protection for a fixed ten-year period, counting from the publication of the database.
- The second option would be to count this ten-year period from the date of input of material or information of any type into the database. The Commission rejected this second proposal on grounds of excessive bureaucracy.

According to certain of the sectors concerned, which favoured the second option, a system of individual 'stamps' for each item of data input would have to be set up, to prove the exact date of input into the contents of the database.

Since operations of this type may depend chiefly on the technical characteristics of the support or program utilized, it would be advisable to consider the costs which such a system would entail, which might prove too heavy for small and medium-sized undertakings. There is also a need to examine whether a provision of this type could be incorporated on an ex-lege or compulsory basis in a draft directive like the one under consideration.

3. Other provisions contained in the draft directive

For reasons of space, your rapporteur cannot cover all aspects of the draft directive. He does, however, reserve the right to take action later, at the amendments stage.

He would, however, make the following general observations:

3.1. Authorship and author's exclusive rights

As regards entitlement to copyright over a database and authorship (Article 3) and restricted acts in relation to copyright (Article 5), the draft directive is broadly similar to the corresponding articles in the directive on computer programs.
3.2. Incorporation of works or materials into a database

As regards the input into a database of 'whole' works or materials already protected under other intellectual property rights, it would be appropriate to consider whether or not this provision is superfluous, bearing in mind that the laws of the Member States will continue to apply in this area at any rate. Consequently, the original author's authorization will always be required. As regards the incorporation of other materials, such as brief abstracts, quotations, summaries or bibliographical material, the Commission has opted for the criterion which emerged from the famous French case law on the Montfort case. The incorporation of such material shall not require the author's authorization, provided that it is not a substitute for the original work.

3.3. Exceptions to restricted acts relating to copyright, on the selection or arrangement of the content of the database

Although access to databases shall be governed by contractual agreements between the parties concerned, the Commission has chosen to make an exception in favour of the lawful user. In utilizing the database which he has acquired, the user often commits illegal acts, especially reproduction, which may infringe the author's exclusive rights to the selection and arrangement of the database's contents.

The Commission states that once a database has been legally acquired, the legitimate user shall not require the author's authorization to perform the necessary actions to access and use the contents of the database.

3.4. Exceptions in relation to the copyright on the contents

Article 7 allows the Member States to continue applying the derogations provided for by their laws, such as private copies or the right to brief quotations and illustrations for the purposes of teaching, provided that such use is compatible with fair practice in relation to the works or materials making up the contents of the database and that the material in question is already protected by copyright.

3.5. Reciprocal arrangements with third countries with respect to the right to prevent the unauthorized extraction of the contents of a database

The right to prevent the unfair extraction of the contents is not a right under intellectual property law, and therefore falls outside the scope of the Berne Convention, which is based on the principle that such matters must be dealt with at national level.

Under the draft directive, this right can therefore be extended to databases produced in third countries on a reciprocal basis only, or -which comes to the same - if such countries provide comparable protection for databases created by Member State nationals. To this end, as provided for by Article 11(3), the Community can conclude the necessary conventional instruments.