TRANSLATION OF LETTER

from: European Commission, signed by Ms Anita GRADIN

dated: 15 September 1995

to: Mr Javier SOLANA, President of the Council of the European Union

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Subject: Communication from the Commission to the European Parliament regarding the Council’s common position on the proposal for a Directive on the legal protection of databases

Sir,


(Complimentary close).

(s.) Anita GRADIN

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

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Common position adopted by the Council with a view to adopting a g a Parliament and Council Directive on the legal protection of databases

1. **Background**

- Transmission of the proposal to Parliament and to the Council: 13.5.1992
- Parliament's opinion on first reading: 23.6.1993
- Transmission of the amended proposal: 4.10.1993
- Adoption of the common position: 10.7.1995
- Opinion of the Economic and Social Committee: 24.11.1992

2. **Subject of the Commission proposal**

The Commission proposal seeks to harmonize national copyright provisions as applied to the structure (selection or arrangement of the contents) of databases.

The protection will be without prejudice to any existing right of protection for the different elements of the contents. Harmonization of this aspect of copyright involves, among other things, transposing the international obligations under Article 10(2) of the TRIPS agreement.

Alongside copyright protection, the proposal for a Directive introduces a *sui generis* right to grant effective protection to investments associated with the production of databases.

3. **Commentary on the common position**

3.1 **General comments**

The Council has deemed it appropriate to include in its common position a chapter on the scope and limitations of the scope of the Directive (Chapter I) rather than simple definitions, and accepted the regrouping, proposed by the Commission in its amended proposal, of provisions dealing with copyright protection in a second chapter (Chapter II), and those concerning the *sui generis* right in a third chapter (Chapter III). The Commission agrees with the Council that this new structure helps to make the text easier to understand.
The Council has also deleted a number of articles in the "copyright" chapter, either because they were merely declaratory or because they were inappropriate to the objective pursued by the proposal for a Directive.

Article 4 (Amendment No 12) of the amended proposal, on entitlement to protection under copyright, no longer seems necessary. The reference to requirements laid down in national legislation or international agreements does not provide any additional harmonization. The question on Article 9(1) (Amendment No 21) concerning the duration of protection has since been harmonized at Community level by Directive 93/98/EEC.

In addition, the Council has deleted Articles 5 and 8 on the incorporation of contents into a database and on exceptions to the restricted acts in relation to the material contained in a database because retaining them could have brought about only a small degree of harmonization and contributed little towards achieving the Directive's objectives.

Lastly, the Council has added, amended and deleted a number of recitals in order to give more emphasis to a number of key provisions. The Commission takes the view that some of the additions make the text clearer and ensure better understanding of the delicate balance that the Directive seeks to establish between the different interests concerning databases.

3.2 Amendments adopted by Parliament on first reading

(a) Amendments accepted by the Commission and included in the common position

In accordance with Parliament's opinion, the Commission had introduced one substantive amendment into its amended proposal and had made a number of other changes to the wording.

In its common position the Council has accepted the single substantive amendment proposed by Parliament concerning the extension of the term of protection by the *sui generis* right (Amendment No 24, Article 12 of the amended proposal, Article 10(1) of the common position). Consequently, the term of protection has been extended from ten years to fifteen years once the database has been completed.

The Council has also accepted the idea, set out in Amendment No 26, of renewing protection by the *sui generis* right where there is a substantial change to the contents of a database (Article 10(3) of the common position).

Like Parliament, the Council has preferred the terms "unauthorized extraction and/or re-utilization" to "unfair extraction" throughout the text, since the *sui generis* right, as an economic right, is clearly quite distinct from the field of unfair competition (Amendment No 6, recitals 41 and 42 of the common position, etc.).
In accordance with Parliament’s Amendment No 8 and the Commission’s amended proposal, the Council has deleted the definition of an "insubstantial part" of a database. The common position is also based on Amendment No 10 with regard to substantive changes (Article 7(5)).

Amendment No 13 on authorization to incorporate into a database works or materials prompted the Council to include Recital No 18.

Most of the lawful user’s minimum rights proposed by Amendment No 15 have been included in Articles 6(1) and 8(1) of the common position. The Council even went further on consumer protection, making these provisions mandatory (ius cogens) (Article 14(1) and (3)).

The idea behind Amendment No 30, which seeks to protect rights acquired before the entry into force of the Directive, was taken into account by the Council when drafting Article 14(2).

Lastly, the Council accepted a review clause which largely uses the wording called for by Recital No 32 (Article 16(3)).

(b) Amendments accepted by the Commission but not included in the common position

The Council thought it appropriate not to include Parliament’s Amendments Nos 18 and 33 and to change the approach pursued by the Commission proposal, which provided for non-voluntary licensing arrangements for the sui generis right in order to establish a counterbalance to this substantial right with a view to promoting the interests of competition, SMEs and consumers.

(c) Differences between the Commission’s amended proposal and the Council’s common position

The rejection of the system of non-voluntary licence provided for in Article 11 of the amended proposal has led the Council to restrict the scope of protection by the sui generis right on two levels. In this respect, it should be noted that the sui generis right now covers all or a substantial part of the contents of a database, whereas the Commission proposal covered the insubstantial parts too (Article 7(1)).

In addition, unlike the Commission’s amended proposal, the Council has drawn up a limitative list of optional exceptions covering the substantial parts of the contents of a database (Article 9).

Moreover, the common position provides for a larger degree of parallelism in terms of exceptions between the chapter on copyright and that on the sui generis right (Articles 6(2) and 9).
The Council has also preferred to redefine the object of the *sui generis* right, namely protection of a substantial investment evaluated qualitatively or quantitatively (Article 7(1) of the common position).

The Council has deemed it appropriate to provide a list of acts subject to restrictions under the *sui generis* right, specifying the exact scope of this legal innovation (Article 7(2)).

The Commission welcomes the basis and the desirability of the compromise formula which the Council has produced on these last two points.

Under the common position, the *sui generis* right is no longer a subsidiary right and can now be applied irrespective of whether protection is available under other rights (Article 7(4)). In view of this overlapping of rights, it seems logical that the Council has thought it necessary to ensure that the rules applied to copyright and to the *sui generis* right were as uniform as possible.

Lastly, it should be stressed that the Council has revised the definition of the term "database" by including collections of works within the meaning of Article 2(5) of the Berne Convention. It has added a number of recitals with a view to reassuring holders of existing rights as to the different elements of the contents of a database (Recital 17 et seq.).

3.3 Commission position with regard to the deletion of the provisions on the non-voluntary licence

Although the Commission takes the view that the common position as a whole is a balanced compromise, it would have preferred to retain the non-voluntary licensing arrangements advocated in its own proposal for a Directive.

Whilst it is true that, in the final analysis, the reduced scope of the *sui generis* right is likely to meet with the legitimate expectations of consumers and of the public since the insubstantial parts of the contents of a database are now in the public domain, it cannot be doubted that the inclusion within the Directive of precise criteria could have resolved, in this field, potential conflicts between exercising intellectual property rights and competition law rights.

In the first place, competitors of the right holder, in particular S.M.E.s as well as users in general, could have relied on specific rules in order to obtain the necessary material without having to invoke national or Community competition law. Moreover, this probably would have strengthened their position as against the right holder. Secondly, the inclusion of precise criteria would have led to an increase in the general level of legal certainty. This would no doubt have been in the interest of all the parties concerned, including the right holder himself.
That is why the Commission undertook, when the Council adopted the common position, to examine in particular in its report on the application of the Directive (Article 16(3)) whether the application of the *sui generis* right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, in particular the establishment of non-voluntary licensing arrangements.

4. **Conclusions**

In the Commission’s view, the common position, which was adopted by a very broad consensus, represents remarkable progress in the effort to create a harmonious legal environment with regard to databases. This compromise text is of great importance in the context of the information society since most of the new products and services will operate from databases.

The harmonized system as established by the eventual Directive will enable the doctrine of copyright to be brought closer to that of *droit d'auteur* in this crucial sector. This in itself will undoubtedly have a non-negligible effect on the work of the international bodies responsible for harmonizing intellectual property law at global level.

The high degree of protection afforded by the text, and its application throughout the single market, will help to strengthen investment in this key sector and to create jobs.

In relation to these advantages, the deletion of the non-voluntary licensing arrangements and the partial harmonization of the exceptions to copyright and to the *sui generis* right seem acceptable. Accordingly, the Commission supports the Council’s common position while making the following statement:

As part of the report provided for by Article 16(3), the Commission undertakes to examine:

(a) the case for further harmonization of the exceptions to copyright and to the *sui generis* right, in particular in the light of the issue made by the Member States of the options available to them under the Directive;

(b) the effects of Article 15 on the respective interests of the parties concerned.