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COMMISSION JURIDIQUE
ET DES DROITS DES CITOYENS

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AUDITION

le

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relative à la

proposition de directive du Conseil

concernant la protection juridique des bases de données

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M. Richard BAKER

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To: The Committee on Legal Affairs & Citizen Rights of The European Parliament


I greatly appreciate the opportunity to contribute to the deliberations of the Legal Affairs Committee on this important proposal.

As the Legal Director of Reed International I speak on behalf of a major UK based International publishing and information group of companies whose databases include such well known products as the World Airways Guide, The Hotel and Travel Index, The Martindale-Hubbell Law Directories and Digests, Books in Print, Who's Who (the American version) and Kelly's & Kompass Business Directories.

As of 1st January, 1993 we became at an operating level Reed Elsevier plc through our merger with the leading scientific publisher Elsevier NV which also has a considerable interest in database publishing as abstracting develops in that direction. Although I expect that Reed's and Elsevier's views will become harmonised much more rapidly than the views of Community members on these subjects, after only two months I have to say I do not as yet seek to represent the Elsevier view of the Directive which my Dutch colleague Erik Ekker puts forward as a member of the Legal Advisory Board of DGXIII and through his Chairmanship of the Copyright Council of the Dutch Publishers Association.

Reed wholeheartedly welcomes the initiative of the Commission in putting forward its proposal for a Directive to cover the specific issues that arise in relation to the construction and maintenance of databases. We believe that copyright law as it has evolved is likely to be ill suited for tackling all the aspects of database protection. I am not a expert copyright lawyer but I am relieved to find that my new colleague Mr. Ekker (who is) shares this view also. Therefore I believe that the new right to prevent unfair extraction suggested is a necessary and imaginative legal response to the challenge of technology and I have concentrated my efforts on four or five main points relating to these new rights.

I think it is equally important to ensure that the provisions of the Directive relating to copyright law and to the relationship between Berne convention rights and the new protection are carefully examined but others will be able to help you more than I can on these subjects.
1. **Scope of Directive (Article 182)**

Many of our largest directories are stored on electronic databases and distributed by both electronic and hard copy means. For example, Kompass revenues are split between hard copy and online database subscription and libraries are increasingly using Books in Print in CD-ROM form. Although hard copy versions of the World Airways Guide published by ABC International still abound we see increasing use being made of CD delivery of this database to travel professionals. I actually have the ABC Travel Disc loaded into my own PC. In the legal directories market Martindale Hubbell has just become available to subscribers via Lexis and other opportunities beckon.

Hard copy will, of course, remain a viable alternative method of delivery of this information to certain segments of the market for as far ahead as we can see. Moreover in developing databases, publishers and information providers often do not know the preferred delivery system for material on it and need to conduct actual research by sample before determining the market's preference.

The effect of the definition of "database" in Article 1 however is to restrict the right to prevent unfair extraction to databases which are distributed electronically.

Where the originality requirement for copyright protection is not met, the effect of this is to remove any protection, particularly where 'sweat of the brow' copyright protection had previously been available, from database products distributed in hard copy form.

Once the investment in a database product has been made, the owner has created the economic effect which this proposal is designed to protect. It seems to me that subsequently if an owner can prove unauthorised use of factual material derived from an electronic database the means of delivery should be irrelevant. I think UK owners may well be prepared to harmonise back to European originality definitions on copyright if this approach was adopted, allowing any problems of overlap to be dealt with by Article 12.

Accordingly, I suggest (using the English version) that the relevant words in Article 1(1) read:-

"a collection of works or materials arranged and stored by electronic means and accessed by electronic or non-electronic means."
2. Parts (Articles 1 & 8)

Some problems arise about the definition of parts. Multiple separate 'products' are produced from one database. For example valuable specialised mailing lists are formed from tiny parts of our Kompass database. If such products can be fairly extracted individually, much of the value of the new protection is lost. I consider that the addition of the words "or its products" after "the database" where those words appear in 1(3) (twice) would be a more practicable test of insubstantiality? This would also be consistent with the 'brief extracts of works' derogation from copyright in Article 7.

3. Revisions & Duration (Article 9)

The ten year protection period appeals to owners the value of whose databases lies in storing relatively current information. The Commission recognises this point in its preamble (para 5.c page 47). Our initial reaction to this was based on the hope and expectation that a way would be found to deal with the position of updates.

If this is not done the effect of the directive would be to impose on producers a requirement to reconstitute their database design every ten years. A sensible time period for protection would thus be converted into an arbitrary re-design criterion for producers.

The Commission's suggestion for date stamping individual pieces of information is a thoughtful response to this point but one which we think would throw up major difficulties in practice. There are at least two other approaches which could be adopted.

a) At some point, certain databases change completely as a result of the cumulative effect of successive insubstantial changes (e.g. World Airways Guide). One could therefore envisage clarifying Article 9(4) by adding after "insubstantial changes to the contents of a database" the words "(which do not themselves or when combined with other changes to the database subsequent to the date of first protection amount to a new database)".

b) Other databases consist of the additional assertion of new material which does not replace the old (e.g. Books in Print). Here individual changes do not amount to a new database and so would not benefit from suggestion a). My conclusion on these cases which I have reached after initially supporting the ten year period as adequate, is that the only practicable solution may be a longer period of protection of up to twenty-five years.
4. Licensing (Article 8.1)

We understand that the need to harmonise this proposal with the requirements of competition policy suggests licensed access, where the material on the database has in effect been exclusively contracted for by the database producer. However the present language of the directive could also allow member states to legislate in a way which would apply compulsory licensing to a wider group of situations than this. While accepting that the following amendment may be redundant in the Commission's view, my experience of my own country's enthusiasm for legislating on directives in a somewhat restrictive fashion leads me to suggest that in Article 8(1) after (line 3) "materials" there should be inserted "or similar works or materials" and after "cannot" insert "(whether by investment of appropriate resources or otherwise)".

5. Licence Valuation (Article 8.3)

It is important that the licensing provisions clearly ensure that an economic return to the database producer results from the process of making the material available to third parties. For this to happen it is necessary that the purpose of the arbitration referred to in this paragraph is to value the new right and provide for a return to the right holder from the licensee based on valuation principles rather than any other considerations. For this reason I would add "having regard to the value of the right to prevent the unauthorised extraction and re-utilisation of the contents of a database to its owner" to the end of Article 8.3.

I have limited my comments on unfair extraction to these few points to indicate that in general we welcome and support this proposal. I hope that those of my more expert colleagues on copyright who are concerned about the interaction of copyright and the new right will not mind me saying that, as a database producer, it is better to have a choice of remedies than none at all; and I also hope that at the end of their deliberations your Committee's report will facilitate and encourage the creation of this new and potentially very useful right.