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relative à la
proposition de directive du Conseil
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de

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(81/91)
A First Assessment of this draft Directive was made by me for the FEP and for the IPCC in March 1992 (attached, for convenience). Nothing in the commentaries and articles published since that time invalidates the Assessment. It is, however, only on Assessment, and in January 1993 the publishing community must move from an assessment to a position which we can propose and defend, as the draft Directive begins to move through the pressure of reviews at Parliamentary, Council and Commission levels to a 'common position', and then to a final Directive.

The major problem areas in the draft Directive are set out in my Assessment under the headings of Originality, Fair Extraction (the compulsory licence), Term of Protection, and Remedies. There are minor problems, again set out in the Assessment, of Substantial and Insubstantial Part, and of Abstracts. There should not be too much difficulty in persuading the EC that the level of insubstantiality is set too high, and that the Article on Abstracts should simply be deleted.

The major problem areas on the other hand, are substantial. After much thought and discussion with colleagues, I have come to the view that while the unfair extraction right is admirably intentioned (not least in favour of publishers' investment in databases whose contents are not protected by copyright) the price for adopting the draft Directive as a whole is too high, because particularly of the uncertainties that surround originality, the proposed compulsory licence in favour of competing database producers, and the uncertainties that surround duration.
one alternative route, proposed by the Economic and Social Affairs Committee, is to adopt a right to prevent unfair extraction of the contents of a database as an act restricted by copyright, alongside the other classic rights of e.g. reproduction, performance, etc. This route would involve wholesale rethinking by member nations of the nature of copyright protection, and is most unlikely to find favour in the droit d'auteur tradition. It does, however, suggest that somewhere between copyright and the (to borrow from the EP Rapporteur) 'trop baroque' sui generis right against unfair extraction in the draft Directive, there may lie a way forward through a neighbouring right approach. The 'building blocks' for a neighbouring right Directive are offered in the following draft Articles, together with short comments. The draft draws, wherever appropriate, on the EC Computer Programs Directive.

ARTICLE 1

Member States shall protect databases in accordance with the terms of this Directive. For the purpose of this Directive, "database" means any collection of information which is stored and accessed by electronic means.

Comment

Unlike the Computer Programs Directive, no attempt is made in this draft to restrict the protection to a particular form of copyright protection, nor is an originality test imposed. The normal requirement of authorship in some member states are simply not relevant to commercial databases. The basic philosophy of this draft is that of the English judge who said: 'if it is worth copying, it is worth protecting'. It should also be noted that the definition of originality adopted in the EC Directive on the Protection of Computer Programs, 'the author's own intellectual creation', is conspicuously absent from the drafts for implementation of that Directive in the national laws for Denmark, France, The Netherlands and the UK, so that, in copyright, uncertainty will continue.

The definition of database is broad. The expression "information" is employed to embrace copyright and public domain works as well as data that does not constitute a 'work' in the copyright sense.
Protecting all databases on the same footing creates a level playing field in the EC internal market and makes it easier for both providers and users alike, who will not have to ask, and answer, very difficult questions about whether a particular compilation is, or is not, protected.

By structuring the rights so that they are analogous to copyright, the draft is clearly proposing a new neighbouring right. Member States with common law systems may, however, be able to include the rights within copyright statute.

ARTICLE 2

The natural or legal person who compiles the database shall be the first owner of the rights in the database.

Comment

The neighbouring right approach allows one to move away from the irrelevant search to identify an author and the qualities of authorship in the production of a database. The natural place for the rights is with the organisation that compiles the information into the database, effectively the publisher.

ARTICLE 3

Protection shall be granted to all natural or legal persons in Community countries and to those from third countries who provide equivalent protection to EC databases.

Comment

Since a neighbouring right approach is suggested, there is no obligation under Berne. The experience with semiconductor chip protection is an interesting precedent. The USA introduced protection on the basis of reciprocity, which spurred the EC, and others, into a very quick legislative response. With the completion of the single market, US and Japan could not afford to be without protection in Europe and the EC member states can insist on proper protection in those markets. It may well be that in their cases they can satisfy a reciprocity test on the basis of their existing laws.
This reciprocity approach is not without its political problems for the publishing community. On the one hand, to offer protection on the national treatment basis of Berne is no guarantee, alas, that third countries would do the same. On the other hand, the IPA and STM Group have consistently supported national treatment, and since the protection of computer programs is seen as a copyright right under Berne, the EC has gone down that route in its Computer Programs Directive. This proposal for a neighbouring rights regime must open the debate up again in relation to protection of databases.

ARTICLE 4

The owner of the rights shall have the exclusive right to do, or authorise, any of the following acts:

a) permanent or temporary reproduction by electronic means from the database of any material stored in it, whether by loading into another electronic storage medium or computer memory or by displaying on a screen.

b) translation, adaptation or alteration of the database by electronic means.

Comment

This is, of course, the central provision. The reproduction right (a) is partly modelled on that in the Computer Programs Directive. The rights in the database are only infringed if it is accessed. Independent compilation would not be prevented, even if this compilation was the same as the original, both in content and expression. All would be free to make a database of, say, telephone numbers, providing they made the compilation without accessing an existing database.

The reproduction right is however not limited by any requirement that a substantial part must be taken or that the information constitutes a 'work' or part of it, nor is it subject to fair use/fair dealing limitations. The issue of Substantiality is thus disposed of, and the difficulty which the Berne Art. 2 (5) has of being limited to collections of 'works' is avoided.
The adaptation right (b) is an integrity right, not in the sense of the moral right of integrity, but as a means of preserving the integrity of the data in the database which can be easily corrupted.

ARTICLE 5

In the absence of specific provisions, the acts referred to in Article 4 shall not require authorisation when done by a person with lawful access to the database to the extent necessary for the use of the database in accordance with its intended purpose.

Comment

This provides the only exception and is based on Article 5.1 of the Computer Programs Directive. It probably does no more than recognise legal principles such as 'implied licence'.

ARTICLE 6

Members States shall provide appropriate remedies against:

a) any act of putting into circulation of a database knowing, or having reason to believe, that it is an infringing copy;

b) possession for commercial purposes of a database knowing, or having reason to believe, that it is an infringing copy;

c) accessing a database knowing, or having reason to believe, that access was not authorised by the rights owner;

d) any act of putting into circulation, or the possession for commercial purposes, of any means, the intended purpose of which is to facilitate the unauthorised removal of any technical device applied to prevent, deter or to measure the extent of copying of, or access to, database.

Member States shall also provide for the seizure of infringing copies and of any means referred to in (d) above.
This draws on Article 7 of the Computer Program Directive, and also brings into the debate the issue of not allowing circumvention of a device incorporated in the database to provide the database owner 'record and reward' information, which would be the base for reward for use of the database.

ARTICLE 7

The database shall be protected for 10 years from the end of year following the last substantial addition to, or deletion from, the material stored in the database.

Comment

The term of protection in neighbouring rights is often dated from publication or some other public activity. This is not appropriate here. First, the ever changing nature of the database makes it difficult to determine what is the subject of protection. Secondly, a number of databases may not be made available in terms which would satisfy some tests of "publication": they may, indeed, not be made available to the public at all.

This issue of duration is not an easy one. On balance, it seems preferable to offer maximum protection, even although substantial changes (and how do we measure 'substantial'? ) will create for certain databases perpetual copyright. The alternative of a fixed term of protection running from first fixation would leave long-established, but ever-changing databases without protection. If, however, a period of 50 years (a familiar period for neighbouring rights) were adopted after first fixation, that period might be sufficient protection for most databases.

ARTICLE 8

1. The provisions of this directive shall be without prejudice to other legal provisions such as, but not confined to, those concerning patents rights, trade marks, unfair competition, trade secrets, protection of semiconductor products, or the law of contract.
2. In particular, it shall not prejudice any rights in copyright or neighbouring rights which are enjoyed by the owners of rights in works included in the database or which exist in the database as a whole.

Comment

This Article ensures that other legal rights and obligations are not prejudiced and is similar in form to that in the Computer Program Directive. Paragraph 2 preserves the rights of those whose 'works' are incorporated in the database. This is a welcome consequence of EC Member States' membership of the Berne Convention. Paragraph 2 also preserves full protection in those databases which, by virtue of showing the necessary creativity, qualify for copyright protection.

I am well aware that this Draft Proposal does not address (never mind solve) all the problems inherent in the protection of databases. It is offered as something for colleagues to get their teeth into. We need to concentrate time and energy in the first few months of 1993.

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