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M. Barry MAHON

The European Association of Information Services

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Presentation to the Legal Affairs and Citizens Rights Committee of the European Parliament

By

Barry Mahon, Executive Director, EUSIDIC, The European Association of Information Services

representing also:

DGD: Deutsche Gesellschaft für Dokumentation

EBLIDA: The European Bureau of Library, Information & Documentation Associations

EIIA: The European Information Industry Association

GFII: Groupement Français de l'Industrie de l'Information

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Mr Chairman and Members of the Legal Affairs and Citizens Rights committee of the European Parliament, it is a pleasure and an honour to have been asked to present to you the views of Busicic and to represent to you the views of a number of other National and European trade and professional Associations on the subject of the draft directive on the legal protection of databases.

Busicic is an Association which will celebrate its 25th anniversary in 1995 and has therefore been a close witness to the dramatic developments that have taken place in the production, distribution and consumption of information. As an Association which represents producers, distributors and users of electronic information our response is based on a wide range of opinions and viewpoints.

This Directive comes before you at a time when the much heralded convergence between computing and telecommunications is actually being implemented in many sectors of the economy and none more so than in the information sector. Members of Busicic are in the forefront of these developments and are therefore extremely interested in the content and effect of the proposed Directive. The other bodies who have asked me to represent their views have equal interest in this topic. We are jointly and severally of the opinion that the status quo is not sacrosanct and look forward to the challenges brought about by the changes.

Since the publication of the text a number of opinions have been expressed on the validity and the necessity for the Directive. We would subscribe to the viewpoint that the proposition is necessary in order to rationalise certain anomalies within the Community regarding the status and level of protection afforded to electronic collections of data and the intellectual effort associated with their creation. However, we feel that certain provisions of the text go further than what is actually required.
As I said the information sector has undergone dramatic changes in recent years. These changes have served the objectives of all who are professionally involved in the sector, namely to ensure the rapid and accurate production and distribution of information for consumers. Electronic databases are fundamental to that process. I have deliberately used the words production and consumption because we in Eusidic feel that the economic climate of electronic information creation and use have changed also, from being primarily the outputs of the somewhat rarefied environments of academic research to being a vital part of developed economies. In the same process the efficient protection of investment, both intellectual and financial, is also fundamental. In that context any procedure that potentially inhibits the free flow of information has to be viewed with suspicion. The proposed Directive falls into that category.

Allow me to explain.

In an effort to cover as much as possible of the territory which is occupied by electronic databases, the draft establishes a number of criteria designed to evaluate the extent to which their creation and exploitation is legitimate. Typical are the concepts of 'insubstantial part' and 'commercial purposes' as applied to the exploitation of a database or its contents. These concepts are well known to lawyers and others who are concerned with the protection of property, but the do not sit easily in the information sector. Consider an electronic database of medical data - the recommended dosage of a drug may be only one number amongst millions in that database but it may be the most important item of information concerning that drug. Is it an 'insubstantial part'? Many of you will say no, in that particular context, but if someone wishes to dispute that interpretation they may be permitted to refer the matter to the European Court for a ruling. This process will take time - meanwhile the information sector awaits, in limbo, the outcome. Development may be inhibited. Similarly, many institutions active in the information sector are 'non commercial' in the sense that they do not sell products and services. They have a clientele and therefore their use is not the same.
as that of a private individual, what is their status under this proposal? There are a number of other areas of the draft to which similar uncertainties apply.

It is easy to criticise a text such as this and I am sure that the members of this committee have had many representations on the subject. I will not dwell further on the apparent shortcomings, I will suggest some solutions.

In many Member States Government Ministers may establish "rules of procedure" for the application of a law. Such a course of action is normal where the legislation concerned covers complex matters. Directives of the EC do not normally allow for such a mechanism. Perhaps in the case of this Directive the Community could break new ground and provide for regulations to be included. This would have the effect of allowing the Directive to be implemented in a 'known' environment from the point of view of the information sector participants and would also allow the Directive to take account of technical developments over time in the production and use of databases.

The following areas of uncertainty in the present proposal could be covered by regulations:

1. The treatment of databases containing numerical data compared to those containing text or images, specifically concerning the meaning of 'insubstantial part' and 'substantial part'.

2. How to keep the application of the exclusive criteria for protection - selection and arrangement - up to date; typically how they might be applied to databases created through advanced techniques such as Artificial Intelligence.

3. To establish the meaning and understanding of 'publicly available' as it applies to databases made available over wide area academic networks.

4. To regulate matters concerning the re-sale of databases.

5. To define rules for the operative date for copyright protection, especially in the case of constantly changing data collections.
6. Provide the framework for a code of practise between publishers and database creators on the re-use of abstracts or summaries created by the original authors, a matter of contention today.

Apart from the advisability of creating a method of using regulations to control some of the consequences of the proposal, the present text incorporates very well the basic requirement, that of establishing ground rules for the protection of electronically created databases. In so doing it opens up new areas of potential exploitation, typically the concepts of so called compulsory licensing and unfair extraction. We in Busicic would have no particular problem with those concepts, as proposed, which I must admit is not the view of all the associations I represent here.

Let me refer to one or two fears which have been expressed:

The ten year provision for sui generis protection is arbitrary and very difficult to implement in the case of databases which are undergoing constant change. Many database producers feel that the economic principles of their business will be seriously affected by this provision. In addition, whilst users welcome the option to exploit data without copyright they realise that in many cases the original material is protected and that furthermore the overall economics of information transfer may be affected.

Concerning the licensing provisions, they take no account of the discussions presently being co-ordinated by DG 13 of the Commission on the access to & use of publicly collected data. The proposal if implemented would arbitrarily cut short these discussions.

In summary what we all fear is that the implementation of the Directive as presently conceived will lead to either a plethora of legal protective measures by database producers and their distributors, or debatable practices to defeat the purposes of the Directive or deliberate provocation in order to establish Court rulings. In all or any of these
circumstances the effect is one of creating uncertainty, and no set of economic activities can feel happy in a climate of uncertainty.

Our proposal to allow for regulations, within the framework of the Directive, would create a workable solution. The regulations would presumably be established by the Commission in collaboration with the parties affected and inspected by the European Parliament - an example of subsidiarity? The overall effect would be to achieve the objective of providing a stable legal environment for the exciting developments still to come in the area of electronic database creation and exploitation.

Once again we welcome the opportunity to present our views to your Committee Mr Chairman, and I will be happy to try to respond to any queries you or the other Members may have.