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COMMON POSITION (EC) No 20/95 adopted by the Council on 10 July 1995 with a view to adopting Directive 95/ /EC of the European Parliament and of the Council of ... on the legal protection of databases

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COMMON POSITION (EC) No 20/95 adopted by the Council on 10 July 1995 with a view to adopting Directive 95/ /EC of the European Parliament and of the Council of . . . on the legal protection of databases (95/C 288/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57 (2), 66 and 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure referred to in Article 189b of the Treaty (3),

1. Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;
2. Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on an equal legal basis throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation on this subject, which is now taking on an increasingly international dimension;
3. Whereas existing differences having a distortive effect on the functioning of the internal market need to be removed and new ones prevented from arising, while differences not at the present time adversely affecting the functioning of the internal market or the development of an information market within the Community need not be dealt with in this Directive;
4. Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community if differences in the scope and conditions of protection remain between the legislation of the Member States;
5. Whereas copyright remains an appropriate form of exclusive right for authors who have created databases;
6. Whereas, nevertheless, in the absence of a harmonized system of unfair competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;
7. Whereas database manufacture requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to develop them

independently;

8. Whereas the unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences;
9. Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;
10. Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry requires investment in all the Member States in advanced information management systems;
11. Whereas there is at present a great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries;
12. Whereas such an investment in modern information storage and retrieval systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of database manufacturers;
13. Whereas this Directive protects collections, sometimes called compilations, of works, of data or other materials whose arrangement, storage and access is performed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;
14. Whereas protection under this Directive should be extended to cover non-electronic databases;
15. Whereas the criteria by which a database should be eligible for protection by copyright should be confined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;
16. Whereas no other criterion than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;
17. Whereas the term database should be understood to include collections of works, whether literary, artistic, musical or other, or of other material such as texts, sounds, images, numbers, facts, and data; whereas it should cover collections of works, data or other independent materials which are systematically or methodically arranged and can be individually accessed; whereas this means that the recording of audiovisual, cinematographic, literary or musical works as such does not fall within the scope of this Directive;
18. Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; whereas the protection of databases by the sui generis right is without prejudice to existing rights over their contents, and whereas in particular where an author or the holder of a related right permits some of his works or services to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or services subject to the required consent of the author or of the holder of the related right without the sui generis right of the maker of the database being invoked to prevent him doing so, on condition that those works or services are neither extracted from the database nor re-utilized on the basis thereof;
19. Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for protection under copyright and because it does not represent a substantial enough investment to be eligible under the sui generis right;

20. Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as the thesaurus and indexation systems;
21. Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner;
22. Whereas electronic databases within the meaning of this Directive also include devices such as CD-ROM and CD-i;
23. Whereas the term database should not be taken to extend to computer programs used in the construction or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes (4);
24. Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5);
25. Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (6);
26. Whereas works protected by copyright and services protected by related rights, which are incorporated into a database, remain nevertheless the object of the respective exclusive rights and may not be incorporated into, or reproduced from, the database without the permission of the rightholder or his successors in title;
27. Whereas copyright in such works and related rights in services thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and services in a database;
28. Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;
29. Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore, nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;
30. Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;
31. Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;
32. Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;
33. Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases in the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike the cases of CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to

authorization where the copyright so provides;

34. Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;

35. Whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangement of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and reproduction for private purposes, which concerns provisions under national legislation of some Member States on taxes on unused media or recording equipment;

36. Whereas the term 'scientific research' within the meaning of this Directive covers both the natural sciences and the human sciences;

37. Whereas Article 10 (1) of the Berne Convention is not affected by this Directive;

38. Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically without his authorization to produce a database of identical content but which does not infringe any copyright in the arrangement of his database;

39. Whereas, in addition to protecting the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment incurred in obtaining and collecting the contents by providing that certain acts done by the user or a competitor in relation to the whole or substantial parts of a database are subject to restriction;

40. Whereas the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist of the implementation of financial resources and/or the expending of time, effort and energy;

41. Whereas the objective of the sui generis right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;

42. Whereas the special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated quantitatively or qualitatively, to the investment;

43. Whereas, in cases of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;

44. Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder;

45. Whereas the right to prevent unauthorized extraction and/or re-utilization is not to be considered in

any way as an extension of copyright protection to mere facts or data;

46. Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves;

47. Whereas, in the interests of competition between suppliers of information products and services, protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national rules of competition;

48. Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aims of Directive 95/ /EC of the European Parliament and of the Council of . . . on the protection of individuals with regard to the processing of personal data and on the free movement of such data (7), which are to guarantee free circulation of personal data on the basis of a harmonized standard of rules designed to protect the fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;

49. Whereas, notwithstanding the right to prevent extraction and/or re-utilization of all or a substantial part of a database, it should be laid down that the maker of a database or his successor in title may not prevent a lawful user of the database from extracting and re-utilizing insubstantial parts; whereas, however, such user may not unreasonably prejudice either the legitimate interests of the holder of the sui generis right or the holder of copyright or a related right in respect of the works or services contained in the database;

50. Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-utilization of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where there is extraction an/or re-utilization for the purposes of public security or the proper performance of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not have a commercial nature;

51. Whereas the Member States, where they avail themselves of the option to permit a lawful user of a database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institution;

52. Whereas those Member States which already have specific national legislation providing for a right which is similar to the sui generis right provided for in this Directive may retain the exceptions to that right traditionally permitted by that legislation;

53. Whereas the burden of proof regarding the date of completion of manufacture of a database lies with the maker of the database;

54. Whereas the burden of proof that the criteria exist for concluding that a substantial amendment to the contents of a database is to be regarded as a substantial new investment lies with the maker of that database;

55. Whereas a substantial new investment involving a new term of protection may include a substantive verification of the contents of the database;

56. Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by companies or firms not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or who have their habitual residence in the territory of the Community;

57. Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database;

58. Whereas, in addition to the protection given under this Directive to the structure of the database by copyright, and to its contents against unauthorized extraction and/or re-utilization under the sui generis right, other legal provisions in the Member States relevant to the supply of database goods and services continue to apply;

59. Whereas this Directive is without prejudice to the application to databases composed of audiovisual works of any rules recognized by a Member State's legislation concerning the broadcasting of audiovisual programmes;

60. Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.
2. For the purposes of this Directive, 'database' shall mean a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means.
3. Protection under this Directive shall not apply to computer programs used in the manufacture or operation of databases which can be accessed by electronic means.

Article 2

Limitations of the scope

This Directive shall apply without prejudice to Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;

(c) the term of protection of copyright and certain related rights.

CHAPTER II COPYRIGHT

Article 3

Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.
2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

Article 4

Authorship

1. The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.
2. Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.
3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Article 5

Restricted acts

The author of a database shall have the exclusive right to do or to authorize in respect of the expression of the database which is protectable by copyright:

- (a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;
- (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale within the Community of that copy;
- (d) any communication, display or performance to the public;
- (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

Article 6

Exceptions to the restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the database and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the

lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

(a) in the case of reproduction for private purposes of a non-electronic database;

(b) where there is use for the sole purposes of illustration for teaching or scientific research, to the extent justified by the non-commercial purpose;

(c) where there is use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure;

(d) where other exceptions to copyright which are traditionally permitted by the Member State concerned are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the Protection of Literary and Artistic Works, this article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the database.

CHAPTER III SUI GENERIS RIGHT

Article 7

Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, to prevent acts of extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this chapter:

(a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale within the Community of that copy.

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of the eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right referred to in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database which would have the result of performing acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

Article 8

Rights and obligations of legitimate users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.
2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.
3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or services contained in the database.

Article 9

Exceptions to the sui generis right

Member States shall have the option to lay down that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be attained;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or the proper performance of an administrative or judicial procedure.

Article 10

Term of protection

1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire 15 years from 1 January of the year following the date of completion.
2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire 15 years from 1 January of the year following the date when the database was first made available to the public.
3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

Article 11

Beneficiaries of protection under the sui generis right

1. The right provided for in Article 7 shall apply to databases whose makers or successors in title are nationals of a Member State or who have their habitual residence in the territory of the Community.

2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must possess an effective and continuous link with the economy of one of the Member States.

3. Agreements extending the right provided for in Article 7 to databases manufactured in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

CHAPTER IV COMMON PROVISIONS

Article 12

Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

Article 13

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

Article 14

Application in time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to in Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.

2. Notwithstanding paragraph 1, where a database protected under a copyright system in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under that system.

3. Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the manufacture of which was completed not more than 15 years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.

4. The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts accomplished and rights acquired before the date referred to in those paragraphs.

5. In the case of a database the manufacture of which was completed not more than 15 years prior to the date referred to in Article 16 (1), the term of protection by the right provided for in Article 7 shall expire 15 years from 1 January following that date.

Article 15

Binding nature of certain provisions

Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

Article 16

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia on the basis of specific information supplied by the Member States, it shall examine in particular the application of the sui generis right, including Articles 8 and 9, and especially whether the application of this 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. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.

Article 17

This Directive is addressed to the Member States.

Done at, . . .

For the European Parliament

The President

For the Council

The President

(1) OJ No C 156, 23. 6. 1992, p. 4 and OJ No C 308, 15. 11. 1993, p. 1.

(2) OJ No C 19, 25. 1. 1993, p. 3.

(3) Opinion of the European Parliament of 23 June 1993 (OJ No C 194, 19. 7. 1993, p. 144), Council common position of . . . (not yet published in the Official Journal) and Decision of the European Parliament of . . . (not yet published in the Official Journal).

(4) OJ No L 122, 17. 5. 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No L 290, 24. 11. 1993, p. 9).

(5) OJ No L 346, 27. 11. 1992, p. 61.

(6) OJ No L 290, 24. 11. 1993, p. 9.

(7) OJ No L

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 15 April 1992 the Commission submitted a proposal, based on Articles 57 (2), 66 and 100a of the Treaty, on the legal protection of databases (1).

2. The European Parliament delivered its opinion at first reading on 23 June 1993 (2). Further to that opinion the Commission forwarded an amended proposal for a Directive on 4 October 1993 (3).

The Economic and Social Committee delivered its opinion on 24 November 1992 (4).

3. The Council adopted its common position in accordance with Article 189b of the Treaty on 10 July 1995.

II. OBJECTIVE

4. The purpose of the Commission proposal is to lay down harmonized provisions for the legal protection of databases. The proposal follows on from the Green Paper on Copyright and the Challenge of Technology (5), Chapter 6 of which proposed harmonization measures in the field of the legal protection of databases. As a harmonizing framework it takes Member States' provisions on copyright as applied to databases and in conformity with the Berne Convention for the Protection of Literary and Artistic Works, to which all Member States are parties. In addition to copyright protection, the proposal provides for the protection of databases by a sui generis right.

III. THE COMMON POSITION

General comments

5. Regarding the structure of the Directive, the Council accepted the regrouping proposed by the Commission in its amended proposal of all Articles relating to copyright protection in a Chapter II and of the Articles relating to the sui generis right in a Chapter III. The Council considered that this separation helped make the text more comprehensible.

6. The Council deleted four Articles of the Commission's amended proposal, considering them superfluous. These are:

(a) Article 4 of the amended proposal: the insertion of this Article was proposed by the European Parliament (European Parliament amendment 12); it was purely declaratory and in the Commission's view was not to be considered 'as implying any new obligation on the Member States or as requiring any acts of compliance with international agreements in respect of copyright';

(b) Article 5 of the amended proposal (Article 4 of the original proposal): as this Article does not concern the legal protection of databases, the Council considered its inclusion in this Directive to be inadvisable and unnecessary;

(c) Article 8 of the amended proposal (Article 7 of the original proposal): since this Article does not have the effect of harmonizing Member States' laws, the Council preferred to delete it as redundant;

(d) Article 9 of the amended proposal: following adoption of Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (6), paragraph 1 of this article has become purely declaratory and has been deleted by the Council as redundant. The other paragraphs of the article relate closely to paragraph 1 and have likewise been deleted.

Recitals

7. The Council has inserted, deleted or amended a number of recitals, in particular to reflect amendments to articles of the enacting terms.

Articles of the proposal

8. Article 1

Both the Commission's original proposal and its amended proposal covered electronic databases only. The Council's common position extends the scope of the Directive to all databases in any form (paragraph 1); the reasons are as follows:

- (a) this solution is simpler, as it obviates the need to draw a clear distinction between electronic and non-electronic databases;
- (b) it is inappropriate for a database distributed in both electronic and non-electronic forms not to enjoy the same protection in both forms;
- (c) no distinction between electronic databases and non-electronic databases is made either by the corresponding provision of the GATT Agreement on trade-related aspects of intellectual property rights (Trips Agreement), or in the ongoing discussions in the World Intellectual Property Organization (WIPO) on a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works.

The Council has adapted the definition of 'database' (paragraph 2) to reflect the broadening of the Directive's scope. It has accepted the European Parliament amendment consisting in adding 'data' alongside 'works' and 'other materials'. However, it has not accepted, for the same reasons as the Commission, the European Parliament amendment which sought to include in the definition of database 'a large number' of works, data or other material: this amendment would have given rise to problems of interpretation and is inconsistent with the definition in the Trips Agreement and with the discussions in progress in the WIPO on a possible protocol to the Berne Convention.

The Council considered that the point that the Directive does not apply to computer programs used in the manufacture or operation of databases should be placed in a separate paragraph (paragraph 3).

The Council, like the Commission, has rejected the European Parliament's proposed definition of 'author (créateur) of a database' (amendment 4). It considered it preferable not to introduce such a definition for databases when there is no internationally agreed definition of an 'author' (créateur) of other literary or artistic works.

The Council has not accepted the definition of 'owner of a database' proposed by the European Parliament (amendment 5), which was adapted and incorporated by the Commission in its amended proposal. It has opted to retain 'author of a database' for copyright protection and 'maker of a database' for protection under the sui generis right.

9. Article 2

To avoid any uncertainty, the Council considered it advisable to insert a new article specifying that the Directive applies without prejudice to Directives 91/250/EEC, 92/100/EEC and 93/98/EEC.

10. Article 3 (Article 2 of the amended proposal)

The Council has merged into one paragraph (paragraph 1) the content of paragraphs 1 and 3 of the Commission proposal.

Paragraph 2 of the Commission proposal ceases to be relevant by virtue of the extension of the scope of

the Directive to non-electronic databases.

The Council has simplified the wording of paragraph 2 (paragraph 4 of the Commission proposal).

11. Article 4 (Article 3 of the amended proposal)

The Council chose to leave to Member States' discretion the question of who exercises economic rights where a database is created by an employee in the execution of his duties. Paragraph 4 has therefore been deleted and recital 29 added.

12. Article 5 (Article 6 of the amended proposal)

The Council has edited this article, in particular to take account of the amendments to Article 1. All references to rental have been deleted in view of Article 2 (b).

13. Article 6 (Article 7 of the amended proposal)

The Council has merged the content of paragraphs 1 and 2 of the Commission proposal into a single paragraph (paragraph 1). It regarded this provision as setting out a minimum right of the lawful user of a database from which there should be no possibility of derogating by contract (see Article 15).

The Council has deleted paragraph 3 of the Commission proposal as being redundant, in the light of Article 3 (2) in particular.

The Council has added a new paragraph 2, which allows Member States the option of providing for exceptions to the restricted acts listed in Article 5. It considered that no exception should be allowed for reproduction for private purposes of electronic databases, in particular in view of the ease with which they can be reproduced, but accepted the possibility of such exceptions for non-electronic databases.

So that the exceptions under paragraphs 1 and 2 do not unduly upset the balance between the rights of the author of the database and those of the lawful user, the Council has added a paragraph 3, which is based on Article 6 (3) of Directive 91/250/EEC.

14. Article 7 (Article 10 of the amended proposal)

The Council thought that more detailed provisions on the sui generis right and the object of its protection were needed.

It considered that Article 10 (1) and the first sentence of Article 10 (2) of the amended proposal overlapped. Article 7 (1) of the common position contains two significant changes to those provisions:

(a) The Council considered that the purpose of the sui generis right should be to safeguard the position of makers of databases against misappropriation of the results of investment in obtaining and collecting the contents of the database; it has accordingly restricted the enjoyment of that right to cases where the obtaining, verification or presentation of the contents is shown to have involved substantial qualitative and/or quantitative investment.

(b) Under the amended Commission proposal, the sui generis right covered the contents of the database in whole or in substantial or insubstantial parts, with exceptions regarding the insubstantial parts being provided for in Article 11 (5), (6) and (8). In its common position the Council has chosen to restrict the extent of the protection afforded by the sui generis right to the whole of or a substantial part of the contents of the database, evaluated qualitatively and/or quantitatively, on the grounds that the extraction and/or re-utilization of insubstantial parts of those contents was unlikely adversely to affect the maker's investment; it has accordingly deleted the exceptions relating to insubstantial parts. However, to ensure that the lack of protection of the insubstantial parts does not lead to their being repeatedly and systematically extracted and/or re-utilized, paragraph 5 of this article in the common position introduces a

safeguard clause.

In the interests of clarity, the Council has defined the terms 'extraction' and 're-utilization' in paragraph 2.

The sui generis right is a new right and the Council thought it wise to specify that it may be transferred, assigned or granted under contractual licence (paragraph 3).

The first sentence of paragraph 4 of the common position corresponds to the second sentence of Article 10 (2) of the amended proposal. The Council does not however agree with the approach embodied in the third sentence of that paragraph of the amended proposal: it sees no valid reason for the sui generis right not to apply to the contents of a database consisting of works already protected by copyright or of objects protected by other rights; this could lead to anomalies where a database consisted, for example, partly of works protected by copyright and partly of other material protected by no other right. The Council has therefore provided for the sui generis right to apply irrespective of the eligibility of the contents of the database for protection by copyright or by other rights; at the same time it is specified that protection under the sui generis right is without prejudice to copyright or to other rights existing in respect of works or other material forming part of the contents of the database (second and third sentences of paragraph 4).

15. Non-voluntary licences

The Commission proposal made provision for obtaining non-voluntary licences in certain circumstances notwithstanding the sui generis right. This was meant to offset the substantial sui generis right which applied not only to the entirety and a substantial part of the contents of the database but also to insubstantial parts of it. Given that the scope of that right has been restricted to the whole of or a substantial part of the contents of the database, and in view of the exceptions to that right under Article 9 of the common position, the Council concluded that a proper balance between the rights of the maker of a database and the rights of the users no longer hinged on the possibility of obtaining such licences and it has deleted the provisions allowing for it. It nevertheless judged it useful to state that the sui generis right must not be exercised in such a way as to facilitate abuses of a dominant position and that competition rules continue to apply (recital 47). In addition, the Council has added a specific reference to this issue in the clause on the review of the Directive (Article 16 (3)).

16. Article 8

As the sui generis right is a new right, the Council felt it advisable to include in its common position an article on the rights and obligations of lawful users of databases in the context of that right (Article 8). It is therefore specified in paragraph 1 that the sui generis right does not allow its holder to prevent a lawful user from extracting and/or re-utilizing insubstantial parts of its contents. Concerning the obligations of the lawful user, this article stipulates that he may not cause prejudice either to the legitimate interests of the holder of the sui generis right (paragraph 2) nor to the holder of a copyright or related right in respect of the works or services contained in the database (paragraph 3). The Council also considers that it should not be possible to derogate from the provisions of this article by contractual means (see Article 15).

17. Article 9

In view of the amendment by the Council to the scope of the sui generis right and the deleting of the provisions on non-voluntary licences, the exceptions to the sui generis right provided for in Article 11 of the amended proposal are no longer relevant.

The Council has introduced new exceptions (Article 9 of its common position), modelled on the exceptions to copyright provided for in Article 6 (2), as it was concerned that the exceptions to the two rights should correspond as far as possible. No corresponding exception to that laid down in Article 6 (2) (d) is found in Article 9, since no Member State has a national right having all the features of the sui generis right laid down by this proposal for a Directive. However, as the legislation in some Member States already provides for a right akin to the sui generis right, it was accepted that those Member States could retain the exceptions to that right traditionally permitted by the legislation in question (recital 52).

18. Article 10 (Article 12 of the amended proposal)

The Council has accepted the proposal of the European Parliament (amendment 24), reproduced by the Commission in its amended proposal, which was to lay down a period of 15 years' protection under the sui generis right (paragraph 1).

For reasons of clarity, the Council preferred to place in two separate paragraphs the statement that protection under this right will run from the date of completion of the making of the database (paragraph 1) and the statement that, where a database is made available to the public, the expiry of the term of protection will be calculated from the date on which this was done (paragraph 2).

The Council accepted the substance of the European Parliament's amendment providing that any substantial change to the content of a database would give rise to a fresh period of protection by the sui generis right (amendment 24 (b) and amendment 26). In view of the link established in Article 7 between the sui generis right and substantial investment on the part of the maker of the database, the Council made the point that this fresh period had to arise from a new substantial investment (paragraph 3).

In the light of paragraph 3 of its common position, the Council considered Article 12 (3) of the amended proposal to be redundant and deleted it.

19. Article 11 (Article 13 of the amended proposal)

Article 11 of the common position corresponds to Article 13 of the amended proposal, with some drafting adjustments.

The Council did not however accept the new paragraph proposed by the European Parliament (amendment 28 (2a) (new)), which refers to the provisions of the international agreements. The Council, like the Commission, considered that this provision would lead to confusion, since the sui generis right created by this proposal for a Directive is not linked to any existing international convention of any kind.

20. Article 12 (Article 14 of the amended proposal)

Article 12 of the common position corresponds to Article 14 of the amended proposal

21. Article 13 (Article 15 (1) of the amended proposal)

Article 13 of the common position corresponds to Article 15 (1) of the amended proposal. Apart from some drafting adjustments, the Council supplemented the non-exhaustive list in this Article with a reference to protection of national treasures, laws on restrictive practices, security and access to public documents.

22. Article 14 (Article 15 (2) of the amended proposal)

The Commission accepted the substance of amendments 29 and 30 of the European Parliament extending the benefit of protection to all databases, whether already in existence on the date of entry into force of the Directive or created subsequently (Article 15 (2) of the Commission's amended proposal); the Council also accepted them in Article 14 of its common position.

For the sake of clarity, the Council made a distinction here between copyright (paragraph 1) and the sui generis right (paragraph 3). In these two paragraphs, the Council replaced as the reference date the date of publication of the Directive by the deadline for its transposition, to prevent transposition measures having to apply retroactively.

The European Parliament had proposed stating that protection by the Directive of databases existing on the date of the Directive's entry into force would be without prejudice to any contracts concluded or rights acquired before that date (amendment 30). The Council specified that this applied both for copyright

protection and for protection by the sui generis right (paragraph 4 of the common position).

Paragraph 2 of this article in the common position was added by the Council with the aim of settling the question of databases at present protected by national copyright arrangements but which may no longer be protected by copyright once the Directive comes into effect, since the eligibility criteria for protection by such national arrangements are less exacting than the criteria of the Directive for copyright protection. Such situations may arise under national arrangements now applying in three Member States, in which the term of copyright protection is at present 50 years post mortem auctoris, and will be 70 years post mortem auctoris with effect from the transposition of Directive 93/98/EEC. It is likely that most of the databases concerned will be eligible for protection by the sui generis right; however, the term of protection by this right is only 15 years. To solve this problem, the Council introduced a derogation allowing the Member States concerned to continue to protect these databases under the present arrangements until the term of protection remaining at the date of the Directive's publication expires.

Since the period of protection by the sui generis right is 15 years, the Council considered it opportune to state that the protection of already existing databases by this right applied only if their manufacture had been completed in the 15 years preceding transposition of the Directive (paragraph 3 of the common position).

To avoid any uncertainty as to whether the 15 years of protection by the sui generis right of databases already in existence on the date of the Directive's transposition are to run from that date or from the date of completion of their manufacture, the Council stated that the first of the alternatives would be applied (paragraph 5 of the common position). The reason for this choice was that the sui generis right was a new right and therefore no database would have had the benefit of any identical right before transposition of the Directive.

23. Article 15

As already noted at points 13 and 16 above, the Council considers the provisions of Article 6 (1) and Article 8 to be so fundamental that it must not be possible to derogate from them by contractual means.

24. Article 16

In its amended proposal, the Commission had accepted the proposal of the European Parliament (amendment 31) changing the deadline for transposition of the Directive to 1 January 1995 (first subparagraph of paragraph 1). As that date has already been passed, the Council has replaced it by 1 January 1998 in order to give the Member States a period of nearly two years for transposition, as from the date of final adoption of the Directive.

The Council has accepted the proposal of the European Parliament (amendment 32), incorporated by the Commission into its amended proposal (Article 16 (3)), including a review clause in the Directive. In view of the rapidity of developments in this field, it has brought forward the time of the first Commission report to three years after the date of transposition of the Directive. Because of the innovative nature of the sui generis right, the Council has further stipulated that the Commission will examine in particular the right's application, and that the examination will inter alia be based on specific information supplied by the Member States.

(1) OJ No C 156, 23. 6. 1992, p. 4.

(2) OJ No C 194, 19. 7. 1993, p. 144.

(3) OJ No C 308, 15. 11. 1993, p. 1.

(4) OJ No C 19, 25. 1. 1993, p. 3.

(5) COM(88) 172 final.

(6) OJ No L 290, 24. 11. 1993, p. 9.