

# COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a  
COUNCIL DIRECTIVE

on the legal protection of databases

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(presented by the Commission)

EXPLANATORY MEMORANDUM

PART ONE : GENERAL

1.0 Introduction

- 1.1. The present Directive aims to provide a harmonized and stable legal regime protecting databases created within the Community. According to the "Panorama of EC Industry 1990", at the present time one quarter of the world's accessible on-line databases are of European origin compared with the US share of the world market of 56%. However, the gap between the US and European markets is closing, compared with the situation ten years ago when the European market was only one tenth the size of that of the US. According to recent figures, Western Europe's on-line information market is valued at around 2.4 billion US dollars, or 2.188 billion ECU.

The market for CD ROM products is also growing quickly although it is still less substantial than the on-line market since the total world market for drives and disks amounted only to around 368 million ECU in 1988 of which a third was devoted to internal publications.

- 1.2. This new and growing sector is of considerable importance to the economic development of the Community, both as a sector in its own right and also as a service which underpins commercial, industrial and other activities of all kinds. The availability of up-to-date comprehensive sources of information, and the ability to store and manipulate large quantities of data are key factors in today's competitive business environment.

Increasingly such information and data is international in character, originating and circulating in countries around the world on a daily or hourly basis, subject to rapid and constant change, and yet having a profound and far-reaching effect on the economic, commercial and political environment.

- 1.3. Databases are also increasingly the "hypermarkets" of the future for the products of intellectual creativity. Every year there are more new films, books, press and periodical publications to be archived, new sound recordings, videos, photographs, artistic works to be collected and catalogued. Traditional retail distribution outlets for such goods have either to become highly specialized or to carry increasingly larger and larger ranges of stock. The trend will be in the long term towards greater user accessing of works from databases via networks or satellites rather than user acquisition of copies of works fixed on material supports. This trend can already be seen in some professions such as legal practices where on-line access to legal databases is a more efficient solution in many instances than the collection of an extensive library of legal texts in paper form.

- 1.4. Not surprisingly in view of the comparative youth of the sector, the legal environment in which database authors, makers and operators have to function is far from mature.

Divergences and anomalies exist in the legislation of the Member States on the question of the legal protection of databases. In many instances database operators rely on contract law as the only basis for the marketing of their goods and services. Unless a stable and uniform legal environment is created within Europe, investment in the creation of databases within the Community will not keep pace with the demand for on-line information services. That demand will easily be met by foreign database operators transmitting their services from outside the Community, to the potential detriment of the database sector in Europe and of those who rely on its services.

- 1.5. Therefore the Commission, following the publication in 1988 of the Green Paper on Copyright and the Challenge of Technology in which the question of the legal protection of databases was raised in chapter 6, proceeded in April 1990 to a hearing of views on the issue, and solicited informed opinions by means of studies and individual responses as to the appropriateness of action by the Community.

## 2.0. The economic and legal situation

### 2.1. The situation as regards the database market in Europe: The Internal Market and the growth of trans-border data flows

2.1.1. Information is considered more and more as a tradeable commodity which is subject to economies of scale due to the increased cost of collecting, codifying, distributing relevant data on top of a considerable initial investment. Technical, legal, commercial and financial information is a resource of great value which is sold at high prices by specialised companies.

2.1.2. In order to tackle the information explosion it has become indispensable to bring in the new technologies (informatics and computer communication) for the provision of effective information services. These new technologies are, however, upsetting the traditional equilibrium of the information economy. The same information may be transmitted via different, coexisting generations of services, and traditional press and book publishers find themselves increasingly in competition with unconventional publishers who communicate through optical media, radio, TV channels and new online information services.

2.1.3. As a result of these changes, Europe is faced with a challenge. It possesses some notable advantages : an abundance of raw information material in science, technology and culture, a strong press and publishing industry, a competitive industry and expertise in the field of telecommunications and a very real innovative capacity in the sector of information services, as shown by the exceptional success of videotext services within certain countries. However, its position on the world information market has become relatively weaker since the advent of electronic services. The Community market is fragmented by many technical, legal and linguistic barriers. This fragmentation hinders the free movement of information services, and therefore prevents the achievement of the economies of scale which are necessary in order to launch advanced information services. In addition, a number of uncertainties as regards technological trends, regulations and market response to new products and services handicap private investment in the area.

2.1.4. The term "electronic information services" covers a multitude of offerings today : bibliographic databases, electronic directories, real-time financial information services, full-text databases which may be delivered through a variety of media, such as :

online ASCII database services,  
videotext services,  
CD-ROM databases, or  
new delivery media (audiotext and broadcasting).

2.1.5. ASCII database services

In 1989, the world-wide turnover for online database and real-time information services accounted for around 8,5 billion ECU, with a share of around 2 billion ECU for Europe. The size in turnover of Europe's market in this segment (excluding videotext) is currently one third of the US market.

In effect, the level of consumption of scientific databases and of financial information services in the USA and Europe are comparable. The deficit in Europe comes from a lower level of consumption of database services in other areas : company data and current affairs, legal information, etc. A striking feature is the uneven development of the market across the Community. The United Kingdom alone accounts for a share which is said to vary between 30% and 50%.

2.1.6. In 1989, the European Community produced less than half as many online databases as the United States. In addition, it has to be stated that the US develop many more higher value (e.g. factual or full-text) and larger (in volume) databases than Europe. For-profit organisations are the major actors in database production in the US (72%), whereas within the Community the non-profit sector still predominates in production (54%).

2.1.7. At the present moment, the involvement of the private sector in database production varies greatly according to country. Both in the UK and Germany, the private sector now plays a predominant role in production. The production and distribution of ASCII database services is very uneven across the Community. One third of the hosts located within the Community are based in the United Kingdom which also dominates production with one third of the databases.

2.1.8. Although the ASCII database market is usually considered as an international market (and this is particularly true as regards scientific and technical information services and real-time financial information services), most of the databases produced within Europe have little international coverage and are primarily concerned with domestic scientific, technical and economic information. Since their primary aim is to meet the information needs of domestic users, it follows that nine European databases in every ten are accessible in only one language, i.e. that of the producer country. Yet, 52% of the databases produced in Europe can be consulted in English.

2.1.9. The tendency of European databases to cater for the national market, plus the exclusive use of the national language, explains why most databases produced in Europe are distributed by hosts based in the country of production. Of the 1,256 (1989) databases distributed by Community hosts, 73% are of national origin, 18% from third countries (nearly half of which from the USA) and only 9% from other Member States.

2.1.10. Videotext services

The situation of the videotext market as opposed to traditional ASCII database services is radically different. Videotext services did not take off in the United States, whereas they are growing quickly in most Member States of the Community. However, the various videotext systems established by the Member States in the late 1970s developed very differently. Each Member State took its own approach to technical standards, transmission network development, terminal distribution policies and invoicing methods.

2.1.11. It is estimated that there are within the EC some 25,000 videotext services (1989). Half of them are located in France which has the largest installed base of videotext terminals (over 5 million). It is difficult to compare videotext services with traditional database services. Videotext is a communication medium which can be used for a variety of purposes : games, entertainment, advertising, E-Mail, transactions, information retrieval. The use of videotext for accessing database services is, however, steadily increasing in France since the opening of a professional kiosk which differentiates these services from those aimed at the general public.



2.1.12. Again, the level of development of the videotext market is very unbalanced according to each Member State. Over 90 % of users of videotext services were located in France in 1989. Germany and the UK are the largest videotext markets behind France (4% and 3% of the European user base), but the market place is growing very quickly in Italy. In view of its larger user base, France has the largest market share in terms of traffic (83%), followed by Germany (11%). It is difficult to find reliable statistics on the market share of the UK (2% to 3%).

2.1.13. In view of the diversity of standards, the videotext market has developed exclusively within national boundaries. However, gateways between national videotext networks are now multiplying, although international videotext traffic remains low as compared to domestic traffic. There were over 86 million connect hours recorded on the France Teletel network in 1989 but only 30,000 connect hours coming from other countries.

2.1.14. CD-ROM market

The ability to record a huge mass of information on a small compact disc which can be retrieved with a PC has created great expectations within the database industry. The CD-ROM market is growing very quickly : the number of titles published doubles each year. It is expected that the number of titles (about 750 in 1989) will increase to more than 6000 worldwide in 1992.

2.1.15. CD-ROM today covers a wide variety of applications, from diagnostic programmes, computer graphics via cartography and full-text encyclopaedias. The size and the fields covered vary greatly from country to country.

According to Infotech, the USA still dominated the world market in 1989 with 56% of the production of commercial titles and 66% of revenue. But the Japanese are fast coming up. They increased their market share in production from 1% in 1988 to 21% in 1989. The European Community accounted for only 15% of the supply. The leading countries in Europe have been in 1989 Italy and the United Kingdom followed by Germany and France.

2.1.16. The subject areas mostly covered in the Community have been "Laws and Government Regulations" (19%) followed by "Business, Finance and Company Directories" (16%), whereas in the USA "Geography, Cartography, Census, Statistics" (20%) and "General Reference, Bibliographies" (15%) have been printed especially on CD-ROM. Japan contributed the majority of "Entertainment" titles (52%). According to Infotech, the total revenue of CD-ROM commercial titles amounted to some 441 million ECU in 1989 for an installed base of 366.000 drives and 753 titles published.

2.1.17. New delivery media

Data transmission by radio relay channel, i.e. ground-based TV networks, satellite or FM radio subcarriers, is an alternative method of supplying electronic information services. Broadcasting is particularly suited to data services aimed at large numbers of users simultaneously: real-time stock market prices, race results, updated lists of prices transmitted to a network of retailers. These three segments are the core of the data-broadcasting market. The development of the market is, however, hindered in Europe by the shortage of radio frequencies, high investment costs and uncertainties as regards the evolution of the regulatory framework for such services. Excluding broadcasted videotext (teletext), very few broadcasting information services exist in Europe. Most of them are located in the United Kingdom.

2.1.18. Audiotext is a technology which gives users interactive access to information and telephone communication services. The user is routed into the information service by making a selection from successive menus as with videotext tree-searching using the twelve keys of his or her telephone. The information is supplied either by a synthesized or pre-recorded voice reciting the data collected or transmitted by telefax.

A pilot multilingual audiotext service with voice recognition is currently being tested by the ECHO host of the Commission of the European Communities. This technology, which is just beginning to emerge in Europe, could become a serious rival to videotext since it makes use of the simplest and most widely available terminal : the telephone.

2.1.19 According to a survey carried out by Electronic Publishing Services, the Community audiotext information services market was worth 300 million ECU in 1989. It could develop by 300-400% over the next five years and reach 700 to 1,200 million ECU by 1993 provided that appropriate regulatory and billing frameworks are set up.

2.1.20. The Community started to become active in the area of database services in the early 70s. At that time, Community initiatives focussed mainly on scientific and technical information.

2.1.21. Initial action plans for information and documentation over the period 1975-83 has as a primary goal the development of the basic infrastructure which was necessary in order to access online databases available within the Community. This goal was achieved through the implementation of the Euronet DIANE network, which has now been superseded by the interconnection of national packet-switched data networks. Later on, through a five-year programme for the development of the specialised information market (1984-1988), Community efforts focussed on the improvement of the quality and coverage of databases produced within the Community.

Through calls for proposals it encouraged the formation of European databases and promoted their use across the Community. These efforts continue with the Impact I and now the Impact II programme. (Council Decision of 12 December 1991)

2.1.22. These Community programmes, together with national initiatives, have stimulated the development of electronic information services within the Community. Before the opening of the Euronet DIANE network, the gap in terms of turnover between the European and the US online information market was 1 to 10. It has been reduced to 1 to 3.

2.1.23. However, the gap between the size of the Community information services market and that of the US market is closing only gradually. The European information services market is still very fragmented, chiefly as a result of linguistic, legal and technical barriers. Its main developments are taking place on a national basis. The diversity of national policies, particularly as regards the development of videotext networks, combined with the economic disparities within the Community exacerbates the discrepancies between Member States.

2.1.24. In view of the increased competition on the market place, the main operators on the European information services market have favoured national or transatlantic defensive agreements rather than European cooperation. However, progress achieved in the implementation of a Community telecommunications policy, the emergence of the CD-ROM market and audiotext technologies, the development of gateways between hosts, coupled with the new demand for information as a result of the creation of the single market, open new opportunities for developing a Community-wide database services market.

N.B: Source of figures in Section 2.1. see end of document (on page 57)

2.2. The situation as regards the legal protection of databases in the Member States

2.2.1. At the present time none of the Member States makes express reference in its copyright legislation to the legal protection of electronic databases. In view of the fact that database production only began to be significant in Europe in the middle of the 1980's, it is not surprising that legislators have not yet incorporated specific references to a technology which has only recently become of importance in a number of Member States.

2.2.2. In addition to the fact that the emergence of a database sector is a recent development it must also be said that it is a sector which is currently more dynamic in some of the Member States than in others. Figures quoted in "Panorama of EC Industry 1990" of predicted turnover for on-line services by 1992 show at one end of the scale the United Kingdom with a turnover of 1770 million ECU, and at the other Spain with 26 million ECU. Figures for the rest of Europe, including 5 of the Member States with less turnover than Spain, only totals 196 million ECU. The United Kingdom alone thus could occupy 50 % of the European market for on-line database services. A similar imbalance on a smaller scale can be observed in respect of videotext terminals where France had over 4 million videotext terminals in service at the end of 1988 compared with only 330,000 terminals in the remaining 11 Member States combined.

2.2.3. This combination of recent and uneven growth of the database industry within the Community has led to a situation where databases in the sense of collections of facts or data can only be said to be expressly eligible for protection by copyright in a limited number of Member States according to the existing legislation. These would probably include the United Kingdom and Spain. Other Member States which have non-exhaustive lists of works protected by copyright may well also protect databases under the broad heading of literary works or as "collections".

However in none of the legislation in question is the term "database" used. References to collections, compilations, or to types of works such as tables, directories or catalogues would therefore have to be taken as encompassing collections of both works or data, if it is to be assumed that all databases are currently protected by the legislation of the Member States. It is unclear whether databases held in electronic form are equally protected, or if the terms used in the legislation of the Member State are taken to refer expressly or impliedly to works or data in paper form only.

2.2.4. It would be logical to assume that all data bases should be protected, given that the physical form in which a work is fixed or commercialized is usually irrelevant in copyright terms, as far as its eligibility for protection is concerned. However, it could be argued that the selection or arrangement of the works or materials contained in the type of collection foreseen in Article 2.5 of the Berne Convention is not in every respect the same activity as the compiling of data by electronic means in an on-line real-time database. Therefore with limited exceptions, it is not possible to say that the references in the Member States' legislation to "works", or to "collections" or similar types of works necessarily extend to electronic databases.

2.2.5. Even if one were to make the assumption that nothing in the legislation of the Member States excludes, implicitly or explicitly, electronic databases from protection by copyright, there still remain significant differences in the resulting protection given by the Member States. A first and fundamental difference relates to the standard of originality which a particular Member State might apply to determine whether a database is protectable or not. Given the considerable variations in the tests of originality which are currently applied, the same database could be protected in some Member States and not protected in others, or protected not as a database but as a different type of work.

- 2.2.6. Similar differences exist as regards the term of protection, and the ownership of the rights where the database is created under a contract of employment, as a collective work or by an entity having legal personality.
- 2.2.7. A third and equally important area of divergence concerns the ability of a user of a database in a given Member State to perform acts of downloading i.e. reproduction of the database or of parts of it. Exceptions under the legislation of the Member States for educational or private use vary both in respect of different types of work and in respect of works recognized as being of the same category in all Member States.
- 2.2.8. In summary therefore the legislation of the Member States probably serves to protect collections or compilations of works or other material by copyright either as works under Article 2.1. or as collections under Article 2.5 of the Berne Convention but it is unclear whether in all cases such protection extends to "databases" and to electronic databases in particular. It is equally unclear to what extent works or materials other than text are covered by existing legislation. Even if protection for electronic databases exists, including those containing materials other than text, it is certainly the case that different results will be obtained in practice by the application of the legislation of the Member States to a given database.
- 2.2.9. Nor is the jurisprudence of the Member States illuminating on the question of the scope of copyright protection for electronic databases. There is relatively little case law even in the Member States with the most developed database industry. Isolated cases in the jurisprudence of other Member States are inconclusive as to the scope of protection. Therefore an analysis of the jurisprudence of the Member States in relation to collections or compilations in paper form is not necessarily a reliable indication as to the outcome of litigation involving an electronic database in a Member State.

- 2.2.10. A different solution has been retained in Denmark, Finland, Norway and Sweden where a ten year protection against copying exists independently of copyright legislation, for "catalogues, tables and similar productions in which a great number of items of information have been compiled".

Certain types of information would not even be protected under this 10 year catalogue rule, since this protection only prohibits reproduction of the work in question, rather than re-use of the information contained therein.

- 2.2.11. In view of the uncertainty and possible divergence of interpretation which surround the protection of databases at present, there is clearly a need to establish at least a basic harmonized framework. If this is not done quickly, there is a risk that Member States may legislate expressly in widely differing ways, or that Community databases fall victim to misappropriation because of an absence of enforceable protection. Investment in the sector cannot be sustained as the database industry comes to maturity unless Community databases are at least as well protected as those of its major trading partners.

### 2.3 The Legal Protection of databases in the major trading partners of the Community

- 2.3.1. The most obvious comparison to be made is with the database industry in the United States. The US Copyright Act of 1976 gives a definition of a compilation as "a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship". Section 103 of the Act further clarifies that compilations are included in the non-exhaustive list of "works" protected by virtue of Section 102 without specifying whether such protection would be as literary works or as another category.



Section 103 (6) does however indicate that the copyrightable element of the compilation is the material contributed by the author of such work as distinguished from the pre-existing material employed in the work.

2.3.2. The jurisprudence on the question of the protection of electronic databases in the United States is also relatively limited and therefore it is necessary to look at the case law involving compilations in paper form since the definition of "compilation" makes specific reference to "data" and Section 102 applies to works "fixed in any tangible medium of expression ... from which they can be perceived reproduced or otherwise communicated, either directly or with the aid of a machine or device".

2.3.3. From the most recent US Supreme Court decision on the question of the protection of a compilation of data (Feist Publications Inc. v. Rural Telephone service company Inc. 499 US. 113 L Ed 2nd 385, 111 D.C.t. 1991) it seems clear that a new line of jurisprudence may be emerging which rejects the "sweat of the brow" criteria but requires originality in the copyright sense. If this reasoning is to be followed consistently in the United States now, it may well be that electronic databases, as well as collections in paper form, which do not meet the test of originality, will be excluded from copyright protection regardless of the skill, labour, effort or financial investment expended in their creation.

2.3.4. As regards the legal protection of databases in other jurisdictions around the world, few countries party to the Berne Convention have express legislation covering databases. It may be assumed, as with the Member States of the Community, that the application of Article 2.5 of the Berne Convention allows for the protection of collections or compilations where national legislation has provisions relating to such works, or where the non-exhaustive nature of the list of protected works is sufficiently broad to encompass additional and unspecified categories of works.

In the most recent debate on the subject of the application of the Berne Convention to databases, (Meeting of the Committee of Experts on a possible protocol to the Berne Convention, November 4 to 8, 1991) there was a large measure of support for clarification of the Convention on this point.

2.3.5. Among the industrialized countries there are however instances of specific provisions. In Japan, for example, the Copyright Law of 1986 gives protection to "database works" in Article 12 bis.

"(1) Databases which, by reason of the selection or systematic construction of information contained therein, constitute intellectual creations shall be protected as independent works".

Article 2(1) (xter) defines data bases as follows : "database means an aggregate of information such as articles, numerals or diagrams, which is systematically constructed so that such information can be searched for with the aid of a computer".

### 3.0. Scope of the protection

#### 3.1. Definition of subject matter

- 3.1.1. It is intended by this Directive to regulate the specific problems which arise as a result of the use of electronic data processing equipment for the storage, processing and retrieval of "Information", in the widest sense of that term.
- 3.1.2. Under the Berne Convention, Article 2.5, collections of literary or artistic works are capable of receiving protection by reason of the selection or arrangement of their contents. Clearly at the time of its drafting the parties to the Convention could not have foreseen the multi-media interactive databases of today where sound, text, image, data and number are brought together in one collection.
- 3.1.3. Before the advent of electronic processing using digitization, the various media on which works protected by copyright were fixed had to be stored and used in isolation one from another by means of a variety of fixation and reproduction techniques. Thus the sound track and the images of a film were not fixed and reproduced by the same process, nor were text, data and number capable of being manipulated by the same equipment using the same processing techniques.
- 3.1.4. With the possibility of converting all written works, facts, numerical information, images and sounds into a binary representation, the concepts of fixation and reproduction, storage and retrieval of the materials in question have to be re-examined.
- 3.1.5. Until recently, legislation, where it existed to protect compilations as such, envisaged only collections of literary works or extracts of literary works, or in some instances, collections of artistic works. Collections of data are rarely mentioned expressly.

There appears to have been relatively little litigation in most Member States around the question of the infringement of copyright in collections of whole works or extracts of works.

3.1.6. Such an absence of litigation can be explained by the fact that the protection extends not to the contents of the collection, the works themselves, but to the selection or arrangement of those works. Given the variety of permutations of choice which these two criteria allow, there are few instances where a second author chooses to make exactly the same selection or arrangement of works in his anthology as those of the first author.

3.1.7. It is also the case that, until the advent of the computerized storage and retrieval system, the physical limitations on how much material could usefully be assembled in one volume placed a constraint on the type of collection undertaken.

3.1.8. The advent of digitization has had a bearing on both of these factors. Whereas the arrangement of the works compiled "manually" was to a large extent arbitrary, and, as such, a clear manifestation of the author's personal choice, the order in which works are arranged in a database is to some extent dictated by the logic of the software which underlies the database and which allows its retrieval by the user. Thus some similarity may occur in the arrangement of materials in databases which are created using the same database management software.

In certain cases, (more properly termed "intelligent applications" rather than "artificial intelligence") one can even find instances where aspects of the arrangement are generated and adjusted by the computer program itself according to the use made of the database. Nevertheless even where the parameters of the arrangement of materials in a database are set by reference to mass-marketed database management software, there may still be authorship in other aspects of the creation of the database.

- 3.1.9. As electronic data processing has greatly extended the range and volume of material which can be stored in a single database, the selection made by the author may also become less narrow, since it is the exhaustive, comprehensive nature of the database as a resource which gives it, in many cases, its market value. The selection function is therefore partly transferred from the author to the user, even if the latter is in reality guided through the contents of the database by the underlying software.
- 3.1.10. Because the electronic processing method has radically altered the nature of what could have been foreseen by Article 2.5. of the Berne Convention, the Commission has focussed in this Directive on collections whose contents are arranged, stored and accessed by electronic means. This should not be taken as limiting the scope of the Directive to any particular technology, nor should an argument be made that a contrario, collections not using electronic means are not protected by copyright in the Member States. Given the existence of a clear provision of the Berne Convention protecting what might be termed traditional non-electronic compilations, and the recent proposal by the World Intellectual Property Organization to include collections of data among the works protected under Article 2.5 of the Convention (World Intellectual Property WIPO BCP/CE/1/1/Part One Memorandum on Questions concerning a possible Protocol to the Berne Convention) there can be no doubt that such a protection should continue to be available for collections or anthologies of works and data in paper form under the existing copyright law of the Member States. This question is dealt with more detail in paragraph 2.2 of the particular provisions of this Explanatory Memorandum.
- 3.1.11. The second element of the scope of protection which causes the Commission to focus its attention on the electronic processing criteria is the fact that images and sound can now be compiled along with data of other kinds in the same way, even in the same database, as text and number.

Such a reduction of different genres to a common binary code representation radically alters the nature of the product called "a compilation", and makes it necessary, for the avoidance of doubt, to lay down clear ground rules for these new types of collections commonly known as "databases", in particular with respect to questions of limitations on the author's exclusive rights under copyright. It is also the case that electronic databases are particularly susceptible to acts of piracy given the ease with which some or all of their contents can be down-loaded and reproduced at low cost and high speed using modern communication networks. It is therefore imperative that special measures be introduced to give clear and enforceable rights to creators of electronic databases over and above those which currently exist for collections held in paper form according to Article 2.5 of the Berne Convention.

### **3.2. Relationship between protection of the database and its contents**

3.2.1. As has been indicated in 2.1. above, the basis for protection of the database afforded by Article 2.5. of the Berne Convention relates to the selection or arrangement of its contents. The question of the protection of the works or materials held within the database is not addressed by Article 2.5. of the Berne Convention, except to the extent that the protection of the database is without prejudice to rights in its contents.

3.2.2. The present Directive follows that principle in establishing copyright protection for the way in which the collection has been made, that is, the personal choices made by the author in selecting or in arranging the material and in making it accessible to the user. Unauthorized acts in respect of the database under copyright law therefore relates to infringement of rights in those elements of selection or arrangement, but not to infringement of rights in the contents of the database, although the contents may themselves also be subject to intellectual property or other rights.

Although the act of storing works or materials in a database of necessity implies a reproduction of those works or materials, the present Directive does not address the issue of copyright or other rights in the contents of the database. This is because if the contents are themselves subject to copyright, the legislation of the Member States concerning reproduction of the works in question continues to apply when the works are incorporated into the database. However, the question of the inclusion in a database of bibliographic material is specifically dealt with, given that the issue of the copyright protection of such material is far from clear in a number of Member States. This question is discussed in more detail in Part Two of this Memorandum at paragraph 4.1.

- 3.2.3. It is a feature of electronically stored and manipulated data that the selection process may be open-ended, just as the arrangement of the contents may be in constant evolution. A database operating in real time or close to real time which is updated every thirty seconds, for example, has contents which grow over time, and from which some may eventually be deleted. Equally, the disposition of those contents may evolve over time according to new inputs and to patterns of use. Nevertheless the criteria and parameters for selection and arrangement have to be set by a human author, regardless of whether the selection or arrangement are then performed with the aid of intelligent or expert systems incorporated in the underlying software and regardless of whether the contents of the database remain the same over time or not. Therefore to the extent that choices have been made in the selection or arrangement of material, the initial criteria and parameters which determine those choices can be attributed to a human author.

- 3.2.4. It has been suggested that in some instances neither the selection nor the arrangement criteria will afford sufficient room for individual choices to be made by the author. The example of an alphabetically arranged list of telephone subscribers in a given locality is often cited. In this instance, in order to be useful, the contents of the directory must be as complete as possible and a second author cannot avoid replicating the same contents if he wishes to achieve the same completeness. Equally, a convention of such directories is that the arrangement of the data is alphabetic for ease of use, and the second author cannot easily avoid replicating such an alphabetical arrangement. The second author may of course make a different directory which would select subscribers by some particular criteria such as address or occupation, or may in theory vary the alphabetical arrangement.
- 3.2.5. In these limited circumstances, where realistically neither the selection nor the arrangement can be varied by the second author, the protection normally afforded to collections by copyright may be unattainable since the second author will not be able to demonstrate originality in his choices. Nor should copyright subsist in the first collection if it employs certain well-known methods such as listing every subscriber or using an alphabetical arrangement, because the consequence of such a copyright would be to prevent any other author from compiling works or materials comprehensively or alphabetically.
- 3.2.6. It would be an unacceptable extension of copyright and an undesirably restrictive measure if simple exhaustive accumulations of works or materials arranged according to commonly used methods or principles could attract protection on the same basis as other literary works.



3.2.7. However, even the mere accumulation of facts, statistics, bibliographical information, names and addresses involves considerable commercial activity. Time, labour and organizational skills are brought to bear, to collect and verify the accuracy of the required volume of data and to create from it a marketable product or service. The data in this instance is similar to a raw material. If others misappropriate that raw material they will be able to market similar or identical products or services at greatly reduced cost. In other industries it would be considered as an act of unfair competition for the raw material procured for processing at one company's expense to be freely appropriated by another company to make a similar product or service. On the other hand no one manufacturer should have a monopoly over the source of the raw material such that he excludes others from the market for the finished product or service.

3.2.8. Therefore, in addition to the protection given to the database as a collection if it fulfils the criteria of originality required for such protection, the present Directive gives a limited protection to the contents of the database where such contents are not already protected themselves by copyright. This protection against parasitic behaviour by competitors, which would already be available under unfair competition law in some Member States but not in others, is intended to create a climate in which investment in data processing can be stimulated and protected against misappropriation. It does not prevent the flow of information, nor does it create any rights in the information as such.

If the information in question is available from other sources, there is no exclusive right in that information in favour of the creator of the database. If, on the other hand, the creator of the database is the only source of such information, licences for the commercial re-exploitation of the information must be granted on fair and non-discriminatory terms. Users who only require to use the information for private purposes remain free to do so.

#### 4.0. The need for action

##### 4.1. The nature of the work to be protected

4.1.1. It is increasingly the case, given the growth rate of the corpus of information at society's disposal, that electronic means are the only solution to the problem of storing and accessing such a mass of material. To quote examples from different ends of the spectrum of database technology, an airline reservation system can operate worldwide in real time because it can be updated electronically: a law library no longer needs to stock paper versions of all decided cases going back over centuries when an on-line legal database can provide instant access to summaries or full texts of judgements. It has been estimated that the volume of the increase annually in information generated today equals the total information in circulation in the world fifty years ago. Such percentage increases annually in the volume of information generated and consumed can only be managed by substantial research and development investment in data storage and retrieval techniques. A database is therefore not only an intellectual creation worthy of protection in its own right in cultural terms but also a vital industrial and commercial tool which requires optimal conditions to be created for investment in the future Community development of databases.

4.1.2. There can be no doubt that the act of making a collection is an intellectual activity worthy of recognition under copyright law as a creative process analogous to the writing of reference works, textbooks, scientific writings, or in the field of artistic compositions the creation of works such as collages.

4.1.3. To the extent that the creator of the database can be judged to have exercised choice and therefore intellectual creativity in the selection or arrangement of the materials at his disposal, there is no obvious reason for excluding databases from copyright protection. Such a judgement as to whether an act of intellectual creation has taken place is not dependent on the protectability of the contents nor indeed exclusively on the selection or arrangement of the contents themselves.

4.1.4. The acts of creating data models and a thesaurus and indexing or cross reference system are also necessary intellectual steps towards the creation of the database regardless of the material on which they are performed. The efficacy of the database as a resource will depend on the ease and efficiency with which the user can access works or materials required, and the preparation of the raw material, in terms of abstracting, tagging, devising data models, indexing, and the system for obtaining information and presenting it to the user, contributes significantly to what can be termed the intellectual input of the author.

The "arrangement" of the materials within the database depends to some extent on the indexing system which has been devised, in the sense that efficient retrieval of information from a given location is only possible by virtue of the index. To this extent, "arrangement" does not occur unless a framework of references is established, which the database management software then implements.

4.1.5. A database author therefore performs not just the mechanical collection and arrangement of his material : value is added to that raw material by processing which can even in some instances result in the creation of new derivative works, for example summaries of legal judgements to enable the user to decide whether the full text of the decision is required.

4.2. The economic consequences of a failure to protect databases.

4.2.1. Investment in new database technologies will not take place if the legal regime within the Community is not stable, uniform and sufficiently protective of the creator's skill and labour to encourage new entrants into the sector. There is at present a considerable imbalance between the Member States in the development of database industries (see paragraph 2.1.5.). Such a legal regime does not imply an over-protection of the rightholder at the expense of his competitors nor of consumers as a whole. Nor does it imply a restraint on the free flow of information.

4.2.2. Information, either in the sense of pre-existing works, or in the sense of facts, figures, statistics can normally be acquired by anyone who has an interest in buying and selling such information. A publisher acquires the right to produce and sell an edition of a work; he is permitted to have the exclusive right of publication of that particular text. A producer or broker of information, whether it be stock exchange figures, weather data, bibliographical information is free to create, collect and sell that information to others who may wish to distribute it against payment to end users. Equally a competing producer of information may perform the same collecting operation or generate his own information which can be sold to competing brokers.

4.2.3. Therefore the protection of the database by copyright prevents no-one from acquiring the right to publish works or materials or from creating such works or materials himself.

- 4.2.4. Only in the isolated instance where the producer and distributor of a work or of materials is the sole possible source of such information and where there is a public interest in promoting competition, or in ensuring dissemination of the information, can a case be made for the free dissemination of the database creator's work.
- 4.2.5. "Free" does not imply in this case without payment, since the collection of works or materials will not have been created without some investment, financial or otherwise on the part of the database creator. However, in the interests of competition and greater consumer choice, if such instances arise where the database creator is the only source of information there should be a possibility for that information to be made available under licence on non-discriminatory terms to avoid a monopoly position being abused by dominant information providers.
- 4.2.6. In this way the Directive aims to address both the creative and economic aspects of the protection of databases : first the protection of the intellectual creation of the author under copyright law which may well be applicable for a large number of the databases currently produced in the Community, and second, the protection of the investment of the creator against parasitic behaviour on the part of pirates and dishonest competitors who seek to misappropriate the results of the collection work undertaken by the database owner.
- 4.2.7. If these two aspects are not addressed and protection is given only to the copyrightable selection or arrangement aspects of database creation, the Directive will not in reality give any protection in circumstances where nevertheless considerable financial loss will be incurred if copying takes place.

Technically speaking there is often nothing to prevent a user or a competitor from down-loading the contents of a database and from re-arranging the contents in a different order, even making his own selection from that material to be included in his own product. Since the protection under copyright only applies to the elements of selection or arrangement of a collection no violation of the author's copyright will have occurred. Equally, since copyright protection does not extend to ideas, principles or mere facts, the database creator will not be able to claim any protection under copyright for the misappropriated contents of his database.

4.2.8. The economic consequences of such behaviour are potentially very damaging to the database industry within the Community. At present contract law regulates to a large extent the terms and conditions under which access to databases is given. Even in these circumstances, there is uncertainty on the part of database rightholders as to the extent to which specific conditions with regard to copying of both the selection and arrangement and the information itself can be enforced given that the scope of the legal regimes protecting databases is far from clear both in legislation and jurisprudence in the Member States.

4.2.9. In future, commercialization of databases may well turn increasingly towards outright sale of products such as memory chips, digital tapes and CD ROM discs which contain substantial databases. Whether the sale is clearly unconditional, or whether "shrink wrap" conditions apply as is currently the case for much mass market software, it will be difficult, if not impossible, for right holders to exercise such effective control by contractual means over the use made of their databases as is currently the case with on-line systems.

4.2.10. Therefore the long term economic future of the database industry demands that there be adequate protection not only of the elements which may be of less direct relevance to the user or the competitor, namely the selection or arrangement of the material, but also of the material itself, which is easily appropriated under present copyright regimes and which is in many cases the real essence of the database itself.

#### 5.0. The choice of legal regime

5.1.1. In determining which legal framework would offer the most advantageous protection to databases, the Commission has had to choose a solution which conforms to certain parameters.

The legal regime must provide certainty and stability, protect acquired rights and encourage investment in the sector. It must ensure that Community databases receive protection in third countries. It must be coherent with the protection given to other similar works, and be consistent with the Community's policy in the GATT TRIPS and in WIPO. It must be balanced in its treatment of creators and users of databases.

5.1.2. A sui generis regime could fulfill some of these requirements but not all. It could be adapted to the specific characteristics of databases but would provide neither certainty nor stability since a considerable period of time would elapse before any jurisprudence could develop to give a constant interpretation of the text of new legislation in such a complex technical field.

5.1.3. Nor would a sui generis regime alone ensure reciprocal treatment for Community databases outside the Community since such arrangements would have to be concluded on a country by country basis bilaterally or through a new international convention with all its attendant risks of failure or delay. A

sul generis regime could have been tailored to provide a balanced solution with regard to the interests of users, but would not have formed a coherent link with the protection given, for example, to the computer program which underlies the database. Nor would it have been consistent with the protection already given to collections and anthologies by copyright under Article 2.5. of the Berne Convention.

5.2.1. The choice of a neighbouring rights regime would have presented many of the same difficulties as those identified above in relation to a sul generis regime since no Member State currently protects database by a neighbouring right, nor do the Conventions which regulate the protection of neighbouring rights, such as rights of phonogram producers, offer any real basis for the extension of such measures to the protection of databases.

5.2.2. Since neighbouring right protection is intended to cover those productive activities which fall short of the level of intellectual creativity required to attract copyright protection, it would be a clear negation of Article 2.5. of the Berne Convention to deprive the creators of collections or compilations, whether in paper or in electronic form, of the right to obtain copyright protection, where it is applicable, by reducing their protection to that of a neighbouring right, or by creating a two-tier system under which certain types of databases benefited only from a neighbouring right protection while others enjoyed a full copyright protection.

5.2.3. Even if it were to be assumed that the Rome or Geneva Conventions could be extended to cover fixations of databases, in terms of protection of Community databases in third countries, the neighbouring rights Conventions would have offered a much less adequate protection worldwide than a copyright based regime for two reasons. First, the number of states party to neighbouring rights Conventions is significantly lower than that of signatories to the Berne Convention.



Second, the existing neighbouring rights conventions do not apply the national treatment principle in exactly the same way as that which operates under the Berne Convention.

- 5.2.4. Even if the neighbouring right approach were to give some guarantee of international recognition, the analogy between an phonogram which consists, for example, of a selection of music fixed digitally on an optical disc, and a database contained on the same type of optical disc is not appropriate.

The rights of the producer of the phonogram relate to the fixation of a performance of a musical work. The phonogram producer has originated, or acquired the rights in a performance which he fixes onto a material support for the purpose of commercialising that performance to a wider audience. However others may cause the musical works in question to be performed by different artists (or even by the same artists assuming that the first phonogram producer does not have exclusive rights also in the musical works which are being performed or an exclusive contract with the performer.) The same selection of works may be performed again by the same artists in exactly the same order and the performance fixed by a second phonogram producer, without him having "reproduced" the phonogram of the first producer. It is precisely for this reason that the Berne Convention for the Protection of literary and artistic works makes provision in its Article 13 for the re-recording of musical works.

- 5.2.5. In contrast, a database creator has to perform considerable intellectual activity to collect and check the material which is then prepared for incorporation into the database and to arrange the material in his database in such a way that the user may interact efficiently with the material. Although the hardware which plays a compact disc is capable of causing the individual parts of the work to be played in a variety of orders, the compact disc is not interactive with its user in the same way as a database.

In contrast, for a typical large scale scientific journal database in the physics, electrical and electronic engineering field, the classification and indexation task requires a thesaurus of some 3 million references in order for the user to extract the relevant articles from the system efficiently, and to interact with it.

- 5.3.1. In view of the factors identified above, the Commission has opted for a two-tier approach which retains the advantages of copyright protection but with additional measures against unfair extraction and re-utilization of the contents from a database.

The copyright protection will apply to the selection or arrangement of works or materials in a database and is in conformity with the scope of protection of Article 2.5. of the Berne Convention.

In this way existing legal structures in the Member States can be easily used or amended to include databases as a protected work under copyright legislation and existing case law as to the protection of collections or compilations of works in paper or electronic form can be drawn upon.

- 5.3.2. The advantages of the national treatment regime provided by the Berne Convention can be enjoyed, as can the possibilities offered by that Convention of allowing for certain exceptions to the author's exclusive rights in favour of users for example in its Articles 2, 9, and 10.

- 5.3.3. The choice of copyright protection will complete a coherent package taken in conjunction with the Council Directive on the legal protection of computer programs (91/250/EEC) since the contents of the database and the program which stores and manages the materials are difficult to separate.

- 5.3.4. However, it has to be recognized that copyright protection alone may not be an adequate solution to all of the problems raised by the protection of databases.

- 5.3.6. Therefore the Commission has proposed to introduce a special sui generis provision which is derived from regimes such as unfair competition law or the law repressing parasitic behaviour but which relates specifically to the act of extracting and re-utilizing works or materials from a database. It is not an extension of copyright law to cover ideas or facts, nor is it a new right in the information itself which is contained in a database. It is a right which will vest in the maker of a database for a fixed term of ten years irrespective of whether or not copyright protection is available for the database. It does not prejudice the continued existence of unfair competition law generally or the application to data bases of other forms of protection such as contract.
- 5.3.7. However the granting of such a right to prohibit extraction of works or materials from a database could have anti-competitive implications if no safeguards were made available. Therefore the Directive foresees that in certain circumstances the rightholder may be obliged to make the information available to competitors and in all circumstances, users are able to use the contents for their own private purposes. Limited commercial re-use is also permitted providing acknowledgment is made of the source. The wholesale copying of the contents of the database with a view to commercializing a competing product, without any independent effort in the collection and verification of the material is not permitted.
- 5.3.8. It is necessary to create a specific right prohibiting unfair extraction from a database, rather than to rely upon existing unfair competition law or contractual arrangements between the parties.

- 5.3.9. First it has to be recognized that, with some exceptions, unfair competition law is not fully developed yet in all Member States. Different techniques exist, through a variety of legislative structures, to deal with questions of unfair competition, parasitic behaviour, breach of confidence, passing off and so on. Until such time as the unfair competition laws of the Member States are harmonized, it serves little point to attempt to harmonize in respect of database protection by means of a regime which manifests itself in widely differing forms throughout the Community and which is largely based on case law. Nor would it be possible, through a sectoral directive on a single product, a database, to regulate unfair competition law generally in the Member States.
- 5.3.10. A second limitation on the applicability of unfair competition law per se stems from the fact that its purpose is to regulate behaviour between competitors and not between suppliers and users. Therefore a more general regime which determines the acts to be performed without authorization by all users, whether or not they are also competitors, is desirable.

## 6.0. The International framework

### 6.1. The International conventions

- 6.1.1. As has already been noted in paragraph 3.1.10 discussions have begun within the World Intellectual Property Organization (WIPO) on the question of the protection given by the Berne Convention to databases. In the first session of the Committee of Experts on a possible Protocol to the Berne Convention for the protection of literary and artistic works, held in Geneva from November 4 to 8 1991, a text proposed by the International Bureau for possible inclusion in a Protocol to the Convention was discussed.

6.1.2. The text presented in document BCP/CE/1/2 Part One indicates at paragraph 41 "There is now growing agreement that databases - whether in print, in computer storage or any other form - deserve protection of the kind provided for under Article 2(5) (dealing with "collections") of the Berne Convention, if they constitute intellectual creations by reason of the selection coordination or arrangement of their contents." The text of the Memorandum goes on in paragraph 42 to state "...a number of national copyright laws grant protection not only to collections composed of works but to any collection of information, data and the like, if such collections are original by reason of selection, coordination or arrangement. A somewhat extensive interpretation of the Berne Convention to cover such collections seems justified."

6.1.3. The text of the Memorandum therefore proposes that collections of data or other unprotected material should be considered as literary and artistic works and should be protected in the same way as the collections of works mentioned in Article 2.5 of the Berne Convention. It further suggests that databases should be mentioned in any Protocol text as an illustration of this type of protected work. Further, it should be made clear that the protection of collections of data or other unprotected material does not make the data or other unprotected material eligible for copyright protection.

6.1.4. Following an extensive debate during the meeting of the Committee of Experts in November 1991, the draft report indicated the following conclusion in paragraph 94.

"The Chairman concluded as a result of the discussion that the question of protection of databases should be dealt with in the context of the proposed Protocol, and also said that, in view of some of the statements made, it would be desirable that the future working document include a study of the possibility to protect also databases which contained large amounts of data or information items but did not meet the criterion of originality, such as some catalogues of goods offered for sale."

6.2. The Trade Related Intellectual Property aspects of the GATT Uruguay Round (TRIPs)

6.2.1 The question of the protection of databases has also been raised within the TRIPs discussions. Following discussions during which there seems to have been a considerable measure of agreement, a text of the Chairman has been put forward as Article 10.2. which reads "Compilations of data or other material, whether in machine-readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."

7.0. The legal basis

7.1.1 In its Green Paper on Copyright and the challenge of Technology COM(88)172, the Commission announced that it intended to propose a number of harmonizing measures in the field of copyright with a view to eliminating distortions constituting obstacles to the free movement of goods and services, obstacles to the freedom of establishment and distortions of competition with the Internal Market. Chapter 6 of the Green Paper sought opinions on the appropriateness of harmonizing the legal protection of databases within the Community.

Following the analysis of the responses received to the Green Paper and the hearing of interested circles of April 1990, the Commission has proposed Articles 57(2), 66, 100A and 113 as the legal bases for the present proposal.

7.1.2. Differences in the legal regime applicable to the hosts of databases services as well as those applicable to the creators of databases can constitute obstacles to the freedom of establishment within the Community in the sense that the legal regime in force in one Member State may prevent the production of goods such as CD Roms or the provision of services such as on-line services in another Member State. Article 57(2) is therefore an appropriate basis for the proposal in this respect.

7.1.3. In respect of database services, which are at the present time a significant part of the database market, it follows that differences in or an absence of legal protection of databases as between Member States can constitute a serious impediment to the freedom to provide services and create distortions of competition between database service providers. Therefore, Article 66 is also relevant to the question of the legal basis of the proposal.

7.1.4. Third, in respect of the free circulation of goods and distortions of competition, it is clear that differences in and uncertainties regarding the legal protection of databases can have a negative effect on the functioning of the common market in these products, and therefore Article 100A is also an appropriate legal basis for the present proposal. For the completion of the internal market before 31 December 1992, Article 100A paragraph 1, sentence 2 provides by way of derogation from Article 100:

"The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

Article 8A paragraph 2 defines the internal market as comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

- 7.1.5. The present proposal will favour the free circulation of databases insofar as industry in those countries with clear and established protection of databases is currently in a more favourable position than that in countries where protection is uncertain; such differences in legal protection distort the conditions of establishment and of competition in Member States for firms which engage in activities concerned with databases.

This situation may affect the growth of the Community database industry and the operation of the internal market. In addition, by harmonizing the conditions under which the results of research and development in the database fields are legally protected on a uniform basis in the Member States, innovation and technical progress throughout the Community will be encouraged.

- 7.1.6. In the preparation of this proposal the Commission has taken into account the requirements of Article 8c of the EEC Treaty and has concluded that no special provisions or derogations seem warranted or justified at this stage.

- 7.1.7. Likewise the Commission has studied the question of the high level of health/safety/environmental and consumer protection required by the terms of Article 100A(3) of the EEC Treaty.

It has done so by soliciting opinions from interested circles by means of the publication of a Green Paper on Copyright and the challenge of Technology in 1988, and the holding of a hearing on the subject of database protection in April 1990. The proposal takes full account of these considerations in the light of the overall objectives of this provision of the Treaty.



PART TWO: PARTICULAR PROVISIONS

1.1. The term "database" is to be taken to include collections of any types of materials in the literary, artistic or musical fields such as text, images, sounds, and also numbers, data, facts and pieces of information and the like. It is not intended to include three-dimensional objects or the mere stockage of quantities of works or materials in electronic form.

This Directive cannot determine the minimum number of items to be selected or arranged in order to qualify for copyright protection as a collection. Each case will have to be decided on its own merits.

1.2. The right to prevent unfair extraction from a database is intended to prevent the extraction and re-utilization of the contents of a database in circumstances where the database in question is used directly as a source from which to take the works or materials, with or without adaptation of those contents. It is not a copyright right, nor a right in the contents themselves.

2.1. Although the current text of the Berne Convention in its Paris Act of 1971 does not expressly refer to collections of data, the provisions of Article 2.1. are intended to indicate that the protection given by this Directive is to be of the kind enjoyed by collections as the term is used in Article 2.5. of the Convention. The Directive is not in any way limited in scope to an interpretation of Article 2.5. of the Convention as presently drafted, since the Directive also covers collections of data.

2.2. To the extent that Member States have expressly or impliedly provided for the protection of collections or databases in non-electronic form in accordance with Article 2.5. of the Berne Convention, that protection remains unaffected by the present Directive.

As far as the copyright protection given by this Directive is concerned, no divergent treatment of collections in electronic and non-electronic form should result from the exclusion of non-electronic collections from this measure, since the copyright aspects of this Directive are consistent with the general principles of the Berne Convention.

However, if in practice, divergent interpretations of the Convention occur in respect of databases in paper form, the Commission may at a later date propose an extension of the present Directive to cover all databases.

2.3. The definition of originality is the same one as that retained in Directive 91/250/EEC on the legal protection of computer programs. Given the similarity in the creative processes involved and the fact that software is an essential component in database management, it seems appropriate to rationalize the definition of the criteria for eligibility for protection into one and the same formulation. In the case of a database, the originality must be demonstrated in relation to the selection or arrangement of the works or materials which form the collection, rather than in relation to a work viewed as a whole, as is the case with a computer program. This is a consequence of the provisions of Article 2.5. of the Berne Convention which specifically attribute authorship to a database on the basis that the selection or the arrangement constitutes the author's own intellectual creation, and that such collections are a type of derivative work.

2.4. Separate copyright rights may subsist in the works which are brought together to form the database and in the selection or arrangement of the works themselves. No additional copyright rights can be gained by the inclusion into a database of a work which is otherwise unprotectable under copyright or which has fallen out of copyright protection.

Thus the owner of neighbouring rights in phonograms assembled together to form a database cannot, by so doing, acquire a copyright in each individual recording. He may however acquire a copyright in the database as a whole providing that original selection or arrangement of the contents has taken place.

- 2.5. Member States are also required by this Directive to introduce a right to prevent unfair extraction and re-utilization of works of materials from a database in addition to any copyright for which the database may be eligible. Member States are free to choose the means by which such an unfair extraction from a database right is implemented. It must be available regardless of whether the database itself qualifies for copyright protection.

In some cases, it can therefore be applied cumulatively with copyright protection since it addresses different aspects of the database. While copyright can only prevent the copying of non-copyrighted material from a database if, in so doing, the selection or the arrangement of that material are infringed, the right to prevent unfair extraction applies to the contents of the database even if the copyright in the database itself has not been infringed. Thus if database A fails to qualify for copyright protection because original selection or arrangement of its contents are not present, the right to prevent unfair extraction nevertheless applies to prevent copying from that database as a source. If database B is protectable by copyright by virtue of the selection or arrangement of its contents, it can also benefit from the right to prevent unfair extraction if the contents are copied. If, in copying the contents, the selection or arrangement are also copied, an action for copyright infringement may be brought in parallel.

However, if the contents of a database are already protected by copyright or neighbouring rights, no cumulation can occur since the right to prevent unfair extraction cannot apply. This is to avoid the imposition of a compulsory licence on a work protected by copyright or neighbouring rights. In these circumstances the normal idea/expression dichotomy doctrine should apply, in that,

the ideas contained in the works incorporated into a database remain accessible whereas the expression of these ideas is protected under copyright. This does not apply where the works which form the contents of the database are themselves databases containing unprotected works or materials.

- 3.1 The Directive does not seek to regulate authorship beyond restating the fundamental principle of the Berne Convention, namely, that the human author who creates a work is the first owner of the rights in that work. However the nature of the database industry is such that frequently a database will be produced by a company, a legal person, and to the extent that Member States have made provision for ownership or exercise of rights by a legal person, the Directive permits those arrangements to continue at the present time.
- 3.2 In the same way, if the database is the result of a collective activity, whether controlled by a natural or a legal person, Member States which have provided specifically for this eventuality are free to continue to apply such provisions for the present.
- 3.3 As regards joint authorship, only the ownership of the rights is regulated by this Directive, the exercise being left to contractual relations between the joint authors.
- 3.4 Databases created in the course of employment are dealt with in Article 3 paragraph 4 in respect of economic rights only. Moral rights therefore remain outside of the scope of this Directive. The employer and employee remain free to contract in ways other than those prescribed by Article 3.4. All employment situations, whether or not carried out within an employment contract, where the employee acts under the control of the employer, are intended to fall within the scope of this paragraph. Commissioned works, or works made for hire, or those created by an employee not acting under the control of his employer, are not regulated by this paragraph and accordingly fall within the provisions of paragraph 1 of this Article.

4.1. The question of rights in works which are incorporated into a database is in general terms outside the scope of this Directive since it is a matter for contract between the holder of rights in such works and the database maker to regulate the conditions under which they may be incorporated. In the absence of any contractual regulation of the question, the legislation of the Member States in respect of the works in question continues to apply.

However one clarification has been introduced into this Directive in respect of bibliographical material and similar data. In cases where the materials in question do not substitute for a work but are merely informative about the work, these materials should be capable of being incorporated into a database without authorization, although this exception is without prejudice to the question of whether the material is itself subject to copyright.

5.0. The exclusive rights of the author of a database under copyright refer to the right to prohibit acts in relation to the selection or arrangement of the contents. Restrictions on the use made of the contents themselves may also apply but these will be a consequence of a separate copyright in the works which have been incorporated into the database. If the author of the database is not the author of its contents he may nevertheless have acquired the copyright in the contents, if any, or be authorized to permit certain acts with regards to those contents.

The exclusive rights in relation to the 'creative' elements of the database, the selection or arrangement of its contents, are therefore the object to the normal rights given by the Berne Convention. This means that the author of the database may prohibit any reproduction, translation, adaptation or other alteration which would result in these acts being done to a sufficiently significant portion of the database to constitute an infringement of rights in the selection or arrangement.

So, for example, if a reproduction of one insubstantial portion of the database were made in isolation from a reproduction of the structure as a whole, it might be difficult to demonstrate that, by such an insignificant reproduction of one part of the contents of the database, its selection or arrangement had been infringed. If on the other hand, substantial parts of the contents were reproduced or translated, then the selection and the arrangement would be infringed, either by an act of reproduction, or by an act of adaptation, or by both. The same reasoning would apply to acts of distribution and communication or display to the public.

- 5.a Both temporary and permanent reproduction of the database are restricted acts since even temporary down-loading of the database could cause grave economic loss to its author. The temporary reproduction necessary for use is permitted under Article 6.
- 5.b This language reflects the provisions of the Berne Convention, Articles 8 and 12.
- 5.c The person who without authorization makes a translation, adaptation or other alteration of a database may not continue to disseminate copies of this unauthorized version. Where the authorization of the holder of the rights in the database has been given for a translation or an adaptation, new rights will of course arise in the work of the authorized translator or adaptor.
- 5.d Since the distribution of databases "on line" is the most common current means of distribution to the public, it is important to note that paragraph 5d covers all forms of distribution. However, in future, CD Rom versions of many databases will also be offered for sale and therefore a right is also provided for the author to control rental of copies of a database which have been sold. This provision on the exhaustion of rights is to be interpreted as referring to Community exhaustion only, there being no exhaustion of rights worldwide by first sale in the Community.

5.e The rightholder is also able to prohibit the communication, display or performance of his database to the public. As databases containing up-to-the-minute information (such as stock market closing figures) are increasingly used as a source of public display of the information, for example at airports, on large scale screens in the street, in hotels, it is necessary to provide for some control over these activities once they are carried on outside the family circle.

6.1 The preceding paragraphs (Article 5) dealt with rights in the selection or arrangement of the contents of the database. Technically speaking an infringement of the selection or arrangement would take place every time the database was accessed if no specific derogation were provided since accessing the database, of necessity, involves performance of some of the restricted acts, notably the act of reproduction. Therefore in Article 6 a provision has been introduced that where the contract for the supply of database goods or services regulates the use which can be made of that database, it is not necessary for the user to seek further authorization to carry out acts necessary to use the database in conformity with his contract.

6.2 This is also the case where the contract does not regulate a particular aspect of use or where no contract regulating use exists at all. Then the user who is a lawful acquirer of the database is able to access the database and use it, that is to say, consult the database.

6.3 This implied permission to use the database only refers to the question of whether rights in the database itself would be infringed by such use, that is to say, rights in the selection or arrangement of the contents. The question of infringement of rights in the contents, for example by downloading or adapting the contents, is decided not by Article 6, but by Articles 7 and 8.

7.1 As regards the reproduction, translation or adaptation or other acts performed in relation to the contents of the database, where such contents are in themselves protected by copyright, this Directive does not seek to harmonize at the present time the provisions of the Member States currently applicable to the various types of works which could form the contents of the database.

This is for a number of reasons. First, the Member States may not protect a given work, for example a phonogram, or a photograph, in the same way. In one Member State, the work in question may be protected by copyright, in another by a neighbouring right and in a third, not protected at all. Second, the Member States may not treat all works protected by copyright in the same way as regards permitted exceptions to the exclusive rights. For example, home copying of literary works may be permitted but home copying of computer programs is not. Third, even for the same type of work protected by the same regime in all Member States, different solutions to the problems of home copying, copying for educational purposes, and so on, have been retained.

Therefore it is not only premature but technically impractical to regulate in this Directive how and to what extent every type of work may be reproduced or translated or adapted in this new circumstance in which the work in question is made available via a database.

It is the case, in any event, that copyright works may only be incorporated into a database with the consent of the author. That authorization should therefore indicate the extent to which the work can be re-used from the database.

Equally, the contract for the supply of database goods or services should specify what acts of downloading, reproduction in paper form, adaptation and so on are to be permitted.



It is however necessary to ensure that merely because a work is made available via a database, the freedom currently enjoyed by certain users, notably by educational establishments, to use brief extracts from works, is not removed. Therefore to the extent that Member States have made provision for such exceptions, these should continue to apply, regardless of the fact that the work has now been incorporated into a database.

The wider question of the extent to which private copying, either of the contents of the database, or of the selection and arrangement of the contents, should be allowed, is also left unregulated by this Directive, pending harmonization of the issues of reprography and electro-copying.

- 7.2 If, either by specific solutions in the Member States' legislation or by arrangements concluded between the database creator and the owner of rights in the contents, certain works may be subject to exceptions to the exclusive rights of the author, it should be possible to continue to do such acts even if their performance would technically involve infringement of the rights in the selection or arrangement of the contents. This is a necessary safeguard to avoid a situation where a more extensive protection is given to a work incorporated into a database than it would have had if it had been distributed in another way.

Since it is likely that the permitted reproduction, translation, adaptation etc of the work itself will be of insubstantial parts only and not of the entire work, it is unlikely that the continued permission to carry out such acts once the work has been put into a database will have a serious impact on the rights in the selection or arrangement of its contents. It is however always open to the database creator not to include certain works in the database or to make contractual arrangements with the rightholder in the work limiting the extent to which that work may be subject to exceptions to the author's exclusive rights.

- 8.1. The granting of a specific right to prevent the extraction and re-utilization of works or materials from a database requires that the circumstances in which it applies and the exceptions to the right are also indicated.

As far as the granting of the right is concerned, it can only come into being when the contents of the database in question are not protected by copyright or neighbouring rights. The contents may, however, be protected by other rights or subject to prior obligations. In this case, there may be cumulation with, but not conflict with those prior rights.

For example, the works or materials in question may be the subject of contractual arrangements. In such cases, it may be that the compulsory licence provided for in Article 8 paragraph 1 and 2, and the provisions of paragraphs 3, 4 and 5 cannot apply. If the contents are subject to other legislation or obligations such as those mentioned in the non-exhaustive list in Article 8 paragraph 6, that legislation or obligation will also preclude the operation of Article 8 paragraphs 1, 2, 3, 4 and 5.

If, however, the works or materials in the database are protected neither by copyright or neighbouring rights nor by other prior and conflicting rights, and are not the object of other legislation or obligations, then they may be subject to the provisions of Article 8 paragraph 1 imposing a compulsory licence on fair and non-discriminatory terms.

This licence may only be imposed in certain limited circumstances, namely where the database has been made publicly available and when that particular database is the only source of the work or material. This means that if a database is the only source of a work or material, but that database has not been published, or is an in-house or private database, licences may not be imposed. This is to guard against the compulsory publication of certain sensitive information collected into databases for private or for internal purposes.

The restricting of licences to circumstances where the database is the only source also requires certain conditions to be fulfilled. If the work or material could have been made, collected, assembled, purchased or otherwise obtained elsewhere then there is no justification on competition grounds for imposing a compulsory licence.

For example, if a Stock Market in a Member State makes available to one or to a number of applicants its closing figures, which are then incorporated by one applicant into a database, others who wish to publish the Stock Market closing figures for commercial purposes should obtain them from the Stock Market in the same way as the first database creator, or, if they choose to avail themselves of his database service as their source, negotiate with him for the right to use his database for this purpose.

If the Stock Market refused to supply the figures to more than one applicant, remedies under competition rules might have to be sought to deal with that issue.

The request for a licence may not be made for reasons of commercial expediency such as a saving of time or financial resources. So if, for example, the contents of a database are data obtained by the use of an earth observation satellite, it will be necessary for the second database maker to collect his own observation data or to buy them from others who are willing to obtain them on his behalf.

- 8.2. A second circumstance where the contents of the database may be subject to a compulsory licence is in the case of a database which has been made by a public body and which has been made publicly available.

This means that a database created by a police authority, for example, would not be subject to licences because it had not been made publicly available, whereas a database created by a national administration composed of, for example, legislative texts, would be subject to licence if the texts were not subject to copyright, if the database had been publicly available and if that public body had a specific or general duty to make such information available.

If the public body in question has entered the private sector by commercializing its databases but is under no obligation to do so, then it should be considered under Article 8 paragraph 1 since it may nevertheless be the only source of the information in question. However, if conflicts arise between the grant of licences and the obligations of a public body such as those quoted in paragraph 6, licences may still be refused.

- 8.3. The Member States have an obligation to provide an appropriate mechanism by which arbitration can take place on a request for a licence which is refused or where the terms are neither fair nor non-discriminatory.
- 8.4. Where the user of a database requires to reproduce small extracts from a database, by quotation or by reference to the information, it should be possible for him to do so provided that he is a lawful user, i.e. a person having acquired a right to use the database, and providing that the source is acknowledged. The term 'insubstantial part' is defined in Article 1 paragraph 3 but no fixed limits can be placed in this Directive as to the volume of material which can be used. It will be the task of the database maker to demonstrate that the amount of material so reproduced prejudiced his normal exploitation of his database, for example, by substituting as a source in its own right for the work or materials in question.

8.5. In the same way, a lawful user may reproduce insubstantial parts of the contents of a database for his own personal private use. This could include incorporating the extracts into other material which is not for commercial use, creating new materials based on knowledge gained from the database and so on.

It should be noted that this use must be personal i.e. the extracts may not be given to third parties and private i.e. used inside the domestic sphere rather than the professional or commercial environment. Use in educational establishments cannot therefore be considered as falling within the private and personal sphere.

8.6. As has been stated in paragraph 8.1. above, the exclusive right to prevent unauthorized extraction and re-utilization of the contents may only be subject to exceptions where to do so would not conflict with other rights and obligations.

This is especially important where the data itself is of a personal or sensitive nature or where the maker of the database is not in a position to grant more exploitation rights than those which he has himself acquired in that data.

9.1. If a database demonstrates sufficient originality in the selection or arrangement of its contents to qualify it for copyright protection then the term of that protection should be the same as that provided for literary works generally in accordance with the existing legislation of the Member States pending harmonization of the term of protection.

9.2. The term of protection granted to a particular database cannot be extended by the addition or deletion of insubstantial amounts of works or materials. For example, if a database is intended to contain all articles published on a given topic by a given newspaper, it should not be possible to acquire a new period of protection following the inclusion of each new article.

If on the other hand, the database author decides to make a significant change to the selection or arrangement criteria, for example, to include all magazine articles as well as newspaper articles on that subject it could be argued that this constitutes a new "edition" of the database.

9.3. Paragraphs 9.1 and 9.2 above refer to the term of protection of the selection or arrangement of the contents of the database by copyright. The question of protection of the contents, by copyright or by other rights, has to be determined separately. If there is copyright or a neighbouring right in the contents, those contents will have protection in their own right for whatever term remains unexpired at the time of incorporation into the database. If the contents benefit from the right to prevent unfair extraction, that right relates to the material which is incorporated into the database. The one finite period of protection begins on incorporation of the work or material into the database and continues for a period of 10 years from the time when the database was made publicly available. At the end of the 10 year period, the contents of that particular database are no longer protected by the right to prevent unfair extraction.

10. It is left to the discretion of the Member States as to the means which they adopt to provide for adequate remedies in respect of infringement of both the copyright and the unfair extraction rights. Such measures as regards copyright no doubt already exist but may require to be complemented in relation to the rights given in Article 5 paragraphs d) and e).

As far as the right to prevent unfair extraction is concerned, Member States may be able to adapt existing structures to accommodate the specificities of Article 2 paragraph 5 and Article 8. It is unlikely however that existing copyright or neighbouring rights legislation would be an appropriate vehicle since the right in question is clearly not either of these, but is something more similar to unfair competition or parasitic behaviour legislation.

- 11.1 The copyright rights given by this Directive extend to all works covered by the provisions of the Berne Convention Articles 3, 5 and 6 paragraph 1. However, since the right to prevent unfair extraction is not a copyright based regime, national treatment does not apply. Therefore the points of attachment are limited in Article 11 paragraph 1 to works whose makers are nationals or residents of the Community but excludes publication within the Community as a 'point of attachment'.
- 11.2 Since many databases will be the result of collective work undertaken within companies rather than works of individual authorship, paragraph 2 extends the provisions of paragraph 1 above to companies and firms which operate within the Community. Therefore to the extent that the legislation of a Member State makes provision under the conditions of Article 3.4 of this Directive for such circumstances, Community-based companies can also be beneficiaries of the unfair extraction provisions.
- 11.3 However databases created by nationals or residents of third countries and those created by companies not based in the Community can only be granted protection on a reciprocal basis.
- 12.1 Nothing in this Directive may be interpreted as prejudicing any rights already subsisting in the works or materials which are incorporated into a database. The authorization of the holder of rights in such works or materials is therefore required, subject to the exception provided for in Article 4 paragraph 1, when such works or materials are incorporated into a database and in determining the use which can be made of them from that database. The database itself may also be the object of rights cumulatively with any copyright in the selection or arrangement of its contents.

12.2 Where a database has already been created prior to the taking effect of the directive, it should enjoy any copyright and rights to prevent unfair extraction for which it may be eligible, providing that such copyright and rights to prevent unfair extraction do not conflict with any prior contractual arrangements, rights acquired or obligations undertaken before that date.

Such contractual arrangements or rights and obligations must be allowed to run to their full term.



#### ASCII DATABASE SERVICES

- IMO working paper 90/4 rev.1 "Size and Trends of the Electronic Information Services Markets 1988-1994 as seen by Specialized Press and Publications", Luxembourg, November 1990.
- IMO working paper 90/5 rev.1 "Production and Availability of Online Databases In 1989", Luxembourg, December 1990.

#### VIDEOTEX SERVICES

- IMO Report 89/7, "The Impact of Videotex on the Online Market", Luxembourg, November 1989.
- IMO working paper 90/3, "Overview of the Videotex Market In 1989", Luxembourg, July 1990.

#### CD-ROM MARKET

- IMO Report 89/4, "Production of databases on CD-ROM In 1988", Luxembourg, May 1989.
- IMO working paper 91/2, "Overview of the CD-ROM Market", Luxembourg, June 1991.

#### AUDIOTEX + New delivery media

- IMO working paper 91/1, "Overview of the Audiotex Market In 1989 and 1990", Luxembourg, February 1991.

Proposal for a  
COUNCIL DIRECTIVE

on the legal protection of databases

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

1. Whereas databases are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;
2. Whereas such differences in the legal protection offered by the legislation of the Member States have direct and negative effects on the establishment and functioning of the Internal Market as regards databases and in particular on the freedom of individuals and companies 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 establishment and 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 establishment and functioning of the Internal Market or the development of an information market within the Community need not be addressed in this Directive;
4. Whereas copyright protection for databases exists in varying forms in a number of Member States according to legislation or case-law and such unharmonized intellectual property rights, being territorial in nature, can have the effect of preventing the free movement of goods or services within the Community if differences in the scope, conditions, derogations or term of protection remain between the legislation of the Member States;
5. Whereas although copyright remains an appropriate form of exclusive right for the legal protection of databases and in particular an appropriate means to secure the remuneration of the author who has created a database, in addition to copyright protection, and in the absence as yet of a harmonized system of unfair competition legislation or of case-law in the Member States, other measures are required to prevent unfair extraction and re-utilization of the contents of a database;
6. Whereas database development requires the investment of considerable human, technical and financial resources while such databases can be copied at a fraction of the cost needed to develop them independently;
7. Whereas unauthorized access to a database and removal of its contents constitute acts which can have the gravest economic and technical consequences;
8. Whereas databases are a vital tool in the development of an Information Market within the Community; whereas this tool will be of use to a large variety of other activities and industries;

9. 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;
10. Whereas a correspondingly high rate of increase in publications of literary, artistic, musical and other works necessitates the creation of modern archiving, bibliographic and accessing techniques, to enable consumers to have at their disposal the most comprehensive collection of the Community's heritage;
11. Whereas there is at the present time a great imbalance in the level of investment in database creation both as between the Member States themselves, and between the Community and the world's largest database producing 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 authors of databases and the repression of acts of piracy and unfair competition;
13. Whereas this Directive protects collections, sometimes called compilations, of works 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 the criteria by which such collections shall be eligible for protection by copyright should be that the author, in effecting the selection or the arrangement of the contents of the database, has made an intellectual creation;
15. Whereas no other criteria than originality in the sense of 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;

16. 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, data or combinations of any of these;
17. Whereas the protection of a database should extend to the electronic materials without which the contents selected and arranged by the maker of the database cannot be used, such as, for example, the system made to obtain information and present information to the user in electronic or non-electronic form, and the indexation and thesaurus used in the construction or operation of the database;
18. Whereas the term database should not be taken to extend to any computer programme used in the construction or operation of a database, which accordingly remain protected by Council Directive 91/250/EEC<sup>(1)</sup>;
19. Whereas the Directive should be taken as applying only to collections which are made by electronic means, but is without prejudice to the protection under copyright as collections, within the meaning of Article 2.5. of the Berne Convention for the Protection of Literary and Artistic Works, (text of Paris Act of 1971) and under the legislation of the Member States, of collections made by other means;
20. Whereas works protected by copyright or by any other rights, which are incorporated into a database, remain the object of their author's exclusive rights and may not therefore be incorporated into or reproduced from the database without the permission of the author or his successors in title;
21. Whereas the rights of the author of such works incorporated into a database are not in any way affected by the existence of a separate right in the original selection or arrangement of these works in a database;

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(1) OJ No L 122, 17.5.1991, p. 42.

22. Whereas the moral rights of the natural person who has created the database should be owned and exercised according to the provisions of the legislation of the Member States consistent with the provisions of the Berne Convention, and remain therefore outside the scope of this Directive;
23. 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 availability of his work to unauthorized persons;
24. 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;
25. Whereas if the user and the rightholder have not concluded an agreement regulating the use which may be made of the database, the lawful user should be presumed to be able to perform any of the restricted acts which are necessary for access to and use of the database;
26. Whereas in respect of reproduction in the limited circumstances provided for in the Berne Convention, of the contents of the database by the lawful user, whether in electronic or non-electronic form, the same restrictions and exceptions should apply to the reproduction of such works from a database as would apply to the reproduction of the same works made available to the public by other forms of exploitation or distribution;

27. Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be downloaded and re-arranged electronically without his authorization to produce a database of identical content but which does not infringe any copyright in the arrangement of his database;
28. 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 data by providing that certain acts done in relation to the contents of a database are subject to restriction even when such contents are not themselves protected by copyright or other rights;
29. Whereas such protection of the contents of a database is to be achieved by a special right by which the maker of a database can prevent the unauthorized extraction or re-utilization of the contents of that database for commercial purposes; whereas this special right (hereafter called "a right to prevent unfair extraction") is not to be considered in any way as an extension of copyright protection to mere facts or data;
30. Whereas the existence of a right to prevent the extraction and re-utilization for commercial purposes of works or materials from a given database should not give rise to the creation of any independent right in the works or materials themselves;
31. Whereas in the interests of competition between suppliers of information products and services, the maker of a database which is commercially distributed whose database is the sole possible source of a given work or material, should make that work or material available under licence for use by others, providing that the works or materials so licensed are used in the independent creation of new works, and providing that no prior rights in or obligations incurred in respect of those works or materials are infringed;

32. Whereas licences granted in such circumstances should be fair and non-discriminatory under conditions to be agreed with the rightholder;
33. Whereas such licences should not be requested for reasons of commercial expediency such as economy of time, effort or financial investment;
34. Whereas in the event that licences are refused or the parties cannot reach agreement on the terms to be concluded, a system of arbitration should be provided for by the Member States;
35. Whereas licences may not be refused in respect of the extraction and re-utilization of works or materials from a publicly available database created by a public body providing that such acts do not infringe the legislation or international obligations of Member States or the Community in respect of matters such as personal data protection, privacy, security or confidentiality;
36. Whereas the objective of the provisions 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 author who has created the database, is different from the aims of the proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data<sup>(1)</sup> 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 the data protection legislation;

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(1) OJ No C 277, 5.11.1990, p. 3.



37. Whereas notwithstanding the right to prevent unfair extraction from a database, it should still be possible for the lawful user to quote from or otherwise use, for commercial and private purposes, the contents of the database which he is authorized to use, providing that this exception is subject to narrow limitations and is not used in a way which would conflict with the author's normal exploitation of his work or which would unreasonably prejudice his legitimate interests;
38. Whereas the right to prevent unfair extraction from a database may only be extended to databases whose authors or makers are nationals or habitual residents of third countries and to those produced by companies or firms not established in a Member State within the meaning of the Treaty if such third countries offer comparable protection to databases produced by nationals of the Member States or habitual residents of the Community;
39. 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 unfair extraction from a database;
40. Whereas in addition to the protection given under this Directive to the database by copyright, and to its contents against unfair extraction, other legal provisions existing in the law of the Member States relevant to the supply of database goods and services should continue to apply,

HAS ADOPTED THIS DIRECTIVE:

Article 1

DEFINITIONS

For the purposes of this Directive,

1. "data base" means a collection of works or materials arranged, stored and accessed by electronic means, and the electronic materials necessary for the operation of the database such as its thesaurus, index or system for obtaining or presenting information; it shall not apply to any computer programme used in the making or operation of the database;
2. "right to prevent unfair extraction" means the right of the maker of a database to prevent acts of extraction and re-utilization of material from that database for commercial purposes;
3. "insubstantial part" means parts of a database whose reproduction, evaluated quantitatively and qualitatively in relation to the database from which they are copied, can be considered not to prejudice the exclusive rights of the maker of that database to exploit the database;
4. "insubstantial change" means additions, deletions or alterations to the selection or arrangement of the contents of a database which are necessary for the database to continue to function in the way it was intended by its maker to function.

Article 2

OBJECT OF PROTECTION:

COPYRIGHT AND RIGHT TO PREVENT UNFAIR EXTRACTION FROM A DATABASE

1. In accordance with the provisions of this Directive, Member States shall protect databases by copyright as collections within the meaning of Article 2(5) of the Berne Convention for the protection of Literary and Artistic works (text of the Paris Act of 1971).

2. The definition of database in point 1 of Article 1 is without prejudice to the protection by copyright of collections of works or materials arranged, stored or accessed by non-electronic means, which accordingly remain protected to the extent provided for by Article 2(5) of the Berne Convention.
3. A database shall be protected by copyright if it is original in the sense that it is a collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied to determine the eligibility of a database for this protection.
4. The copyright protection of a database given by this Directive shall not extend to the works or materials contained therein, irrespective of whether or not they are themselves protected by copyright; the protection of a database shall be without prejudice to any rights subsisting in those works or materials themselves.
5. Member States shall provide for a right for the maker of a database to prevent the unauthorized extraction or re-utilization, from that database, of its contents, in whole or in substantial part, for commercial purposes. This right to prevent unfair extraction of the contents of a database shall apply irrespective of the eligibility of that database for protection under copyright. It shall not apply to the contents of a database where these are works already protected by copyright or neighbouring rights.

### Article 3

#### AUTHORSHIP: COPYRIGHT

1. The author of a database shall be the natural person or group of natural persons who created the database, or where the legislation of the Member States 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 person considered by that legislation to have created the database shall be deemed to be its author.
3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.
4. 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.

#### Article 4

##### INCORPORATION OF WORKS OR MATERIALS INTO A DATABASE

1. The incorporation into a database of bibliographical material or brief abstracts, quotations or summaries which do not substitute for the original works themselves, shall not require the authorization of the rightholder in those works.
2. The incorporation into a database of other works or materials remains subject to any copyright or other rights acquired or obligations incurred therein.

#### Article 5

##### RESTRICTED ACTS: COPYRIGHT

The author shall have, in respect of:

- the selection or arrangement of the contents of the database and
- the electronic material referred to in point 1 of Article 1 used in the creation or operation of the database,

the exclusive right within the meaning of Article 2(1) to do or to authorize:

- (a) the temporary or permanent reproduction of the database by any means and in any form, in whole or in part,
- (b) the translation, adaptation, arrangement and any other alteration of the database,
- (c) the reproduction of the results of any of the acts listed in (a) or (b),
- (d) any form of distribution to the public, including the rental, 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 distribution right within the Community of that copy, with the exception of the right to control further rental of the database or a copy thereof,
- (e) any communication, display or performance of the database to the public.

#### Article 6

##### EXCEPTIONS TO THE RESTRICTED ACTS ENUMERATED IN ARTICLE 5:

##### COPYRIGHT IN THE SELECTION OR ARRANGEMENT

1. The lawful user of a database may perform any of the acts listed in Article 5 which is necessary in order to use that database in the manner determined by contractual arrangements with the rightholder.
2. In the absence of any contractual arrangements between the rightholder and the user of a database in respect of its use, the performance by the lawful acquiror of a database of any of the acts listed in Article 5 which is necessary in order to gain access to the contents of the database and use thereof shall not require the authorization of the rightholder.

3. The exceptions referred to in paragraphs 1 and 2 relate to the subject matter listed in Article 5 and are without prejudice to any rights subsisting in the works or materials contained in the database.

#### Article 7

##### EXCEPTIONS TO THE RESTRICTED ACTS IN RELATION TO THE COPYRIGHT IN THE CONTENTS

1. Member States shall apply the same exceptions to any exclusive copyright or other rights in respect of the contents of the database as those which apply in the legislation of the Member States to the works or materials themselves contained therein, in respect of brief quotations, and illustrations for the purposes of teaching, provided that such utilization is compatible with fair practice.
2. Where the legislation of the Member States or contractual arrangements concluded with the rightholder permit the user of a database to carry out acts which are permitted as derogations to any exclusive rights in the contents of the database, performance of such acts shall not be taken to infringe the copyright in the database itself provided for in Article 5.

#### Article 8

##### ACTS PERFORMED IN RELATION TO THE CONTENTS OF A DATABASE - UNFAIR EXTRACTION OF THE CONTENTS

1. Notwithstanding the right provided for in Article 2(5) to prevent the unauthorized extraction and re-utilization of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilize, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms.

2. The right to extract and re-utilize the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so.
3. Member States shall provide appropriate measures for arbitration between the parties in respect of such licences.
4. The lawful user of a database may, without authorization of the database maker, extract and re-utilize insubstantial parts of works or materials from a database for commercial purposes provided that acknowledgement is made of the source.
5. The lawful user of a database may, without authorization of the database maker, and without acknowledgement of the source, extract and re-utilize insubstantial parts of works or materials from that database for personal private use only.
6. The provisions of this Article shall apply only to the extent that such extraction and re-utilization does not conflict with any other prior rights or obligations, including the legislation or international obligations of the Member States or of the Community in respect of matters such as personal data protection, privacy, security or confidentiality.

#### Article 9

#### TERMS OF PROTECTION

1. The duration of the period of copyright protection of the database shall be the same as that provided for literary works, without prejudice to any future Community harmonization of the term of protection of copyright and related rights.

2. Insubstantial changes to the selection or arrangement of the contents of a database shall not extend the original period of copyright protection of that database.
3. The right to prevent unfair extraction shall run as of the date of creation of the database and shall expire at the end of a period of ten years from the date when the database is first lawfully made available to the public. The term of protection given in this paragraph shall be deemed to begin on the first of January of the year following the date when the database was first made available.
4. Insubstantial changes to the contents of a database shall not extend the original period of protection of that database by the right to prevent unfair extraction.

#### Article 10

##### REMEDIES

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

#### Article 11

##### BENEFICIARIES OF PROTECTION UNDER RIGHT TO PREVENT UNFAIR EXTRACTION FROM A DATABASE

1. Protection granted under this Directive to the contents of a database against unfair extraction or re-utilization shall apply to databases whose makers are nationals of the Member State or who have their habitual residence on the territory of the Community.



2. Where databases are created under the provisions of Article 3(4), paragraph 1 above shall also apply to companies and firms formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community. Should the company or firm formed in accordance with the legislation of a Member State have 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 to prevent unfair extraction to databases produced 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 this procedure shall not exceed that available under Article 9(3).

## Article 12

### CONTINUED APPLICATION OF OTHER LEGAL PROVISIONS

1. The provisions of this Directive shall be without prejudice to copyright or any other right subsisting in the works or materials incorporated into a database as well as to other legal provisions such as patent rights, trade marks, design rights, unfair competition, trade secrets, confidentiality, data protection and privacy, and the law of contract applicable to the database itself or to its contents.
2. Protection under the provisions of this Directive shall also be available in respect of databases created prior to the date of publication of the Directive without prejudice to any contracts concluded and rights acquired before that date.

Article 13

FINAL PROVISIONS

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

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

Article 14

This Directive is addressed to the Member States.

Done at Brussels,

For the Council  
The President

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