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Protection for databases : the European Database Directive and its effects in the Netherlands, France and the United Kingdom

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APPENDICES

1 | European Database Directive

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

Official Journal L 077, 27/03/1996, p. 0020 – 0028

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 57 (2), 66 and 100a thereof,

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

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

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),

(1) Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;

(2) Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on the basis of harmonized legal arrangements throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation in this field, which is now taking on an increasingly international dimension;

(3) Whereas existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising;

(4) Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community;

(5) Whereas copyright remains an appropriate form of exclusive right for authors who have created databases;

(6) Whereas, nevertheless, in the absence of a harmonized system of unfair-competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;

(7) Whereas the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently;

(8) Whereas the unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences;

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

(20) Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems;

(21) Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner;

(22) Whereas electronic databases within the meaning of this Directive may also include devices such as CD-ROM and CD-i;

(23) Whereas the term 'database' should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (4);

(24) Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5);

(25) Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (6);

(26) Whereas works protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the rightholder or his successors in title;

(27) Whereas copyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database;

(28) Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;

(29) Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;

(30) Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;

(31) Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;

(32) Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;

(33) Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike CD-ROM

or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides;

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

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

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

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

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

(39) Whereas, in addition to aiming to protect 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 made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

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

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

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

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

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

(45) Whereas the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data;

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

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

(48) Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aim of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (7), which is to guarantee free circulation of personal data on the basis of harmonized rules designed to protect fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;

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

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

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

(52) Whereas those Member States which have specific rules providing for a right comparable to the *sui generis* right provided for in this Directive should be permitted

to retain, as far as the new right is concerned, the exceptions traditionally specified by such rules;

(53) Whereas the burden of proof regarding the date of completion of the making of a database lies with the maker of the database;

(54) Whereas the burden of proof that the criteria exist for concluding that a substantial modification of the contents of a database is to be regarded as a substantial new investment lies with the maker of the database resulting from such investment;

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

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

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

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

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

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

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.

2. For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.
3. Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.

Article 2

Limitations on the scope

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

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

CHAPTER II

COPYRIGHT

Article 3

Object of protection

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

Article 4

Database authorship

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

Article 5

Restricted acts

In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

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

(e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

Article 6

Exceptions to restricted acts

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

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

- (a) in the case of reproduction for private purposes of a non-electronic database;
- (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
- (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

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

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

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

2. For the purposes of this Chapter:

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

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

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

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

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

Article 8

Rights and obligations of lawful users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.

Article 9

Exceptions to the *sui generis* right

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

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

(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Article 10

Term of protection

1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.

2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of

successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

Article 11

Beneficiaries of protection under the *sui generis* right

1. The right provided for in Article 7 shall apply to database whose makers or right-holders are nationals of a Member State or who have their habitual residence in the territory of the Community.
2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.
3. Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

CHAPTER IV

COMMON PROVISIONS

Article 12

Remedies

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

Article 13

Continued application of other legal provisions

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

Article 14

Application over time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to Article 16(1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.
2. Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3(1), this Directive

shall not result in any curtailment in that Member State of the remaining term of protection afforded under those arrangements.

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

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

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

Article 15

Binding nature of certain provisions

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

Article 16

Final provisions

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

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

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

3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the *sui generis* right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.

Article 17

This Directive is addressed to the Member States.

Done at Strasbourg, 11 March 1996.

For the European Parliament

The President

K. HÄNSCH For the Council

The President

L. DINI

- (1) OJ No C 156, 23. 6. 1992, p. 4 and OJ No C 308, 15. 11. 1993, p. 1.
- (2) OJ No C 19, 25. 1. 1993, p. 3.
- (3) Opinion of the European Parliament of 23 June 1993 (OJ No C 194, 19. 7. 1993, p. 144), Common Position of the Council of 10 July 1995 (OJ No C 288, 30. 10. 1995, p. 14), Decision of the European Parliament of 14 December 1995 (OJ No C 17, 22 1. 1996) and Council Decision of 26 February 1996.
- (4) OJ No L 122, 17. 5. 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No L 290, 24. 11. 1993, p. 9.)
- (5) OJ No L 346, 27. 11. 1992, p. 61.
- (6) OJ No L 290, 24. 11. 1993, p. 9.
- (7) OJ No L 281, 23. 11. 1995, p. 31.

WIPO

CRNR/DC/6

ORIGINAL: English

DATE: August 30, 1996

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

DIPLOMATIC CONFERENCE
ON
CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS
QUESTIONS

Geneva, December 2 to 20, 1996

BASIC PROPOSAL

FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY
ON INTELLECTUAL PROPERTY IN RESPECT OF DATABASES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE

prepared by the Chairman of the Committees of Experts

on a Possible Protocol to the Berne Convention

and

*on a Possible Instrument for the Protection of the Rights of Performers
and Producers of Phonograms*

Memorandum prepared by the Chairman of the Committees of Experts

**Draft Treaty
on Intellectual Property
in Respect of Databases**

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[Administrative and Final Clauses]

ANNEX

Notes on the Title and on the Preamble

0.01 *The proposed Treaty complements the existing treaties in the field of intellectual property. For this reason, the expression "intellectual property" has been included in the title of the proposed Treaty. The Treaty extends protection to databases that qualify according to the provisions of the Treaty. The expression "database" has been included in the title without further qualification.*

0.02 *The first paragraph of the Preamble expresses the primary objective of Contracting Parties in concluding the Treaty.*

0.03 *The second paragraph indicates the main reasons behind the objective stated in the first paragraph.*

0.04 *The third paragraph indicates the main reasons why Contracting Parties think databases ought to be protected as intellectual property.*

0.05 *The fourth paragraph refers to the means by which Contracting Parties seek to obtain their objective, namely to establish a new form of protection which, by enabling recovery of investments in databases, encourages investment in this field.*

0.06 *The fifth paragraph underlines the principle that the proposed Treaty does not interfere with other forms of intellectual property protection at the international level. Because many databases are already protected as literary or artistic works under the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to in these Notes as "the Berne Convention"), a specific reference to the Convention has been made. The provisions of the proposed Treaty leave unaffected the protection provided under existing treaties for other intellectual property rightsholders, including authors, performers, producers of phonograms, and broadcasting organizations.*

[End of Notes on the Title and the Preamble]

Preamble

The Contracting Parties,

Desiring to enhance and stimulate the production, distribution and international trade in databases,

Recognizing that databases are a vital element in the development of a global information infrastructure and an essential tool for promoting economic, cultural and technological advancement,

Recognizing that the making of databases requires the investment of considerable human, technical and financial resources but that such databases can be copied or accessed at a fraction of the cost needed to design them independently,

Desiring to establish a new form of protection for databases by granting rights adequate to enable the makers of databases to recover the investment they have made in their

databases and by providing international protection in a manner as effective and uniform as possible,

Emphasizing that nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under treaties in the field of intellectual property, and in particular, that nothing in this Treaty shall in any way prejudice the rights granted to authors in the Berne Convention for the Protection of Literary and Artistic Works,

Have agreed as follows:

[End of Preamble]

**Draft Treaty
on Intellectual Property
in Respect of Databases**

**Article 1
Scope**

(1) Contracting Parties shall protect any database that represents a substantial investment in the collection, assembly, verification, organization or presentation of the contents of the database.

(2) The legal protection set forth in this Treaty extends to a database regardless of the form or medium in which the database is embodied, and regardless of whether or not the database is made available to the public.

(3) The protection granted under this Treaty shall be provided irrespective of any protection provided for a database or its contents by copyright or by other rights granted by Contracting Parties in their national legislation.

(4) The protection under this Treaty shall not extend to any computer program as such, including without limitation any computer program used in the manufacture, operation or maintenance of a database.

Notes on Article 1

1.01 *Article 1* sets out the scope of the proposed Treaty. It provides that Contracting Parties shall protect all databases that represent a substantial investment.

1.02 The production and distribution of databases has become a broad economic activity which is expanding rapidly worldwide. The production and distribution of databases may be viewed as a “content industry” within the information industry, and it may be expected that this industry will be a major source of employment. The development of a content industry has both direct and indirect effects on the development of the information infrastructure at a national and international level. In this connection, the database industry plays a significant role in fostering new industries and new jobs.

1.03 The production and distribution of databases requires considerable investment. At the same time, exact copies of whole databases or their essential parts can be made at practically no cost. The increasing use of digital recording technology exposes database makers to the risk that the contents of their databases may be copied and *rearranged* electronically, without their authorization, to produce similar competing databases or databases with identical content.

1.04 Unauthorized retrieval and copying of the contents of a database has serious consequences for the economics of database production. Protection against unauthorized

copying and other unauthorized use has been sought through the copyright system. According to the prevailing view, a significant proportion of existing databases may already be protected by copyright. A condition for this protection is that a database meet the requirements for copyright protection, i.e. that it be the result of its creator's own intellectual effort and that it achieve a sufficient level of originality. It has, however, become evident that copyright does not provide sufficient protection. Many valuable databases do not qualify for copyright protection. It should be noted that in some countries specific *sui generis* forms of intellectual property protection now apply to databases or are presently being established. In some other countries, copyright seems to provide all the protection needed by databases. Nonetheless, these national or regional solutions remain insufficient. In the network environment of the global information infrastructure the database market is truly international and does not respect national boundaries.

1.05 In all countries, continued investment is an essential factor for the development and refinement of databases. Such investment will not take place unless a stable and uniform regime of legal protection is established to protect the rights of makers of databases.

1.06 The proposed Treaty seeks to safeguard makers of databases against misappropriation of the fruits of their financial and professional investment in collecting, verifying and presenting the contents of databases. It does this by proposing protection that covers the whole or substantial parts of a database against certain acts by a user or by a competitor, for the limited duration of the right. The investment, of course, may comprise financial resources, human resources or both.

1.07 On March 11, 1996, the European Parliament and the Council of the European Union adopted a Directive on the legal protection of databases (96/9/EC). This Directive harmonizes certain aspects of the copyright protection provided for databases and creates an exclusive *sui generis* right for the makers of databases. The general objective of this right is to protect the investment of time, money and effort by the maker of a database, irrespective of whether the database is in itself innovative. According to the Directive, a database is protected if there has been a substantial investment, in qualitative or quantitative terms, in obtaining, verifying or presenting the contents of the database. The duration of the protection provided by the Directive is 15 years. The date by which the Member States of the European Union must implement the Directive in their national legislation is January 1, 1998. The proposal submitted by the European Community and its Member States for the February 1996 session of the Committees of Experts follows closely the substantive provisions of this Directive.

1.08 In May 1996, a bill was introduced in the United States Congress (H.R. 3531) that would amend title 15 of the United States Code to create a new federal statute for database protection. The proposed "Database Investment and Intellectual Property Antipiracy Act of 1996" is aimed at preventing actual or threatened competitive injury by the misappropriation of databases or their contents; it is not targeted at non-competitive uses. A database would be subject to protection under the Act if the collection, assembly, verification, organization or presentation of the database contents were the result of a qualitatively or quantitatively substantial investment of human, technical, financial or other resources.

1.09 An important part of the background to the United States bill was the United States Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991). The bill was introduced in the U.S. Congress with the statement

that “While reaffirming that most, although not all, commercially significant databases satisfy the ‘originality’ requirement for protection under copyright, the Court [in *Feist*] emphasized that this protection is ‘necessarily thin’. Several subsequent lower court decisions have underscored that copyright cannot stop a competitor from lifting massive amounts of factual material from a copyrighted database to use as the basis for its own competing product.”

1.10 The United States bill draws on the fundamental elements of the European Directive and is parallel to its Trans-Atlantic counterpart in its most crucial points. The most significant difference between the United States bill and the European Directive is that the former proposes a 25-year term of protection. When the bill was introduced, its sponsors emphasized that the existing protection for databases afforded by copyright and contract law would not be affected. The bill is intended to supplement these legal rights, not replace them. Furthermore, it was emphasized that the bill avoids conferring any monopoly on facts. The bill is intended to be fully consistent with the proposal on *sui generis* protection of databases which was submitted by the Delegation of the United States of America for the May 1996 sessions of the Committees of Experts (document BCP/CE/VII/2-INR/CE/VI/2).

1.11 The proposed Treaty is based on the aforementioned proposals made by the European Community and its Member States and by the United States of America, taking into account discussions within the Committees of Experts. The scope of the proposed Treaty is laid down in the provisions of Article 1 in a manner that is fully consistent with these proposals.

1.12 *Paragraph (1)* identifies the protected subject matter and sets out the general condition for protection. The protected subject matter is databases. The condition for protection is that a substantial investment has been made in the formation of the database. The expressions “database” and “substantial investment” are defined in Article 2.

1.13 *Paragraph (2)* makes it clear that protection shall be granted to databases irrespective of the form or medium in which they are embodied. Protection extends to databases in both electronic and non-electronic form. Moreover, this wording embraces all forms or media now known or later developed. Paragraph (2) also makes it clear that protection shall be granted to databases regardless of whether they are made available to the public. This means that databases that are made generally available to the public, commercially or otherwise, as well as databases that remain within the exclusive possession and control of their developers enjoy protection on the same footing.

1.14 *Paragraph (3)* expresses the principle that the protection accorded by the proposed Treaty is independent of any other form of protection. The protection would therefore be of a new or independent nature. Consequently, the proposed Treaty provides cumulative protection by the attachment of different rights to the database or to its contents. It should be pointed out that the proposed new protection does not replace any of the existing forms of protection that apply to databases or their contents.

1.15 *Paragraph (4)* provides that protection does not extend to any computer programs as such. A computer program is a set of programming instructions that may cause a computer to perform certain functions or achieve certain results. A computer program can include collections of data or other materials that are not part of the set of instructions that form the operative core of the computer program. According to the proposed Treaty, such databases incorporated in computer programs are protected in the same way as any other databases.

Article 2

Definitions

For the purposes of this Treaty:

- (i) “database” means a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means;
- (ii) “extraction” means the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;
- (iii) “maker of the database” means the natural or legal person or persons with control and responsibility for the undertaking of a substantial investment in making a database;
- (iv) “substantial investment” means any qualitatively or quantitatively significant investment of human, financial, technical or other resources in the collection, assembly, verification, organization or presentation of the contents of the database;
- (v) “substantial part”, in reference to the contents of a database, means any portion of the database, including an accumulation of small portions, that is of qualitative or quantitative significance to the value of the database;
- (vi) “utilization” means the making available to the public of all or a substantial part of the contents of a database by any means, including by the distribution of copies, by renting, or by on-line or other forms of transmission, including making the same available to the public at a place and at a time individually chosen by each member of the public.

Notes on Article 2

2.01 *Article 2* contains definitions of the key terms used in the proposed Treaty.

2.02 *Item (i)* defines the term “database”. The term should be understood to include collections of literary, musical or audiovisual works or any other kind of works, or collections of other materials such as texts, sounds, images, numbers, facts, or data representing any other matter or substance. It is worth pointing out that in addition to many kinds of works and other information materials, databases may contain collections of expressions of folklore.

2.03 In a database, the works or other materials are systematically or methodically arranged, and each of these works or other materials can be individually accessed by electronic or other means. It is not necessary that the materials in a database be stored physically in an organized manner. The arrangement of the materials may be laid down in the addresses and indexes of the material that make it possible to directly access any of the materials in a systematic or methodical way. The requirement that the contents of a database be independent works, data or other materials, and that items in the database are individually accessible excludes any recording of an audiovisual, cinematographic, literary or musical work as such from the definition of a database and the protection of this proposed Treaty.

2.04 The term “collection” has been used in the definition of the term “database”, whereas the term “compilation” is used in Article 10.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter referred to in these Notes as the TRIPS Agreement) concerning copyright protection for databases. The term “collections” has been used in Article 2(5) of the Berne Convention, defining the copyright protection available for collections of works, and in Article 5 of the draft “Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works”. It is not intended that the proposed Treaty make any

distinction between the two terms; rather, the proposed Treaty, compared to the Berne Convention, adds certain conditions for protection and removes others.

2.05 *Item (ii)* defines the term “extraction” as meaning the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form. The act of extraction is the transfer of some material to another medium; the original material on the medium in which the database is embodied remains on that medium. In this sense, the term “extraction” is a synonym for “copying” or “reproduction”. The expression “another medium” does not refer to any particular medium. Transfer to the same type or any other type of medium, device, instrument or contrivance capable of recording the transferred material, is a transfer within the meaning of this provision. Reference in the provision to “any means” or “any form” is meant to cover all means and forms now known or later developed.

2.06 According to *item (iii)*, the “maker of the database” means the natural or legal person or persons with control and responsibility for the undertaking of a substantial investment in making a database. The expression “control and responsibility for the undertaking of a substantial investment” is intended to exclude the possibility that the protection of the proposed Treaty might flow to the employees who execute the tasks required to produce a database; it is clear that the rights and protection flow to their employer, be it a company, enterprise or other organization, which makes the investment. Likewise, the definition excludes subcontractors who may be commissioned to execute such tasks. In the same way that the term “author” in the Berne Convention applies to the successors in title of the author, the term “maker of a database” applies to the successors in title of the maker of a database. The successors in title of the maker of a database enjoy the full protection of the proposed Treaty.

2.07 *Item (iv)* defines the term “substantial investment”. The investment may be in human, financial, technical or other resources essential to the production of a database. The human resources may, in addition to the “sweat of the brow”, consist of the contribution of ideas, innovation and efforts that add to the quality of the product. The protection of a database does not, however, depend upon innovation or quality; mere investment is sufficient. The fact that the main requirement for protection is investment does not, however, reduce the value of the proposed system of protection since it also encourages innovation as well as industrious efforts in the production of databases. The investment must be sufficient, or “substantial”, to qualify the database for protection. The substantiality requirement has been characterized in the expression “qualitatively or quantitatively significant”; this expression should be understood to mean qualitatively, quantitatively or both together. The measurement of significance must be based on objective criteria. In any dispute, it is the burden of the maker of the database to demonstrate the necessary investment.

2.08 The activities listed in Article 1(1) that may comprise the investment are the collection, assembly, verification, organization or presentation of the contents of the database. In practice, these are the steps in the production of a database that are most likely to involve substantial investments. A substantial investment in any one of the listed activities will fulfil the requirements for protection. It is recognized that “collection” and “assembly” are often interlinked, and “organization” and “presentation” of the contents may take place simultaneously. Any subsequent verification or re-verification is considered to be “verification” in the sense of Article 1(1).

2.09 *Item (v)* defines the term “substantial part”. The substantiality of any portion of the database is assessed against the value of the database. This assessment should

evaluate the qualitative and quantitative aspects of the portion, although neither aspect is more important than the other. As noted in connection with item (iv), “qualitatively or quantitatively” must be understood to mean either or both together. The value of the database refers to its commercial value. This value consists on one hand of direct investments made in the database and on the other hand of the market value or expected market value of the database. This assessment may also take into account the diminution in market value that may result from the use of the portion, including the added risk that the investment in the database will not be recoverable. It may even include an assessment of whether a new product using the portion could serve as a commercial substitute for the original, diminishing the market for the original.

2.10 According to item (v), “substantial part” means any portion of the database, “including an accumulation of small portions”. In practice, repeated or systematic use of small portions of the contents of a database may have the same effect as extraction or utilization of a large, or substantial, part of the contents of the database. This construction is intended to ensure the effective functioning of the right and to avoid misappropriation. 2.11 In *item (vi)* a definition is provided for the term “utilization”. Utilization is a broad concept that covers all forms of making a database or its contents available to the public. It comprises both tangible and intangible dissemination and diffusion, including the distribution of physical copies and all forms of transmission by wire or wireless means. Utilization covers the making of a database available to the public by both on-line and “local” means; it encompasses interactive on-line, on-demand operations where members of the public have access to the database at a place and at a time individually chosen by them, and it encompasses such local means as showing, “playing”, demonstrating or otherwise making the contents of a database (such as a CD-ROM) perceptible to the public, even when no transmission is involved. Broadcasting and cable transmissions, whether subscription-based or not, may also be utilization of a database.

2.12 The term “public” has been used in the provision. The purpose for this is to make a distinction between relevant utilization and non-relevant communication between private parties. Utilization includes making available to the public by any means. No list of examples can be exhaustive. The expression “any means” includes all means now known or later developed. A database may be made available to the public even in the absence of any direct or indirect commercial advantage or financial gain.

Article 3 Rights

- (1) The maker of a database eligible for protection under this Treaty shall have the right to authorize or prohibit the extraction or utilization of its contents.
- (2) Contracting Parties may, in their national legislation, provide that the right of utilization provided for in paragraph (1) does not apply to distribution of the original or any copy of any database that has been sold or the ownership of which has been otherwise transferred in that Contracting Party’s territory by or pursuant to authorization.

Notes on Article 3

3.01 *Paragraph (1)* contains the most important operative provision of the proposed Treaty. It accords to the maker of a database the right to authorize or prohibit the relevant acts of extraction and utilization. The right is by its nature an exclusive right. The contents of the provision have, to a great extent, already been determined by the definitions of “extraction”, “substantial part” and “utilization” in Article 2.

3.02 The protection provided does not preclude any person from independently collecting, assembling or compiling works, data or materials from any source other than a protected database.

3.03 The right of utilization granted to the maker of a database covers, according to the definition of “utilization”, the making available to the public of all or a substantial part of the contents of a database inter alia by the distribution of copies. *Paragraph (2)* allows Contracting Parties to provide for the exhaustion of the right of distribution on a national basis.

3.04 If it is possible for regional economic integration areas with their own legislation in this field to become parties to the Treaty the effect of the exhaustion of the right of distribution may be regional. The territories of such Contracting Parties consist of the territories of their member countries. There is thus no need to make separate mention of regional economic integration areas.

Article 4
Rightholders

- (1) The rights provided under this Treaty shall be owned by the maker of the database.
- (2) The rights provided under this Treaty shall be freely transferable.

Notes on Article 4

4.01 *Paragraph (1)* determines the first owner of the rights provided for in this Treaty. The expression “maker of the database” has been used in singular form in many provisions of the proposed Treaty. This expression must be understood to include its plural wherever there has been more than one maker of a database. When the rights in respect of a database belong to several makers, they own the rights jointly and the authorization of each rightholder is necessary for the extraction or utilization of a substantial part of the database. Likewise, when there is joint ownership of rights in a database, the consent of each of the rightholders is necessary for the assignment, transfer or licensing of the database.

4.02 *Paragraph (2)* provides that the rights established by the proposed Treaty are freely transferable. No limitations apply to this freedom of contract. National laws, of course, may impose certain requirements in connection with contracts generally, such as a requirement that they be embodied in written documents. Requirements of this type may also be imposed in connection with contracts concerning rights in databases.

4.03 A transferee of rights under paragraph (2) may enjoy all the same protection as the original maker of the database. The maker of a database may transfer all of the rights he has therein.

Article 5 Exceptions

(1) Contracting Parties may, in their national legislation, provide exceptions to or limitations of the rights provided in this Treaty in certain special cases that do not conflict with the normal exploitation of the database and do not unreasonably prejudice the legitimate interests of the rightholder.

(2) It shall be a matter for the national legislation of Contracting Parties to determine the protection that shall be granted to databases made by governmental entities or their agents or employees.

Notes on Article 5

5.01 According to *paragraph (1)*, Contracting Parties may provide, in their national legislation, exceptions to or limitations of the rights provided in this Treaty. This freedom is limited by the criteria originally introduced in Article 9(2) of the Berne Convention. First, the criteria permit exceptions only in certain special cases. Second, the exceptions may never conflict with normal exploitation of the database, and third, the exceptions may not unreasonably impair or prejudice the legitimate interests, including economic interests, of the rightholder. The provisions of paragraph (1) allow limitations on the rights of both extraction and utilization.

5.02 *Paragraph (2)* sets forth a specific rule permitting national legislation to determine whether and how to protect databases made by governmental entities, their agents and employees.

5.03 The rights and exceptions in the proposed Treaty are norms for minimum protection. *Article 5* does not preclude national legislation that imposes stricter or narrower rules in respect of exceptions. For example, a Contracting Party may enact national legislation that excludes any limitation of the right to extract the contents of a database in electronic form for private purposes.

Article 6 Beneficiaries of Protection

(1) Each Contracting Party shall protect according to the terms of this Treaty makers of databases who are nationals of a Contracting Party.

(2) The provisions of paragraph (1) shall also apply to companies, firms and other legal entities formed in accordance with the laws of a Contracting Party or having their registered office, central administration or principal place of business within a Contracting Party; however, where such a company, firm or other legal entity has only its registered office in the territory of a Contracting Party, its operations must be genuinely linked on an on-going basis with the economy of a Contracting Party.

Notes on Article 6

6.01 According to *paragraph (1)*, the benefit of protection is granted to nationals of Contracting Parties. According to the provisions of Article 7(4) makers of databases who have their habitual residence in a Contracting Party are assimilated to nationals of that Contracting Party.

6.02 By a reference to the provisions of paragraph (1), *paragraph (2)* contains a provision laying down the same principle for the benefit of companies, firms and other legal

entities having certain points of attachment to a Contracting Party. The expression “companies, firms and other legal entities” is intended to cover all companies, firms, corporations, unions, associations, non-profit institutions and other legal persons.

6.03 Protection is given to the persons identified in paragraph (1) and paragraph (2) if they meet the criteria set forth in those provisions at the time of the making of the database, which is the moment when the database meets the requirements of Article 1(1).

Article 7

National Treatment and Independence of Protection

(1) The maker of a database shall enjoy in respect of the protection provided for in this Treaty, in Contracting Parties other than the Contracting Party of which he is a national, the rights which their respective laws do now or may hereafter grant to their nationals as well as the rights specially granted by this Treaty.

(2) Protection of a database in the Contracting Party of which the maker of the database is a national shall be governed by national legislation.

(3) The enjoyment and the exercise of rights under this Treaty shall be independent of the existence of protection in the Contracting Party of which the maker of a database is a national. Apart from the provisions of this Treaty, the extent of protection, as well as the means and extent of redress, shall be governed exclusively by the laws of the Contracting Party where protection is claimed.

(4) Makers of databases who are not nationals of a Contracting Party but who have their habitual residence in a Contracting Party shall, for the purposes of this Treaty, be assimilated to nationals of that Contracting Party.

Notes on Article 7

7.01 *Article 7* contains rules on national treatment and independence of protection. The provisions closely follow the corresponding clauses in Article 5 of the Berne Convention. In accordance with the language in Article 6, these rules refer to the Contracting Party of which the maker of a database is a national, whereas the Berne Convention refers to the country of origin which is defined in the Convention.

7.02 It is proposed that global and unlimited national treatment shall be applied to the rights granted in the proposed Treaty. *Paragraph (1)* sets out the fundamental principle of national treatment, which is modelled on Article 5(1) of the Berne Convention. In addition, paragraph (1) guarantees all the rights specially granted by this Treaty in a manner similar to the aforementioned clause of the Berne Convention.

7.03 *Paragraph (2)* contains the rule governing protection of the maker of a database in the Contracting Party of which he is a national. Such protection shall be governed by national legislation. The provision follows the principle of the first sentence of Article 5(3) of the Berne Convention.

7.04 *Paragraph (3)* adds a provision on independence of protection. This provision corresponds to the language of Article 5(2) of the Berne Convention.

7.05 *Paragraph (4)* contains a provision according to which the criterion of habitual residence is assimilated to the criterion of nationality for the purposes of the proposed Treaty.

Article 8 Term of Protection

(1) The rights provided for in this Treaty shall attach when a database meets the requirements of Article 1(1) and shall endure for at least

Alternative A: 25

Alternative B: 15

years from the first day of January in the year following the date when the database first met the requirements of Article 1(1).

(2) In the case of a database that is made available to the public, in whatever manner, before the expiry of the period provided for in paragraph (1), the term of protection shall endure for at least

Alternative A: 25

Alternative B: 15

years from the first day of January in the year following the date when the database was first made available to the public.

(3) Any substantial change to the database, evaluated qualitatively or quantitatively, including any substantial change resulting from the accumulation of successive additions, deletions, verifications, modifications in organization or presentation, or other alterations, which constitute a new substantial investment, shall qualify the database resulting from such investment for its own term of protection.

Notes on Article 8

8.01 The intellectual property protection provided for in the proposed Treaty is limited in duration. Provisions on the term of protection are found in *Article 8*. Two alternatives are offered in the Article concerning the term of protection. *Alternative A* follows the proposal made by the United States of America (document BCP/CE/VII/2-INR/CE/VI/2) according to which the term of protection would be at least 25 years, calculated according to Article 6 of that proposal. *Alternative B* is based on the term of 15 years proposed by the European Community and its Member States (document BCP/CE/VI/13).

8.02 The determination of the proper duration of any form of intellectual property protection is bound to depend on many factors, including the nature of the subject matter protected, the prevailing economic and technical circumstances and the interests of rightholders, users and society at large. In the case of databases, the need for protection in the first instance is connected to the ability of makers of databases to recover the investment they make in a database. The economic life-span of different databases varies depending on their content and the structure of the marketplace. For dynamic databases that are constantly changed and developed, a shorter term of protection could be justified. New versions may be protected under the proposed Treaty and old versions rapidly become outdated and useless. In the case of static databases, such as encyclopaedic, historical and cartographic databases, protection may be needed for a longer period of time. Indeed, the recovery of the heavy investments required by the production of such databases may justify or even necessitate a longer term of protection. For practical reasons, it would be advisable to adopt a single term of protection for all types of databases.

8.03 The 25-year and 15-year alternatives are found in *paragraph (1)* and *paragraph (2)* of Article 8. The decision on the term of protection has been left to the Diplomatic Conference.

8.04 In paragraph (1), it is proposed that the calculation of the term of protection should start from the time when the database first meets the requirements of Article 1(1). It is proposed that the term of protection laid down in the proposed Treaty would be a minimum term of protection. This is indicated by the words “at least” in the provision. As is customary in the field of copyright, it is proposed that the rights would endure for a fixed number of years starting from January 1 of the year following the date when the database first met the above-mentioned requirements.

8.05 According to the provisions of paragraph (2), the calculation of the term of protection would start from the date when the database was first made available to the public, if the database is made available to the public in any manner before the expiration of the term provided for in paragraph (1).

8.06 *Paragraph (3)* establishes the principle that when a database is substantially changed it becomes a new database, entitled to its own term of protection. The substantiality of the change is to be evaluated qualitatively, quantitatively or both qualitatively and quantitatively. The kinds of changes that will lead to the formation of a new database with its own term of protection are those substantial changes in the contents of the database that involve a new substantial investment. Such changes may result from an accumulation of successive acts, such as those included in the non-exhaustive list in the provision.

Article 9

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Notes on Article 9

9.01 *Article 9* sets forth the principle of formality-free protection. The protection provided for in the proposed Treaty may not be subject to registration, notice, marking, or any other formality.

Article 10

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, “protection-defeating device” means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Notes on Article 10

10.01 *Article 10* contains provisions on obligations concerning technological measures.

10.02 According to *paragraph (1)* Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices or the offer or performance or services having the same effect. A condition for proscription is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. This knowledge requirement therefore focuses on the purpose for which the device or service will be used. The expression “knowing or having reasonable grounds to know” has the same meaning as the expression “knowingly or with reasonable grounds to know” in the provisions on enforcement in the TRIPS Agreement.

10.03 *Paragraph (2)* includes a provision on remedies against the unlawful acts referred to in paragraph (1). The reason for a special provision on remedies is the fact that the provisions on enforcement in the TRIPS Agreement, which are applicable according to Article 14 of the proposed Treaty, only concern “any act of infringement of intellectual property rights covered by this Agreement”. The obligations established in the proposed Article 10 are more akin to public law obligations directed at Contracting Parties than to provisions granting “intellectual property rights”.

10.04 Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts.

10.05 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

10.06 *Paragraph (3)* contains the definition of a “protection-defeating device”. It describes the characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase “primary purpose or primary effect of which is to circumvent...” has been used rather than “specifically designed or adapted to circumvent...”.

10.07 A proposal on this issue was made for the May 1996 session of the Committees of Experts by the United States of America (document BCP/CE/VII/2-INR/CE/VI/2). The ongoing international discussion has led to a number of modifications and these are incorporated in Article 10.

Article 11
Application in Time

(1) Contracting Parties shall also grant protection pursuant to this Treaty in respect of databases that met the requirements of Article 1(1) at the date of the entry into force of this Treaty for each Contracting Party. The duration of such protection shall be determined by the provisions of Article 8.

(2) The protection provided for in paragraph (1) shall be without prejudice to any acts concluded or rights acquired before the entry into force of this Treaty in each Contracting Party.

(3) A Contracting Party may provide for conditions under which copies of databases which were lawfully made before the date of the entry into force of this Treaty for that Contracting Party may be distributed to the public, provided that such provisions do not allow distribution for a period longer than two years from that date.

Notes on Article 11

11.01 According to *Article 11*, the introduction of the new form of protection provided for in the proposed Treaty adheres to a principle that is familiar from the field of copyright.

11.02 In *paragraph (1)*, the right is introduced in such a way that all existing databases become protected from the moment of the entry into force of the proposed Treaty for each Contracting Party. The normal term of protection under Article 6 applies. A database that met the requirements of Article 1(1) before the entry into force of the proposed Treaty for a given Contracting Party, but within the term prescribed in Article 6, will be protected for the remainder of the Article 6 term. A database that met the requirements of Article 1(1) a longer time ago than the term prescribed in Article 6 will remain unprotected.

11.03 *Paragraph (2)* makes clear that the protection accorded by the proposed Treaty shall not be retroactive and shall not disrupt existing agreements. The protection is without prejudice to any acts performed, agreements concluded or rights acquired before the entry into force of the proposed Treaty for each Contracting Party.

11.04 *Paragraph (3)* allows transitional arrangements for a limited period of time. The purpose of these provisions is to protect investments made in the making copies by persons who in good faith engaged in the exploitation of databases in a situation where no protection existed. The provision makes it possible for Contracting Parties to provide for conditions under which copies made before the entry into force of the Treaty may continue to be distributed to the public after the entry into force of the Treaty. The time limit for such provisions is two years. Transitional arrangements only concern distribution of copies and do not extend to the reproduction of new copies by extraction, or to utilization of the database by making it available to the public by transmission.

Article 12

Relation to Other Legal Provisions

The protection accorded under this Treaty shall be without prejudice to any other rights in, or obligations with respect to, a database or its contents, including laws in respect of copyright, rights related to copyright, patent, trademark, design rights, antitrust or competition, trade secrets, data protection and privacy, access to public documents and the law of contract.

Notes on Article 12

12.01 *Article 12* deals with the relationship between the protection accorded under the proposed Treaty and existing or future rights and obligations. The protection granted under the proposed Treaty shall leave intact and shall in no way affect any “conventional” rights in the database or its contents. This principle is extended as well to any obligations that might exist with respect to the database or its contents. The Article contains a non-exhaustive list of rights and obligations.

Article 13 Special Provisions on Enforcement of Rights

Alternative A

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

Notes on Article 13

13.01 Two alternatives on enforcement are presented in *Article 13*. The choice between them has been left to the Diplomatic Conference. This is because the issue of enforcement is a horizontal one that must be considered in connection with the two other proposed Treaties published simultaneously with the present proposed Treaty. Each of the two alternatives is based on the enforcement provisions of Part III, Articles 41 to 61, of the TRIPS Agreement.

13.02 *Alternative A* consists of the text of Article 13 and an Annex. *Paragraph (1)* introduces the Annex which contains the substantive provisions on enforcement. *Paragraph (2)* states that the Annex forms an integral part of the proposed Treaty. The provisions of the Annex have the same status as the provisions of the proposed Treaty.

13.03 *Alternative B* incorporates the enforcement provisions in the TRIPS Agreement by reference. The provisions of Alternative B obligate Contracting Parties to ensure that proper enforcement procedures, as specified in Part III, are available. To this end, Contracting Parties shall apply the relevant provisions of the TRIPS Agreement *mutatis mutandis*.

Notes on the Annex

14.01 *The Annex forms the second part of Alternative A of Article 13. The Annex reproduces in its Articles 1 to 21, Part III, Articles 41 to 61, of the TRIPS Agreement. Certain necessary technical adaptations have been made, corresponding to the joint proposal made by the European Community and its Member States and Australia concerning the enforcement of rights which was submitted for the September 1995 sessions of the Committees of Experts (document BCP/CE/V/8). Certain other modifications have been made concerning clauses that are not relevant with regard to the proposed Treaty.*

14.02 No detailed Notes are offered on the specific provisions of the Annex.

Alternative A
ANNEX
Enforcement of Rights

SECTION 1
GENERAL OBLIGATIONS

Article 1

1. Contracting Parties shall ensure that enforcement procedures as specified in this Annex are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
2. Procedures concerning the enforcement of rights covered by this Treaty shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Contracting Party's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.
5. It is understood that this Annex does not create any obligation to put in place a judicial system for the enforcement of rights covered by this Treaty distinct from that for the enforcement of law in general, nor does it affect the capacity of Contracting Parties to enforce their law in general. Nothing in this Annex creates any obligation with respect to the distribution of resources as between enforcement of rights covered by this Treaty and the enforcement of law in general.

SECTION 2
CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 2

Fair and Equitable Procedures

Contracting Parties shall make available to the right holders¹ civil judicial procedures concerning the enforcement of any right covered by this Treaty. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 3

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.
2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Contracting Party may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

Article 4

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of a right covered by this Treaty, immediately after customs clearance of such goods. Contracting Parties are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of a right covered by this Treaty.

[Paragraph 2 of Article 44 of the TRIPS Agreement is not reproduced here.]

Article 5

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's right covered by this Treaty by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.
2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Contracting Parties may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 6

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use

of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. [A clause not reproduced here.]

Article 7

Right of Information

Contracting Parties may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 8

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.
2. In respect of the administration of any law pertaining to the protection or enforcement of rights covered by this Treaty, Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 9

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3

PROVISIONAL MEASURES

Article 10

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:
 - (a) to prevent an infringement of any right covered by this Treaty from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
 - (b) to preserve relevant evidence in regard to the alleged infringement.
2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Contracting Party's law so permit or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of a right covered by this Treaty, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4

*SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES*²

Article 11

Suspension of Release by Customs Authorities

Contracting Parties shall, in conformity with the provisions set out below, adopt procedures³ to enable a right holder, who has valid grounds for suspecting that the importation of [words omitted] pirated goods⁴ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. [A clause omitted]. Contracting Parties may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 12
Application

Any right holder initiating the procedures under Article 11 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's right covered by this Treaty and to supply a sufficiently detailed description of the goods to make them readily recognisable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 13
Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

[Paragraph 2 of Article 53 of the TRIPS Agreement is not reproduced here.]

Article 14
Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 11.

Article 15
Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 10 shall apply.

Article 16
Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 15.

Article 17**Right of Inspection and Information**

Without prejudice to the protection of confidential information, Contracting Parties shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Contracting Parties may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of goods in question.

Article 18***Ex Officio Action***

Where Contracting Parties require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that a right covered by this Treaty is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 15;
- (c) Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 19**Remedies**

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 6. [A clause not reproduced here.]

Article 20***De Minimis Imports***

Contracting Parties may exclude from the application of above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5**CRIMINAL PROCEDURES****Article 21**

Contracting Parties shall provide for criminal procedures and penalties to be applied at least in cases of wilful [words omitted] piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding

gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. [A clause not reproduced here.]

¹ For the purpose of this Annex, the term “right holder” includes federations and associations having legal standing to assert such rights.

² Where a Contracting Party has dismantled substantially all controls over movement of goods across its border with another Contracting Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

³ It is understood that there shall be no obligation to apply such procedures to imports of goods put on the Market in another country by or with the consent of the right holder, or to goods in transit.

⁴ For the purposes of this Annex: “pirated goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a right covered by this Treaty under the law of the country of importation.

[End of Document]

3 | Dutch transposition: Databankenwet

Staatsblad 1996, nr. 303.

ARTIKEL I

Bescherming van de producent van databanken

Artikel 1

1. Voor de toepassing van het bij of krachtens deze wet bepaalde wordt verstaan onder:
 - a. databank: een verzameling van werken, gegevens of andere zelfstandige elementen die systematisch of methodisch geordend en afzonderlijk met elektronische middelen of anderszins toegankelijk zijn en waarvan de verkrijging, de controle of de presentatie van de inhoud in kwalitatief of kwantitatief opzicht getuigt van een substantiële investering;
 - b. producent van een databank: degene die het risico draagt van de voor de databank te maken investering;
 - c. opvragen: het permanent of tijdelijk overbrengen van de inhoud van een databank of een deel daarvan op een andere drager, ongeacht op welke wijze en in welke vorm;
 - d. hergebruiken: elke vorm van het aan het publiek ter beschikking stellen van de inhoud van een databank of een deel daarvan door verspreiding van exemplaren, verhuur, on line transmissie of transmissie in een andere vorm.
2. Het voor een beperkte tijd en zonder direct of indirect economisch of commercieel voordeel voor gebruik ter beschikking stellen door voor het publiek toegankelijke instellingen wordt niet als opvragen of hergebruiken beschouwd.
3. Op computerprogramma's die worden gebruikt bij de productie of de werking van met elektronische middelen toegankelijke databanken zijn de desbetreffende bepalingen in de Auteurswet 1912 van toepassing.

Artikel 2

1. De producent van een databank heeft het uitsluitende recht om toestemming te verlenen voor de volgende handelingen:
 - a. het opvragen of hergebruiken van het geheel of een in kwalitatief of kwantitatief opzicht substantieel deel van de inhoud van de databank;
 - b. het herhaald en systematisch opvragen of hergebruiken van in kwalitatief of in kwantitatief opzicht niet-substantiële delen van de inhoud van een databank, voorzover dit in strijd is met de normale exploitatie van die databank of ongerechtvaardigde schade toebrengt aan de rechtmatige belangen van de producent van de databank.
2. Het auteursrecht of andere rechten op de databank of op de in de databank opgenomen werken, gegevens of andere elementen blijven onverlet.

3. Indien een exemplaar van een databank door of met toestemming van de producent of zijn rechtverkrijgende voor de eerste maal in het verkeer is gebracht in een van de lidstaten van de Europese Unie of in een staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte van 2 mei 1992, vormt anderszins in het verkeer brengen in die staten van dat exemplaar geen inbreuk op het in het eerste lid bedoelde recht.

4. Het in het eerste lid bedoelde recht gaat over bij erfopvolging en is vatbaar voor gehele of gedeeltelijke overdracht. De levering vereist voor gehele of gedeeltelijke overdracht geschiedt door een daartoe bestemde akte.

Artikel 3

1. De producent van een databank welke op enigerlei wijze aan het publiek ter beschikking is gesteld mag de rechtmatige gebruiker van die databank niet verhinderen in kwalitatief of kwantitatief opzicht niet-substantiële delen van de inhoud ervan op te vragen of te hergebruiken. Voorzover de rechtmatige gebruiker toestemming heeft om slechts een deel van de databank op te vragen of te hergebruiken, geldt de eerste zin slechts voor dat deel.

2. Bij overeenkomst kan niet ten nadele van de rechtmatige gebruiker van het eerste lid worden afgeweken.

Artikel 4

De rechtmatige gebruiker van een databank welke op enigerlei wijze aan het publiek ter beschikking is gesteld, mag geen handelingen verrichten waardoor hij de normale exploitatie van de databank in gevaar brengt of ongerechtvaardigde schade aan de producent toebrengt.

Artikel 5

De rechtmatige gebruiker van een databank die op enigerlei wijze aan het publiek ter beschikking is gesteld mag zonder toestemming van de producent van de databank een substantieel deel van de inhoud van de databank:

- a. opvragen voor privé doeleinden, mits het een niet-elektronische databank betreft;
- b. opvragen ter illustratie bij onderwijs of voor wetenschappelijk onderzoek, met bronvermelding en voor zover door het niet-commerciële doel gerechtvaardigd;
- c. opvragen of hergebruiken voor de openbare veiligheid of in het kader van een administratieve of rechterlijke procedure.

Artikel 6

1. Het recht, bedoeld in artikel 2, eerste lid, ontstaat op het tijdstip waarop de productie van de databank is voltooid. Het vervalt door verloop van vijftien jaar na 1 januari van het jaar volgend op het tijdstip van voltooiing.

2. Indien een databank voor het tijdstip waarop de productie werd voltooid ter beschikking van het publiek is gesteld, vervalt het recht, bedoeld in artikel 2, eerste lid, door verloop van vijftien jaar na 1 januari van het jaar volgend op het tijdstip waarop de databank voor het eerst ter beschikking van het publiek werd gesteld.

3. Met elke in kwalitatief of kwantitatief opzicht substantiële wijziging van de inhoud van de databank, met name door opeenvolgende toevoegingen, weglatingen of veranderingen, die in kwalitatief of kwantitatief opzicht getuigt van een nieuwe substantiële

investering, ontstaat een nieuw recht als bedoeld in artikel 2, eerste lid, voor de door die investering ontstane databank.

Artikel 7

Het recht, bedoeld in artikel 2, eerste lid, komt toe aan:

- a. de producent van de databank of zijn rechtverkrijgende die onderdaan is van of zijn gewone verblijfplaats heeft op het grondgebied van een lidstaat van de Europese Unie of van een staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte van 2 mei 1992;
- b. de producent van de databank of zijn rechtverkrijgende die een rechtspersoon is die is opgericht overeenkomstig de wetgeving van een lidstaat van de Europese Unie of van een staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte van 2 mei 1992 en haar statutaire zetel, hoofdbestuur of hoofdvestiging heeft binnen het grondgebied van een van die staten; indien een dergelijke rechtspersoon echter alleen haar statutaire zetel op het grondgebied van een van die staten heeft, moeten haar werkzaamheden een daadwerkelijke en duurzame band hebben met de economie van die staat;
- c. de producent van de databank of zijn rechtverkrijgende die een recht kan ontlenen aan een overeenkomst die de Raad van de Europese Unie heeft gesloten met andere landen dan bedoeld onder a. of b.

Artikel 8

1. De openbare macht bezit het recht, bedoeld in artikel 2, eerste lid, niet ten aanzien van databanken waarvan zij de producent is en waarvan de inhoud gevormd wordt door wetten, besluiten en verordeningen, door haar uitgevaardigd, rechterlijke uitspraken en administratieve beslissingen.
2. Het recht, bedoeld in artikel 2, eerste lid, is niet van toepassing op databanken waarvan de openbare macht de producent is, tenzij het recht hetzij in het algemeen bij de wet, besluit of verordening, hetzij in een bepaald geval blijkens mededeling op de databank zelf of bij de terbeschikkingstelling aan het publiek van de databank uitdrukkelijk is voorbehouden.

Artikel 9

Deze wet wordt aangehaald als: Databankenwet.

ARTIKEL II

In de Auteurswet 1912 worden de volgende wijzigingen aangebracht:

A. In artikel 10 worden de volgende wijzigingen aangebracht:

1. De laatste volzin van het eerste lid komt te vervallen.
2. Ingevoegd worden een nieuw derde, vierde en vijfde lid die als volgt komen te luiden:

Verzamelingen van werken, gegevens of andere zelfstandige elementen, systematisch of methodisch geordend, en afzonderlijk met elektronische middelen of anderszins toegankelijk, worden, onverminderd andere rechten op de verzameling en onverminderd het auteursrecht of andere rechten op de in de verzameling opgenomen werken, gegevens of andere elementen, als zelfstandige werken beschermd.

Verzamelingen van werken, gegevens of andere zelfstandige elementen als bedoeld in het derde lid, waarvan de verkrijging, de controle of de presentatie van de inhoud in kwalitatief of kwantitatief opzicht getuigt van een substantiële investering behoren niet tot de in het eerste lid, onder 1°, genoemde geschriften.

Computerprogramma's behoren niet tot de in het eerste lid, onder 1°, genoemde geschriften.

B. Ingevoegd wordt een nieuw artikel 12b dat als volgt komt te luiden:

Artikel 12b

Indien een exemplaar van een verzameling als bedoeld in artikel 10, derde lid, door of met toestemming van de maker of zijn rechtverkrijgende voor de eerste maal in het verkeer is gebracht in een van de lidstaten van de Europese Unie of in een staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte van 2 mei 1992, vormt anderszins in het verkeer brengen van dat exemplaar geen inbreuk op het auteursrecht.

C. In artikel 16b, eerste lid, wordt na de woorden «wordt niet beschouwd» ingevoegd:, tenzij het een met elektronische middelen toegankelijke verzameling als bedoeld in artikel 10, derde lid, betreft.

D. Ingevoegd wordt een nieuw artikel 24a dat als volgt komt te luiden:

Artikel 24a

Als inbreuk op het auteursrecht op een verzameling als bedoeld in artikel 10, derde lid, wordt niet beschouwd de verveelvoudiging, vervaardigd door de rechtmatige gebruiker van de verzameling, die noodzakelijk is om toegang te verkrijgen tot en normaal gebruik te maken van de verzameling. Indien de rechtmatige gebruiker slechts gerechtigd is tot het gebruik van een deel van de verzameling geldt het eerste lid slechts voor de toegang tot en het normaal gebruik van dat deel.

Bij overeenkomst kan niet ten nadele van de rechtmatige gebruiker worden afgeweken van het eerste en tweede lid.

ARTIKEL III

A. 1. Artikel I is ook van toepassing op databanken waarvan de productie na 1 januari 1983 voltooid is, met dien verstande dat aan vóór 1 januari 1998 verrichte handelingen en verkregen rechten geen afbreuk wordt gedaan.

2. Het recht, bedoeld in artikel 2, eerste lid, vervalt in dat geval op 1 januari 2014.

B. Artikel II is ook van toepassing op verzamelingen als bedoeld in artikel 10, derde lid, van de Auteurswet 1912 die vóór 1 januari 1998 gemaakt zijn, met dien verstande dat aan vóór die datum verrichte handelingen en verkregen rechten geen afbreuk wordt gedaan.

C. Op verzamelingen als bedoeld in artikel 10, derde lid, van de Auteurswet 1912 die op 27 maart 1996 behoorden tot de in artikel 10, eerste lid, onder 1°, van de Auteurswet 1912 genoemde geschriften blijven de bepalingen in hoofdstuk III van de Auteurswet 1912 over de duur van het auteursrecht van toepassing.

ARTIKEL IV

Deze wet treedt in werking met ingang van de dag na de datum van uitgifte van het Staatsblad waarin zij wordt geplaatst.

4 | Dutch transposition in English: Databases Act¹

ARTICLE I

Databases Act

Article 1

1. For the purposes of this Act and provisions laid down pursuant to this act:
 - a. database: a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means and for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment;
 - b. producer of a database: the person who bears the risk of the investment for creating the database;
 - c. extraction: the permanent or temporary transfer of all or a part of the contents of a database to another medium by any means or in any form;
 - d. re-utilization: any form of making available to the public of all or a part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.
2. The making available by institutions accessible to the public for a limited period and without direct or indirect economic or commercial advantage shall not be regarded as extraction or re-utilisation.
3. The relevant provisions of the Copyright Act 1912 shall not apply to computer programs used for the production or operation of databases accessible by electronic means.

Article 2

1. The producer of a database shall have the exclusive right to authorize the following acts:
 - a. the extraction or re-utilization of all or a substantial part of the content of the database, evaluated qualitatively or quantitatively,
 - b. the repeated and systematic extraction or re-utilization of insubstantial parts of the content of a database, evaluated qualitatively or quantitatively, where this does not conflict with the normal exploitation of that database or unreasonably prejudice legitimate interests of the producer of the database.

1 This text is a translation by the Dutch Ministry of Justice, on the Internet at <http://www.justitie.nl/images/databases%20act_tcm34-2345.pdf>. Article II, containing provisions to be transposed into the Dutch Copyright Act, was not translated so we did this ourselves.

2. This shall be without prejudice to the copyright or other rights to the database or works, data or other materials included in the database.
3. Where a copy of a database has been brought into circulation for the first time by or with the consent of the producer or his right holders in one of the Member States of the European Union or in a state that is party to the Agreement on the European Economic Area of 2 May 1992, the bringing into circulation of that copy in those States shall otherwise not infringe the right referred to in paragraph 1.
4. The right referred to in paragraph 1 shall be transferred upon hereditary succession and is eligible for full or partial transfer. The conveyance required for full or partial transfer shall be executed in a deed intended for this purpose.

Article 3

1. The producer of a database which is made available to the public in whatever manner may not prevent the lawful user of the database from extracting or re-utilizing insubstantial parts of its contents, evaluated qualitatively or quantitatively. Where the lawful user is authorized to extract or re-utilize only part of the database, paragraph 1 shall apply only to that part.
2. By agreement no exception may be made to paragraph 1 to the detriment of the lawful user.

Article 4

The lawful user of a database which is made available to the public in whatever manner, may not perform acts which conflict with the normal exploitation of the database or unreasonably prejudice the producer.

Article 5

The lawful user of a database which is made available to the public in whatever manner may not² without the authorization of the producer of the database extract or re-utilize a substantial part of the contents of the database:

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

Article 6

1. The right, referred to in Article 2, paragraph 1, shall run from the date of completion of the making of the database. It shall expire fifteen years from 1 January of the year following the date of completion.
2. If a database is made available to the public before the date of completion of the making of the database, the right provided for in Article 2, paragraph 1, shall expire fifteen years from 1 January of the year following the date when the database was first made available to the public.

2. The word 'not' is an editorial error and should have been left out.

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, in particular resulting from successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for a new right referred to in Article 2, paragraph 1.

Article 7

The right referred to in Article 2, paragraph 1, shall apply to:

- a. the producer of the database or his right holders who are nationals of or who have their habitual residence in the territory of a Member State of the European Union or a state which is a party to the Agreement on the European Economic Area of 2 May 1992;
- b. the producer of the database or his right holders that are a company or firm formed in accordance with the legislation of a Member State of the European Union or a state which is a party to the Agreement on the European Economic Area of 2 May 1992 and having their registered office, central administration or place of business within the territory of one of these states; if such a company or firm has only its registered office in the territory of one of these states, its operations must be genuinely linked on an ongoing basis with the economy of this state;
- c. the producer of the database or his right holders that can derive a right from an agreement that the Council of the European Union has signed with countries other than those referred to under a. or b.

Article 8

1. The public authority shall not have the right referred to in Article 2, paragraph 1, with respect to databases of which it is the producer and for which the contents are formed by laws, orders and resolutions promulgated by it, legal decisions and administrative decisions.
2. The right, referred to in Article 2, paragraph 1 shall not apply to databases of which the public authority is the producer, unless the right is expressly reserved either in general by law, order or resolution or in a particular case as evidenced by a notification in the database itself or when the database is made available to the public.

Article 9

This act shall be cited as: the Databases Act.

ARTICLE II

[Contains amendments to other legislation].

In the Copyright Act 1912 the following alterations are inserted:³

3 The text of article II is our translation.

- A. In article 10 the following alterations are inserted:
1. The last sentence of the first paragraph is to be deleted.
 2. Inserted are a new third, fourth and fifth paragraph reading as follows:

Collections of works, data or other independent materials, systematically or methodically arranged, and individually accessible by electronic or other means, shall, without prejudice to other rights in the collection and without prejudice to the copyright or other rights in the works, data or other materials included in the collection, be protected as separate works.

Collections of works, data or other independent materials as referred to in the third paragraph, of which the obtaining, verification or presentation of the contents gives evidence of qualitatively or quantitatively a substantial investment, are excluded from the writings mentioned in the first paragraph, subparagraph 1.

Computer programs are excluded from the writings mentioned in the first paragraph, subparagraph 1.

- B. A new article 12b is inserted which reads as follows:

Article 12b

Where a copy of a collection as referred to in article 10, paragraph 3, is put on the market by or with consent of the producer or his right holder for the first time within one of the Member States of the European Union or within a state party to the Agreement on the European Economic Area of 2 May 1992, putting that copy on the market otherwise/in another manner within these states shall not be taken to constitute an infringement of the copyright.

- C. In article 16b, paragraph 1, after the words «is not regarded» is inserted: , unless a collection accessible by electronic means is concerned as referred to in article 10, paragraph 3,.

- D. A new article 24a is inserted which reads as follows:

Article 24a

The reproduction, made by the lawful user of the collection, which is necessary to gain access to and make normal use of the collection shall not be taken to constitute an infringement on the copyright in a collection as referred to in article 10, third paragraph.

Where the lawful user is authorised to use only a part of the collection, the first paragraph shall apply only to the access to and the normal use of that part.

Contractual provisions may not deviate from the first and second paragraph to the prejudice of the lawful user.

ARTICLE III

- A.
1. Article I shall also apply to databases which were completed after 1 January 1983, provided this is without prejudice to acts performed and rights acquired before 1 January 1998.

2. The right, referred to in Article 2, paragraph 1, in that case expires on 1 January 2014.
- B. Article II shall also apply to collections referred to in Article 10, paragraph 3, of the Copyright Act 1912 which were made before 1 January 1998, provided that this is without prejudice to acts performed and rights acquired before that date.
- C. The provisions of Chapter III of the Copyright Act 1912 on the duration of copyright shall apply to collections referred to in Article 10, paragraph 3, of the Copyright Act 1912 which on 27 March 1996 belonged to the writings mentioned in Article 10, paragraph 1, subparagraph 1, of the Copyright Act 1912.

ARTICLE IV

This Act shall enter into force with effect from the day after the date of publication in the Official Journal in which it is placed.

5 | French transposition

© *Direction des Journaux Officiels*
J.O. n° 151 du 2 juillet 1998 page 10075

LOI no 98-536 du 1er juillet 1998 portant transposition dans le code de la propriété intellectuelle de la directive 96/9/CE du Parlement européen et du Conseil, du 11 mars 1996, concernant la protection juridique des bases de données (1)

NOR: MCCX9700091L

L'Assemblée nationale et le Sénat ont adopté,
Le Président de la République promulgue la loi dont la teneur suit:

TITRE Ier DISPOSITIONS RELATIVES AU DROIT D'AUTEUR

Article 1er

L'article L. 112-3 du code de la propriété intellectuelle est ainsi rédigé :
« Art. L. 112-3. – Les auteurs de traductions, d'adaptations, transformations ou arrangements des oeuvres de l'esprit jouissent de la protection instituée par le présent code sans préjudice des droits de l'auteur de l'oeuvre originale. Il en est de même des auteurs d'anthologies ou de recueils d'oeuvres ou de données diverses, tels que les bases de données, qui, par le choix ou la disposition des matières, constituent des créations intellectuelles.

« On entend par base de données un recueil d'oeuvres, de données ou d'autres éléments indépendants, disposés de manière systématique ou méthodique, et individuellement accessibles par des moyens électroniques ou par tout autre moyen. »

Article 2

Le 2o de l'article L. 122-5 du même code est complété par les mots : « ainsi que des copies ou reproductions d'une base de données électronique ».

Article 3

L'article L. 122-5 du même code est complété par un 5o ainsi rédigé :
« 5o Les actes nécessaires à l'accès au contenu d'une base de données électronique pour les besoins et dans les limites de l'utilisation prévue par contrat. »

TITRE II
DISPOSITIONS RELATIVES AUX DROITS
DES PRODUCTEURS DE BASES DE DONNEES

Article 4

L'intitulé du livre III du code de la propriété intellectuelle est ainsi rédigé : « Dispositions générales relatives au droit d'auteur, aux droits voisins et droits des producteurs de bases de données ».

Article 5

Il est inséré, après l'article L. 335-10 du même code, un titre IV ainsi rédigé :

« TITRE IV
« DROITS DES PRODUCTEURS
DE BASES DE DONNEES

« Chapitre Ier
« Champ d'application

« Art. L. 341-1. - Le producteur d'une base de données, entendu comme la personne qui prend l'initiative et le risque des investissements correspondants, bénéficie d'une protection du contenu de la base lorsque la constitution, la vérification ou la présentation de celui-ci atteste d'un investissement financier, matériel ou humain substantiel. « Cette protection est indépendante et s'exerce sans préjudice de celles résultant du droit d'auteur ou d'un autre droit sur la base de données ou un de ses éléments constitutifs.

« Art. L. 341-2. - Sont admis au bénéfice du présent titre :

« 1o Les producteurs de bases de données, ressortissants d'un Etat membre de la Communauté européenne ou d'un Etat partie à l'accord sur l'Espace économique européen, ou qui ont dans un tel Etat leur résidence habituelle;

« 2o Les sociétés ou entreprises constituées en conformité avec la législation d'un Etat membre et ayant leur siège statutaire, leur administration centrale ou leur établissement principal à l'intérieur de la Communauté ou d'un Etat partie à l'accord sur l'Espace économique européen ; néanmoins, si une telle société ou entreprise n'a que son siège statutaire sur le territoire d'un tel Etat, ses activités doivent avoir un lien réel et continu avec l'économie de l'un d'entre eux.

« Les producteurs de bases de données qui ne satisfont pas aux conditions mentionnées ci-dessus sont admis à la protection prévue par le présent titre lorsqu'un accord particulier a été conclu avec l'Etat dont ils sont ressortissants par le Conseil de la Communauté européenne. »

« Chapitre II
« Etendue de la protection

« Art. L. 342-1. - Le producteur de bases de données a le droit d'interdire :

« 1o L'extraction, par transfert permanent ou temporaire de la totalité ou d'une partie qualitativement ou quantitativement substantielle du contenu d'une base de données sur un autre support, par tout moyen et sous toute forme que ce soit ;

« 2o La réutilisation, par la mise à la disposition du public de la totalité ou d'une partie qualitativement ou quantitativement substantielle du contenu de la base, quelle qu'en soit la forme.

« Ces droits peuvent être transmis ou cédés ou faire l'objet d'une licence.

« Le prêt public n'est pas un acte d'extraction ou de réutilisation.

« Art. L. 342-2. - Le producteur peut également interdire l'extraction ou la réutilisation répétée et systématique de parties qualitativement ou quantitativement non substantielles du contenu de la base lorsque ces opérations excèdent manifestement les conditions d'utilisation normale de la base de données.

« Art. L. 342-3. - Lorsqu'une base de données est mise à la disposition du public par le titulaire des droits, celui-ci ne peut interdire :

« 1o L'extraction ou la réutilisation d'une partie non substantielle, appréciée de façon qualitative ou quantitative, du contenu de la base, par la personne qui y a licitement accès ;

« 2o L'extraction à des fins privées d'une partie qualitativement ou quantitativement substantielle du contenu d'une base de données non électronique sous réserve du respect des droits d'auteur ou des droits voisins sur les oeuvres ou éléments incorporés dans la base.

« Toute clause contraire au 1o ci-dessus est nulle.

« Art. L. 342-4. - La première vente d'une copie matérielle d'une base de données dans le territoire d'un Etat membre de la Communauté européenne ou d'un Etat partie à l'accord sur l'Espace économique européen, par le titulaire du droit ou avec son consentement, épuise le droit de contrôler la revente de cette copie matérielle dans tous les Etats membres.

« Toutefois, la transmission en ligne d'une base de données n'épuise pas le droit du producteur de contrôler la revente dans tous les Etats membres d'une copie matérielle de cette base ou d'une partie de celle-ci.

« Art. L. 342-5. - Les droits prévus à l'article L. 342-1 prennent effet à compter de l'achèvement de la fabrication de la base de données. Ils expirent quinze ans après le 1er janvier de l'année civile qui suit celle de cet achèvement.

« Lorsqu'une base de données a fait l'objet d'une mise à la disposition du public avant l'expiration de la période prévue à l'alinéa précédent, les droits expirent quinze ans après le 1er janvier de l'année civile suivant celle de cette première mise à disposition.

« Toutefois, dans le cas où une base de données protégée fait l'objet d'un nouvel investissement substantiel, sa protection expire quinze ans après le 1er janvier de l'année civile suivant celle de ce nouvel investissement. »

« Chapitre III
« Sanctions

« Art. L. 343-1. - Est puni de deux ans d'emprisonnement et de 1 000 000 F d'amende le fait de porter atteinte aux droits du producteur d'une base de données tels que définis à l'article L. 342-1.

« Art. L. 343-2. - Les personnes morales peuvent être déclarées responsables pénalement, dans les conditions prévues à l'article 121-2 du code pénal, des infractions définies à l'article L. 343-1. Les peines encourues par les personnes morales sont :

« 1o L'amende, suivant les modalités prévues par l'article 131-38 du code pénal ;
« 2o Les peines mentionnées à l'article 131-39 du même code ; l'interdiction mentionnée au 2o de cet article porte sur l'activité dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise.

« Art. L. 343-3. - En cas de récidive des infractions définies à l'article L. 343-1 ou si le délinquant est ou a été lié à la partie lésée par convention, les peines encourues sont portées au double.

« Les coupables peuvent, en outre, être privés pour un temps qui n'excédera pas cinq ans du droit d'élection et d'éligibilité pour les tribunaux de commerce, les chambres de commerce et d'industrie et les chambres de métiers, ainsi que pour les conseils de prud'hommes.

« Art. L. 343-4. - Outre les procès-verbaux des officiers ou agents de police judiciaire, la preuve de la matérialité des infractions définies au présent chapitre peut résulter des constatations d'agents assermentés désignés par les organismes professionnels de producteurs. Ces agents sont agréés par le ministre chargé de la culture dans les mêmes conditions que celles prévues pour les agents visés à l'article L. 331-2. »

TITRE III
DISPOSITIONS DIVERSES ET TRANSITOIRES

Article 6

Il est inséré, dans le code de la propriété intellectuelle, un article L. 331-4 ainsi rédigé:

« Art. L. 331-4. - Les droits mentionnés dans la première partie du présent code ne peuvent faire échec aux actes nécessaires à l'accomplissement d'une procédure juridictionnelle ou administrative prévue par la loi, ou entrepris à des fins de sécurité publique. »

Article 7

L'article L. 332-4 du même code est ainsi modifié :

1o La première phrase du premier alinéa est ainsi rédigée :

« En matière de logiciels et de bases de données, la saisie-contrefaçon est exécutée en vertu d'une ordonnance rendue sur requête par le président du tribunal de grande instance. » ;

2o Le dernier alinéa est ainsi rédigé :

« En outre, les commissaires de police sont tenus, à la demande de tout titulaire de droits sur un logiciel ou sur une base de données, d'opérer une saisie-description du logiciel ou de la base de données contrefaisants, saisie-description qui peut se concrétiser par une copie. »

Article 8

Les dispositions prévues par l'article 5 sont applicables à compter du 1er janvier 1998, sous réserve des sanctions pénales prévues par ce même article.

La protection prévue par le même article 5 est applicable aux bases de données dont la fabrication a été achevée depuis le 1er janvier 1983 et qui, à la date de publication de la présente loi, satisfont aux conditions prévues au titre IV du livre III du code de la propriété intellectuelle.

Dans ce cas, la durée de protection est de quinze ans à compter du 1er janvier 1998.

La protection s'applique sans préjudice des actes conclus et des accords passés avant la date d'entrée en vigueur de la présente loi.

Article 9

La présente loi est applicable dans les territoires d'outre-mer et dans la collectivité territoriale de Mayotte.

La présente loi sera exécutée comme loi de l'Etat.

Fait à Paris, le 1er juillet 1998.

Jacques Chirac

Par le Président de la République:

Le Premier ministre,

Lionel Jospin

Le garde des sceaux, ministre de la justice,

Elisabeth Guigou

Le ministre de l'intérieur,

Jean-Pierre Chevènement

La ministre de la culture et de la communication,

Catherine Trautmann

Le secrétaire d'Etat à l'outre-mer,

Jean-Jack Queyranne

(1) Loi no 98-536.

- Directive communautaire :

Directive 96/9/CE du Parlement européen et du Conseil du 11 mars 1996 concernant la protection juridique des bases de données.

- Travaux préparatoires :

Assemblée nationale :

Projet de loi no 383 ;

Rapport de M. Gérard Gouzes, au nom de la commission des lois, no 696 ;

Discussion et adoption le 5 mars 1998.

Sénat :

Projet de loi, adopté par l'Assemblée nationale, no 344 (1997-1998) ;

Rapport de M. Charles Jolibois, au nom de la commission des lois, no 395 (1997-1998).
Discussion et adoption le 29 avril 1998.
Assemblée nationale :
Projet de loi, modifié par le Sénat, no 866 rectifié ;
Rapport de M. Gérard Gouzes, au nom de la commission des lois, no 927 ;
Discussion et adoption (procédure d'examen simplifiée) le 16 juin 1998.

6 | French transposition in English¹

The National Assembly and the Senate have adopted,
The President of the Republic has promulgated the act with the following content:

TITLE I PROVISIONS RELATING TO COPYRIGHT

Article 1

Article L. 112-3 of the Intellectual Property Code is worded as follows:
Art. L. 112-3.

The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. The same shall apply to the authors of anthologies or collections of miscellaneous works or data, such as databases, which, by reason of the selection or the arrangement of their contents, constitute intellectual creations.

Database means a collection of independent works, data or other materials, arranged in a systematic or methodical way, and capable of being individually assessed² by electronic or any other means.

Article 2

The second paragraph of article L. 122-5 is completed by the words: «as well as copies or reproductions of an electronic database».

Article 3

Article L. 122-5 of the same Code is completed by a paragraph 5 reading:

5. Acts necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract.

TITLE II PROVISIONS RELATING TO THE RIGHTS OF PRODUCERS OF DATABASES

Article 4

The title of Book III of the Intellectual Property Code is worded as follows: «General provisions relating to copyright, neighbouring rights and rights of producers of databases».

¹ Translation by the French government, see on the Internet www.legifrance.gouv.fr.

² This most probably is an editorial error; it should have been 'accessed'.

Article 5

After article L. 335-10 of the same Code, a title IV is added which is worded as follows:

TITLE IV RIGHTS OF PRODUCERS OF DATABASES**Chapter I****Field of application**

Art. L. 341-1. The producer of a database, understood as the person who takes the initiative and the risk of the corresponding investments, benefits from protection of the contents of the database when its constitution, verification or presentation shows that there has been a substantial financial, technical or human investment.

This protection is independent and applies without prejudice to the protection of copyright or any other right over the database or one of its component elements.

Art. L. 341-2. Shall be eligible for the benefit of this Title:

1. Producers of databases, nationals of a Member State of the European Community or of a State party to the Agreement on the European Economic Area, or who have their principal residence in such State;
2. Companies and enterprises formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community or a State party to the Agreement on the European Economic Area; however, where such a company or enterprise has only its statutory head office in the territory of such State, its operations must be genuinely linked on an ongoing basis with either the economy of this Member State or State within the European Economic Area.

Producers of databases who do not satisfy the conditions indicated above shall be eligible for protection under this Title where a special agreement has been concluded between the State of which they are a national and the Council of the European Community.

Chapter II**Scope of protection**

Art. L. 342-1. The producer of a database has the right to prohibit:

- 1°. The extraction, by the permanent or temporary transfer of all or a substantial part, qualitatively or quantitatively, of the contents of a database to another medium, by any means or in any form;
- 2°. The reuse, by making available to the public all or a substantial part, qualitatively or quantitatively, of the contents of a database, in any form whatsoever.

These rights can be transferred, assigned or licensed.

Public lending is not an act of extraction or reuse.

Art. L. 342-2. The producer may also prohibit the repeated and systematic extraction or reuse of insubstantial parts, qualitatively or quantitatively, of the contents of the database when such operations manifestly go beyond the conditions of normal use of the database.

Art. L. 342-3. When a database is made available to the public by the rightholder, he may not prohibit:

1°. The extraction or the reuse of an insubstantial part, evaluated qualitatively or quantitatively, of the contents of the database, by a person having lawful access;

2°. The extraction for private purposes of a qualitatively or quantitatively substantial part of the contents of a non-electronic database, subject to compliance with the copy-rights or neighbouring rights over the works or materials incorporated into the database. Any provision that is contrary to item 1° above shall be null and void.

Art. L. 342-4. The first sale in the territory of a Member State of the European Community or of a State party to the Agreement on the European Economic Area of a physical copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that physical copy within all Member States;

However, online transmission of a database shall not exhaust the right of the producer to control resale of a physical copy or this database or a part thereof in any of the Member States.

Art. L. 342-5. The rights provided for in Article L. 342-1 shall become effective from the date of completion of the production of the database. They shall expire fifteen years from the 1st of January of the calendar year following that of completion.

When a database has been made available to the public before the expiry of the period set forth in the paragraph above, the rights shall expire fifteen years from the 1st of January of the calendar year following the date when the database was first made available to the public.

However, in case a protected database is the subject of a new substantial investment, its protection shall expire fifteen years from the 1st of January of the calendar year following that in which this new investment was made.

Chapter III

Sanctions

Art. L. 343-1. The infringement of the rights of the producer of a database, as defined in Article L. 342-1, shall be punishable by a two-year prison term and a fine of FRF 1,000,000.

Art. L. 343-2. Legal persons may be declared penally liable, in accordance with Article 121-2 of the Penal Code for the infringements defined in Article L. 343-1. Legal persons may incur the following penalties:

1°. A fine determined in accordance with Article 131-38 of the Penal Code;

2°. The penalties provided for in Article 131-39 of same [Ik: of the same code]; the prohibition provided for in item 2 of this Article concerns the activity in the exercise of which or on the occasion of the exercise of which the infringement was committed.

Art. L. 343-3. In the event of the repetition of the offences defined in Article L. 343-1, or if the offender is or has been contractually bound to the aggrieved party, the penalties involved shall be doubled.

Guilty parties may, in addition, be deprived for a period not exceeding five years, of the right to elect and be elected to commercial courts, chamber of commerce and industry and professional chambers and to joint labour dispute conciliation boards.

Art. L. 343-4. Apart from the reports drawn up by police investigators, the proof of the existence of the infringements defined in this Chapter may be provided by the statement of a sworn agent designated by professional organisations of producers. These agents shall be approved by the Minister responsible for culture under the same conditions as those provided for agents under Article L. 331-2.

TITLE III VARIOUS AND TRANSITIONAL PROVISIONS

Article 6

In the Intellectual Property Code is inserted an article L. 331-4 reading:

Art. L. 331-4. The rights mentioned in part one of this Code shall not prevail over any acts necessary for the accomplishment of a jurisdictional or administrative procedure provided by law, or undertaken for public safety reasons.

Article 7

Article L. 332-4 of the same code is thus modified:

The first sentence of the first paragraph is thus drawn up:

In respect of software and databases, infringement seizures shall be carried out under an order issued, upon application, by the president of the court of first instance. The president shall authorise, if required, an actual seizure.

The last paragraph is thus drawn up:

In addition, the police commissioners shall be required, at the request of any holder of rights over software or a database, to carry out a descriptive seizure of the infringing software or database, which may take the physical form of a copy.

Article 8

The provisions provided for by article 5 are applicable as from January 1, 1998 except for the penal sanctions provided for by the same article.

The protection provided for by the same article 5 applies to databases of which the production is completed as from January 1, 1983 and which, on the date of publication of the present act, satisfy the requirements foreseen in title IV of book III of the Intellectual Property Code.

In that case, the term of protection is 15 years from January 1, 1998.

The protection applies without prejudice to acts concluded and rights acquired before the date of entry into force of the present act.

Article 9

The present act is applicable within the overseas territories and the collective territory of Mayotte.

Enacted in Paris, 1 July 1998.

7 | British transposition: Copyright and Rights in Databases Regulations 1997

Statutory Instrument 1997 No. 3032

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1997 No. 3032

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RIGHTS IN DATABASES

The Copyright and Rights in Databases Regulations 1997

Made

Coming into force

18th December 1997

1st January 1998

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Explanatory Note

Statutory Instrument 1997 No. 3032

The Copyright and Rights in Databases Regulations 1997

Whereas a draft of the following Regulations has been approved by a resolution of each House of Parliament:

Now, therefore, the Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972[1] in relation to measures relating to copyright[2] and measures relating to the prevention of unauthorised extraction of the contents of a database and of unauthorised re-utilisation of those contents[3], in exercise of the powers conferred by section 2(2) and (4) of that Act, hereby makes the following Regulations: -

PART I INTRODUCTORY PROVISIONS

Citation, commencement and extent

1. – (1) These Regulations may be cited as the Copyright and Rights in Databases Regulations 1997.

(2) These Regulations come into force on 1st January 1998.

(3) These Regulations extend to the whole of the United Kingdom.

Implementation of Directive

2. – (1) These Regulations make provision for the purpose of implementing -

(a) Council Directive No. 96/9/EC of 11 March 1996[4] on the legal protection of databases, and

(b) certain obligations of the United Kingdom created by or arising under the EEA Agreement so far as relating to the implementation of that Directive.

(2) In this Regulation “the EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992[5], as adjusted by the Protocol signed at Brussels on 17th March 1993[6].

Interpretation

3. In these Regulations “the 1988 Act” means the Copyright, Designs and Patents Act 1988[7].

Scheme of the Regulations

4. – (1) The 1988 Act is amended in accordance with the provisions of Part II of these Regulations, subject to the savings and transitional provisions in Part IV of these Regulations.

(2) Part III of these Regulations has effect subject to those savings and transitional provisions.

Notes:

[1] 1972 c.68; by virtue of the amendment of section 1(2) of that Act by section 1 of the European Economic Area Act 1993 (c.51) regulations may be made under section 2(2) to implement obligations of the United Kingdom arising under the EEA Agreement.

[2] S.I. 1993/595.

[3] S.I. 1996/3155.

[4] O.J. No. L77, 27.3.96 p.20.

[5] Cm 2073.

[6] Cm 2183.

[7] 1988 c.48.

PART II
AMENDMENT OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988

Copyright in databases

5. In section 3(1), in the definition of “literary work” -

- (a) in paragraph (a) after “compilation” insert “other than a database”;
- (b) at the end of paragraph (b) leave out “and”;
- (c) at the end of paragraph (c) insert “and (d) a database”.

Meaning of “database”

6. After section 3 insert -

“ Databases

3A. – (1) In this Part “database” means a collection of independent works, data or other materials which -

- (a) are arranged in a systematic or methodical way, and
- (b) are individually accessible by electronic or other means.

(2) For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.”.

Meaning of “adaptation” in relation to database

7. In section 21 (infringement by making adaptation or act done in relation to adaptation), in subsection (3) -

(a) in paragraph (a), for “other than a computer program or” substitute “other than a computer program or a database, or in relation to a”, and

(b) after paragraph (ab) insert -

“ (ac) in relation to a database, means an arrangement or altered version of the database or a translation of it;”.

Research

8. – (1) In section 29 (research and private study), in subsection (1), after “literary” insert “work, other than a database, or a”.

(2) After subsection (1) of that section insert -

“ (1A) Fair dealing with a database for the purposes of research or private study does not infringe any copyright in the database provided that the source is indicated.”.

(3) After subsection (4) of that section insert -

“ (5) The doing of anything in relation to a database for the purposes of research for a commercial purpose is not fair dealing with the database.”.

Permitted acts in relation to databases

9. After section 50C insert -

“ Databases: permitted acts

Acts permitted in relation to databases.

50D. – (1) It is not an infringement of copyright in a database for a person who has a right to use the database or any part of the database, (whether under a licence to do any of the acts restricted by the copyright in the database or otherwise) to do, in the exercise of that right, anything which is necessary for the purposes of access to and use of the contents of the database or of that part of the database.

(2) Where an act which would otherwise infringe copyright in a database is permitted under this section, it is irrelevant whether or not there exists any term or condition in any agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296B, void).".

Avoidance of certain terms

10. After section 296A insert -

“ Databases

Avoidance of certain terms relating to databases

296B. Where under an agreement a person has a right to use a database or part of a database, any term or condition in the agreement shall be void in so far as it purports to prohibit or restrict the performance of any act which would but for section 50D infringe the copyright in the database.”.

Defined expressions

11. In section 179 (index of defined expressions), in the appropriate place in alphabetical order insert -

database Section 3A(1)“

original (in relation to a database) section 3A(2)".

PART III
DATABASE RIGHT

Interpretation

12. – (1) In this Part –

“database” has the meaning given by section 3A(1) of the 1988 Act (as inserted by Regulation 6);

“extraction”, in relation to any contents of a database, means the permanent or temporary transfer of those contents to another medium by any means or in any form;

“insubstantial”, in relation to part of the contents of a database, shall be construed subject to Regulation 16(2);

“investment” includes any investment, whether of financial, human or technical resources;

“jointly”, in relation to the making of a database, shall be construed in accordance with Regulation 14(6);

“lawful user”, in relation to a database, means any person who (whether under a licence to do any of the acts restricted by any database right in the database or otherwise) has a right to use the database;

“maker”, in relation to a database, shall be construed in accordance with Regulation 14;

“re-utilisation”, in relation to any contents of a database, means making those contents available to the public by any means;

“substantial”, in relation to any investment, extraction or re-utilisation, means substantial in terms of quantity or quality or a combination of both.

(2) The making of a copy of a database available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public shall not be taken for the purposes of this Part to constitute extraction or re-utilisation of the contents of the database.

(3) Where the making of a copy of a database available through an establishment which is accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the costs of the establishment, there is no direct or indirect economic or commercial advantage for the purposes of paragraph (2).

(4) Paragraph (2) does not apply to the making of a copy of a database available for on-the-spot reference use.

(5) Where a copy of a database has been sold within the EEA by, or with the consent of, the owner of the database right in the database, the further sale within the EEA of that copy shall not be taken for the purposes of this Part to constitute extraction or re-utilisation of the contents of the database.

Database right

13. - (1) A property right ("database right") subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

(2) For the purposes of paragraph (1) it is immaterial whether or not the database or any of its contents is a copyright work, within the meaning of Part I of the 1988 Act.

(3) This Regulation has effect subject to Regulation 18.

The maker of a database

14. - (1) Subject to paragraphs (2) to (4), the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and as having made, the database.

(2) Where a database is made by an employee in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary.

(3) Subject to paragraph (4), where a database is made by Her Majesty or by an officer or servant of the Crown in the course of his duties, Her Majesty shall be regarded as the maker of the database.

(4) Where a database is made by or under the direction or control of the House of Commons or the House of Lords -

(a) the House by whom, or under whose direction or control, the database is made shall be regarded as the maker of the database, and

(b) if the database is made by or under the direction or control of both Houses, the two Houses shall be regarded as the joint makers of the database.

(5) For the purposes of this Part a database is made jointly if two or more persons acting together in collaboration take the initiative in obtaining, verifying or presenting the contents of the database and assume the risk of investing in that obtaining, verification or presentation.

(6) References in this Part to the maker of a database shall, except as otherwise provided, be construed, in relation to a database which is made jointly, as references to all the makers of the database.

First ownership of database right

15. The maker of a database is the first owner of database right in it.

Acts infringing database right

16. - (1) Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database.

(2) For the purposes of this Part, the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents.

Term of protection

17. - (1) Database right in a database expires at the end of the period of fifteen years from the end of the calendar year in which the making of the database was completed.

(2) Where a database is made available to the public before the end of the period referred to in paragraph (1), database right in the database shall expire fifteen years from the end of the calendar year in which the database was first made available to the public.

(3) Any substantial change to the contents of a database, including a substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment shall qualify the database resulting from that investment for its own term of protection.

(4) This Regulation has effect subject to Regulation 30.

Qualification for database right

18. - (1) Database right does not subsist in a database unless, at the material time, its maker, or if it was made jointly, one or more of its makers, was -

(a) an individual who was a national of an EEA state or habitually resident within the EEA,

(b) a body which was incorporated under the law of an EEA state and which, at that time, satisfied one of the conditions in paragraph (2), or

(c) a partnership or other unincorporated body which was formed under the law of an EEA state and which, at that time, satisfied the condition in paragraph (2)(a).

(2) The conditions mentioned in paragraphs (1)(b) and (c) are -

(a) that the body has its central administration or principal place of business within the EEA, or

(b) that the body has its registered office within the EEA and the body's operations are linked on an ongoing basis with the economy of an EEA state.

(3) Paragraph (1) does not apply in any case falling within Regulation 14(4).

(4) In this Regulation -

(a) "EEA" and "EEA state" have the meaning given by section 172A of the 1988 Act;

(b) "the material time" means the time when the database was made, or if the making extended over a period, a substantial part of that period.

Avoidance of certain terms affecting lawful users

19. - (1) A lawful user of a database which has been made available to the public in any manner shall be entitled to extract or re-utilise insubstantial parts of the contents of the database for any purpose.

(2) Where under an agreement a person has a right to use a database, or part of a database, which has been made available to the public in any manner, any term or condition in the agreement shall be void in so far as it purports to prevent that person from extracting or re-utilising insubstantial parts of the contents of the database, or of that part of the database, for any purpose.

Exceptions to database right

20. - (1) Database right in a database which has been made available to the public in any manner is not infringed by fair dealing with a substantial part of its contents if -

(a) that part is extracted from the database by a person who is apart from this paragraph a lawful user of the database,

(b) it is extracted for the purpose of illustration for teaching or research and not for any commercial purpose, and

(c) the source is indicated.

(2) The provisions of Schedule 1 specify other acts which may be done in relation to a database notwithstanding the existence of database right.

Acts permitted on assumption as to expiry of database right

21. - (1) Database right in a database is not infringed by the extraction or re-utilisation of a substantial part of the contents of the database at a time when, or in pursuance of arrangements made at a time when -

(a) it is not possible by reasonable inquiry to ascertain the identity of the maker, and

(b) it is reasonable to assume that database right has expired.

(2) In the case of a database alleged to have been made jointly, paragraph (1) applies in relation to each person alleged to be one of the makers.

Presumptions relevant to database right

22. - (1) The following presumptions apply in proceedings brought by virtue of this Part of these Regulations with respect to a database.

(2) Where a name purporting to be that of the maker appeared on copies of the database as published, or on the database when it was made, the person whose name appeared shall be presumed, until the contrary is proved -

(a) to be the maker of the database, and

(b) to have made it in circumstances not falling within Regulation 14(2) to (4).

(3) Where copies of the database as published bear a label or a mark stating -

(a) that a named person was the maker of the database, or

(b) that the database was first published in a specified year,

the label or mark shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(4) In the case of a database alleged to have been made jointly, paragraphs (2) and (3), so far as is applicable, apply in relation to each person alleged to be one of the makers.

Application of copyright provisions to database right

23. The following provisions of the 1988 Act -

sections 90 to 93 (dealing with rights in copyright works);

sections 96 to 98 (rights and remedies of copyright owner);

sections 101 and 102 (rights and remedies of exclusive licensee);

apply in relation to database right and databases in which that right subsists as they apply in relation to copyright and copyright works.

Licensing of database right

24. The provisions of Schedule 2 have effect with respect to the licensing of database right.

Database right: jurisdiction of Copyright Tribunal

25. - (1) The Copyright Tribunal has jurisdiction under this Part to hear and determine proceedings under the following provisions of Schedule 2 -

(a) paragraph 3, 4 or 5 (reference of licensing scheme);

(b) paragraph 6 or 7 (application with respect to licence under licensing scheme);

(c) paragraph 10, 11 or 12 (reference or application with respect to licence by licensing body).

(2) The provisions of Chapter VIII of Part I of the 1988 Act (general provisions relating to the Copyright Tribunal) apply in relation to the Tribunal when exercising any jurisdiction under this Part.

(3) Provision shall be made by rules under section 150 of the 1988 Act prohibiting the Tribunal from entertaining a reference under paragraph 3, 4 or 5 of Schedule 2 (reference of licensing scheme) by a representative organisation unless the Tribunal is satisfied that the organisation is reasonably representative of the class of persons which it claims to represent.

PART IV SAVINGS AND TRANSITIONAL PROVISIONS

Introductory

26. – (1) In this Part “commencement” means the commencement of these Regulations.

(2) Expressions used in this Part which are defined for the purposes of Part I of the 1988 Act have the same meaning as in that Part.

General rule

27. Subject to Regulations 28 and 29, these Regulations apply to databases made before or after commencement.

General savings

28. – (1) Nothing in these Regulations affects any agreement made before commencement.

(2) No act done -

(a) before commencement, or

(b) after commencement, in pursuance of an agreement made before commencement,

shall be regarded as an infringement of database right in a database.

Saving for copyright in certain existing databases

29. – (1) Where a database -

(a) was created on or before 27th March 1996, and

(b) is a copyright work immediately before commencement,

copyright shall continue to subsist in the database for the remainder of its copyright term.

(2) In this Regulation “copyright term” means the period of the duration of copyright under section 12 of the 1988 Act (duration of copyright in literary, dramatic, musical or artistic works).

Database right: term applicable to certain existing databases

30. Where -

- (a) the making of a database was completed on or after 1st January 1983, and
- (b) on commencement, database right begins to subsist in the database,

database right shall subsist in the database for the period of fifteen years beginning with 1st January 1998.

Ian McCartney,
Minister of State, Department of Trade and Industry

18th December 1997

SCHEDULE 1

Regulation 20(2).

EXCEPTIONS TO DATABASE RIGHT FOR PUBLIC ADMINISTRATION

Parliamentary and judicial proceedings

1. Database right in a database is not infringed by anything done for the purposes of parliamentary or judicial proceedings or for the purposes of reporting such proceedings.

Royal Commissions and statutory inquiries

2. – (1) Database right in a database is not infringed by anything done for -

- (a) the purposes of the proceedings of a Royal Commission or statutory inquiry,
or
- (b) the purpose of reporting any such proceedings held in public.

(2) Database right in a database is not infringed by the issue to the public of copies of the report of a Royal Commission or statutory inquiry containing the contents of the database.

(3) In this paragraph “Royal Commission” and “statutory inquiry” have the same meaning as in section 46 of the 1988 Act.

Material open to public inspection or on official register

3. – (1) Where the contents of a database are open to public inspection pursuant to a statutory requirement, or are on a statutory register, database right in the database is not infringed by the extraction of all or a substantial part of the contents containing factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve re-utilisation of all or a substantial part of the contents.

(2) Where the contents of a database are open to public inspection pursuant to a statutory requirement, database right in the database is not infringed by the extraction or re-utilisation of all or a substantial part of the contents, by or with the authority of the appropriate person, for the purpose of enabling the contents to be inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Where the contents of a database which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contain information about matters of general scientific, technical, commercial or economic interest, database right in the database is not infringed by the extraction or re-utilisation of all or a substantial part of the contents, by or with the authority of the appropriate person, for the purpose of disseminating that information.

(4) In this paragraph -

“appropriate person” means the person required to make the contents of the database open to public inspection or, as the case may be, the person maintaining the register;

“statutory register” means a register maintained in pursuance of a statutory requirement; and

“statutory requirement” means a requirement imposed by provision made by or under an enactment.

Material communicated to the Crown in the course of public business

4. – (1) This paragraph applies where the contents of a database have in the course of public business been communicated to the Crown for any purpose, by or with the licence of the owner of the database right and a document or other material thing recording or embodying the contents of the database is owned by or in the custody or control of the Crown.

(2) The Crown may, for the purpose for which the contents of the database were communicated to it, or any related purpose which could reasonably have been anticipated by the owner of the database right in the database, extract or re-utilise all or a substantial part of the contents without infringing database right in the database.

(3) The Crown may not re-utilise the contents of a database by virtue of this paragraph if the contents have previously been published otherwise than by virtue of this paragraph.

(4) In sub-paragraph (1) “public business” includes any activity carried on by the Crown.

(5) This paragraph has effect subject to any agreement to the contrary between the Crown and the owner of the database right in the database.

Public records

5. The contents of a database which are comprised in public records within the meaning of the Public Records Act 1958[1], the Public Records (Scotland) Act 1937[2] or the Public Records Act (Northern Ireland) 1923[3] which are open to public inspection in pursuance of that Act, may be re-utilised by or with the authority of any officer appointed under that Act, without infringement of database right in the database.

Acts done under statutory authority

6. – (1) Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe database right in a database.

(2) Sub-paragraph (1) applies in relation to an enactment contained in Northern Ireland legislation as it applies in relation to an Act of Parliament.

(3) Nothing in this paragraph shall be construed as excluding any defence of statutory authority otherwise available under or by virtue of any enactment.

Notes:

[1] 1958 c.51.

[2] 1937 c.43.

[3] 1923 c.20 (N.I.).

SCHEDULE 2

Regulation 24.

LICENSING OF DATABASE RIGHT

Licensing scheme and licensing bodies

1. – (1) In this Schedule a “licensing scheme” means a scheme setting out -

(a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant database right licences, and

(b) the terms on which licences would be granted in those classes of case;

and for this purpose a “scheme” includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.

(2) In this Schedule a “licensing body” means a society or other organisation which has as its main object, or one of its main objects, the negotiating or granting, whether as owner or prospective owner of a database right or as agent for him, of database right licences, and whose objects include the granting of licences covering the databases of more than one maker.

(3) In this paragraph “database right licences” means licences to do, or authorise the doing of, any of the things for which consent is required under Regulation 16.

2. Paragraphs 3 to 8 apply to licensing schemes which are operated by licensing bodies and cover databases of more than one maker so far as they relate to licences for extracting or re-utilising all or a substantial part of the contents of a database; and references in those paragraphs to a licensing scheme shall be construed accordingly.

Reference of proposed licensing scheme to tribunal

3. – (1) The terms of a licensing scheme proposed to be operated by a licensing body may be referred to the Copyright Tribunal by an organisation claiming to be representative of persons claiming that they require licences in cases of a description to which the scheme would apply, either generally or in relation to any description of case.

(2) The Tribunal shall first decide whether to entertain the reference, and may decline to do so on the ground that the reference is premature.

(3) If the Tribunal decides to entertain the reference it shall consider the matter referred and make such order, either confirming or varying the proposed scheme, either generally or so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

Reference of licensing scheme to tribunal

4. – (1) If while a licensing scheme is in operation a dispute arises between the operator of the scheme and -

(a) a person claiming that he requires a licence in a case of a description to which the scheme applies, or

(b) an organisation claiming to be representative of such persons,

that person or organisation may refer the scheme to the Copyright Tribunal in so far as it relates to cases of that description.

(2) A scheme which has been referred to the Tribunal under this paragraph shall remain in operation until proceedings on the reference are concluded.

(3) The Tribunal shall consider the matter in dispute and make such order, either confirming or varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

Further reference of scheme to tribunal

5. – (1) Where the Copyright Tribunal has on a previous reference of a licensing scheme under paragraph 3 or 4, or under this paragraph, made an order with respect to the scheme, then, while the order remains in force –

(a) the operator of the scheme,

(b) a person claiming that he requires a licence in a case of the description to which the order applies, or

(c) an organisation claiming to be representative of such persons,

may refer the scheme again to the Tribunal so far as it relates to cases of that description.

(2) A licensing scheme shall not, except with the special leave of the Tribunal, be referred again to the Tribunal in respect of the same description of cases –

(a) within twelve months from the date of the order on the previous reference,
or

(b) if the order was made so as to be in force for 15 months or less, until the last three months before the expiry of the order.

(3) A scheme which has been referred to the Tribunal under this section shall remain in operation until proceedings on the reference are concluded.

(4) The Tribunal shall consider the matter in dispute and make such order, either confirming, varying or further varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(5) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

Application for grant of licence in connection with licensing scheme

6. – (1) A person who claims, in a case covered by a licensing scheme, that the operator of the scheme has refused to grant him or procure the grant to him of a licence in accordance with the scheme, or has failed to do so within a reasonable time after being asked, may apply to the Copyright Tribunal.

(2) A person who claims, in a case excluded from a licensing scheme, that the operator of the scheme either -

(a) has refused to grant him a licence or procure the grant to him of a licence, or has failed to do so within a reasonable time of being asked, and that in the circumstances it is unreasonable that a licence should not be granted, or

(b) proposes terms for a licence which are unreasonable,

may apply to the Copyright Tribunal.

(3) A case shall be regarded as excluded from a licensing scheme for the purposes of sub-paragraph (2) if -

(a) the scheme provides for the grant of licences subject to terms excepting matters from the licence and the case falls within such an exception, or

(b) the case is so similar to those in which licences are granted under the scheme that it is unreasonable that it should not be dealt with in the same way.

(4) If the Tribunal is satisfied that the claim is well-founded, it shall make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms as the Tribunal may determine to be applicable in accordance with the scheme or, as the case may be, to be reasonable in the circumstances.

(5) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

Application for review of order as to entitlement to licence

7. – (1) Where the Copyright Tribunal has made an order under paragraph 6 that a person is entitled to a licence under a licensing scheme, the operator of the scheme or the original applicant may apply to the Tribunal to review its order.

(2) An application shall not be made, except with the special leave of the Tribunal -
(a) within twelve months from the date of the order, or of the decision on a previous application under this section, or

(b) if the order was made so as to be in force for 15 months or less, or as a result of the decision on a previous application under this section is due to expire within 15 months of that decision, until the last three months before the expiry date.

(3) The Tribunal shall on an application for review confirm or vary its order as the Tribunal may determine to be reasonable having regard to the terms applicable in accordance with the licensing scheme or, as the case may be, the circumstances of the case.

Effect of order of tribunal as to licensing scheme

8. – (1) A licensing scheme which has been confirmed or varied by the Copyright Tribunal –

(a) under paragraph 3 (reference of terms of proposed scheme), or

(b) under paragraph 4 or 5 (reference of existing scheme to Tribunal),

shall be in force or, as the case may be, remain in operation, so far as it relates to the description of case in respect of which the order was made, so long as the order remains in force.

(2) While the order is in force a person who in a case of a class to which the order applies –

(a) pays to the operator of the scheme any charges payable under the scheme in respect of a licence covering the case in question or, if the amount cannot be ascertained, gives an undertaking to the operator to pay them when ascertained, and

(b) complies with the other terms applicable to such a licence under the scheme,

shall be in the same position as regards infringement of database right as if he had at all material times been the holder of a licence granted by the owner of the database right in question in accordance with the scheme.

(3) The Tribunal may direct that the order, so far as it varies the amount of charges payable, has effect from a date before that on which it is made, but not earlier than the date on which the reference was made or, if later, on which the scheme came into operation.

If such a direction is made –

(a) any necessary repayments, or further payments, shall be made in respect of charges already paid, and

(b) the reference in sub-paragraph (2)(a) to the charges payable under the scheme shall be construed as a reference to the charges so payable by virtue of the order.

No such direction may be made where sub-paragraph (4) below applies.

(4) Where the Tribunal has made an order under paragraph 6 (order as to entitlement to licence under licensing scheme) and the order remains in force, the person in whose favour the order is made shall if he -

(a) pays to the operator of the scheme any charges payable in accordance with the order or, if the amount cannot be ascertained, gives an undertaking to pay the charges when ascertained, and

(b) complies with the other terms specified in the order,

be in the same position as regards infringement of database right as if he had at all material times been the holder of a licence granted by the owner of the database right in question on the terms specified in the order.

References and applications with respect to licences by licensing bodies

9. Paragraphs 10 to 13 (references and applications with respect to licensing by licensing bodies) apply to licences relating to database right which cover databases of more than one maker granted by a licensing body otherwise than in pursuance of a licensing scheme, so far as the licences authorise extracting or re-utilising all or a substantial part of the contents of a database; and references in those paragraphs to a licence shall be construed accordingly.

Reference to tribunal of proposed licence

10. – (1) The terms on which a licensing body proposes to grant a licence may be referred to the Copyright Tribunal by the prospective licensee.

(2) The Tribunal shall first decide whether to entertain the reference, and may decline to do so on the ground that the reference is premature.

(3) If the Tribunal decides to entertain the reference it shall consider the terms of the proposed licence and make such order, either confirming or varying the terms, as it may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

Reference to tribunal of expiring licence

11. – (1) A licensee under a licence which is due to expire, by effluxion of time or as a result of notice given by the licensing body, may apply to the Copyright Tribunal on the ground that it is unreasonable in the circumstances that the licence should cease to be in force.

(2) Such an application may not be made until the last three months before the licence is due to expire.

- (3) A licence in respect of which a reference has been made to the Tribunal shall remain in operation until proceedings on the reference are concluded.
- (4) If the Tribunal finds the application well-founded, it shall make an order declaring that the licensee shall continue to be entitled to the benefit of the licence on such terms as the Tribunal may determine to be reasonable in the circumstances.
- (5) An order of the Tribunal under this section may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

Application for review of order as to licence

- 12.** – (1) Where the Copyright Tribunal has made an order under paragraph 10 or 11, the licensing body or the person entitled to the benefit of the order may apply to the Tribunal to review its order.
- (2) An application shall not be made, except with the special leave of the Tribunal -
 - (a) within twelve months from the date of the order or of the decision on a previous application under this paragraph, or
 - (b) if the order was made so as to be in force for 15 months or less, or as a result of the decision on a previous application under this section is due to expire within 15 months of that decision, until the last three months before the expiry date.
 - (3) The Tribunal shall on an application for review confirm or vary its order as the Tribunal may determine to be reasonable in the circumstances.

Effect of order of tribunal as to licence

- 13.** – (1) Where the Copyright Tribunal has made an order under paragraph 10 or 11 and the order remains in force, the person entitled to the benefit of the order shall if he -
- (a) pays to the licensing body any charges payable in accordance with the order or, if the amount cannot be ascertained, gives an undertaking to pay the charges when ascertained, and
 - (b) complies with the other terms specified in the order,
- be in the same position as regards infringement of database right as if he had at all material times been the holder of a licence granted by the owner of the database right in question on the terms specified in the order.
- (2) The benefit of the order may be assigned -
 - (a) in the case of an order under paragraph 10, if assignment is not prohibited under the terms of the Tribunal's order; and

(b) in the case of an order under paragraph 11, if assignment was not prohibited under the terms of the original licence.

(3) The Tribunal may direct that an order under paragraph 10 or 11, or an order under paragraph 12 varying such an order, so far as it varies the amount of charges payable, has effect from a date before that on which it is made, but not earlier than the date on which the reference or application was made or, if later, on which the licence was granted or, as the case may be, was due to expire.

If such a direction is made -

(a) any necessary repayments, or further payments, shall be made in respect of charges already paid, and

(b) the reference in sub-paragraph (1)(a) to the charges payable in accordance with the order shall be construed, where the order is varied by a later order, as a reference to the charges so payable by virtue of the later order.

General considerations: unreasonable discrimination

14. In determining what is reasonable on a reference or application under this Schedule relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to -

(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and

(b) the terms of those schemes or licences,

and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.

Powers exercisable in consequence of competition report

15. - (1) Where the matters specified in a report of the Monopolies and Mergers Commission as being those which in the Commission's opinion operate, may be expected to operate or have operated against the public interest include -

(a) conditions in licences granted by the owner of database right in a database restricting the use of the database by the licensee or the right of the owner of the database right to grant other licences, or

(b) a refusal of an owner of database right to grant licences on reasonable terms,

the powers conferred by Part I of Schedule 8 to the Fair Trading Act 1973[1] (powers exercisable for purpose of remedying or preventing adverse effects specified in report of Commission) include power to cancel or modify those conditions and, instead or

in addition, to provide that licences in respect of the database right shall be available as of right.

(2) The references in sections 56(2) and 73(2) of that Act, and sections 10(2)(b) and 12(5) of the Competition Act 1980[2], to the powers specified in that Part of that Schedule shall be construed accordingly.

(3) The terms of a licence available by virtue of this paragraph shall, in default of agreement, be settled by the Copyright Tribunal on an application by the person requiring the licence; and terms so settled shall authorise the licensee to do everything in respect of which a licence is so available.

(4) Where the terms of a licence are settled by the Tribunal, the licence has effect from the date on which the application to the Tribunal was made.

Notes:

[1] 1973 c.41.

[2] 1980 c.21.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement the provisions of Council Directive No. 96/9/EC of 11 March 1996 (O.J. No. L77, 27.3.96, page 20) on the legal protection of databases ("the Directive"). The Regulations come into force on 1st January 1998.

The Directive harmonises the laws of member states relating to the protection of copyright in databases and also introduces a new *sui generis* right to prevent extraction and re-utilisation of the contents of a database ("database right").

The Copyright, Designs and Patents Act 1988 ("the Act") makes no specific provision for databases. The Act currently makes provision for protection of copyright in compilations. A database may fall to be considered as a type of compilation. The Directive requires that a database be defined and that copyright protection should only be accorded to a database which by virtue of the selection or arrangement of the contents constitutes the author's own intellectual creation.

In relation to copyright in databases, Part II of the Regulations (Regulations 5 – 11) amend and modify Part I of the Act in order to properly align its provisions with those of the Directive for those matters where the Act makes no specific provision or makes different provision. In particular, the Regulations -

- (a) modify the definition of literary work in section 3 by including database, as defined in the Directive (regulations 5 and 6);

- (b) introduce new section 3A defining the meaning of “original” in relation to databases so that a database is only accorded copyright protection where the conditions of that section are satisfied (regulation 6);
- (c) make provision for adaptation and translation in relation to a database at section 21 (regulation 7);
- (d) amend section 29 so as to remove research for a commercial purpose from the general application of the fair dealing provision in relation to a database (regulation 8);
- (e) introduce new section 50D containing specific exceptions to the exclusive rights of the copyright owner which permit any person having a right to use a database to do any acts that are necessary for access to and use of the contents of the database without infringing copyright (regulation 9);
- (f) introduce new section 296B which renders void any term in an agreement which seeks to prohibit or restrict the doing of any act permitted under section 50D (regulation 10).

In relation to database right, the Directive provides a right for the maker of a database in which there has been a substantial investment in the obtaining, verification or presentation of the contents of the database to prevent extraction and/or re-utilisation of the whole or a substantial part of the contents of the database. Database right is to apply irrespective of the eligibility of the database for protection by copyright and without prejudice to rights existing in the contents of the database.

Part III of the Regulations (Regulations 12 – 25) provide for database right and in particular -

- (a) make provision for the interpretation of certain terms, in particular database, extraction, insubstantial, investment, jointly, lawful user, maker, re-utilisation and substantial; and exclude public lending from database right (regulation 12);
- (b) create a new property right, “database right” for a database in respect of which there has been a substantial investment (regulation 13);
- (c) provide that the maker of a database is the person who takes the initiative and risk of investing in obtaining, verifying or presenting the contents and that the maker is the first owner of database right (regulations 14 and 15);
- (d) provide for the acts infringing database right (regulation 16);
- (e) provide that the duration of the term of protection of database right is to be 15 years from the end of the calendar year in which the making of the database was completed and that substantial changes give rise to a further term of protection (regulation 17);

- (f) provide that database right does not subsist in a database unless when the database was made, or if the making extended over a period, a substantial part of that period, its maker or one of its makers meets the qualifying conditions for database right to subsist (regulation 18);
- (g) provide that lawful users are entitled to extract or re-utilise insubstantial parts of a database and render void any term or condition in an agreement which seeks to prohibit or restrict such extraction or re-utilisation (regulations 19 and 20);
- (h) provide specific exceptions to database right for a lawful user and other acts which may be done in relation to a database (regulation 20 and Schedule 1);
- (i) provide for acts permitted on assumption as to expiry of database right and certain presumptions relevant to database right (regulations 21 and 22);
- (j) apply in relation to database right certain provisions of Part I of the Act as they apply to copyright in particular dealing with the rights in copyright works, rights and remedies of rights owners and exclusive licensees (regulation 23);
- (k) provide for licensing of database right and extension of the jurisdiction of the Copyright Tribunal to hear and determine proceedings relating to the licensing of database right (regulations 24 and 25 and Schedule 2).

These Regulations apply to databases made before and after the 1st January 1998. However, there is a general saving in relation to agreements made before commencement; in particular acts done in pursuance of such agreements whether before or after commencement are not regarded as infringing database right (regulations 27 and 28). In relation to a database which was created on or before 27th March 1996 (the date of publication of the Directive) and which is a copyright work immediately before commencement, copyright will continue to subsist in such a database for the remainder of the term of copyright (regulation 29). In relation to a database which was completed on or after 1st January 1983 in which database right subsists at 1 January 1998, such a database qualifies for a term of protection of 15 years from 1st January 1998 (regulation 30).

A Compliance Cost Assessment is available, copies of which have been placed in the libraries of both Houses of Parliament. Copies of the assessment are available to the public from the Copyright Directorate of The Patent Office, 25 Southampton Buildings, London WC2A 1AY.

8 | Italian transposition

Decreto Legislativo 6 maggio 1999, n. 169

“Attuazione della direttiva 96/9/CE relativa alla tutela giuridica delle banche di dati”

pubblicato nella Gazzetta Ufficiale n. 138 del 15 giugno 1999

IL PRESIDENTE DELLA REPUBBLICA

Visti gli articoli 76 e 87 della Costituzione;

Vista la direttiva 96/9/CE del Parlamento europeo e del Consiglio dell'11 marzo 1996, relativa alla tutela giuridica delle banche di dati;

Vista la legge 24 aprile 1998, n. 128, ed in particolare gli articoli 1 e 2, nonché l'articolo 43 che detta i criteri di delega al Governo per il recepimento della citata direttiva 96/9/CE;

Vista la legge 22 aprile 1941, n. 633, concernente protezione del diritto d'autore e di altri diritti connessi al suo esercizio;

Vista la legge 20 giugno 1973, n. 399, recante ratifica ed esecuzione della Convenzione di Berna per la protezione delle opere letterarie ed artistiche;

Vista la preliminare deliberazione del Consiglio dei Ministri, adottata nella riunione del 3 dicembre 1998;

Acquisiti i pareri delle competenti Commissioni permanenti della Camera dei deputati e del Senato della Repubblica;

Vista la deliberazione del Consiglio dei Ministri, adottata nella riunione del 30 aprile 1999;

Sulla proposta del Ministro per le politiche comunitarie, di concerto con i Ministri degli affari esteri, di grazia e giustizia, del tesoro, del bilancio e della programmazione economica, delle comunicazioni e per i beni e le attività culturali;

E m a n a

il seguente decreto legislativo:

Art. 1.

1. Al secondo comma dell'articolo 1 della legge 22 aprile 1941, n. 633, sono aggiunte, in fine, le seguenti parole: “, nonché le banche di dati che per la scelta o la disposizione del materiale costituiscono una creazione intellettuale dell'autore.”.

Art. 2.

1. Dopo il numero 8) dell'articolo 2 della legge 22 aprile 1941, n. 633, è aggiunto il seguente:

“9) Le banche di dati di cui al secondo comma dell’articolo 1, intese come raccolte di opere, dati o altri elementi indipendenti sistematicamente o metodicamente disposti ed individualmente accessibili mediante mezzi elettronici o in altro modo. La tutela delle banche di dati non si estende al loro contenuto e lascia impregiudicati diritti esistenti su tale contenuto.”.

Art. 3.

1. L’articolo 12-bis della legge 22 aprile 1941, n. 633, e’ sostituito dal seguente:
“Art. 12-bis. – Salvo patto contrario, il datore di lavoro e’ titolare del diritto esclusivo di utilizzazione economica del programma per elaboratore o della banca di dati creati dal lavoratore dipendente nell’esecuzione delle sue mansioni o su istruzioni impartite dallo stesso datore di lavoro.”.

Art. 4.

1. Dopo la sezione VI del capo IV del titolo I della legge 22 aprile 1941, n. 633, e’ inserita la seguente:

“Sezione VII

Banche di dati

Art. 64-quinquies . – 1. L’autore di un banca di dati ha il diritto esclusivo di eseguire o autorizzare:

- a) la riproduzione permanente o temporanea, totale o parziale, con qualsiasi mezzo e in qualsiasi forma;
- b) la traduzione, l’adattamento, una diversa disposizione e ogni altra modifica;
- c) qualsiasi forma di distribuzione al pubblico dell’originale o di copie della banca di dati; la prima vendita di una copia nel territorio dell’Unione europea da parte del titolare del diritto o con il suo consenso esaurisce il diritto di controllare, all’interno dell’Unione stessa, le vendite successive della copia;
- d) qualsiasi presentazione, dimostrazione o comunicazione in pubblico, ivi compresa la trasmissione effettuata con qualsiasi mezzo e in qualsiasi forma;
- e) qualsiasi riproduzione, distribuzione, comunicazione, presentazione o dimostrazione in pubblico dei risultati delle operazioni di cui alla lettera b).

Art. 64-sexies. – 1. Non sono soggetti all’autorizzazione di cui all’articolo 64-quinquies da parte del titolare del diritto:

- a) l’accesso o la consultazione della banca di dati quando abbiano esclusivamente finalita’ didattiche o di ricerca scientifica, non svolta nell’ambito di un’impresa, purché si indichi la fonte e nei limiti di quanto giustificato dallo scopo non commerciale perseguito. Nell’ambito di tali attivita’ di accesso e consultazione, le eventuali operazioni di riproduzione permanente della totalita’ o di parte sostanziale del contenuto su altro supporto sono comunque soggette all’autorizzazione del titolare del diritto;
- b) l’impiego di una banca di dati per fini di sicurezza pubblica o per effetto di una procedura amministrativa o giurisdizionale.

2. Non sono soggette all’autorizzazione dell’autore le attivita’ indicate nell’articolo 64-quinquies poste in essere da parte dell’utente legittimo della banca di dati o di una sua copia, se tali attivita’ sono necessarie per l’accesso al contenuto della stessa banca di dati e per il suo normale impiego; se l’utente legittimo e’ autorizzato ad utilizzare solo una parte della banca di dati, il presente comma si applica unicamente a tale parte.

3. Le clausole contrattuali pattuite in violazione del comma 2 sono nulle ai sensi dell'articolo 1418 del codice civile.
4. Conformemente alla Convenzione di Berna per la protezione delle opere letterarie e artistiche, ratificata e resa esecutiva con legge 20 giugno 1978, n. 399, le disposizioni di cui ai commi 1 e 2 non possono essere interpretate in modo da consentire che la loro applicazione arrechi indebitamente pregiudizio al titolare del diritto o entri in conflitto con il normale impiego della banca di dati.”.

Art. 5.

1. Dopo il titolo II della legge 22 aprile 1941, n. 633, e' inserito il seguente:

“ Titolo II-bis

DISPOSIZIONI SUI DIRITTI DEL COSTITUTORE DI UNA BANCA DI DATI
DIRITTI E OBBLIGHI DELL'UTENTE

Capo I

Diritti del costituente di una banca di dati

Art. 102-bis. – 1. Ai fini del presente titolo si intende per:

- a) costituente di una banca di dati: chi effettua investimenti rilevanti per la costituzione di una banca di dati o per la sua verifica o la sua presentazione, impegnando, a tal fine, mezzi finanziari, tempo o lavoro;
 - b) estrazione: il trasferimento permanente o temporaneo della totalita' o di una parte sostanziale del contenuto di una banca di dati su un altro supporto con qualsiasi mezzo o in qualsivoglia forma. L'attivita' di prestito dei soggetti di cui all'articolo 69, comma 1, non costituisce atto di estrazione;
 - c) reimpiego: qualsivoglia forma di messa a disposizione del pubblico della totalita' o di una parte sostanziale del contenuto della banca di dati mediante distribuzione di copie, noleggio, trasmissione effettuata con qualsiasi mezzo e in qualsiasi forma. L'attivita' di prestito dei soggetti di cui all'articolo 69, comma 1, non costituisce atto di reimpiego.
2. La prima vendita di una copia della banca di dati effettuata o consentita dal titolare in uno Stato membro dell'Unione europea esaurisce il diritto di controllare la rivendita della copia nel territorio dell'Unione europea.
 3. Indipendentemente dalla tutelabilita' della banca di dati a norma del diritto d'autore o di altri diritti e senza pregiudizio dei diritti sul contenuto o parti di esso, il costituente di una banca di dati ha il diritto, per la durata e alle condizioni stabilite dal presente Capo, di vietare le operazioni di estrazione ovvero reimpiego della totalita' o di una parte sostanziale della stessa.
 4. Il diritto di cui al comma 3 si applica alle banche di dati i cui costitutori o titolari di diritti sono cittadini di uno Stato membro dell'Unione europea o residenti abituali nel territorio dell'Unione europea.
 5. La disposizione di cui al comma 3 si applica altresì alle imprese e società costituite secondo la normativa di uno Stato membro dell'Unione europea ed aventi la sede sociale, l'amministrazione centrale o il centro d'attivita' principale all'interno della Unione europea; tuttavia, qualora la società o l'impresa abbia all'interno della Unione europea soltanto la propria sede sociale, deve sussistere un legame effettivo e continuo tra l'attivita' della medesima e l'economia di uno degli Stati membri dell'Unione europea.

6. Il diritto esclusivo del costituente sorge al momento del completamento della banca di dati e si estingue trascorsi quindici anni dal 1 gennaio dell'anno successivo alla data del completamento stesso.
7. Per le banche di dati in qualunque modo messe a disposizione del pubblico prima dello scadere del periodo di cui al comma 6, il diritto di cui allo stesso comma 6 si estingue trascorsi quindici anni dal 1 gennaio dell'anno successivo alla data della prima messa a disposizione del pubblico.
8. Se vengono apportate al contenuto della banca di dati modifiche o integrazioni sostanziali comportanti nuovi investimenti rilevanti ai sensi del comma 1, lettera a), dal momento del completamento o della prima messa a disposizione del pubblico della banca di dati così modificata o integrata, e come tale espressamente identificata, decorre un autonomo termine di durata della protezione, pari a quello di cui ai commi 6 e 7.
9. Non sono consentiti l'estrazione o il reimpiego ripetuti e sistematici di parti non sostanziali del contenuto della banca di dati, qualora presuppongano operazioni contrarie alla normale gestione della banca di dati o arrechino un pregiudizio ingiustificato al costituente della banca di dati.
10. Il diritto di cui al comma 3 può essere acquistato o trasmesso in tutti i modi e forme consentiti dalla legge.

Capo II

Diritti e obblighi dell'utente

- Art. 102-ter. – 1. L'utente legittimo della banca di dati messa a disposizione del pubblico non può arrecare pregiudizio al titolare del diritto d'autore o di un altro diritto connesso relativo ad opere o prestazioni contenute in tale banca.
2. L'utente legittimo di una banca di dati messa in qualsiasi modo a disposizione del pubblico non può eseguire operazioni che siano in contrasto con la normale gestione della banca di dati o che arrechino un ingiustificato pregiudizio al costituente della banca di dati.
3. Non sono soggette all'autorizzazione del costituente della banca di dati messa per qualsiasi motivo a disposizione del pubblico le attività di estrazione o reimpiego di parti non sostanziali, valutate in termini qualitativi e quantitativi, del contenuto della banca di dati per qualsivoglia fine effettuate dall'utente legittimo. Se l'utente legittimo è autorizzato ad effettuare l'estrazione o il reimpiego solo di una parte della banca di dati, il presente comma si applica unicamente a tale parte.
4. Le clausole contrattuali pattuite in violazione dei commi 1, 2 e 3 sono nulle.”.

Art. 6.

1. L'articolo 171-bis della legge 22 aprile 1941, n. 633, è così modificato:
 - a) dopo il comma 1, è aggiunto il seguente:

“1-bis. Chiunque, al fine di trarne profitto, riproduce, trasferisce su altro supporto, distribuisce, comunica, presenta o dimostra in pubblico il contenuto di una banca di dati in violazione delle disposizioni di cui agli articoli 64 -quinquies e 64-sexies, ovvero esegue l'estrazione o il reimpiego della banca di dati in violazione delle disposizioni di cui agli articoli 102-bis e 102-ter e' soggetto alla pena della reclusione da tre mesi a tre anni e della multa da lire un milione a lire dieci milioni. La pena non è inferiore nel minimo a sei mesi di reclusione e a lire tre milioni di multa se il fatto è di rilevante gravità ovvero se la banca di dati oggetto delle abusive operazioni di riproduzione, trasferimento su altro supporto, distribuzione, comunicazione, presentazione o dimostra-

zione in pubblico, estrazione o reimpiego sia stata distribuita, venduta o concessa in locazione su supporti contrassegnati dalla Società italiana degli autori ed editori ai sensi della presente legge e del relativo regolamento di esecuzione approvato con R.D. 18 maggio 1942, n. 1369”;

b) al comma 2, le parole: “al comma 1” sono sostituite dalle seguenti: “ai commi 1 e 1-bis”.

Art. 7.

Disposizioni finali e transitorie

1. Le disposizioni del titolo I della legge 22 aprile 1941, n. 633, si applicano anche alle banche di dati create prima del 1 gennaio 1998 e che entro la data di entrata in vigore del presente decreto soddisfino i requisiti di cui all’articolo 2 del decreto medesimo, fatti salvi gli eventuali atti conclusi e i diritti acquisiti anteriormente. La stessa disposizione si applica anche alle banche di dati create dal 1 gennaio 1998 fino alla data di entrata in vigore del presente decreto.

2. Le disposizioni del capo I del titolo II-bis della legge 22 aprile 1941, n. 633, si applicano anche alle banche di dati costituite completamente nei 15 anni precedenti il 1 gennaio 1998 e che alla data di entrata in vigore del presente decreto soddisfino i requisiti di cui all’articolo 5 del decreto medesimo, fatti salvi gli eventuali atti conclusi e i diritti acquisiti anteriormente. La stessa disposizione si applica anche alle banche di dati costituite completamente dal 1 gennaio 1998 fino alla data di entrata in vigore del presente decreto.

3. Per le banche di dati di cui al comma 2, primo periodo, il termine di cui all’articolo 102-bis, comma 5, della legge 22 aprile 1941, n. 633, decorre dal 1 gennaio 1998.

4. Il presente decreto non osta all’applicazione delle disposizioni concernenti, in particolar modo, il diritto d’autore, i diritti connessi o altri diritti od obblighi preesistenti su dati, opere o altri elementi inseriti in una banca di dati, brevetti, marchi commerciali, disegni e modelli industriali, la protezione dei beni appartenenti al patrimonio nazionale, le norme sulle intese e sulla concorrenza sleale, il segreto industriale, la sicurezza, la riservatezza, la tutela dei dati di carattere personale ed il rispetto della vita privata, l’accesso ai documenti pubblici o il diritto dei contratti.

Art. 8.

1. Il presente decreto entra in vigore il giorno successivo a quello della sua pubblicazione nella Gazzetta Ufficiale della Repubblica italiana.

Dato a Roma, addì 6 maggio 1999.

9 | Italian transposition in English¹

Art. 1

1. To the second paragraph of article 1 of the law of 22 April 1941, n. 633, are added, at the end, the following words: “, as shall databases that, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation.”

Art. 2

1. After number 8) of art. 2 of the law of 22 April 1941, n. 633, the following number is added:

9. the databases referred to in the second paragraph of Article 1, understood as being collections of works, data or other independent elements systematically or methodically arranged and individually accessible by electronic means or otherwise. The protection of databases shall not extend to their contents and shall be without prejudice to rights existing in those contents.

Art. 3

1. Art. 12-bis of the law of 22 April 1941, n. 633, is substituted for the following:
Art. 12bis. Unless otherwise agreed, the employer shall be the owner of the exclusive right of economic use of the computer program or database created by his employee in the course of his duties or on instructions given by the said employer.

Art. 4

After section VI of chapter IV of title I of the law of 22 April 1941, n. 633, the following is inserted:

Section VII Databases

Art. 64-quinquies. – 1. The author of a database has the exclusive right to carry out or authorize the following:

- a) permanent or temporary reproduction, in its entirety or in part, by any means and in any form;
- b) translation, adaptation, arrangement and any other alteration;
- c) any form of distribution to the public of the database or of copies thereof; the first sale of a copy of the database on the territory of the European Union by the owner of the rights or with his consent shall exhaust the right to control resale of that copy within the said Union;

1 Translation by the International Bureau of WIPO.

- d) any display, performance or communication to the public, including transmission effected by any means and in any form;
- e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in b).

Art. 64-sexies. – 1. The following shall not be subject to authorization by the owner of the rights under Article 64-quinquies:

a) access to or consultation of the database for purely teaching or scientific research purposes outside the framework of a company, as long as the source is mentioned and to the extent justified by the non-commercial purpose to be achieved; in the case of access or consultation, however, the permanent reproduction of all or a substantial part of the contents on another medium shall be subject to authorization by the owner of the rights;

b) use of a database for public security purposes or for the purposes of an administrative or judicial procedure.

2. Authorization by the author shall not be required for acts mentioned in Article 64-quinquies that are performed by the lawful user of the database or a copy thereof where those acts are necessary for access to the contents of the database and for its normal use. Where the lawful user is authorized to use only part of the database, this paragraph shall apply only to that part.

3. Any contractual clause contrary to the provisions of paragraph 2 shall be null and void under Article 1418 of the Civil Code.

4. In accordance with the Berne Convention for the Protection of Literary and Artistic Works, ratified and brought into force by Law of 20 June 1978, n. 399, the provisions of paragraphs 1 and 2 may not be interpreted in such a way as to allow their application to prejudice the owner of the rights unreasonably or to conflict with the normal exploitation of the database.

Art. 5

1. After title II of the law of 22 April 1941, n. 633, the following is inserted:

TITLE II-bis PROVISIONS ON THE RIGHTS OF THE MAKER OF A DATABASE RIGHTS AND OBLIGATIONS OF THE USER

Chapter I

Rights of the maker of a database

Art. 102-bis. – 1. For the purposes of this title:

a) “maker of a database” means the person who invests substantially in the making of a database or in its verification or presentation, devoting financial means, time or effort thereto;

b) “extraction” means the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form. The loan of the subject matter within the meaning of Article 69, paragraph 1, does not constitute an act of extraction;

c) “re-utilization” means any form of making available to the public of all or a substantial part of the contents of the database by distribution of copies, by renting or

transmission by any means and in any form. The loan of the subject matter within the meaning of Article 69, paragraph 1, does not constitute an act of re-utilization.

2. The first sale of a copy of the database made or agreed to by the owner in a Member State of the European Union shall exhaust the right to control the resale of that copy on the territory of the European Union.

3. Independently of the possibility of protecting the database under copyright provisions or by virtue of other rights, and without prejudice to the rights in all or part of the contents thereof, the maker of a database shall have the right, during the period and on the terms provided for in this chapter, to prohibit acts of extraction or re-utilization of all or a substantial part thereof.

4. The right mentioned in paragraph 3 shall apply to databases the makers of which or the owners of the rights in which are citizens of a Member State of the European Union or ordinarily resident on the territory of the European Union.

5. The provisions of paragraph 3 shall apply also to businesses and companies incorporated under the legislation of a Member State of the European Union and having their registered office, central administration or principal business activity within the European Union; however, where such a company or business has only its registered office within the European Union, there must be a genuine and permanent link between its activities and the economy of one of the Member States of the European Union.

6. The exclusive right of the maker shall come into being on the completion of the database, and shall expire 15 years from January 1 of the year following the date of the said completion.

7. In the case of databases made available to the public in any manner before expiry of the period provided for in paragraph 6, the right provided for in the same paragraph shall expire 15 years from January 1 of the year following the date when the database was first made available to the public.

8. Where changes or substantial additions are made to the contents of the database that entail considerable new investment within the meaning of paragraph 1 letter a), the time of completion of the database so changed or completed and expressly identified as such, and of its being made available to the public, shall start a separate period of protection equal to that provided for in paragraphs 6 and 7.

9. The repeated and systematic extraction or re-utilization of insubstantial parts of the contents of the database shall not be authorized where it presupposes acts that conflict with a normal exploitation of that database, or would unjustifiably prejudice the maker of the database.

10. The right provided for in paragraph 3 may be acquired or transferred in any manner and form authorized by the law.

Chapter II

Rights and obligations of the user

Art. 102-ter. – 1. The lawful user of a database made available to the public may not cause prejudice to the owner of the copyright or related right in the works or performances contained in the said database.

2. The lawful user of a database made available to the public in any manner may not perform acts that conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. The authorization of the maker of the database made available to the public in whatever manner shall not be required for a lawful user of the database to extract or re-utilize insubstantial parts of its contents, evaluated qualitatively or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract or re-utilize a part of the database, this paragraph shall apply only to that part.

4. Contractual clauses contrary to the provisions of paragraphs 1, 2 and 3 shall be null and void.

Art. 6

Art. 171-bis of the law of 22 April 1941, n. 633, is thus modified:

a) after paragraph 1, the following is added:

1-bis. Any person who, for profit-making purposes, using media not bearing the mark of the SIAE,² reproduces, transfers to another medium, distributes, communicates, presents or demonstrates in public the contents of a data bank in breach of the provisions of Articles 64-quinquies and 64-sexies, or extracts or re-uses material from a data bank in breach of the provisions of Articles 102-bis and 102-ter, or who distributes, sells or rents a data bank, shall be liable to a prison term of between six months and three years and to a fine of between 5,000,000 and 30,000,000 lire. The penalty shall be a prison term of not less than two years and a fine of 30,000,000 lire if the offense is serious.

b) in paragraph 2, the words “under paragraph 1” are substituted for the following: “under paragraphs 1 and 1-bis”.

Art. 7

Final and transitional provisions

1. The provisions in title I of the law of 22 April 1941, n. 633, also apply to databases created prior to January 1, 1998 and which within the date of entry into force of the present decree satisfy the requirements in art. 2 of the same decree, except for possible acts concluded and rights acquired before [that date]. The same provision also applies to databases created as from January 1, 1998 up to the date of entry into force of the present decree.

2. The provisions of chapter I of title II-bis of the law of 22 April 1941, n. 633, also apply to databases the making of which was completed within fifteen years prior to January 1, 1998 and which within the date of entry into force of the present decree satisfy the requirements in art. 5 of the same decree, except for possible acts concluded and rights acquired before [that date]. The same provision also applies to databases created as from January 1, 1998 up to the date of entry into force of the present decree.

3. For the databases in paragraph 2, first sentence, the term of art. 102-bis, paragraph 5, of the law of 22 April 1941, n. 633, starts from January 1, 1998.

4. The present decree shall not preclude the application of provisions concerning, in particular, copyright, neighbouring rights, or other rights or obligations subsisting in the data, works or other elements incorporated into a database, patent rights, trademarks, design rights or industrial models, the protection of national treasures, the rules on contracts and unfair competition, trade secret, security, confidentiality, protection

2 The Società italiana degli autori ed editori (the Italian society of authors and publishers).

of personal data and respect for privacy, access to public documents, or the law of contract.

Art. 8

1. This decree enters into force on the day following the day of its publication in the *Gazzetta Ufficiale della Repubblica italiana*.

Enacted in Rome, 6 May 1999.

