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A CRITICISM OF THE E.U. DIRECTIVE PROTECTING COMPUTER SOFTWARE

Robert Shaposka[*]

I. INTRODUCTION

Computer technology offers a vision of humankind's future - a "sneak peek" into the culture of tomorrow. Disheartening, however, is the chasm separating computer related legislation and the realities underpinning the computer world's actual practices.

Early legal protection of computers was general and basic. Often legislatures treated computers as pure goods; an oversimplified approach incompatible with the unusual international market forces affecting the fledgling industry. Computers no longer fit within a neat definition of goods, as Charles Levy writes:

> If you look at the computer industry in the world...the hardware is not the money maker for computers (sic) companies any more. It is the software. It is the systems integration. Some computer companies joke that by the beginning of the new century, if you want a computer, we will give it to you like glasses given away at gas stations. Because what they want is you to buy the software, the systems integration, and the services. And that is where they are going to make their money. Not in this big box that people are putting together.[1]

This counterintuitive development (that software, as opposed to hardware, drives the computer industry) leaves one wondering how the law will now protect these "goods," if they are goods at all.

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[*] Washington & Jefferson College, B.A., 1993; Duquesne University, J.D., 1996; member of the Pennsylvania Bar.
[1] Charles Levy, *When Sovereignties May Collide--Sovereignty and the Regulation of International Business in the Intellectual Property Area: An American Perspective*, 20 Can.-U.S. L.J. 185,187(1994).

Present software protection is centered in the field of intellectual property. Specifically of interest is the European Union's Directive of May 14, 1991[2] that expressly attempts to create standardized and comprehensive protection for software under the umbrella of intellectual property.

The success of this directive is unclear, notably since at least one other directive dealing with semiconductor chips sets out conflicting standards of protection within the computer industry. Additionally, some states will prefer *sui generis* protection (such as domestic patent law) for a more comprehensive approach in the computer field. An examination and critique of this EU software directive, and its likely success, will be the focus of this investigation.

The Directive, and the intellectual property rights it entails, are of particular interest because enforcement of protected rights can create justified blocks to the free movement of goods[3], vesting blocked computer-related goods with essentially the same rights as computer-related goods of extra-Community origin in the international marketplace.

II. THE EUROPEAN UNION'S COUNCIL DIRECTIVE ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS -- GOALS AND METHODOLOGY.

The Directive is based on powers stemming from Article 100a of the Maastricht Treaty, calling for harmonization of internal markets[4], and uses the copyright provisions of the Berne Convention as a primary means of enforcement. The motivations expressed for creation of the Directive acknowledge the creative effort put into computer programs, the fundamental role the computer industry plays in industrial development in all member states, and the varying degrees

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[2] Council Directive 91/250, 1991 O.J.(L 122).

[3] STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW: THE ESSENTIAL GUIDE TO THE LEGAL WORKINGS OF THE EUROPEAN COMMUNITY 735 (1993).

[4] Treaty Establishing the European Union (Maastricht), March 25, 1957, art. 100a (as amended through Jan. 1, 1995).

of protection previously afforded by member states on the topic of software. The Directive also seeks a clarification of trouble spots in existing intellectual property protection, such as tests for originality under copyright, and the need for compatible works among authorized use of programs. The Directive also expressly indicates it is not to overpower Maastricht Treaty Articles 85 and 86 dealing with competition.[5] Although these goals directly relate to the Union's economic aims, one should note that they are carefully defined in order to not provide one-hundred percent protection to the creator of software, notably in the areas of interfacing and compatible programs.

It has been critically suggested that this lack of complete protection in the Directive is intentional due to the fact that eighty-percent of all data management software originates outside of the European Community. Such allowed interfacing would encourage software firms within the member states to create non-infringing software based on pre-existing software with the profits from this new, non-infringing software due only to the European software houses.[6] This certainly is a remarkable and ethically unstable economic goal to enhance the computer industry within the Union. By using copyright, as applied by the Berne Convention, as the major method of protection in this Directive, the European Union has created a competitive advantage for its software industry while maintaining a facade of international reciprocity.

A. Who is protected under this directive?

Articles 2 and 3 of the Directive indicate who can enforce his or her rights to protection using the Directive. (This does not mean other parties under national law cannot use copyright or the Berne Convention as applied solely within one specific member state.)

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[5] 1991 O.J. (L 122).

[6] LOUIS BERTONE DES BALBES, THE EEC DIRECTIVE ON COMPUTER SOFTWARE, IN EUROPEAN COMMUNITY LAW AFTER 1992: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET 654, 657 (Ralph H. Folsom and Nanda Lake eds., 1993).

Article 2, Authorship of Computer Programs, defines the author of a work as is applied in general copyright law. An author can hold this right from one of three situations.

First, the author could be the natural person who created the program, or the person who would normally hold such rights under national member state law(s). The position of the creator is easily understood, while another who could hold such rights is vague. Such a provision is likely a recognition of all rights embodied in the Berne Convention, which not only entails copyright as understood in the United States, but also moral rights of the creator (rights of attribution and integrity), that often can be passed on from the author singularly from pure copyright.[7] A similar analysis can be applied to Article 3.

The second method of authorship is joint ownership, where a group of natural persons contributed to the work, and hold equal rights of copyright.

The third method of ownership stems from an employee-employer relationship. Employees creating programs for work purposes do not hold authorship, which instead rests with the employer. This can be altered only by express contract. Article 3 of the Directive, "Beneficiaries of Protection," determines that parties enforcing benefits under the Directive can be any natural or legal person who otherwise could enforce a national copyright. This not only includes legal corporations in the form of employers, but may be extended to cover natural or legal assignees of any extendable moral rights.

B. What is covered under the directive?

The Directive states what is to be protected, what acts constitute violations (and hints at what might be permitted), and specifically addresses decompilation, with Articles 1, 4, 5, and 6.

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[7] The United States recently completely complied with the Berne Convention in embodying similar rights in a legislative subdivision of Federal copyright, the Visual Artists Rights Act of 1991 (VARA), 17 U.S.C. § 106A 1995).

1. Article 1: Object of Protection.

Article 1, Object of Protection, attempts to define what will be protected as exclusive. It states that computer programs shall be protected by copyright as literary works as meant by the Berne Convention. Before the Directive required this type of protection, the only EU state that used literary work-copyright protection for software[8] was the United Kingdom. This is an odd classification because most programs are now considered as literary works which are never readable.[9] One wonders if protection as a musical work would not prove to be a better analogy. One uses a program over and over without right to sell it just as a consumer uses a musical recording. Additionally, containment of both in CD-ROM format is a popular commonality between programs and music. And the musical analogy has been made when defending licensing violations of restricted acts, specifically that one need not gain express permission to play a recording but that one must get permission to run (and by necessity, make a backup copy) of a licensed program. Objectors to this analogy claim that programs are more easily copied than are musical recordings.[10] Though the argument of more easily made copies is in favor, it seems out of touch with reality, when compact discs and radio broadcasts are easily recorded on cassettes, even by children.

A program also includes "preparatory design material." The Directive does not further define such materials, but the United States includes supplemental program materials such as descriptions of the program, its flowcharts, and its instruction manuals. Instructional videos would probably also be included here. Because of the computer industry's international nature, the European Union interfaced its definitions with the Berne Convention's in hopes of reciprocity.[11]

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[8] PETER GROVES, ET. AL., INTELLECTUAL PROPERTY AND THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY 82 (1993).

[9] DES BALBES, *supra* note 6, at 663-64.

[10] GROVES, *supra* note 8, at 85.

[11] DES BALBES, *supra* note 6, at 658.

Likely this term will be given a broad and similar reading.

Also consistent with general copyright law is the notion that only the expression of a program is protected, and not the ideas underpinning it. This is a commonly litigated concern, and it is not surprising that the Directive reiterates this idea, since European software houses would be looking to profit from as many free ideas as possible. Also, these same manufacturers would argue that many of a program's key characteristics are its programming ideas and not expression; this would ease interfacing from a consumer standpoint. Marketable programs could look the same and familiar. Such a "Look and Feel" to a consumer is a hotly debatable issue of protection in computer copyright. Early drafts of the Directive tried to keep the argument out of the European market because such qualities have never yet received protection in the member states and the drafting parties considered the "look and feel" quality protection to be a jumble of confusion in United States case law.[12] Additionally, early Directive drafts denied protection to the logic, algorithms, and programming languages underlying programs. The logic exclusion was removed in the event that it might be interpreted to protect only literal code,[13] and it is clear from the Commission's explanatory memorandum accompanying the Directive that any form of logical expression that executes a program is protected. This includes both high level/source code, common computer languages such as Basic or COBOL, and low level/object code conversions.[14] Algorithms, which are denied protection in the United States, were removed from exclusions since no one could settle on a single definition. Programming Languages were likewise removed from exception to protected materials for the same reasons as logic.[15]

These attempted exclusions may be problem areas in future litigation, since only one topic carries any significant weight of intended protection, while manufacturers are never sure on which side

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[12] *Id.* at 661.

[13] *Id.*

[14] GROVES, *supra* note 8, at 83.

[15] DES BALBES, *supra* note 6, at 662.

of the idea-expression dichotomy logic algorithms fall.

Article 1 also states that a program will merit protection as original if it is the "author's own intellectual creation."[16] No other criteria are evaluated to determine its protection status. Some commentators have indicated that this is not a bona-fide statutory standard and that those seeking a test should look to case law for one,[17] but this clause is surely the test for originality that must be applied. The phrase defines what factor (not factors) will be considered, and excludes all other considerations.

2. Article 4: Restricted Acts.

Under Article 4, a copyright owner exclusively controls all reproductions, including any reproductions for running or storing a program, any alterations of the program, and public distribution. At first glance this seems simple, but this provision becomes increasingly murky when applied to "real life" situations.

Running unauthorized reproductions is authorized because the user likely purchased the program. This is addressed as an Article 6 exception, regardless of what Article 5's wording implies. This is often where computer programs are likened to music, where playing a purchased recording is not a violation.[18] The same analysis, both of necessity to use and as an express exception, applies to any copies, especially those temporarily made, when running the program.[19]

Concerns can be voiced concerning what is a distribution to the public. Some have inquired whether the licensing of programs includes sales to the public, or whether licensed works have other protection. The original draft of the Directive employed the term "marketing" instead of sale,[20] suggesting a breadth entailing licensing as well as sales. The Directive expressly includes a rental as a sale,

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[16] Council Directive, *supra* note 2.

[17] DES BALBES, *supra* note 6, at 663.

[18] *Id.* at 667.

[19] *Id.* at 666-667.

[20] *Id.* at 667.

but does a rental imply a license? Favoring a broad reading of sales to cover licenses in the international market of software, the United States recently amended its Uniform Commercial Code's section 2 of sales to include section 2A, licenses.[21]

3. Article 5: Exceptions to Restricted Acts.

Article 5 sets out three exceptions to acts restricted to the right holder. The first applies to running the program by the lawful acquirer, and authorizes any copies made necessary to running the program in its intended format. Necessity is key.

The second exception is the authorization of back-up copies made by a rightful user. This exception is limited by the vague phrase "insofar as [copying] is necessary for its use." Who can say when a back-up copy is necessary, or how many back-up copies are reasonable? Either this phrase will be a great source of litigation, or it will be completely ignored by the industry.

The last exception is a very recent development in copyright law.[22] This exception to restrictions allows an authorized user to "observe, study, or test" any program while using the program in order to determine any unprotected ideas underlying the program. The authorized user may then apply the unprotected ideas to other programs. This does not mean decompilation, as addressed *infra*, which uncovers the work put into a program by taking the finished program apart. Critics regard Article 4 as allowing most any study of a program which is not decompilation per se.[23] Article 4 thus allows software manufacturers to obtain other manufacturer's programs and encourages the use of underlying ideas among any expression in the programs.

4. Article 6: Decompilation.

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[21] *See* U.C.C. § 2A-102 (1996).

[22] DES BALBES, *supra* note 6, at 668.

[23] JONATHAN BAND AND MASANOBU KATOH, INTERFACES ON TRIAL: INTELLECTUAL PROPERTY AND INTEROPERABILITY IN THE GLOBAL SOFTWARE INDUSTRY 244 (1995).

Article 6 specifically deals with reverse engineering, the process of taking a competitor's product and deconstructing it to discover the methods by which it was developed. It is an easy, cheap, and often illegal method of gaining technology.

This article of the Directive is called "Decompilation" instead of reverse engineering because the authors of the Directive could not understand how one might engineer a literary work.[24] (Similarly, critics of the interoperability provisions lost ground for the very same reason, that to keep rights to limited parties is an economic goal and does not relate to the literary nature of protection. These critics refused to afford secret knowhow, something that is unwritten and economically driven, any literary protection.[25]) This lofty literary goal may be inconsistent with the primary goal of a common market: en masse economic prosperity.

The Directive is unclear whether or not decompilation is favored. The provision reads like a hybrid of permitted and restricted acts. The restricted portions may prevent the Directive from achieving any sort of international harmony.[26] Proponents favoring decompilation as a means to gain technology purport that everyone in the industry will benefit if they decompile from each other's products and continually turn out new, improved versions.[27] If this argument were true, it would not only generate paranoia through the computer industry, it would probably not appeal to the European consumer, who prefers a reliable product over the per se newest product. Seen in this light the provision appears as a thinly veiled attempt of permitting copying of programs originating from outside of the Union.

The first section of Article 6 informs program users what can be done to the program without authorization. A user may copy code and translate the code in the process of properly using the program. Permitted decompilation must be done, however, by proper licensees. These licensees must have lacked the previous opportunity to obtain

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[24] DES BALBES, *supra* note 6, at 671.
[25] *Id.*
[26] *Id.* at 677.
[27] *Id.* at 675.

this information and the information gained must be necessary for interoperability of original programs. Interpretations of permitted decompilation provisions indicate a requirement that the gained information is indispensable. It is also believed that one must ask the author for the information before determining if that information is readily available and that the goal of interoperability of programs is important.[28]

Restricted acts of decompilation are then addressed by the article. Decompilation is not to be performed in order to gain a substantially similar product or to sell to third parties.

Almost as an aside, the third provision of Article 6 reiterates the authors' rights. These rights are not to be interpreted inconsistently with the Berne Convention, nor do they allow anything more extensive than a "normal exploitation of the computer program."[29] The normalcy of an exploitation is not further clarified.

C. How is protection granted?

The basic method of protection used by the Directive is copyright, in its literary sense, and thus is consistent with the Berne Convention. This is an easy solution for the Union, as most member states are already parties to Berne, and will need only little national legislative action to comply. The lack of action on this measure is reflected in the dearth of Union case law concerning the Directive. What is not clear is what will happen if the Union joins with new member states who are not parties to Berne --will they be required to comply, or will they be able to enforce without reciprocity in exact provisions?[30]

Two other methods of protection are addressed by the

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[28] *Id.* at 670-71.

[29] 1991 O.J. (L 122) 42 (see specifically Art. 6 § 3).

[30] An example that comes to mind are the newly forming Eastern European nations. Not all former Soviet block nations have accepted Berne, and Berne's applicability to newly formed and newly independent states is unclear; what will occur if these nations seek EU acceptance is even murkier.

Directive, each meriting an article, but which receive much less focus than other Directive provisions.

Article 7 provides for "Special Measures of Protection." These are regarded as restricted acts that do not necessarily constitute actual copyright infringement under national laws.[31] A party may not put a program into circulation knowing or having a reasonable basis to know that the program is an infringing copy.[32] Likewise a party may not possess for commercial purposes a known infringing program or having a reasonable belief that such a program infringes.[33] Also considered a violation is circulation or commercial possession of a device which removes protective means to prevent unauthorized copying of a program.[34] Circulation, however, is not defined under the article and might mean a sale, license, or free distribution. Sanctions for these violations is seizure of the program copy by any method a member state chooses to implement.

Reserved protection may be applied directly through individual member states in accordance with Article 9, Continued Application of Other Legal Provisions. This article allows two protections. First, it allows the same subject matter to gain any protection possible through member state intellectual property provisions such as patent and trademark. The article also offers protection to programs created before the required implementation of the Directive on January 1, 1993, allowing a retroactive application to protected objects. This is not to say that a retroactive application to claims will necessarily follow.

D. Issues of Time under the Directive.

Two issues of time can generally arise under this Directive, term of protection and deadlines of implementation.

Article 8 determines the term of protection consistent with

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[31] DES BALBES, *supra* note 6, at 679.

[32] *Id.* at 680.

[33] *Id.*

[34] *Id.*

general copyright as fifty years. If the author is a natural person, protection is granted for life plus the fifty years. If the author is a legal person, protection is granted from fifty years after the program's first introduction to the public. This is determined to be a minimum term of protection, as the second paragraph of the article allows inconsistent but greater terms of protection under a member state's individual laws. This minimum, however, is regarded in the software/computer industry as greatly exaggerated. Programs afforded the minimum protection will be either outdated, out of use, or profitably licensed out for total use by most of the industry well within fifty years.[35]

The second issue of time concerns implementation deadlines. Article 10, Final Provisions, determined that member states must comply with the Directive by January 1, 1993. Inclusion of such a deadline opened a Pandora's box of direct effects and Francovich principle possibilities.[36] · Owners of authorship rights may, after January of 1993, claim rights under direct effects if their member state governments have not implemented the special measures of "non-infringing" protection as in Article 7 of the Directive. It is conceded that a citizen may enforce his or her treaty rights individually even if a directive is not directly applicable, so long as provisions in the Directive were limited in time.[37] Provisions in this Directive giving latitude already expired on January 1, 1993. In addition, an author may try to sue a member state government for damages from non-implementation under the Francovich principle.[38] One can easily see

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[35] *Cf. Id.* at 680.

[36] Francovich v. Italy, cases C-6 & 9/90 1991 E.C.R. I-5357, 2 C.M.L.R. 66 (1993), stands for the principle that when a directive has a specific time line and is not implemented by a member state of the EU, a private plaintiff may directly sue that non-acting member state for damages if the plaintiff can establish first, that the directive grants rights to individuals, second, that the contents of those rights are clearly stated in the directive, and third, that there is a causal link between the plaintiff's damages and the state failing to act on the directive in question.

[37] P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 308-09 (5th ed. 1990).

[38] Francovich v. Italy, *supra* note 36.

economic damages arising out of a lack of Article 7 "special measures of protection" calling for seizure of infringing products from the market.

III. ADDITIONAL PROTECTION OF COMPUTER TECHNOLOGY.

Though attempting to be comprehensive, the EU Directive on computer software is not the only protection afforded to the computer industry. The EU has enacted other directives aimed at computer semiconductor chips ("chips directive"), and the software directive itself reserves additional protection through the laws of member states. The Court of Justice may therefore be presented with issues interpreting the software directive in unintended ways. Such an interpretation almost occurred in a 1995 copyright claim, and will be noted here. Lastly, proposals for a directive protecting computer databases are currently being advocated by the Commission of the European Union.[39]

A. The Union's additional Directive focusing on semiconductor chips.

Five years before the Union promulgated its Directive protecting software, an earlier Directive was created to protect another aspect of the computer industry --semiconductor chips. The preamble of the chips directive reads similar to the software directive's.[40] The chips directive may therefore have been created by as much a desire to protect a specialized industry, as an experiment to test case specific directives, and determine how to use directives to favor Union markets without provoking significant external criticism.

The chips directive is regarded as a response to the United States' Semiconductor Chip Protection Act of 1984 ("Chip Protection

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[39] Debra B. Rosler, *The European Union's Proposed Directive for the Legal Protection of Databases: A New Threat to the Free Flow of Information*, 10(1) HIGH TECH. L.J. 105, 107 (1995).

[40] Compare directive 1991 O.J. (L 122) with directive 87/54 EEC.

Act").[41] The Chip Protection Act opened discussion in the computer industry on whether semiconductor chips, not being pure intellectual property, merited protection under the Berne Convention. Hoping for comity, the Union followed the case of the United States, by enacting specific legislative protection.[42] The desire for reciprocity in an international market is clear from the specific provisions and contingencies contained in Article 3, sections (6) and (7), dealing with agreements with non-Member States.

　　　　The chips directive vests the creator of a chip with the power to enforce a negative right against others using the product, similar to intellectual property. The protected objects are defined in Article 1 as being the three-dimensional patterns, or topography, of the semiconductor chips themselves. This is not referred to by its common industry name, a "mask", because the authors wanted to allow future interpretations of semiconductor chips to be covered without creation of a new directive.[43] Much of the methodology of protection is deferred to individual member states as shown in Articles 2 and 4 of the semiconductor directive.

　　　　Article 4 allows permissive registration and deposit of the chip in a manner similar to the United States' patent process. Article 5 determines the prohibited acts to be chip reproduction and commercial exploitation, and the third paragraph of this Article allows an in-depth analysis of the chip by others without authorization. This has been interpreted as fully allowing reverse-engineering/decompilation of semiconductor chips in the Union's member states.[44] The term of protection for chips is set at 10 years from the date of registration or 15 years from first fixation if not registered pursuant to Article 7.

　　　　Critics of the United States semiconductor protection maintain that the authors ignored that semiconductor chips may have been

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[41] Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 901-914 (1994), *amended by* the Semiconductor International Protection Extension Act of 1991, § 1, 105 Stat. 320 (1991).

[42] GROVES, *supra* note 8, at 131.

[43] *See id.* at 133.

[44] *Id.* at 135.

protected under the Paris Convention on Industrial Property.[45] The Paris Convention provides general protection for "goods" of intellectual property while the Berne Convention protects more literary and artistic works. But the Paris Convention was never really integrated into successful semiconductor chip protection. This existing criticism and failure to properly function may have been the reason the authors of the European Union's computer software directive decided to integrate software protection with the Berne Convention.

In any event, the chip directive is an interesting foreshadowing of computer protection under the Union considering the Union's motivations, definition of what goods and acts should be protected, lenient attitudes toward reverse engineering, and delegation to member states the means of protection. The only practical difference between the two Directives is a reliance on pre-existing international Conventions by the latter software directive.

B. Case law touching on the software directive as copyright.

It is important to note that to date no issues concerning the software directive have been referred to the Union's Court of Justice. In other copyright claims, the Court has been careful to distinguish general copyright issues from the copyright protection afforded to software in the 1991 directive.

Such a mention is noted in a 1995 holding by the Court in *Radio Telefis Eireann and another v. European Commission.*[46] The issues of that case concerned competition under Article 86 of the Treaty and compulsory licensing of copyrights. The plaintiffs in the case were publishers who wished to print complete weekly television guides in Northern Ireland. Individual television guides were published by each of the major broadcasting networks on an individual

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[45] *Id.* at 132.

[46] Joined cases 241 & 242/91, Radio Telefis Eirmann and another v. Commission, 1995 E.C.R. 416.

basis, and each refused to offer up the information to the publisher relying on exclusivity of copyright as expressed in the Berne Convention.[47] The plaintiff-publisher consistently won in decisions by the Commission on Article 86 of the Treaty, the Court of First Instance of the European Communities, and on defendant's appeal to the Court of Justice.[48]

The defendants in the case were in a de facto dominant position as per Article 86. Claims of exclusivity through copyright created abusive dominance but it prevented the production of a new, comprehensive product. Though the dominant position did not affect inter-member state trade, it had the potential to do so. The Commission had the valid power to stop infringements of Article 86 as determined by Regulation 17/62, article 3.[49] On its face the *Radio Telefis* decision has little to do with software, but the Commission was fearful of the case's influence on software, and the parties of the case noted an intent to exclude computer software from the decision.[50]

Software manufacturers are in a similar position to the broadcasters in *Radio Telefis*, holders of exclusive information questionably protected by copyright. The holding indicates that the Commission had concerns during argument of the case that the decision would impact upon software manufacturers if copyright were allowed as a viable defense against unfair competition.[51] The defendant's response was that express legislation should be created to the contrary.[52] Legislative action became unnecessary on account of the decision extinguishing such a defense, but the Court was very careful to say that under the case's fact situation, the Berne Convention did not apply copyright to the Community.[53] Inconsistent

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[47] *Id.* at ¶¶ 3-10 (opinion of the Advocate General).
[48] *Id.* at ¶ 9.
[49] *Id.* at ¶ 8.
[50] *Id.* at ¶ 136.
[51] *Id.*
[52] *Id.*
[53] *Id.* at ¶ 83 (judgement of the Court).

with the concerns of the Commission, this distinguishes the copyright situation addressed to the Union's Court of Justice from any situations which might arise under the software directive. The software directive directly applies standards of the Berne Convention to the Community as a whole, even as the Community is not a per se signatory to the Berne Convention. Though the Union, especially the Commission, feared use of such a defense with the software directive, the holding from the Court of Justice does not create any sort of express deterrence to use of such a copyright defense in the field of computer software.

C. The Proposed Database Protection.

The effects of the proposed database directive[54] are similar to those of the software directive -- European markets are favored while foreign, notably American, databases are more open to abuse. Though in a much more limited manner, the database directive takes from the software directive an interfacing of protection with the Berne Convention in the form of copyright guarantees.

The Commission proposed this directive since it recognized the need to balance the necessity of accessing the myriad of information stored in worldwide databases, especially medical and educational information, against the ease with which these databases can be downloaded and copied.[55] The needs for such additional protection beyond existing copyright laws remains questionable. Most information is denied protection under copyright since such information is simply facts lacking in originality. The proposed database directive seeks to encourage individuals to profit from collecting these facts. In addition, few issues have been presented to

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[54] Amended Proposal for a Council Directive on the Legal Protection of Databases, EUR. PARL. DOC. (COM 464 final-SYN 393) (1993). Please note that an original copy of the proposed Directive is generally unavailable, therefore all direct references to the Directive throughout this article are based on factual statements indebted and cited to the Rosler.

[55] Rosler, *supra* note 39, at 106.

the Union concerning abuse of databases. To date, only one written question has been presented to the Commission concerning exchanges of personal data for insurance purposes.[56] One issue hardly seems to objectively justify the Commission's proposed Directive on the matter.

Database compilations is the subject matter protected by the proposed database directive. The database directive vests the rights to use these databases with the owner of the data who, unlike in the field of copyright, is not necessarily the "author." Also noted is that moral rights will probably not be gained by the owner.[57] The database protection focuses only on the economic benefits to be derived from database exclusivity, and not inherent valuation of the information itself.

The protection of the databases is enacted in a bifurcated manner. The first approach is a weakened recognition of the Berne Convention and existing copyright protection. The Directive applies such protection to all databases originating in the Union and as well as foreign databases on conditions of reciprocity.[58] Copyright is weak as a protective measure because it does not apply to facts, which are the main substance of a database.

The second approach is pure *sui generis* protection from the Directive preventing the unauthorized extraction of information.[59] This second approach to protection has the practical effect of removing any ability of international reciprocity of the proposed database directive, as no other nation grants protection of databases in this form.[60]

The Directive also expressly states which acts relating to databases will be exceptions in terms of additions and uses. Limited additions will be permitted to databases on three conditions: (1) the addition must be brief and the author must be noted; (2) the addition may be a quotation; or (3) the addition may be a pertinent

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[56] 1994 O.J. (C 336) 31.

[57] Rosler, *supra* note 39, at 113, 116-17.

[58] *Id.* at 114-16.

[59] *Id.* at 116.

[60] *Id.* at 122-23.

illustration.[61]

In general under usage, one may remove insubstantial parts from the database.[62] No definition of "insubstantial parts" has been presented, and case law is a problematic method for refining this test for the same reason case law does not assist in defining the software Directive's standard of originality -- there is no precedent value. One may also use the database for private or non-commercial uses, to which copyright's fair use defense may be applied.[63] Two concerns occur by these permitted uses. It remains unclear whether the permitted private/non-commercial uses are limited to removing insubstantial parts or whether, since it may be assumed that profit should not occur, the entire database will be open to private users. There is also discussion as to whether licensing of the databases will open the door to abuse of those databases by either commercial or non-profit users in permitting a fair use copyright defense.[64]

The term of protection is split depending upon which of the two protections, Berne or the *sui generis* approach, is being enforced. The copyright provisions of 50 years are consistent with Berne. The *sui generis* aspects will be protected for at least 10 years, and may be extended up to 15 years in the final draft of the Directive.[65] Such a shortened term of protection is consistent with computer industry standards, where goods and services such as software and databases are outdated very quickly and no longer require protection. The term of protection begins "at successive accumulation of insubstantial additions, deletions, or alterations in respect to the contents of the database."[66] This is interesting because one wonders if this clause will be used to define permitted removal of "insubstantial parts." The passage suggests that the information going into a database is "insubstantial" before being accumulated, and would thus likely to be

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[61] *Id.* at 119.

[62] *Id.* at 119.

[63] *Id.* at 120-21.

[64] *Id.* at 121-22.

[65] *Id.* at 117.

[66] *Id.* at 118.

still "insubstantial" when removed. Such an interpretation could permit large segments of a database to be removed from the whole, especially if facts show that the original additions to the database were large deposits of information, "insubstantial" before accumulation.

The database directive has three major criticisms which indicate it will not be an effective means of database protection.

The first criticism relates to the standard of what will be protected. By interfacing with the Berne Convention for at least one-half of the protection, the database will have to meet Berne standards of originality over facts in order to gain copyright protection. In the alternative a lesser standard, analogous to what exists in Great Britain, has been suggested. This lesser standard could protect databases if the collection of information manifests application of a special skill.[67] After all, what database protection should protect is that the collection of the database's comprehensive information is special enough to merit protection.

The second criticism is that database protection creates an express block to the free flow of information within the Union. The World Intellectual Property Organization suggests that the Berne Convention should not be used in such a restrictive manner, and if the Directive is successful, Berne should be amended to correct this abuse.[68] It is unsure how strong this position will become since the software directive, and intellectual property rights, are generally recognized as acceptable blocks to free movements of goods achieved through equivalent means.

The third criticism flags, before the database directive is accepted, one problem the Directive shares with the existing software directive. This criticism points out that the database directive has been drafted in a manner which hinders possibilities of reciprocity under the Berne Convention.[69] Such a criticism manifests the underlying aim to favor European databases and open foreign

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[67] *Id.* at 134.

[68] *Id.* at 136.

[69] *Id.* at 137.

databases to potential abuse in the Union's commercial market. It would be practically impossible for foreign owners of databases to enforce these rights without reciprocity.

The database directive results in the same effects as the software directive, using the Berne Convention as a means of protection while limiting reciprocity in order to favor the European market. It will be interesting to observe the final draft of the database directive in light of these criticisms as the effects are currently in practice with the software directive.

IV. CONCLUSIONS

Copyright protection should, if applied as generally used, create blocks to the free movement of computer software in sales and distribution. Infringing copies should not arrive on the market for a consumer to purchase. This is certainly what the software directive appears to accomplish. But the Directive, perhaps intentionally, goes beyond its goals.

One can see that it is not comprehensive as a means of general protection; it refuses to stand alone. It expressly permits additional member states protections in the realm of intellectual property. It is a sibling to another earlier Directive on semiconductor chip technology. The software directive also seems to have borne a proposed directive on database protection, operating in a similar manner with similar goals. And most importantly, the Directive draws on concepts, terminology, and member state legislation as used under the Berne Convention.

The Directive is also not comprehensive as a means of specific copyright protection. It can accommodate an abuse of free ideas from allegedly protected programs and spells out the means by which an infringing party may obtain this information. It allows for "necessary" decompilation.

Unlike general copyright protection of programs, especially as regarded in the United States which is a major manufacturing nation of software, the Union's protective measures are not a step in the right direction. The Union does not afford protection when a creating

author may wish to preserve his or her rights in the future. The Directive, in the guise of progressive copyright protection, is in fact a means of progression only to enhance the economic strength of the European software industry by allowing for slight violations of other authors' programs in the Union. The Directive protects and encourages development from existing programs which is a malum in se moral violation among computer industry standards. The Directive does not manifest this principled standard.