SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programmes)
on: 10 July 1989
No. Cion prop.: 5662/89 PI 25
Subject: Proposal for a Council Directive on the legal protection of computer programs

At the first meeting of the Working Party on Intellectual Property (Computer Programs) on 10 July 1989 (1) the Commission representative presented the above proposal. The Working Party held an initial general exchange of views and then began the first reading of the individual articles.

1. The Commission's presentation of the proposal

1.1. Explaining the need for the proposed Directive, the Commission representative mentioned the following aspects:

(a) the undertaking the Commission had given in this connection in the White Paper on the completion of the Internal Market.

(1) The Luxembourg delegation was not represented at this meeting.
(b) the lack of harmonization between national legislations and between the Member States' jurisprudence in the field of the protection of computer programs;

(c) the need to ensure a level of protection equivalent to that available under the laws of the Community's principle trading partners, with the aim of preventing the illegal copying of computer programs;

(d) the creation of a stable legal situation that would encourage investment in this field in the Community.

1.2. The Commission representative stressed that the Commission's approach was minimalist and involved no more than the vertical harmonization of laws in this area.

1.3. The Commission proposed that computer programs be protected by copyright as literary works but that other means of protection should not be ruled out in special cases.

1.4. The Commission representative stressed that the proposal was to be situated in the context of the Berne Convention for the Protection of Literary and Artistic Works, and that the Commission had attempted to balance the interests of the creators of computer programs and those of their competitors and of users. He also indicated that the first reactions on the part of the industry concerned had been generally positive.

2. General discussion

2.1. Without prejudice to comments on individual provisions, all delegations welcomed both the Commission's initiative of harmonizing the legal protection for computer programs in the Member States and the form of
protection adopted, although the Greek delegation entered a scrutiny reservation on the text of the proposal.

2.2. Several delegations, however, felt it would be better to ensure greater conformity between certain provisions of the Directive and the Berne Convention, in particular as regards the duration of protection. The German delegation, supported by several others, referred to Articles 19 and 20 of the Berne Convention and commented that the States party to that Convention had the option of conferring rights more extensive than those granted by the Convention itself. On the other hand, the duration of protection as laid down in Article 7 of the proposal for a Directive was more limited than that provided for in the Berne Convention. Those delegations stressed in that connection that Article 7 of the proposal for a Directive as it stood could create a dangerous precedent that might be invoked by other States to provide for other exceptions to the Berne Convention.

The Commission representative pointed out that when drafting Article 7 of the proposal the Commission had taken as its basis a suggestion made at WIPO for the duration of the protection of collective works, as computer programs were very often considered as such.

3. First reading of the Articles of the Directive (Articles 1 to 3)

3.1. Article 1 - The object of protection

(a) Paragraphs 1 and 2

3.1.1. The French delegation, supported by the Belgian delegation, preferred to say "software" rather than "computer program" \(^{(2)}\), as in its opinion

\(^{(2)}\) The Spanish delegation said that the expression "programas de ordenador" should be used in Spanish.
the Directive should provide for the protection not only of computer programs as such but also of design material and auxiliary documentation.

Other delegations (DK/D/NL/UK and the Commission) felt that auxiliary documentation was already protected by copyright and that accordingly it would be sufficient to provide for the protection of computer programs.

The French delegation drew the Working Party's attention to the distinction to be made between auxiliary documentation such as instruction manuals on the one hand and material used in the design of computer programs on the other hand, and the Commission representative expressed the intention of specifying that computer programs included design material, as a consequence of which the expression "computer programs" could be maintained.

3.1.2. The Spanish, French and Netherlands delegations preferred the term "works" without referring specifically to literary works. The Italian delegation also supported that view and added that it would be in favour of a broader term than "literary works".

The German and United Kingdom delegations, on the other hand, and the Commission representative were in favour of maintaining "literary works".

The Irish delegation suggested specifying "literary works as defined in the Berne Convention". That suggestion was welcomed by the Italian delegation and the Commission representative.

3.1.3. The Spanish delegation felt that the expression "exclusive rights" should be interpreted as covering not only property rights but also moral rights.
3.1.4. The German delegation, supported by the French and United Kingdom delegations, suggested merging paragraphs 1 and 2. It suggested the following wording:

"The Member States shall confer copyright protection on computer programs as literary works".

(b) Paragraph 3

3.1.5. Two objections were raised regarding the first sentence of paragraph 3:

- certain delegations pointed out that it was already established that copyright protected expression but did not protect ideas and principles, and that accordingly it was superfluous to restate that principle;

- certain delegations voiced hesitations regarding the terms "logic", "algorithms" and "programming language".

In response to those objections, most delegations felt that this sentence could be reduced to the following:

"The protection provided for in this Directive shall apply to the expression in any form of a computer program".

The Irish delegation supported this position but wanted a guideline to be laid down to the effect that protection did not extend to the programming language.

The Commission representative noted that majority view but stressed the wisdom of laying down guidelines for national courts regarding the distinction between the expression of a computer program, which was protectable, and the ideas and principles which were the basis of such
a program, which were not protectable. To meet that concern the German delegation raised the possibility of referring to that distinction in the recitals.

3.1.6. Most delegations were also in favour of deleting the second sentence of paragraph 3, pointing out that interfaces were an integral part of computer programs and must consequently be protected in the same way.

The Commission representative said that the intention of that sentence was to leave open the possibility of protecting interfaces in certain cases although in most they were not protectable.

(c) Paragraph 4

Subparagraph (a)

3.1.7. In view of the lack of uniform criteria of originality (3) in the laws of the Member States and the lack of any definition of that concept in the Berne Convention, several delegations felt it was desirable that a definition of the originality either of literary works or of computer programs be included in the Directive. Some of them expressed hesitation regarding the definition suggested by the Commission in the explanatory memorandum (page 18, point 1.3.): "that the work has not been copied".

(3) It was pointed out that in the German version "Originalität" must be substituted for "Individualität".
The Danish delegation wondered whether the concept of originality should not be replaced by the terms used in Article 2(2) of the Council Directive of 16 December 1986 on the legal protection of topographies of semiconductor products (4).

The Netherlands delegation asked whether computer programs which were not originals could be protected under the Directive.

The Commission representative said he would review this subparagraph in the light of the delegations' comments.

Subparagraph (b)

3.1.8. Several delegations pointed to the distinction between programs generated by computers and programs generated with the help of computers and the Commission representative said that the Commission's intention had been to restrict the scope of this subparagraph to programs generated by computers.

In the light of that clarification several delegations felt that this subparagraph was unnecessary at the present level of technical development, at which it was not yet possible to have computers generate programs without any human intervention.

The Commission would re-examine this question.

(4) That paragraph reads as follows:
"2. The topography of a semiconductor product shall be protected in so far as it satisfies the conditions that it is the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry. Where the topography of a semiconductor product consists of elements that are commonplace in the semiconductor industry, it shall be protected only to the extent that the combination of such elements, taken as a whole, fulfills the abovementioned conditions."
3.2. **Article 2 - Authorship of a program**

3.2.1. Several delegations felt it was necessary to make a clearer distinction in this Article between the author and the owner of a computer program and between property rights and the author's moral rights, the latter being inalienable while the former could be transferred.

The German delegation stressed in this connection that paragraphs 2 to 5 were not a derogation from the principle enunciated in paragraph 1 and that accordingly the phrase "subject to the following paragraphs" should be reconsidered.

3.2.2. The United Kingdom delegation pointed out that in connection with the phrase "unless otherwise provided by contract" in paragraphs 2, 3, 4 and 5 it should be stipulated that the author of a computer program must be a party to the contract in question.

3.2.3. The Spanish and French delegations expressed doubts regarding the imposition in paragraph 2 of an obligation on a group of authors to exercise exclusive rights in common without any indication of the procedure to be followed in the event of disagreement amongst them.

The German and Italian delegations considered this paragraph superfluous as the provisions of national law on collective works should apply to computer programs created by groups of persons.
3.2.4. Several delegations asked whether paragraphs 3 and 4 were compatible with Article 6a of the Berne Convention.

In connection with paragraph 4 the Danish delegation said that Danish law allowed the universal transfer of all rights, both property and moral, to an employer.

The Spanish delegation suggested specifying in paragraph 4 that rights should be exercised by an employer only insofar as necessary for the pursuit of his commercial activities.

The Commission representative proposed examining the possibility of resolving the problem of the compatibility of paragraphs 3 and 4 with the Berne Convention by specifying that the rights referred to in those two paragraphs were property rights, not moral rights.

3.2.5. The Italian delegation doubted the need for paragraph 5.

3.3. Article 3 - The beneficiaries of protection

3.3.1. The Netherlands and the United Kingdom delegations questioned the point of the first paragraph since it did no more than restate a principle enunciated in the Berne Convention. The Italian delegation suggested that an explicit reference to that Convention would clarify this provision.
3.3.2. The Commission representative explained that the purpose of paragraph 2 was to extend to one or more members of a team of programmers the right to the protection to which they would not normally be entitled because they were nationals of a State which was not a party to the Berne Convention.

Several delegations entered reservations on the wisdom of granting any such extension of protection without making it subject to reciprocity.