SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer Programs)
on: 14 and 15 September 1989

No. prev. doc.: 8395/89 PI 58
No. Con prop.: 5682/89 PI 25

Subject: Proposal for a Council Directive on the legal protection of computer programs

1. Introduction

1.1. The Working Party gave a second reading to the proposal for a Council Directive on the legal protection of computer programs (5682/89 PI 25), taking into account as well the drafting improvements to a number of Articles suggested in the Annex to 8395/89 PI 58.

1.2. On the basis of the Working Party's discussions, the Secretariat has prepared suggested wordings for some Articles in order to facilitate discussions at the next meeting. The suggestions in question are set out in the Annex.
2. Article 1(1) and (2) and Article 7

At the Working Party's earlier meetings, opinions differed as to whether computer programs should be protected as "literary works" or simply as "works" (see 7398/89, point 3.1.2. and 8395/89, point 7.1); the length of protection for literary works also proved controversial (see 7398/89, point 2.2. and 8395/89, point 4).

In order to resolve these two issues satisfactorily, the German delegation proposed a compromise whereby the Directive would stipulate, in Article 1, that Member States were to grant copyright protection to computer programs as works (without the adjective "literary") within the meaning of the Berne Convention (1) and, in Article 7, that protection was to be granted for the life of the author and for fifty years after his death. This proposal, which would have the merit of providing a period of protection in accordance with that in Article 7(1) of the Berne Convention without expressly referring to literary works, was supported by the French and Netherlands delegations.

The Spanish and Italian delegations agreed to the German delegation's proposal in referring to works within the meaning of the Berne Convention but entered reservations on the length of protection proposed; they felt that this should be fifty years from the program's publication or creation.

(1) Berne Convention for the Protection of Literary and Artistic Works.
While willing to assist in arriving at a satisfactory compromise, the United Kingdom, Danish and Irish delegations entered scrutiny reservations on the omission of "literary".

To help those delegations go along with the compromise proposed by the German delegation, the French delegation explained that it had no problem in granting computer programs the protection provided for by the Berne Convention for literary works, which represented a minimum of protection, but that the reason for its difficulty in accepting the reference to literary works was that its national legislation on the protection of literary works contained provisions which went well beyond that minimum and which should not extend to computer programs.

In response to this concern, the idea was mooted of stipulating in the Directive that Member States were to grant computer programs the minimum copyright protection provided for literary works by the Berne Convention but that they were free to extend to such programs, or not, the protection deriving from additional national-law provisions on literary works.

The Commission representative urged the need to protect computer programs as literary works since the omission of that adjective could give rise to uncertainty in relation to the relevant case law.
3. Article 1(4)(a)

Most delegations found the wording suggested in the Annex to 8395/89 an improvement on that in the Commission proposal. The United Kingdom delegation and the Commission representative preferred the alternative "intellectual effort", while the German delegation preferred "creative effort". The Italian and Netherlands delegations favoured using both adjectives; the Italian delegation proposed the following wording:

"Computer programs shall be protected if they are the original result of the author's own creative intellectual effort." (2)

The German delegation felt that this subparagraph should express the idea that computer programs were not to be subject to more stringent creativity criteria than those applied to other works under the Berne Convention; it proposed the following wording:

"Computer programs shall be protected if, having regard to their own nature, they fulfil the same criteria as other works under the Berne Convention." (3)

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(2) "I programmi per elaboratore sono tutelati a condizione che costituiscano il risultato originale dello sforzo intellettuale creativo del loro autore."

(3) "Computerprogramme werden geschützt, wenn sie hinsichtlich ihrer eigenen Art die gleiche Voraussetzungen wie andere Werke des Berner Übereinkommens erfüllen."
4. **Article 1(4)(b)**

As it was not possible in the present state of the art for computer programs to be created by computer programs without the intervention of any human agency, a large majority of delegations felt that this provision was premature and should be deleted.

5. **Article 2(1)**

5.1. **The French delegation**, with the support of the Spanish delegation, pointed out that neither the wording in the Commission proposal nor that suggested in the Annex to 8395/89 took account of French legislation on collective works, i.e. works created, at the instigation of a natural or legal person, by a number of persons without it being possible to attribute separate rights to each of them; under that legislation, the rights in such a case went to the person at whose instigation the work was created. **The Netherlands delegation** said that, under its national legislation, in such a case the person at whose instigation the work was created was deemed to be its author. Those delegations wanted the provision's wording adapted to take account of their national laws. The Netherlands delegation accordingly suggested the following wording:

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(4) Such collective works ("oeuvres collectives") should be distinguished from those in paragraph 2 of this Article, which were collaborative works ("oeuvres de collaboration") under French law.
"The person or group of persons who created the computer program or any person deemed to be its author under national law shall be considered the author of the program." (5).

The German delegation suggested that it would suffice to state that this provision was without prejudice to national provisions regarding collective works.

5.2. The United Kingdom delegation thought it should be stated in this paragraph, as in the Article's other paragraphs, that the author of the program could transfer his rights by contract.

6. Article 2(2)

6.1. The Netherlands and Spanish delegations entered reservations on the term "droits économiques" (economic rights) (6) in this paragraph. Other delegations were in favour of retaining that term to show that the paragraph did not cover moral rights.

6.2. The German delegation thought that computer programs created jointly by a group of natural persons should continue to be governed by the provisions of national law.

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(5) "Maker van een computerprogramma is de persoon of groep van personen die het programma gecreëerd heeft of degene die door de nationale wet als maker wordt aangemerkt."

(6) The term used should be that in Article 6a of the Paris Convention ("droits patrimoniaux" in French, "economic rights" in English).
6.3. **The United Kingdom delegation** wanted the words "unless otherwise provided by contract" revised to avoid the interpretation that a contract between one of the authors and a user could be invoked to thwart a contract between the joint authors.

6.4. **The French delegation** wanted it stipulated that, in the event of disagreement between the joint authors over the joint exercise of rights, one of them could refer the dispute to a court.

7. **Article 2(3)**

The Danish, German, Greek, Netherlands and United Kingdom delegations were opposed to this paragraph, arguing that there was no justification for allowing the person who commissioned the program to reproduce and sell it without the author's consent; any exceptions to the author's exclusive right should be considered under Article 5.

The Working Party Chairman suggested that consideration be given to the possibility of amending this provision to the effect that the author of the program was to exercise all economic rights, unless otherwise provided by contract.

8. **Article 2(4)**

Most delegations were in favour of such a provision, with the Netherlands delegation entering a scrutiny reservation on the wording.
The German delegation wanted it stipulated that the employer was to exercise economic rights in respect of the program only insofar as was necessary in the context of the employment relationship.

9. Article 2(5)

Most delegations were in favour of deleting this paragraph for the same reasons as were given for the deletion of Article 1(4)(b).

Only the Irish and United Kingdom delegations and the Commission representative would prefer the Directive to contain a provision on the subject.

10. Article 3(1)

The United Kingdom delegation suggested the following wording for this paragraph on the basis of Article 3 of the Berne Convention:

"Member States shall protect computer programs which are created by nationals of States party to the Berne Convention or first published in such a State in accordance with the provisions of the Berne Convention." (7)

(7) "Les États membres protègent les programmes d'ordinateur qui sont créés par les ressortissants d'États parties à la Convention de Berne ou qui sont publiés pour la première fois dans un tel État conformément aux dispositions de la Convention de Berne."
The Spanish, Italian and Portuguese delegations were in favour of an explicit reference to the Berne Convention.

The German and French delegations could agree to either the wording proposed by the United Kingdom delegation or the deletion of the paragraph; the German delegation could also agree to the wording proposed by the Commission.

The Netherlands delegation was in favour of deleting the paragraph.

11. Article 3(2)

Most delegations were in favour of deleting this paragraph.

12. Heading of Article 4

The Commission representative proposed that the Article heading be rendered using the customary term in each language rather than translating it literally (8).

13. Article 4(a)

13.1. The Danish, German, Greek, Italian, Netherlands and Portuguese delegations were in favour of deleting the second sentence of subparagraph (a), while the United Kingdom and Irish delegations wanted it to stand.

(8) This proposal also applied to the headings of Articles 5 and 6.
13.2. The French delegation proposed that this subparagraph be worded as follows:

"(a) the reproduction of a computer program, in whole or in part by any means, in any form and for whatever purpose, such as loading, displaying, running, transmission or storage of the computer program;".

Most delegations proposed to state their views on this wording at the Working Party's next meeting.

The Netherlands delegation suggested that the words "and making public" be inserted after "reproduction" in the wording proposed by the French delegation.

14. Article 4(b)

14.1. The German and Greek delegations considered that the word "translation" in the wording suggested in the Annex to 8395/89 should not be construed as including transposition of programs from source code to object code or vice versa; the Irish delegation and the Commission representative, however, maintained that "translation" should include such transposition.

14.2. The Netherlands delegation pointed out that, where translation was performed by a person other than the program's author with the latter's permission, the person in question should be entitled to copyright in respect of the translation.
14.3. The Netherlands delegation entered a scrutiny reservation on the phrase "and the reproduction of the results thereof" in the wording suggested in the Annex to 8395/89.

14.4. The United Kingdom delegation entered a scrutiny reservation on the whole of subparagraph (b) as suggested in the Annex to 8395/89.

15. Article 4(c)

15.1. The German, Spanish, French and Irish delegations voiced doubts about the inclusion of the reference to importation in subparagraph (c) in the wording suggested in the Annex to 8395/89.

15.2. The Netherlands delegation proposed that the second sentence in subparagraph (c) refer to the first sale by the author or with his consent.

15.3. The German and Greek delegations were opposed to the second sentence of subparagraph (c) as set out in that Annex in that, under it, the first sale of a copy of a program did not exhaust the right to control its rental; they did not want the Directive to require their authorities to introduce a rental right in respect of computer programs. The German delegation proposed the following wording for the subparagraph:
"(c) the distribution of copies of a computer program. The first 
sale of a copy of a program shall exhaust the right of the 
author to control further distribution of that copy." (9).

The Danish and United Kingdom delegations objected to this proposal on 
the grounds that their national legislation recognized rental rights 
and they feared this wording would exclude such rights. The Belgian, 
Danish, German, Netherlands and United Kingdom delegations considered 
that subparagraph (c) should neither require Member States not 
recognizing rental rights to introduce them nor require Member States 
which did recognize such rights to cease to do so.

15.4. The Belgian delegation suggested the following wording for the second 
sentence of subparagraph (c):

"The first sale of a copy of a program shall exhaust the right of the 
author to control successive sales or further sale of that copy".

15.5. The Italian delegation suggested the following wording for 
subparagraph (c):

"(c) any commercial act, such as sale, licensing, leasing, rental and 
importation for such purposes. Unless otherwise provided by 
contract, the first sale of a copy of a program

(9) "(c) die Verbreitung von Kopien eines Computerprogramms. Mit dem 
Erstverkauf einer Programmkopie erschöpft sich das Recht des Urhebers 
auf die Kontrolle über die Weiterverbreitung dieser Kopie".
shall exhaust the right of the author to control successive sales of the copy." (10).

15.6. The Italian delegation also asked whether rental should include loans.

16. Article 5(1)

16.1. The Working Party considered that Article 5(1) should apply in the absence of any contractual provisions to the contrary.

16.2. The Italian delegation proposed the following wording for this paragraph:

"1. In the absence of any contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not be subject to authorization by the author where they are necessary for the legitimate use of and as a back-up to the program."

16.3. Several delegations considered that the user should be able to make a back-up copy of the computer program. Other delegations were very wary of the idea of being able to make a back-up copy, but were prepared to envisage one copy, provided that it was used only if the original were destroyed.

(10) "(c) ogni atto di natura commerciale, quali la vendita, la licenza, il leasing, la locazione, nonché l'importazione ai medesimi fini. Salvo patto contrario, la prima vendita di una copia di un programma esaurisce il diritto dell'autore di controllare le successive vendite di tale copia."
The Danish delegation thought it might be necessary to make a number of copies for the program's normal use, especially where this was recommended in the program instructions; other delegations considered that such copies were permitted by the wording suggested in the Annex to 8395/89.

The French delegation proposed that the paragraph be worded as follows:

"1. Where a copy of a computer program has been properly supplied, the acts enumerated in Article 4(a) and (b) required for the program's normal use shall not, in the absence of any contractual provisions to the contrary, be subject to authorization by the right holder. However, for any one copy of the program only one back-up copy may be made."

17. Article 5(2) (new)

Most delegations felt that the new paragraph 2 suggested in the Annex to 8395/89 was unnecessary and favoured its deletion.

18. Article 5(3)

18.1. The Danish, German, French, Italian, Netherlands and United Kingdom delegations were opposed to paragraph 3 as suggested in the Annex to 8395/89, corresponding to Article 5(2) in the Commission proposal. Several of them opposed the implicit requirement in it
that libraries obtain permission from the right holder to rent or lend out computer programs.

18.2. The United Kingdom delegation could envisage the retention of paragraph 3 as suggested in the Annex to 8395/89, provided that the word "rental" was replaced by "reproduction". The Spanish delegation supported this suggestion.

19. New provision in Article 5

The Danish delegation proposed the insertion of a new paragraph in Article 5:

"Notwithstanding Article 4(a) and (b), Member States may authorize reproduction of a computer program in writing."

20. Article 6

20.1. The Spanish, French, Italian and United Kingdom delegations were in favour of the principle of this Article, subject to closer consideration of the wording.

The Danish, German, Greek and Netherlands delegations, however, felt that the Article had criminal-law implications; since the Community had no criminal-law powers, they were in favour of deleting the Article.
The Working Party Chairman pointed out that this Article was not a criminal-law provision since it merely listed acts which infringed the author's exclusive rights, without stating whether action should be taken against such infringements under criminal law or civil law and without laying down any penalties for such infringements.

20.2. The Italian delegation proposed the addition of a new paragraph in Article 6:

"3. Member States shall adopt all appropriate measures to facilitate the detection of infringements of the rights provided for in this Directive." (11)

21. Article 8(1)

The United Kingdom delegation suggested that the legal provisions to which the Directive was without prejudice be given in a non-exhaustive list annexed to the Directive rather than be listed exhaustively in this paragraph. It also suggested stipulating that the Directive was without prejudice to Member States' obligations under international Conventions.

22. Article 8(2)

Several delegations pointed out that this paragraph should not make Article 2(3) and (4) applicable retroactively where the exercise of rights was not dealt with in the contract concerned.

(11) "Gli Stati membri adotteranno tutte le misure idonee ad agevolare l'accertamento della violazione dei diritti previsti alla presente direttiva."
23. Article 9(2)

The Working Party Chairman reiterated his suggestion that the text of the relevant national provisions should have to be communicated not just to the Commission but also to the other Member States.
ANNEX

In order to facilitate discussion, delegations will find below suggestions for the drafting of a number of provisions discussed at the Working Party’s meeting held on 14 and 15 September 1989. These suggestions attempt to reflect the views expressed by the majority of delegations; they do not constitute an amendment of the Commission’s proposal and in no way commit the Commission or its services to amend its proposal accordingly.

Introductory provision

The provisions of this Directive apply exclusively to computer programs. No provision shall be interpreted as applying to other literary works protected under the Berne Convention unless the legislation of a Member State so provides. The existing provisions regarding the protection of literary works in Member States shall not be taken to apply to computer programs where such provisions go beyond the minimum protection granted by the Berne Convention to literary works and re-affirmed by this Directive.

1.1. [Member States shall protect computer programs by conferring exclusive rights to authors of programs in accordance with the provisions of this Directive.]

1.2. Member States shall grant copyright protection to computer programs as [literary] works within the meaning of the Berne Convention.

1.4.(a) A program shall be protected if it is the result of the author’s own [creative] [intellectual] effort. No other qualitative or aesthetic criteria shall be applied.

1.4.(b) Delete.

2.1. The author of a computer program shall be the natural person or group of natural persons who created the program. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.
2.2. In respect of a computer program created by a group of natural persons jointly, the exclusive economic rights shall be owned and exercised jointly unless otherwise provided by contract between the joint authors. Member States shall make appropriate provisions for the resolution of disputes arising between the joint authors as to the exercise of such rights.

2.3. [First variant: delete.]

[Second variant: Where a computer program is created under a contract for the provision of programming services, the natural or legal person for whom such services are provided shall be entitled to exercise the economic rights in the program only to the extent provided by contract.]

2.4. No change to the text in Annex 1 of document 8395/89.

2.5. Delete.

3.1. Add: "In accordance with the provisions of the Berne Convention.

3.2. Delete.

4. The exclusive rights of the author or his successor in title include the right to do or to authorize:

a) the reproduction and the communication to the public of a computer program by any means and in any form, in part or in whole. Whenever the acts of loading, displaying, running, transmission or storage of the computer program necessitate a reproduction of the program, such reproduction shall be considered a restricted act;

b) No change to the text in Annex 1 of doc. 8395/89

c) the distribution of a computer program or copies thereof. [The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy but shall not exhaust the right to control its rental or its loan.]
5.1. In the absence of any contractual provisions to the contrary, or where a copy of a computer program has been sold, performance of the acts enumerated in Article 4a) or 4b) which are technically necessary for the [continued] use of the program by its lawful acquirer for the purpose for which the program was made available shall not require the authorization of the right holder. [However, for any one copy of a program only one safeguard copy may be made; it may be used only in the event of the original being destroyed or damaged to the extent that it cannot be used.]

5.2. Delete the text of paragraph 2 in Annex 1 of doc. 8395/89.

5.3. [Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.]

6.1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

6.2. It shall be an infringement of the author's exclusive rights in the computer program to make, import, possess or deal with articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

6.3. Member States shall adopt all necessary measures to facilitate the identification of infringements of provisions of the present Directive.

7. [1st variant: Protection shall be granted for the life of the author and fifty years after his death.]

[2nd variant: Protection shall be granted for fifty years from the date of creation.]
[3rd variant:
The term of protection granted under this Directive shall be compatible with the provisions of the Berne Convention.]

8.1. No change to the text in Annex 1 of doc. 8395/89.

8.2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9].