REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 6381/90 PI 24
No. Cion prop.: 5682/89 PI 25 COM(88) 816 final - SYN 183

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

A. INTRODUCTION

1. This proposal for a Directive was considered by the Council (Internal Market) on 14 May 1990, with particular reference to the questions of reverse engineering and protection of interfaces. The Council concluded that:

- it was desirable not to move too far from the existing legal order of protection;

1 On the basis of a report from the Presidency in doc. 6179/90 PI 22.
- all the options identified in the report from the Presidency merit further consideration, as did the possibility of combining some of those options;

- the Permanent Representatives Committee and the Working Party were instructed to continue their exploration of all of those options, taking account of the opinion of the European Parliament when received;

- the Permanent Representatives Committee was invited to report back to Council on its examination of all the options with a view to a more definitive consideration of this matter in Council.

The Presidency submits a report to the Permanent Representatives Committee on its further examination of reverse engineering and protection of interfaces (Section B below) and on the state of work on other aspects of the proposal for a Directive (Section C below).

B. REVERSE ENGINEERING AND PROTECTION OF INTERFACES

2. The Presidency considers that the discussion in Council on 14 May 1990 indicated that the majority of delegations were in favour of seeking a solution along the lines of the third option suggested in the Presidency report (an exemption from copyright which would specifically allow reverse engineering for defined purposes under defined circumstances), or a combination of that

2 The European Parliament has not yet given its opinion.
option with the second option (a "fair use" provision). The Working Party has therefore concentrated its efforts in this direction. Following examination by the Working Party of contributions from several delegations, the Presidency submits a compromise proposal in the Annex hereto, which attempts to incorporate "fair use" aspects (option 2) into an exemption for reverse engineering (option 3), as well as offering a solution to the question of protection of interfaces.

3. Since this proposal was tabled as recently as 8 June, delegations have been able to give no more than initial reactions to it. The initial reaction of the majority of delegations was favourable to the approach of this proposal as an overall compromise, subject to more detailed examination and subject to drafting.

4. The following points should be noted in connection with this proposal:

(a) With regard to protection of interfaces, the new recital making it clear that the second sentence of Article 1(2) is necessary for the avoidance of doubt is intended to overcome the reservations of those delegations which consider this sentence superfluous. The Commission services have offered to prepare a statement for the Council minutes which could help to remove any remaining misgivings on this point.

(b) The Danish and German delegations have scrutiny reservations, pending consultation with telecommunications experts, on Article 8(3), which is intended to make it clear
that the Directive under consideration may not be invoked to avoid obligations to publish interfaces resulting from other Community acts in the fields of information technology and telecommunications.

(c) With regard to reverse engineering, the Danish delegation considers that further consideration should be given to the second option mentioned in the Presidency's previous report (a "fair use" provision) before a decision is taken in favour of the approach taken by the Presidency's compromise proposal.

(d) The exemption from copyright allowing reverse engineering is strictly limited to passage from machine code to source code. The terms "modify the form of the code" in Article 5(3) are intended to make this clear.

(e) A definition of the term "interoperability" needs to be further elaborated in the Working Party, particularly with regard to the selection of points on a copyright protected program at which an independently created program may interoperate with the first program.

(f) The Commission services consider that reverse engineering under the conditions laid down should preserve the right of the copyright holder to remuneration, while the majority of delegations consider that no remuneration may be required in respect of acts exempted from copyright protection. The terms "on reasonable conditions" in Article 5(3)(b) attempt to provide a compromise solution on this point.
5. The Presidency submits its compromise proposal on protection of interfaces and reverse engineering to the Permanent Representatives Committee for approval of the approach adopted, on the understanding that:

(a) it constitutes an overall package,

(b) approval should be subject to further consideration in the light of the European Parliament's opinion when received, and

(c) a more detailed definition of interoperability should be elaborated.

C. PROGRESS ON OTHER ASPECTS OF THE PROPOSAL FOR A DIRECTIVE

6. The Working Party has made considerable progress during the last six months on the proposal for a Directive. The consolidated text contained in document 7010/90 PI 32 sets out the draft as it now stands, together with an indication of the points on which delegations still have reservations. Many of these reservations relate to points on which the Presidency considers that no further progress can be made until the European Parliament has given its opinion.

The major points of disagreement (other than protection of interfaces and reverse engineering) are summarized in points 7, 8 and 9 below. The Presidency submits these three points to the Permanent Representatives Committee for consideration at the appropriate time.
7. Rental right

7.1. The Permanent Representatives Committee discussed this question on 28 March 1990 and instructed the Working Party to continue its examination, taking account of the individual legal arrangements in the Member States.

7.2. The Commission services maintain their position that the Directive should provide for an exclusive rental right, as set out in Article 4(d) (which is to be read in conjunction with Article 4(c)) of the consolidated text, but no longer insist on the maintenance of Article 5(2) of their proposal. The French, Irish and Italian delegations support the Commission's position.

The Danish, German, Netherlands and United Kingdom delegations on the other hand consider that the question of rental should be discussed in a broader framework encompassing other areas of copyright, and that this Directive should not set a precedent which might prejudice the broader discussion.

The Spanish and Portuguese delegations, while supporting the Commission's proposal, would not oppose a postponement of this issue to a broader framework.
8. **Special measures of protection**

The majority of delegations and the Commission services support the first variant of Article 6 as set out in the consolidated text, considering that this provision is essential as a clear signal of the Community’s determination to combat piracy.

However, the Greek delegation has a scrutiny reservation on the inclusion of "the possession for commercial purposes" in paragraph 1(c), and the Danish delegation has a reservation on the devices referred to in paragraph 1(c) being liable to seizure (paragraph 2), as it considers this sanction to be too severe.

The German delegation has a reservation on the whole of the first variant of Article 6, as the only way of transposing its provisions into German law would be to amend criminal law, and it points out that the Community has no competence in respect of criminal law. It also has reservations on including possession among the acts referred to in this article. The German delegation has therefore proposed the second variant of Article 6, which is supported by the Spanish delegation.
9. Term of protection

The majority of delegations and the Commission services are in favour of Article 7 as set out in the consolidated text, which is in conformity with Article 7 of the Berne Convention.

The German delegation has a reservation on this Article, as it considers that Member States should have the option (also allowed by the Berne Convention) of granting a longer term of protection. German copyright law has a term of protection of the life of the author and seventy years after his death.

D. ACTION REQUESTED

10. The Presidency requests the Permanent Representatives Committee to:

(a) approve the approach adopted in the Presidency’s compromise proposal on protection of interfaces and reverse engineering set out in the Annex, on the understanding that it constitutes an overall package, that approval should be subject to further consideration in the light of the European Parliament’s opinion when received, and that a more detailed definition of interoperability should be elaborated;

(b) consider whether this proposal should be submitted to the Council (Internal Market) at its meeting on 20 June 1990 for approval on the same understanding.
(c) consider at the appropriate time the major points of disagreement set out under points 7, 8 and 9 above;

(d) note with approval the progress made on the other aspects of the proposal for a Directive.
COMpromise proposition by the presIdency
on protection of Interfaces and reverse engineering

1. Interfaces

   a) a new recital shall be added as follows:

   "Whereas for the avoidance of doubt it has to be made clear
   that only the expression of a computer program is protected
   and that ideas and principles which underlie any element of
   a computer program, including those which underlie its
   interfaces, are not protected by copyright under this
   directive; whereas to the extent that logic, algorithms and
   programming languages constitute ideas and principles which
   underlie a computer program, they are not protected by
   copyright under this directive."

   b) Article 1(2) shall read:

   "Protection in accordance with this Directive shall apply to
   the expression in any form of a computer program. Ideas and
   principles which underlie any element of a computer program,
   including those which underlie its interfaces, are not
   protected by copyright under this Directive."

   c) Article 8(3) shall read:

   "The provisions of this Directive shall be without prejudice
   to specific requirements of Community law already enacted in
   respect of the publication of interfaces in the telecommunication
   sector or Decisions of the Council
   relating to standardization in the field of information
   technology and telecommunications."
2. Restricted Acts

Article 4 a) and b) shall read:

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

(a) the reproduction of a computer program by any means and in any form, in part or in whole. Insofar as they necessitate a reproduction of the program in part or in whole, loading, displaying, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the program."

3. Exceptions

a) A new recital shall be added as follows:

"Whereas, although the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available, constitutes an infringement of the exclusive rights of the author, it has to be considered that under the following circumstances performance of any of these acts in order to modify the form of the code, by or on behalf of a person having a right to use a copy of the program, is legitimate and consistent with fair practice and must therefore be deemed to be authorized; whereas such circumstances exist when a modification of the form of the code of a computer program is indispensable to obtain the necessary information to ensure that interoperable programs can be created or can function, that is to ensure the functioning of an independently created program with an existing program enabling these programs to function together in the ways such programs are intended to function; whereas Member States must ensure that such a

3 A definition of the term "interoperability" has to be further elaborated.
modification does not conflict with a normal exploitation of the program and does not unreasonably prejudice the legitimate interest of the rightholder."

b) Article 5 shall read:

"1. In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require the authorization by the rightholder where they are necessary for the use of the program by the lawful acquirer in accordance with its intended purpose. The making of a back-up copy by a person having a right to use the program may not be prevented by contract insofar as it is necessary for that use.

2. Notwithstanding the provisions of Article 4(a) the person having a right to use a copy of a program shall be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, if he does so while loading, displaying, running, transmitting or storing the program in execution of his contract.

3. The authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) shall not be required - notwithstanding contractual provisions to the contrary - where performance of these acts to modify the form of the code is indispensable to achieve the interoperability of an independently created program, provided:

a) these acts are performed by or on behalf of a person having a right to use a copy of the program;

b) the information necessary cannot be obtained otherwise within a reasonable time or on reasonable conditions;

c) these acts are strictly limited to those parts of the program necessary to attain interoperability;

d) the information thus obtained is not given to others, except when necessary for the interoperability of the independently created program.
4. The provisions of paragraph 3 of this article shall not permit the information obtained through its application to be used:

a) for goals other than to achieve interoperability of the independently created program,

b) for the development, production or marketing of a program substantially similar in its expression, or

c) for any other act which infringes copyright."