EUROPEAN COMMUNITIES
THE COUNCIL

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SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer Programs)
on: 12 and 13 October 1989

Nos prev. docs: 9304/89 PL 68, 9013/89 PL 64
No. Cion prop.: 5682/89 PI 25

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

Introduction

1.1. At its meeting on 12 and 13 October 1989, the Working Party held a third reading of the proposal for a Council Directive on the legal protection of computer programs (5682/89 PI 25), also basing itself on the Secretariat's drafting suggestions set out in the Annex to 9013/89.
1.2. On the basis of the Working Party’s discussions and also taking account of its earlier meetings in July and September (1), the Presidency prepared a consolidated text of the proposal for a Directive which is set out in 9304/89 PI 68.

1.3. The German delegation made the statement contained in the Annex.

Introductory statements

2. In the light of certain provisions of the Berne Convention for the Protection of Literary and Artistic Works and national laws based on that Convention, the Working Party agreed to stipulate in introductory statements that the Directive did not oblige Member States to grant to computer programs protection beyond the minimum protection under the Berne Convention and that it did not affect derogations provided for under national legislation in accordance with that Convention on points not covered by the Directive.

(1) See 7938/89 PI 53, 8395/89 PI 58 and 9013/89 PI 64.
Article 1 - Object of protection

3.1. Paragraphs 1 and 2 (9013/89, (Annex))

The Working Party agreed to delete paragraph 1 and replace it by a provision incorporating paragraph 2 (9013/89) and stating that the copyright protection provided for by this Directive covered computer programs and their preparatory design material (1) but did not apply to operating instructions and manuals.

In this context, most delegations were in favour of including the word "literary". The Spanish, Italian and Netherlands delegations were against inclusion. The French, Greek and Portuguese delegations expressed a preference for deletion of the term "literary" but indicated some flexibility on this point.

3.2. Paragraph 3 (5682/89)

This paragraph has become paragraph 2 in the new consolidated text (9304/89). A large majority of delegations was in favour of the following sentence: "Protection in accordance with this Directive shall apply to

(1) The Spanish delegation stated its preference for "technical or preparatory design material."

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the expression in any form of a computer program." The last part of the sentence should therefore be deleted.

The Greek delegation was in favour of the original Commission proposal although it could support the majority.

The Commission representative stood by the original Commission proposal. It was suggested that the second sentence could be worded as follows: "Ideas and principles which underlie any aspect of a program, including interfaces, shall not be protected under this Directive."

3.3. Paragraph 4(a) (9013/89, (Annex))

This paragraph has become paragraph 3(a) in the new consolidated text.

The Belgian, French, Irish, Portuguese and United Kingdom delegations were in favour of deleting "creative".

The Danish, Spanish, Greek and Italian delegations were in favour of using the term "creative intellectual".
The German delegation, supported by the Danish delegation, was in favour of the term "personal intellectual effort".

The French delegation suggested replacing "intellectual effort" by "intellectual activity".

The Netherlands delegation suggested the following text: "A computer program shall be protected when it is original, in that it is the result of the author's own intellectual effort."

Most delegations suggested that the last sentence of this paragraph be deleted. The Commission representative, supported by the French delegation, suggested that this sentence be worded as follows: "No judgment must be passed on the merit of the result of the intellectual effort."

3.4. Paragraph 4(b) (5682/89)

This paragraph has become paragraph 3(b) in the new consolidated text.

Most delegations were in favour of deleting the paragraph on the grounds that it was premature at this stage to make a provision concerning computer generated programmes.
The Irish and United Kingdom delegations and the Commission representative wanted this paragraph to stand, the United Kingdom delegation having suggested examining a document submitted by interested circles on the existence of computer-generated programmes.

The German delegation reserved its position pending examination of the above document.

Article 2 - Ownership of rights

4.1. Paragraph 1 (9013/89)

The Netherlands delegation requested that the following text be added at the end of the first sentence: "or the natural or legal person deemed to be its author under national law."

4.2. Paragraph 2 (9013/89)

The Danish, Spanish, Italian, Netherlands and United Kingdom delegations were against the second sentence of this paragraph.

A compromise solution was found whereby the Member States which already had such provisions could retain them without obliging the other Member States to adopt such provisions.
4.3. Paragraph 3

A large majority of delegations was in favour of deleting this paragraph.

The Italian delegation was in favour of the text contained in the Annex to 8395/89.

The Commission representative stood by the original Community proposal (5682/89).

4.4. Paragraph 4

A large majority of delegations was in favour of the following text:
"Where a program is created by an employee in the execution of the duties entrusted to him or at the request of his employer, the employer ...."
(remainder is unchanged in relation to the text of the Annex to 9013/89).

The Spanish delegation entered a reservation on this paragraph and suggested the following wording: "the exercise of these rights by the employer shall be limited to his usual activity at the time of the author's remittal of the work".

4.5. Paragraph 5

See positions on Article 1(4)(b) (point 3.4).
Article 3 (5682/89 + 9013/89) - Beneficiaries of protection

5.1. Paragraph 1

A large majority of delegations was able to accept the text put forward by the Commission.

Several delegations (DK/NL/UK) felt that adding "in accordance with the provisions of the Berne Convention" was not strictly necessary but was a useful message to third countries.

5.2. Paragraph 2

All delegations requested that this paragraph be deleted.

The Commission representative stood by his original proposal.

Article 4 (9013/89) - Restricted acts

6.1. Paragraph 4(a)

The Danish, French, Irish, Netherlands, Portuguese and United Kingdom delegations were in favour of a broad interpretation of the term "reproduction", i.e. including loading among other things.
The Belgian, Spanish, Greek and Italian delegations were in favour of a restrictive concept confined to the permanent reproduction of the program.

The German delegation reserved its position on this issue.

As a compromise solution, the Presidency suggested adopting the text tabled by the French delegation (9013/89, p. 10), with the addition suggested by the Netherlands delegation (9013/89, p. 10).

The German, Danish and Spanish delegations reserved their positions on this text.

The Commission representative expressed doubts on the expression "for whatever purpose".

6.2. Paragraph 4(b)

Most delegations were in favour of the text set out in 8395/89.

The Netherlands delegation gave a reminder of its position set out in point 14.2. of 9013/89.

6.3. Paragraph 4(c), first sentence

Most delegations were in favour of the text set out in 9013/89.
The Italian delegation requested that reference be made to commercial acts only.

The Belgian, Danish, Spanish, French, Netherlands, Portuguese and United Kingdom delegations wanted commercial and non-commercial acts to be covered.

The Danish, German and Greek delegations requested that it be made clear that the term "distribution" meant "distribution to the public".

6.4. Paragraph 4(c), second sentence

The German, Greek and Netherlands delegations were against including a rental or lending right in the last part of the sentence, the Netherlands delegation stating that in its view this Directive was not the appropriate context for introducing Community rules governing rental rights.

The Danish, Spanish, Italian, Irish and United Kingdom delegations were in favour of a rental right but against a lending right.

The Portuguese delegation reserved its position on a lending right.
Article 5 (9013/89) - Exceptions to the restricted acts

7.1. Paragraph 1, first sentence

The German, Danish, Italian and United Kingdom delegations requested the deletion of "or where a copy of a program has been sold" since this would prejudge the issue of whether "shrink-wrap" licences were binding contractual provisions.

The Greek and Netherlands delegations requested that the term "technically necessary" be specified. In this context the Netherlands delegation suggested adding "for loading, audit, archives, research and security purposes." (2) after "... correct use of the program by its lawful acquiror".

The United Kingdom delegation requested that it should either be stated in Article 4(b) that the user of a computer program may adapt his program to his personal requirements or that Article 5(1) should include a derogation along these lines to the rule laid down in Article 4(b).

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(2) "ten behoeve van laad, audit, archief, studie en beveiligingsdoeleinden."
As a compromise solution, most delegations could agree to the text suggested by the Italian delegation on p. 13 of 9013/89.

The Spanish delegation and the Commission representative were against this text. The German delegation reserved its position.

7.2. Paragraph 1, second sentence

Most delegations were in favour of one or more back-up copies.

The German delegation did not think it was necessary to settle this problem in this text.

The Commission representative preferred the question to be settled in the licence agreements.

7.3. Paragraph 2 of the Commission proposal (paragraph 3 in the Annex to 9013/89)

Most delegations asked for this paragraph to be deleted.
The Portuguese delegation reserved its position.

The Commission representative stood by the Commission proposal, on the ground that if this provision were deleted, copyright holders could force libraries to get rid of their stocks of computer programs.

7.4. The Danish delegation reiterated its proposal that reproduction of the source code in writing be removed from the control of the author of the program.

This proposal was not supported by other delegations.

**Article 6 (9013/89) - Other restricted acts**

8.1. Paragraph 1

Several delegations could agree to this provision, provided that the following words were added: "Without prejudice to national provisions on combating piracy".

The German and Netherlands delegations entered reservations on this paragraph.
8.2. Paragraph 2

The Belgian, Spanish, French, Italian, Irish and United Kingdom delegations were in favour of this provision.

The German, Danish, Greek, Portuguese and Netherlands delegations entered reservations on the text.

8.3. Paragraph 3

A number of delegations (B/DK/E/IRL/UK) thought the content of this paragraph should be put in a statement.

**Article 7 (9013/89) - Term of protection**

9. The great majority of delegations were in favour of the third variant amended as follows: "The period of protection granted to computer programs and their preparatory design material shall be a term of protection compatible with the terms provided for the protection of literary works under the Berne Convention but such terms shall not exceed the life of the author and fifty years from the date of his death".

The German delegation was in favour of variant 3 in 9013/89, as it thought protection should be guaranteed at least fifty years after the author's death.
Article 8 (8395/89 and 9013/89) - Continued application of other legal provisions

10. The Danish, French, Italian, Netherlands and United Kingdom delegations were against retroactive effect of the Directive.

Article 9 (8395/89) - Final provisions

11.1. Paragraph 1

All delegations were able to agree from the outset to a two-year period for transferring the Directive into national law.

11.2. Paragraph 2

All delegations asked for addition of a duty to notify other Member States.
Statement by the German delegation

Today the Working Party is again due to discuss the proposal for a Directive on the legal protection of computer programs and also to examine some new variants on the text.

On Monday - three days before the start of the meeting - the German delegation received the summary of proceedings at the last meeting on 24 and 25 September in French, and the drafting proposals in English. German texts are as yet unavailable, so it has not been possible to make adequate preparation for today's meeting.

The German delegation understands that the Presidency wants to conclude the discussions quickly and is scheduling meetings at short intervals. However, speed should not be at the expense of the quality of results. Discussions so far have shown that there is a whole series of difficult questions still unsolved. The aim must not just be to solve them as quickly as possible: the solutions must be good ones.
When the Directive comes into force it will have major consequences for software manufacture throughout the Community. Its effectiveness will hinge largely on the solutions which the Working Party finds for the various problems. Provisions decided on in haste, without careful consideration of their effects, can do more harm than good. The advantages and disadvantages of the various texts therefore need to be examined carefully. This can only be done if:

1. working documents for meetings are available in all the official languages and

2. working documents and minutes of previous discussions are ready sufficiently in advance of meetings to allow adequate preparation.

The German delegation has been unable to make such preparation for today's meeting, and so it is unable to take part in the discussions. It will give its views on the new proposals when it has had an opportunity of examining the German texts.
The German delegation would ask the Chairman and the Council Secretariat to ensure that in future, the requisite working documents reach delegations in the appropriate official languages in good time for meetings. If this cannot be done, the meetings must be postponed.