OPINION
of the Section for Industry, Commerce, Crafts and Services
on the
on the legal protection of computer programs
(COM(88) 816 final - SYN 183)

Rapporteur: Mr MORELAND
On 23 January 1989, the Council decided, in accordance with Article 100 A of the Treaty establishing the European Economic Community, to consult the Economic and Social Committee on the


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The Section for Industry, Commerce, Crafts and Services was instructed to prepare the work on this topic and adopted its Opinion on 4 October 1989. The Rapporteur was Mr MORELAND.

The Economic and Social Committee, at its .... Plenary Session, meeting on .... adopted .... the following Opinion:

1. Summary of the Commission’s Proposal

1.1. The draft Directive introduces into Community law the concept of the protection of computer programs through the law of copyright. This concept already exists in the law of several Member States. The proposal does not introduce a specific law but rather proposes that Member States should accord computer programs the same copyright protection that they accord to literary works. In addition the term of protection is to be 50 years from the date of creation of the program.

1.2. However, the proposal goes on to exempt from protection "ideas, principles, logic, algorithms or programming language underlying the program". It also makes lawful the use by the public of programs in non-profit making public libraries.

1.3. The proposal gives rights to the commissioner of programs rather than the creator and to the employer rather than the employee (unless otherwise provided by contract).

2. General comments

2.1. The Section welcomes the Commission’s proposal as a means of ensuring appropriate copyright protection for the Community’s computer and software industry and in eliminating barriers to trade in the Community.

The Section recognizes that absolute precision in the wording is extremely difficult for the first draft of a directive on this complex subject. It believes that a number of drafting changes are required as specified under part 3. That detailed changes are in some places recommended should not detract from the Section’s overall approval of the draft.
2.2. The Section believes that the Commission’s approach has two significant advantages:

1. In according computer programs the same protection as literary works use can be made of a “ready made” copyright law. The lengthy process of adaptation and development of the new law that a “sui generis” approach would bring is avoided.

2. The approach is intended to bring computer programs within the definition of “literary works” in the Berne Convention (this could be made more explicit in the directive). The advantage of this approach is that it encourages States outside the Community to treat Community programs as copyright works entitled to the protection of the law.

   Indeed, the more closely Community law is assimilated to the Berne Convention the greater this advantage becomes. If the Member States are all in closer harmony with the Berne Convention then, in the opinion of the Section, the ability of the Member States to influence the forthcoming discussions on the revision of the Convention will be enhanced.

   The Section recognizes that clauses designed for the purposes of “literary works” the Berne Convention may not be entirely appropriate for “computer programs” and that rules to take account of their specific characteristics will be needed.

   Nevertheless the Section stresses the importance of being as close to the Berne Convention as possible.

2.3. One matter of concern, however, is that the proposal still leaves open the possibility of the continuation of barriers to the free movement of computer programs within the Community through, for example, the co-existence of different definitions of “originality” in Member States’ laws.

2.4. The Section believes that the Commission’s proposal will not restrict the spread and understanding of information technology. However, it stresses the importance of ensuring that no undesirable restrictions exist through the enforcement of the competition provisions of the Treaty.

2.5. The Section supports the need to ensure that computer programs receive adequate protection and believes that there are clear advantages in the establishment of a copyright law regulating the protection of computer programs in Community legislation.

2.6. Consequently the Section welcomes the proposal from the Commission, subject to the following specific comments.
3. Specific comments

3.1. Preamble: Eighth Recital

3.1.1. It should be made clear whether the "interfaces" referred to in this recital are the interfaces themselves, or the specifications for those interfaces.

3.1.2. There is no dispute that "ideas and principles" are outside the protection of the law of copyright. It is, therefore, superfluous to state that the ideas and principles behind the interfaces are "not copyrightable subject matter", because ideas and principles behind any program are "not copyrightable subject matter".

3.1.3. To take these two points into account, the whole recital could be deleted in its entirety without affecting the substance of the proposal. Alternatively, the recital could be amended to read as follows:

"Whereas for this purpose a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. Any such means of interconnection and interaction are generally known as 'interfaces'. Interfaces are protectable in the same way as any other copyright computer program."

3.2. Preamble: Ninth Recital

In view of the importance of the international copyright conventions to the means of protection chosen for programs which are eligible for copyright protection it might be useful to add to the end of this recital

"... and to the principle of compliance by each Member State to the provisions of the International Convention for the Protection of Literary and Artistic Works (the Berne Convention)"

3.3. Article 1 - Object of protection

3.3.1. Article 1: Paragraph 2

As stated in part 2 above, the Section considers that the protection of computer programs through the medium of the "literary works" provisions of the Berne Convention should be explicitly referred to in the draft. Therefore the paragraph should conclude with the words:
"in the context of the Berne Convention".

3.3.2. Article 1: Paragraph 3

3.3.2.1. The Section supports the exclusion of ideas and principles from copyright protection as computer programs.

3.3.2.2. "Logic" and "algorithms" are not clear terms and are frequently interchangeable. In any event, in the current state of technology and of Member States' legislation, few would argue that "logic", "algorithms" and "programming languages" are within a definition of "computer programme". Consequently specific reference in this article to these terms as requiring exclusion from protection only serves to confuse and cause unnecessary debate. Consequently the Section believes they should be removed.

3.3.2.3. As has been stated above, it is not in dispute that "ideas and principles" are not susceptible of copyright protection. It is superfluous here, just as in the preamble, to state that the ideas and principles behind the interfaces are "not copyrightable subject matter". The second sentence could be deleted. The Section understands and supports the concern that the proprietors of the copyright in interfaces may exercise their rights in an anti-competitive matter. The Section, however, remains convinced that the second sentence of Article 1.3. adds nothing to the control of anti-competitive practices which it is the clear responsibility of the Commission to enforce through the Competition rules of the Community.

3.3.2.4. The paragraph could therefore read as follows:

"Protection in accordance with this Directive shall apply to the expression in any form of a computer program but shall not extend to the ideas, or principles which underlie the program."

3.3.3. Article 1: Paragraph 4

3.3.3.1. The Commission does not define "originality". As the interpretation of this word in law differs from Member State to Member State, this clause does not harmonize anything. Hence, the continued existence of different degrees of originality in different Member States could act as a barrier to trade in computer programs between Member States.

3.3.3.2. The Section recognizes that this problem of "originality" is not unique to the law of copyright in computer programs and extends to many more aspects of copyright. However, it stresses that failure to address the problem in the first attempts to harmonize the law of copyright will only perpetuate a barrier to trade in the Community and simply delay a solution.

3.3.3.3. The Section believes that any clause defining "originality" should incorporate the following:

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3.3.3.3.1. There should be no requirement that the program meets aesthetic, qualitative or quantitative criteria.

3.3.3.3.2. There should be no requirement of a level of programming expertise.

3.3.3.3.3. The test for originality should be that to the extent the program has not been copied from another program it should be protected.

3.3.3.4. If, for any reason, it is decided not to have a definition of originality then paragraph 4(a) would be better drafted if it were expressed positively rather than negatively, and the following is suggested:

"A computer program shall be protected if it satisfies the same conditions as regards its originality as apply to any other literary work."

3.4. Article 2 - Authorship of program

3.4.1. Article 2: Paragraph 3

3.4.1.1. It is questionable whether the draft complies with the "moral rights" provisions of the Berne Convention. Nevertheless, these provisions are more relevant to the more traditional forms of literary work copyright, not to computer programs.

3.4.1.2. It is for this reason that the Section supports this paragraph as drafted. The Section believes that it is right that the first owner of the copyright in commissioned works should be the person who has ordered and paid for them. There is a difference between computer programs and any other sort of literary work. The concepts that have made Member States' legislatures reluctant to vest the copyright in commissioned works in the commissioner, rather than the commissioneer apply to more traditional forms of literary work. Furthermore, invariably these matters are covered expressly in a contract between commissioner and commissioneer, especially where the commissioneer is concerned about the intellectual property rights in the program commissioned.

3.4.2. Article 2: Paragraph 4

The Section supports the principle of this paragraph, but, for the sake of clarity, proposes that it be reworded as follows:

"Where a computer program is created in the course of employment and it is part of the employee's job to create the program, the employer shall be entitled to exercise all rights in respect of the program unless otherwise provided by contract or by legally enforceable collective bargaining agreement."

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3.4.3. Article 2: Paragraph 5

The Section believes that it is important to protect the rights of the owner of the copyright in the program which generates the subsequent program. For that reason, the Section suggests the following changes of wording:

Add after "contract":-

"This Article does not affect the copyright in the computer program which generates the subsequent programs."

3.5. Article 4 - Restricted acts

3.5.1. Article 4(a)

"Viewing" a program is difficult to define technically, and should be replaced by "displaying".

3.5.2. Article 4(b)

In order to conform as closely as possibly to the Berne Convention, the Section proposes that 4(b) reads:-

"The adaptation, translation, modification and arrangement of a computer program and the reproduction of such adaptation, translation, modification or arrangement".

Although the Commission has avoided including definitions in this Directive, the word "adaptation" is open to various interpretations and a definition in the Directive may be necessary.

3.5.3. Article 4(c)

3.5.3.1. Although the media upon which a computer program is carried can be "sold" it is inappropriate to use the word "sale" of computer programs themselves.

3.5.3.2. The Commission has not placed any geographical restriction on exhaustion rights (such as a restriction to the Community). Whatever the merits of a geographical restriction the Section considers this a matter of trade and not copyright legislation, i.e. Community copyright law would not be an appropriate vehicle to prohibit parallel importing from outside the Community. Consequently the Section supports the objective of this clause which makes clear in terms of copyright law that the position of EC individuals and companies taking licences of programs from copyright proprietors outside the Community is protected. However, the whole question of parallel importing of computer programs from outside the Community deserves further study by the Commission.

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3.5.3.3. The word "marketing" is difficult to define accurately. The Section proposes certain changes to the drafting of 4(c) to overcome this difficulty.

3.5.4. Redraft of Article 4

It is therefore proposed that Article 4 should read as follows:

"Subject to the provisions of Article 5, the exclusive rights referred to in Article 1 shall 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 adaptation, translation, modification and arrangement of a computer program and the reproduction of such adaptation, translation, modification or arrangement of a computer program;

c) the distribution of copies of a computer program by means of licensing, sale, lease, rental and the importation for these purposes. The right to control the distribution of a copy of a program shall be exhausted in respect of the sale or importation of that copy following the first sale of that copy to any person by the rightholder or with his consent."

(Plus a possible clause defining "adaptation").

3.6. Article 5 - Exceptions to the restricted acts

3.6.1. Article 5: Paragraph 1

3.6.1.1. The paragraph needs more precise drafting. There are many ways of licensing computer programs which do not involve the signature of a written agreement by both parties. There will be fewer such written agreements as technology develops. The Section proposes that the reference to written agreement signed by the parties be deleted and replaced by the words "any valid licence agreement"; further the words "acts enumerated in Article 4(a) and (b) above" should be replaced by the more limited "reproduction by loading, displaying, running, transmission or storage". Further, the present text does not address the question of whether parallel processing of such a program is permitted. Accordingly, the Section recommends the addition of the following after """... the use of the program":

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"... on one processor by one user at any one time".

3.6.1.2. The Commission should also consider including the right to make backup copies of a program as one of the general rights of the user.

The following text is suggested:

"(a) The copyright in a computer program is not infringed by the making of a reproduction of the program, or of a computer program being an adaptation of that program, if:

(i) the reproduction is made by, or on behalf of, the owner of the copy (the "original copy") from which the reproduction is made; and

(ii) the reproduction is made for the purpose only of ensuring that another copy of the program may be used by the owner of the original copy if one copy of the program is lost, destroyed or rendered unusable.

(b) Sub-clause (a) above does not apply if:

(i) there is a clear statement in writing upon the original copy or upon any media or packaging in or with which it is supplied that the right to make backup copies is excluded or if the media upon which the original copy is supplied are not such as would in normal use be lost, destroyed or rendered unusable.

or

(ii) there is a legally valid agreement to the contrary."

3.6.2. Article 5: Paragraph 2

The Section proposes that, for the sake of clarity, the paragraph should read:

"Where a copy of a computer program has been sold or made available to the public by means other than a valid licence agreement, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent the use as reference material of that copy of the program by the public on the premises of non-profit making organizations which make available programs as reference material for the public, such as public libraries."

3.7. Article 6 - Secondary infringement

The Commission should examine the translation in various languages of the word "infringement" to make sure that no criminal sanctions are necessarily implied.
3.8. Article 7 - Term of protection

3.8.1. The Article lays down a term which differs from the term of protection prescribed in the Berne Convention because, as the Commission states in its explanatory memorandum, "attaching the term of protection to the life of a human author might cause some hesitations in the light of joint authorship of computer-generated works and the length of term which will result". As the life of a computer program is invariably far shorter than 50 years, this concern of the Commission's is academic and should not be allowed to weigh against the need to adhere to the provisions of Berne as closely as possible. The same argument applies to any suggestion of any other period of years, e.g. 25 or 30. The Section must emphasize the advantage of adhering closely to the Berne Convention. Consequently, the Article should in the Section's view read as follows:

"The term of protection under this Article shall be the life of the author (or, if there is more than one author, the life of the last author to die) plus fifty years. The term of protection for a computer generated work shall be fifty years from the date upon which it was generated."

The Convention permits "at least 50 years". Nevertheless, to use such wording would invite Member States to impose different terms of protection, i.e. further barriers to trade. In any event use of 50 years clearly complies with the Berne Convention.

3.8.2. If the Commission is also concerned that the wording of the Berne Convention may be changed at some time in the future so that the term will be fifty years "from the date of creation", then the Section still maintains its view that Berne as it is now drafted should be complied with (so far as possible) until it is altered, at which point the Commission could put forward a proposal to alter the wording of the Directive.

However, agreeing to this position now does not mean a commitment to maintain the principles behind this clause at meetings to revise the Berne Convention.

3.8.3. Although the number of programs to which this would apply is minimal, the Section considers that in order to comply as closely as possible with the Berne Convention (and particularly article 7(3) thereof) the following should be inserted (the existing clause 7 becoming clause 7.1.):

"2. In the case of anonymous or pseudonymous works, the terms of protection shall expire fifty years after copies of the program have been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, 7.1. above applies. If the author of an anonymous or pseudonymous work discloses his identity during the said fifty years, 7.1. shall also apply."
3.9. Article 8 - Continued application of other legal provisions

The Section considers that the drafting would be clearer if

a) to be consistent with the Directive on the protection of semi-conductor topography - the phrase: "insofar ... Directive" were deleted; or

b) article 8.1. were replaced by:

"Legal protection for computer programs provided in addition to the law of copyright is not affected by this Directive."

3.10. Article 9 - Final provisions

The latest date to be filled in this Article should of course be 1 January 1993 and the Section hopes that the Council can set an earlier date.

In any event the Section would emphasize the importance of a Council decision on this Directive as soon as possible so that the Member States have a clear and common position for negotiations to revise the Berne Convention.

4. Further comments

4.1. While welcoming this proposal from the Commission, the Section believes that there are other issues in the Green Paper on Copyright that also require legislative proposals and looks forward to receiving these proposals, so that a clear position is established by 1 January 1993 of the Community's position on the whole law of copyright.

4.2. The Section believes the effect of this legislation in terms of both the impact on the computer and software industry and on the development of information technology should be regularly assessed by the Commission, particularly when any changes in Community legislation is envisaged as a result of changes in the Berne Convention, and the Commission should consider giving a regular report on the effect of this legislation to the Council, the European Parliament and the Economic and Social Committee.

4.3. It is clear that there is a serious problem across the Community of unauthorized access to computer programs and data ("hacking"). There is also the problem of "viruses", that is to say, the unlawful insertion of matter into computer programs which impairs their function. Of course, these are not issues of copyright as such but they are issues which affect the use of computer technology and have implications for the regulation of
the single market. The Section recommends that the Commission give these issues serious examination with a view to making legislative proposals.

Brussels, 4 October 1989.

The Chairman of the Section for Industry, Commerce, Crafts

Filotas KAZAZIS

The Secretary-General of the Economic and Social Committee

Jacques MOREAU