COMMON POSITION ADOPTED BY THE COUNCIL ON 13 DECEMBER 1990
WITH A VIEW TO THE ADOPTION OF A DIRECTIVE
ON THE LEGAL PROTECTION
OF COMPUTER PROGRAMS

THE COUNCIL'S REASONS
Subject: Common position adopted by the Council on 13 December 1990 with a view to the adoption of a Directive on the legal protection of computer programs

1. On 5 January 1989 the Commission submitted to the Council a proposal for a Directive on the legal protection of computer programs (1). It based its proposal on Article 100a EEC.

The European Parliament and the Economic and Social Committee delivered their Opinions on the proposal on 11 July 1990 (2) and 18 October 1989 (3) respectively.

In its Opinion, the European Parliament approved the substance of the Commission proposal; it proposed a number of amendments which the Commission has, to a large extent, incorporated in its amended proposal of 18 October 1990 (4).

On 13 December 1990 the Council unanimously adopted a common position within the meaning of Article 149(2) of the EEC Treaty, the text of which is set out in 10652/1/90 PI 82 PRO-COOP 148.

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(1) OJ No C 91, 12.4.89, p. 4.
(2) Not yet published in the Official Journal.
(3) OJ No C 329, 30.12.89, p. 4.
I. Points on which the amended Commission proposal differs, as to the substance, from the European Parliament's Opinion

2. The Commission has not included the new paragraph 2a of Article 1, proposed by the European Parliament. It felt that the proposed definition of computer program was unnecessary in the context of this Directive and that user's guides should not enjoy the same protection as the program itself, since they enjoyed protection in their own right under the Berne Convention for the Protection of Literary and Artistic Works.

The Council endorsed the grounds used by the Commission in rejecting the Parliament's proposal.

3. The amended Commission proposal includes the amendment proposed by the European Parliament involving the introduction of a new Article 5a (now Article 6) which provides for an additional derogation from the exclusive rights of the author so as to permit the creation of an interoperable program. However, the amended Commission proposal does not go along with the amendment proposed by the European Parliament on the following question of substance: whereas the amendment proposed by the European Parliament refers to "any act essential to ensure the maintenance of the program and the creation or operation of interoperable programs", the amended Commission proposal specifies that the derogation is limited to "the reproduction of the code and translation of its form ...........
indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program". The aim of this clarification was to:

(a) limit the number of acts which could be the subject of the derogation to acts involving the reproduction of the code or the translation of its form in order to ensure that the adaptation of the program, which was not necessary for decompilation, did not benefit from the derogation;

(b) ensure that "the maintenance of the program" was limited to the maintenance of the interoperability of the independently created program, since the derogation should be granted only for the purposes of interoperability. The text proposed by the European Parliament could be interpreted as permitting the acquirer of the protected program to benefit from the derogation to carry out acts subject to restrictions, for the purposes of updating or improving the program on the pretext that such acts were intended to "maintain" the program, which was unacceptable to the Commission.

The Council endorsed the Commission's view as regards point (a) above.

As regards point (b), the Council, while sharing the Commission's concern, held the view that the terms used by the Commission could be interpreted too broadly and it preferred to replace "indispensable to achieve the creation, maintenance or functioning of an independently
created interoperable program by "indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs". In order to underline further that interoperability was the only grounds for the derogation and to specify that interoperability was achieved between an independently created program and one or more other programs.

4. As regards Article 7 (now Article 8), the Commission accepted the amendment proposed by the European Parliament that the term of protection should begin on the first of January of the year following the event in question, but did not adopt the amendment concerning the length of the term of protection, on the grounds that it did not correspond to the terms laid down in the Berne Convention; accordingly the amended Commission proposal was aligned on the Berne Convention.

The Council endorsed the reasoning of the Commission in adopting its common position, while making a number of clarifications to the amended Commission proposal to take account of works of joint authorship (Article 7a of the Berne Convention) and of the case where a legal person was considered the author under national legislation pursuant to Article 2(1) of the Directive.

The Council also added a new paragraph 7 to the Article to permit the Federal Republic of Germany, whose current legislation provides for a longer term of protection than that laid down in paragraph 1 (the life of
the author and seventy years after his death instead of the life of the author and fifty years after his death), to maintain the current term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

5. The Commission did not adopt the new paragraphs 2a, 2b and 2c of Article 9 (now Article 10) proposed by the European Parliament on the grounds that paragraph 2a did not correspond to Commission policy on the committee procedure, that paragraph 2b was superfluous and that it would be excessive to forward a report on the implementation of the Directive (paragraph 2c) every two years. However, on this latter point, the Commission agreed in a statement in the Council minutes to forward such a report by the end of 1996.

The Council endorsed the grounds used by the Commission in rejecting the amendments proposed by the European Parliament.

II. Points on which the Council's common position differs, as to the substance, from the European Parliament's Opinion and the amended Commission proposal

6. The European Parliament did not propose any amendment to Article 2(3) nor did the Commission amend its proposal on this provision.

The Council held the view that, where a computer program was created under a contract, the parties involved should be free to specify in the
contract which of the parties would be entitled to exercise all rights in respect of the program; it accordingly deleted the paragraph.

7. The European Parliament did not propose any amendment to Article 3(2) nor did the Commission amend its proposal on this provision.

The Council did not share the view that where a computer program was created jointly by several natural persons, the right to protection should be granted automatically to all authors if at least one author was the beneficiary of protection under national copyright legislation as applied to literary works; it argued that this provision would have the effect of granting the right to protection to one or more persons not covered by the categories of persons listed in Article 3 of the Berne Convention and that such an effect was undesirable. The Council accordingly deleted the provision.

8. The Commission adopted the amendment to Article 4(b) proposed by the European Parliament.

The Council, while accepting the amendment, added "without prejudice to the rights of the person who alters the program", in order to take account of the Article 2(3) of the Berne Convention.

9. The European Parliament did not propose any amendment to Article 4(c) nor did the Commission amend its proposal on this provision.
The Council introduced a number of changes to the provision in order to clarify that:

- the distribution right covered every form of distribution to the public, including rental;

- the exhausting of the distribution right applied at Community level;

- the exhausting of the distribution right did not extend to the right to control the rental of the sold program or of a copy. On this latter point there are two statements in the Council minutes to the effect that this provision does not prejudge the solution to be adopted in a future Community instrument relating more generally to the rental of works of art protected by copyright and that Article 8(2) (now Article 9(2)) permits Member States to adopt transitional measures to protect rights acquired prior to 1 January 1993, including those relating to the rental of computer programs or copies of those programs where the rental was already authorized before that date.

10. The Commission adopted the amendment to Article 5(2) proposed by the European Parliament (Article 5(4) of the amended Commission proposal).

The Council reached the conclusion that the lending to the public of computer programs by public libraries should be left to national legislation and should not be included in the Directive. It accordingly
deleted the provision and added a recital that specifies clearly that "rental" within the meaning of Article 4(c) does not include public lending, which remains outside the scope of the Directive.

III. Drafting amendments

11. Finally, the Commission and the Council made a number of drafting amendments to several provisions of the Directive in order to clarify their content.