Brussels, 14 June 1989

PRELIMINARY DRAFT 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

Sent on: 14 June 1989
To the Members of the Study Group
on Computer Programs
(Section for Industry, Commerce, Crafts and Services)
N.B.: This document will be discussed at the meeting on 5 July 1989.
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 .... The Rapporteur was Mr MORELAND.

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

1. Summary of the Proposal

1.1. The draft Directive introduces the concept of copyright into Community law for the protection of computer programs. 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 believes that the Commission's approach has two significant advantages. First, 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. Secondly (and this could be made more explicit in the proposals) the approach is intended to bring computer programs within the definition of "literary works" in the Berne Convention. 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.
2.2. However, the Section accepts that some Member States’ laws on “literary works” diverge in detail from the Berne Convention and that judgement has to be applied as to the necessity of being as close to the Berne Convention as possible in order to obtain its advantages. Further, computer programs have specific characteristics and some special rules have to be formulated.

2.3. 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.

2.4. 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.

2.5. If concern exists that the enactment of the Directive may limit the spread or advance of information technology, then the Section believes the answer lies not in restricting the law of copyright but in the enforcement of the competition provisions of the Treaty.

2.6. 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.

2.7. Consequently the Section welcomes the proposal from the Commission.

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 interface programs themselves, or the specifications for those programs.

3.1.2. It is not in dispute that “ideas and principles” are not susceptible to copyright protection. It is, therefore, superfluous to state that the ideas and principles behind the interface programs are “not copyrightable subject matter”, because ideas and principles behind any program are “not copyrightable subject matter”.

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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 copyright programs, 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: 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:

"as defined by the Berne Convention".

3.4. Article 1: Paragraph 3

3.4.1. The Section supports the exclusion of ideas, principles and algorithms from copyright protection.

3.4.2. As to "logic", although it is a term of art widely used in the computer industry, its meaning is unclear and frequently interchangeable with the word "algorithm". Its inclusion may only serve to confuse rather than clarify and the Section therefore recommends that it be excluded from the paragraph.

3.4.3. However, the Section does support the exclusion from copyright protection of programming languages as such. The paragraph as drafted does not (as we understand it) affect the copyrightability of any program written in a specific language, or the copyrightability of any compilers or interface programs.
which may make a language understandable on a particular computer or in conjunction with particular programs. But a language itself, as such, has not been copyrightable in most Member States until now and the Section sees no reason to alter that state of affairs.

3.4.4. 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 interface programs are "not copyrightable subject matter". The second sentence could be deleted.

3.4.5. 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 or algorithms or programming languages as such which underlie the program."

3.5. Article 1: Paragraph 4

3.5.1. The Commission does not define "originality" as the interpretation of this word in law differs from Member State to Member State (for example, the Federal Republic of Germany has a stiff test of originality). This clause does not harmonize anything, particularly as the Court of Justice, if the matter were tested before it, would probably uphold the validity of different degrees of originality as it has upheld the validity of different terms of protection. 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.

3.5.2. The Community will therefore have to decide what degree of originality is necessary in order to qualify for copyright protection.

3.5.3. In any event, 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."

3.6. Article 2: Paragraph 3

3.6.1. 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 commissionee (as in the recent UK Copyright Act) apply to more traditional forms of literary work, not to computer programs.

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

3.7. Article 2: Paragraph 4

The Section supports the principle of this paragraph, but proposes that it be amended by the addition of the words

"(or in accordance with legally enforceable collective bargaining agreements)".

3.8. 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. It does not consider that any amendment is necessary to do so, but invites the Commission to re-examine the wording with a view to ensuring that the original copyright owner's position is protected.

3.9. Article 4(a)

3.9.1. For the avoidance of doubt, the Section considers that the restricted acts should expressly include the reproduction of adaptations of a computer program and the authorization of reproduction, etc.

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

3.10. Article 4(b)

The Section proposes that, for the avoidance of doubt over the meaning of the word "adaptation", a definition should be added:

"For the purposes of this Directive, 'adaptation' includes, but is not limited to, the conversion of the program into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program."

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3.11. Article 4(c)

3.11.1. The use of the word "sale" is inappropriate in this context; computer programs are licensed, not sold, and the word can be deleted.

3.11.2. The Section proposes that the words "anywhere in the world" be added after the words "first marketing" or whatever replaces them. This will make clear that the position of EC individuals and companies taking licences of programs from copyright proprietors outside the Community is protected.

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

3.12. 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 of a computer program (for the purposes of this Directive, 'adaptation' includes, but is not limited to, the conversion of the program into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program);

c) the distribution of a computer program by means of licensing, 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 its being licensed or made available to any person anywhere in the world by the rightholder or with his consent."

3.13. Article 5: Paragraph 1

3.13.1. 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 either the reference to written agreement signed by
the parties be deleted and replaced by the words "any legally enforceable licence agreement"; or 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".

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


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

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

3.15. Article 7

3.15.1. 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. 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 made."

3.15.2. 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.
3.16. Article 8

The Section considers that the drafting would be clearer if the words "relating to the protection of computer programs" were added after "principles". This would ensure that those who are to enforce the Directive know what principles are to override Member States' intellectual property laws.

3.17. Article 9

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.

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. Because this proposal breaks new ground in Community law, and because it covers technology which is changing rapidly the Section considers that there should be an automatic review period of, say, five years.

4.3. It is clear that there is a serious problem across the Community of unauthorized access to computer programs and data ("hacking"). As this clearly has implications for the regulation of the single market (but is an issue distinct from that of copyright), the Section recommends that the Commission give this issue serious examination with a view to making legislative proposals.