NOTE

from: the Presidency

to: Working Party on Intellectual Property (Computer programmes)

No. prev. doc.: 9013/89
No. Cion prop.: 5682/89 PI 25

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

The Working Party will find attached a consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party at its meetings held on 10 July, 24 and 25 July, 14 and 15 September and 12 and 13 October 1989.
This text merely constitutes the basis for the Working Party's proceedings at its meeting scheduled for 30 and 31 October 1989. Delegations are invited to make known their observations and their preferences in respect of it.

Those drafts have been included which have met with general agreement or considerable support, square brackets indicating texts which have encountered stiff opposition. The texts of the Commission's original proposal have been included in square brackets where the Commission representatives have indicated that they maintained them in spite of reservations expressed against them.

Statements

The two following statements would serve to clarify the scope of the Directive and thus meet the concerns of certain delegations:

"The Council and the Commission confirm that the present Directive does not oblige Member States to grant to computer programs protection beyond the minimum protection granted under the Berne Convention for literary works."

"The present Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive."
Article 1

Object of protection

1. Member States shall protect computer programs, including their preparatory design material, as literary works within the meaning of the Berne Convention.\(^1\)

2. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.]\(^2\).

Alternative proposal to replace the second sentence of this paragraph:

"Ideas and principles which underlie any aspect of a program, including interfaces, shall not be protected under this Directive."

\(^1\) This paragraph would replace paragraphs 1 and 2 of the Commission’s original proposal.

\(^2\) Paragraph 2 corresponds to paragraph 3 in the Commission’s original proposal.
3. (a) A computer program shall be protected if it is the result of the author’s own creative intellectual effort. No other criteria shall be applied to determine its eligibility for protection.

[(b) Programs generated by means of a computer shall be protected as literary works insofar as they satisfy the conditions laid down in subparagraph (a) above.]³ (Commission’s original proposal)

Article 2
Ownership of rights

1. The author of a computer program shall be the natural person, group of natural persons, or where permitted by the legislation of Member States, the legal person who created the program. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

2. Without prejudice to provisions in Member States concerning the settlement of disputes arising between joint authors, in respect of a computer program created by a group of natural persons jointly, the exclusive economic rights shall be owned and exercised jointly unless otherwise provided by contract between the joint authors.

³ Paragraph 3 corresponds to paragraph 4 in the Commission’s original proposals.

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3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.] (Commission's original proposal)

4. Where a computer program is created by an employee in the execution of the duties entrusted to him or at the request of his employer, the employer shall be entitled to exercise all economic rights in the program in the absence of contractual provisions to the contrary.

Article 3
Beneficiaries of protection

1. Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works. (Commission's original proposal)

[2. In the case referred to in Article 2 paragraph 2 the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this article.] (Commission's original proposal)
Article 4
Restricted acts

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 in whole or in part by any means, in any form and for whatever purpose, such as loading, displaying, running, transmission or storage of the computer program; (French proposal in 9013/89, page 10)

(b) the translation, adaptation, arrangement and any other modification of a program and the reproduction of the results thereof;

(c) the distribution of a computer program or copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy [but shall not exhaust the right to control its rental or its loan to the public];

(d) the communication to the public of a computer program in whole or in part.
Article 5

Exceptions to the restricted acts

1. Variant 1:

In the absence of any contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not be subject to authorization by the author where they are necessary for the legitimate use of and as a back-up to the program. (Italian proposal in 9013/89, page 13)

Variant 2:

In the absence of any contractual provisions to the contrary [or where a copy of a program has been sold], performance of the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right holder where such acts are necessary for the use of the program by its lawful acquirer, in accordance with the purpose for which it was made available by the right holder, or for the safety of the program.

[2. Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.] (Text proposed by the Commission)
Article 6
Infringement of rights

1. It shall be an infringement of the author's exclusive rights in the computer program to import, deal with, or possess an infringing copy of the program, knowing [or having reason to believe] it to be an infringing copy of the work.

2. It shall be an infringement of the author's exclusive rights in the computer program to [make, import,] deal with or possess articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

This provision could be supplemented by the following statement in the Council minutes:

"The Council requests that Member States adopt all necessary measures to facilitate the identification of infringements of provisions of the present Directive."

Article 7
Term of protection

1st variant:

Protection shall be granted for the life of the author and fifty years after his death.
2nd variant:

[Protection shall be granted for fifty years from the date of creation.] (Commission's original proposal)

3rd variant:

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.

Article 8
Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of a contract, protection of semiconductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any contractual arrangements entered into before that date.
Article 9

Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive at the latest two years after its notification.

2. Each Member State shall ensure that it communicates to the Commission and to the other Member States the provisions of national law which it adopts in order to transpose this Directive.

Article 10

This Directive is addressed to the Member States.