SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 30 and 31 October 1989

No. prev. doc.: 9475/89 PI 72
No. Cion prop.: 5682/89 PI 25

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

1. Introduction

At its meeting on 30 and 31 October 1989 the Working Party on Intellectual Property examined a consolidated text, drawn up by the Presidency, of the proposal for a Council Directive on the legal protection of computer programs (9304/89 PI 68). The Chairman of the Working Party announced that he would be submitting to the Permanent Representatives Committee, on the basis of this examination, a number of questions with a view to a policy debate by the Council (Internal Market) at its meeting on 23 November 1989. [1]

The present summary refers to the provisions of the proposed Directive as they appear in the consolidated text (9304/89), unless otherwise stated.

[1] This report was circulated under reference 9647/89 PI 73.
2. Article 1(1) (2)

2.1. With regard to whether the term "literary works" or "works" should be used, the Belgian, Danish, German, Irish and United Kingdom delegations and the Commission representative were in favour of the term "literary works"; the Greek, Spanish and Italian delegations were in favour of the term "works", and the French, Netherlands and Portuguese delegations expressed a preference for the term "works".

2.2. Several delegations supported a suggestion by the United Kingdom delegation specifying that any reference to computer programs in the Directive also covered their preparatory design material. This paragraph could therefore read as follows:

"Member States shall protect computer programs as [literary] works within the meaning of the Berne Convention. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material."

3. Article 1(2) (3)

3.1. The Commission representative stated that he upheld the proposal as originally submitted by the Commission and was not in a position to

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(2) Article 1(1) and 1(2) in the original Commission proposal.
(3) Article 1(3) in the original Commission proposal.
support the alternative proposal quoted in the consolidated text.

All delegations were against the part of this paragraph which appears in square brackets in the consolidated text, for reasons already put forward at previous Working Party meetings.

3.2. The Irish delegation, although it agreed with the other delegations on the deletion of the text in square brackets, wondered whether the problem of protecting the specification of interfaces should not be tackled by seeking a solution which would reconcile the principle of copyright protection of interface specification with the desire to achieve "open systems".

The Commission representative, although aware of the problem raised by the Irish delegation, stated that the Commission's intention in proposing the second sentence of this paragraph was to affirm that normal copyright rules applied to all parts of a computer program, including its interfaces; in other words, the Commission did not wish to propose any alteration of the status quo with regard to protection of interface specification in the framework of this Directive.
4. Article 1(3)(a)

4.1. The Danish, German, Greek, Spanish and Italian delegations were in favour of the first sentence of this provision as proposed in the consolidated text.

The Belgian, French, Irish, Netherlands, Portuguese and United Kingdom delegations were against the inclusion of the adjective "creative".

The French delegation proposed replacing the expression "creative intellectual effort" by "personal intellectual effort".

The Netherlands delegation repeated the proposal it had made at the last meeting that this sentence be worded as follows:

"A computer program shall be protected if it is original, in that it is the result of the author's own intellectual effort."
The Italian and United Kingdom delegation stated that they could accept this last proposal by way of compromise: the Danish and German delegations entered a scrutiny reservation on it.

4.2. The Danish, Italian, Netherlands and United Kingdom delegations found the second sentence of this provision superfluous.

The German delegation would have preferred the wording of this sentence proposed in the Annex to 9013/89 ("No other qualitative or aesthetic criteria shall be applied").

The French delegation suggested the wording "No account shall be taken of merit in determining whether protection shall be granted.".

The United Kingdom delegation suggested as a compromise the wording "No assessment of its merit shall be applied in determining its eligibility for protection." (6)

The Danish, Italian and Netherlands delegations were opposed to this suggestion.

The Chairman of the Working Party concluded that this sentence of the consolidated text should appear in square brackets.

(6) Suggestion incorporated in English above.
5. Article 1(3)(b) (7)

The delegations confirmed the positions they had adopted at the last meeting (9475/89, point 3.4), with the German delegation falling in with the majority position.

6. Article 2(1)

The Working Party agreed to a proposal by the Netherlands delegation that the first sentence of this paragraph be worded as follows:

"The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation.". (8)

7. Article 2(2)

7.1. The Danish delegation proposed adding to this paragraph the possibility of one of the joint authors acting independently of the others in the event of infringement of copyright; this could be achieved if the start of this paragraph were to read as follows:

(7) Article 1(4)(b) in the original Commission proposal.
(8) "De maker van het computerprogramma is de natuurlijke persoon of de groep van natuurlijke personen die het programma tot stand heeft gebracht of de rechtspersoon die door de nationale wetgeving als maker wordt aangemerkt."
"Without prejudice to provisions in Member States concerning copyright infringement and the settlement of disputes arising between joint authors, ..." (rest unchanged).

The Spanish, Italian and Netherlands delegations supported this proposal.

7.2. The German delegation suggested rewording this paragraph as follows:

"Where several persons have jointly created a computer program (joint authors) copyright shall be owned by them jointly. Without prejudice to provisions in Member States concerning the settlement of disputes, copyright shall be exercised jointly by the joint authors, unless otherwise provided by contract. [Each of the joint authors shall be entitled to bring proceedings for infringement of the joint copyright; however, he may only seek compensation in favour of all the joint authors.]" (9)
8. Article 2(3)

Only the Italian delegation supported the Commission proposal; all the other delegations were for the deletion of this paragraph.

9. Article 2(4)

9.1. The Belgian, Danish, German, French, Netherlands and United Kingdom delegations were in favour of the deletion of the phrase "or at the request of his employer".

The Netherlands delegation also called for the deletion of the word "exclusivement" ("bij uitsluiting") (which does not appear in the English version).

9.2. The Spanish delegation maintained a scrutiny reservation on this paragraph and pointed out that it would not be justifiable for the employer to exercise all economic rights in certain cases, for example where the employer markets a program which had been created by an employee to satisfy the internal needs of the undertaking in question.

The Commission representative replied that the question of the employees' share in the profits resulting from their work lay outside the scope of this Directive.
10. Article 2(5) (original Commission proposal)

This provision, as proposed by the Commission, should be in square brackets, as any decision on it is linked to that taken for Article 1(3)(b).

11. Article 3(1)

The Danish, French, Italian and Netherlands delegations voiced doubts as to the need for this paragraph, but were not opposed to its retention.

12. Article 3(2)

No delegation was in favour of retaining this paragraph.

13. Article 4(a)

13.1. A number of delegations expressed a preference for the Commission's original proposal, as against the version given in the consolidated text, and the Chairman therefore suggested that the Working Party restore the Commission's original proposal, specifying that the acts listed in the second sentence are only restricted insofar as they involve the reproduction of the program. This provision could read as follows:
"(a) the reproduction of a computer program by any means and in any form, in part or in whole. Insofar as the loading, viewing, running, transmission or storage of the computer program necessitate a reproduction of the program in part or in whole, they shall be considered restricted acts;".

13.2. The United Kingdom delegation proposed that this provision be limited to the following wording:

"(a) the reproduction of a computer program in whole or in part by any means, in any form, whether permanent or transient;". (10)

It added that if it was necessary for this Article to refer to the transmission of a program, this should appear in 4(d) rather than 4(a).

14. Article 4(b)

14.1. The Working Party accepted a proposal from the Danish delegation which would bring the terms used in this provision into line with those of Article 12 of the Berne Convention.

(10) Suggestion incorporated in English above.
"(b) the translation, adaptation, arrangement and any other transformation of a program and the reproduction of the results thereof;".

14.2. The United Kingdom delegation reserved its position on this provision, in conjunction with Article 5(1) (see point 17.5 below).

14.3. The Netherlands delegation referred to its position as set out in point 14.2 of 9013/89 and accordingly suggested adding the following to subparagraph (b):

"Without prejudice to the rights of the person who translates the program,"

The German delegation entered a scrutiny reservation on this addition.

15. Article 4(c)

15.1. The Danish and United Kingdom delegations asked for the term "distribution" to be changed to mean "distribution to the public"; in the view of the United Kingdom delegation, the first sentence of this provision should refer to the first distribution to the public of one or more copies of a program.

15.2. The Netherlands delegation suggested that the right should not be exhausted until the first sale takes place in a Member State of the Community.
15.3. The Danish delegation considered that the exhaustion constituted a derogation from copyright and should therefore be dealt with in Article 5 rather than Article 4.

15.4. The Danish, Spanish, Irish, Italian, Portuguese and United Kingdom delegations were in favour of including the right to control rental in the Directive.

The Belgian, German, Greek, French and Netherlands delegations, on the other hand, thought that the question of introducing such a right should not be raised in the restricted framework of this Directive but should be examined in a wider framework covering other areas of copyright.

15.5. The Irish and United Kingdom delegations were in favour of the Commission proposal that the first sale of a copy of a program should not exhaust the right to control its loan to the public.

The Danish, German, Greek and Italian delegations opposed this proposal.

The Belgian, French and Netherlands delegations did not wish to resolve this question in the framework of the Directive.
15.6. The German delegation proposed the following wording for this provision:

"The placing on the market of the original or of a copy of a program by the author or with his consent shall exhaust the right of the author to control further distribution of that copy. The Member States may provide for exceptions to this principle." (11)

16. **Article 4(d)**

Some delegations voiced doubts as to the need for this provision, without expressly opposing it.

17. **Article 5(1)**

17.1. The French delegation proposed a modified version of variant 1 of this paragraph:

"In the absence of any contractual stipulations to the contrary, the acts set out in Article 4(a) and (b) shall not be subject to authorization by the right holder where they are necessary for the use
of the program in accordance with its intended purpose, or necessary as a back-up"

The Danish, Greek, Italian and Portuguese delegations supported this proposal. The Irish delegation was able to accept it by way of compromise.

17.2. The Spanish and Irish delegations were in favour of variant 2, provided the text in square brackets were retained and the phrase "in accordance with the purpose for which it was made available by the right holder" deleted.

17.3. The German and United Kingdom delegations expressed a preference for the second variant over the first, provided the text in square brackets were deleted, but these delegations both proposed new draftings on this paragraph.

The German delegation proposed replacing the phrase "the use of the program by its lawful acquiror" with "the use of the program in accordance with its intended purpose by its lawful user". (12)

The United Kingdom delegation proposed the following formulation:

(12) "die bestimmungsmässige Verwendung des Programms durch den rechtmässigen Benutzer".
"In the absence of any contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization of the owner of the rights where they are necessary for the use of the program by its lawful acquiror in accordance with the purpose for which it was made available by the owner of the rights [and for security purposes in connection with that use]." (13)

17.4. The German delegation expressed the opinion that Article 4(a) of the proposed Directive would not, without the authorization of the right holder, permit the analysis of a computer program in order to uncover the ideas and principles underlying it (decompiling, reverse engineering), even though copyright protection did not extend to those ideas and principles. To resolve this problem, the German delegation proposed that Article 5 should provide for a derogation from Article 4(a) whereby the authorization of the right holder would not be required where the acts set out in Article 4(a) are carried out for the sole purpose of analysing a computer program, or else that Article 4 and 5 should be worded in such a way that the Member States remain free to legislate on this matter.

(13) Suggestion incorporated in English above.
A number of other delegations and the Commission representative thought that the proposed Directive should not contain a specific provision relating to analysis, decompiling or reverse engineering, especially since this question is not specifically dealt with in the present legislation either of the Member States, or of the United States or Japan; consequently, the introduction of such a provision would be perceived as a modification of the present situation. Several delegations voiced the opinion that, insofar as the Directive makes no specific provision on this subject, the Member States remain free, under Article 9(2) of the Berne Convention, to permit the reproduction of a computer program for the purpose of analysis.

The German delegation entered a reservation on Articles 4 and 5, inasmuch as, in its opinion, the versions currently under discussion did not permit the analysis of a computer program without the authorization of the right holder.

17.5. The United Kingdom delegation repeated its request for a derogation from Article 4(b) which would allow the user of a computer program to adapt it to his personal needs, and to this effect proposed a new provision worded as follows:
"1a. In the absence of any contractual provisions to the contrary, the adaptation, modification or other alteration of the program by the lawful acquiror for his private use shall not require the authorization of the owner of the rights. This derogation from Article 4(b) does not permit any adaptation, modification or other alteration to remove or otherwise change elements of a program intended to limit or prevent reproduction of the program in whole or in part." (14)

18. Article 5(2)

The Working Party agreed to keep this paragraph in square brackets pending resolution of the question of the right of rental in Article 4(c) (point 15.4 above).

The Netherlands delegation pointed out that this provision was superfluous, whatever solution is adopted for the right of rental.

(14) Suggestion incorporated in English above.
19. Article 6(1)

19.1. The Belgian, Spanish, French, Irish, Italian and United Kingdom
delegations were in favour of the principle of this paragraph.

The Portuguese delegation thought the acts listed were not
infringements.

The Danish, German, Greek and Netherlands delegations upheld their
reservations on this paragraph and stressed it should be based on
objective criteria. The German delegation proposed the following text:

"The distribution and use of an infringing copy of a computer program
shall constitute an infringement of the author’s exclusive rights.
The Member States shall adopt the appropriate provisions to prevent
infringements of copyright with infringing copies, taking account of
the legitimate interests of persons possessing or utilizing them in
good faith." (15)
19.2. The Italian delegation, with the support of the Belgian, French and Irish delegations, suggested extending the list of acts to include acts such as leasing and hiring.

19.3. The United Kingdom and Irish delegations suggested deleting the reference to the author both in this paragraph and in paragraph 2.

19.4. The French delegation proposed the following wording:

"Possession of or participation in the distribution of a computer program knowing or unable not to know that it is an infringing copy shall be an infringement constituting liability in respect of the holder of the copyright."

20. Article 6(2)

20.1. The Belgian, Spanish, French, Irish, Italian, Portuguese and United Kingdom delegations were in favour of the principle of this paragraph.

The Danish, German, Greek and Netherlands delegations favoured its deletion.
The Chairman emphasized the importance the Presidency attached to this provision as well as to paragraph 1 of the Article so as to make an effective contribution to combating pirating in this sphere.

20.2. The United Kingdom and Irish delegations suggested supplementing paragraph 2 with the condition that the acts listed were carried out in the knowledge or having good reasons to believe what was the ultimate use of the articles concerned.

20.3. The French delegation suggested the following wording:

"Possession or involvement in the manufacture or distribution of means specifically intended to facilitate the suppression or neutralization of any technical device which may have been installed to protect a program shall be an infringement constituting liability in respect of the holder of the copyright".

21. Statement on Article 6

The Working Party agreed to forward this draft statement to the Permanent Representatives Committee.
22. **Article 7**

The Belgian, Greek, Spanish, Irish, Italian, Portuguese and United Kingdom delegations were able to accept the third variant of this Article.

The Danish, German, French and Netherlands delegations could accept this variant subject to the deletion of the phrase "but such terms shall not exceed the life of the author and fifty years from the date of his death".

The German delegation pointed out in this connection that German copyright legislation made provision for a period of protection for all literary works amounting to the author's lifetime and seventy years after his death which was permitted under Article 7(6) of the Berne Convention; it would not like to be obliged to provide for a period of protection for computer programs different from that provided for other literary works.

23. **Article 8(2)**

It was suggested that the phrase "without prejudice to any contractual arrangements entered into before that date" be replaced by "without prejudice to any acts concluded and rights legitimately acquired before that date".
24. Article 9(1)

The Working Party agreed on a two-year period for the transposal of this Directive into national law.

25. Article 9(2)

25.1. It was agreed that the wording of this paragraph would be amended to read as follows:

"Each Member State shall ensure that it communicates to the Commission the provisions of national law which it adopts in order to transpose this Directive. It shall forward a copy thereof to the other Member States."

25.2. The United Kingdom and Portuguese delegations entered a scrutiny reservation regarding the obligation to communicate such provisions to the other Member States.

25.3. The Chairman suggested that this obligation to communicate the national provisions to the other Member States should be extended to other Directives. The Spanish delegation, although willing to accept this obligation in the framework of the Directive under examination, reserved its position on the question of its extension to other Directives.

26. Statements (page 2 of 9304/89)

26.1. The Netherlands delegation suggested that the first statement be expressed in positive terms:
"The Council and the Commission confirm that the present Directive obliges Member States to grant to computer programs protection at least equivalent to the minimum protection granted under the Berne Convention".

26.2. The Netherlands delegation suggested that the second statement should refer not only to the derogations already provided for under national legislation but also to those which might be provided for in the future. The Commission representative entered a scrutiny reservation on this suggestion.

26.3. The German delegation suggested that the second statement should refer to national provisions rather than to derogations provided for under national legislation.

26.4. The Danish delegation wanted it confirmed that "points not covered by this Directive", on which Member States' national legislation could accordingly continue to provide for derogations, included for instance the reproduction in writing of the source code of a program, the reproduction of program extracts in a book or specialist magazine and "reverse engineering".
In this context several delegations expressed the wish that the Commission prepare a text indicating clearly which were the points not covered by the Directive.