SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 19 and 20 April and 3 and 4 May 1990

No. prev. doc.: 5266/90 PI 15
No. Cion prop.: 5682/89 PI 25 COM(88) 816 final - SYN 183

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

1. At its meetings on 19 and 20 April and 3 and 4 May 1990 the Working Party on Intellectual Property (Computer programs) continued its examination of the issues of reverse engineering, protection of interfaces and rental right, as well as Articles 6 and 7 of the proposal for a Council Directive on the legal protection of computer programs.
1. REVERSE ENGINEERING

2. The Working Party was informed at its April meeting that the Presidency had decided to include the proposal for a Directive on the agenda of the meeting of the Council (Internal Market) to be held on 14 May 1990, and that the main subject of discussion would be reverse engineering; this discussion would be prepared in the Permanent Representatives Committee on 2 May 1990. The Chairman emphasized the need for the discussions in the Permanent Representatives Committee and the Council to concentrate at this stage on the principles of how the problem of reverse engineering should be dealt with in the Directive, leaving examination of drafts to the Working Party.

At its meeting on 3 and 4 May, the Working Party heard an oral report on the discussion held in the Permanent Representatives Committee on 2 May.

A. Questions asked by the Commission services

3. At the Working Party's March meeting, the Commission services had asked delegations to consider a number of questions (doc. 5266/90 PI 15, point 5.3). Delegations had consulted industrial circles on these questions, and in many cases the answers had varied according to the interests of those consulted. Nevertheless, several general tendencies emerged:
(a) the main purpose for which reverse engineering should be allowed is interoperability of programs; mention was also made of systems maintenance, and the Italian delegation considered that it should also be allowed for purposes of research;

(b) only a licensee or other lawful acquiror of a copy of a computer program or persons acting on their behalf should be allowed to perform reverse engineering;

(c) some were in favour of remuneration being paid to the right holder for reverse engineering, others were against;

(d) the general feeling was that reverse engineering should be limited to the extent necessary to achieve the purpose, but several delegations drew attention to the difficulty of enforcing such a rule;

(e) several delegations considered that it would be permissible for the information gained from reverse engineering to be used to produce interoperable programs, but not to produce substitute programs;

(f) views differed on whether or not it should be possible to publish the results of reverse engineering or communicate them to third parties;
(g) the general view was that in the great majority of cases the information being sought could be obtained from published material or standards bodies, by contractual means or in other non-infringing ways, but that in a few cases it could not be obtained without performing reverse engineering.

B. Proposal by the French delegation

4. In the light of the answers to the above questions given by industrial circles in France, the French delegation put forward on 19 April 1990 a proposal which had been approved in France both by those industrial circles which considered that the directive should not permit reverse engineering of computer programs and by those industrial circles which considered that the directive should not prohibit reverse engineering. This proposal is reproduced in Annex I to this document.

The reasoning behind the proposal by the French delegation was that, in order to obtain the information necessary to make interoperable programs, it is necessary to have access to the ideas and principles underlying the interfaces of computer programs; although these ideas and principles cannot be protected by copyright, gaining access to them would sometimes require reverse engineering, involving acts which, under Article 4(a) and (b) of the proposal for a Directive, would constitute infringement if done without the authorization of the right holder; the solution proposed by the French delegation was a provision to the effect that Article 4(a) and (b) could not be invoked to prevent acts being performed that are necessary for the production of interoperable programs, subject to a number of restrictions.
5. The initial reaction of the Belgian, Spanish, Netherlands and Portuguese delegations and the Commission representatives to the general approach adopted by the French delegation was favourable. The German and Irish delegations also indicated that, whereas they would have preferred a simpler solution, they considered that this proposal constituted a good basis for resolving the problem of reverse engineering.

The Danish and United Kingdom delegations expressed doubts as to the general approach proposed by the French delegation.

6. The Danish delegation suggested that the proposal by the French delegation and Article 5(3) (see section H below) be replaced by the following paragraph:

"Notwithstanding the provisions of Article 4(a) and (b), the legitimate user of a copy of a program shall be entitled to undertake research and private study, provided that such acts do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

The German and Netherlands delegations were not in favour of this suggestion on the grounds that either their national law would have to define the conditions under which acts "do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author", or it would be left to the courts to determine such conditions.

7. The following observations were made with regard to the details of the proposal by the French delegation:
7.1. The Italian delegation considered that this provision should not be restricted to acts carried out for the sole purpose of interoperability, but should be extended to acts carried out for research purposes.

The French delegation considered that acts done for research purposes should be the subject of contractual arrangements between the right holder and the researcher, while the Commission representative pointed out that almost all research done in the computer industry was done for commercial purposes and therefore should not be covered by the provision proposed by the French delegation.

7.2. The Italian and Netherlands delegation pointed out that the words "only by or on behalf of the licensee" were too restrictive, as it was possible to be in lawful possession of a computer program without necessarily being a licensee.

7.3. The Netherlands delegation suggested that conditions (a) and (b) be replaced by the condition that the information enabling interoperability with the original program to be achieved could not be obtained in a reasonable time and under reasonable conditions.

The Italian delegation suggested replacing condition (b) by an obligation to request the information required from the right holder and by a condition that reverse engineering could be performed only if the right holder did not supply this information.
The United Kingdom delegation questioned the usefulness of condition (b) unless it was intended to give the right holder an opportunity to supply the information required.

7.4. With regard to condition (e), the German delegation and the Commission representatives expressed a preference for the terms "substantially similar" rather than "substitute".

7.5. The German and Netherlands delegations considered that the last sentence of the proposal was superfluous.

7.6. Other observations made corresponded to reactions to the questions asked by the Commission services (see point 3 above).

C. Proposal by the Commission services

8. On 20 April 1990 the Commission representative tabled a proposal for a new recital and a new Article 5a (see Annex II to this document), which had been agreed by all the relevant services and private offices of the Commission; although it was not a formal amendment to the Commission’s proposal for a directive, it represented the latest position of the Commission services on the question of reverse engineering. The Commission representative explained that in the light of the considerable interest which the computer industry had devoted to the question of reverse engineering over the last six months, the Commission services had realized that it was no longer possible to provide in the Directive that reverse engineering would require the authorization of the right holder under all circumstances; on the other hand, if an exception were to be made for reverse
engineering, there was a risk that this exception could be abused for purposes of piracy. The Commission services had therefore drawn up a proposal which, while providing an exception for reverse engineering, closely defined the limits within which such an exception would be allowed. This new proposal was based on the proposal by the French delegation, but included wording taken from Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in order to make it clear that the solution proposed was in accordance with that provision. The Commission representative stated that, although the question of remuneration was not explicitly mentioned, the Commission services considered that it was implicit that remuneration would be required, as reverse engineering would prejudice the legitimate interests of the right holder if it were free of charge.

D. Proposal by the Irish delegation

9. At the Working Party’s May meeting, the Irish delegation tabled a proposal for an article on reverse engineering (see Annex III to this document). It explained that the French delegation and the Commission services had put forward proposals at the April meeting which corresponded to the option of providing for an exemption that would specifically allow reverse engineering for defined purposes under defined circumstances; the Irish delegation felt that consideration should also be given to the option of a “fair use” clause, and it had therefore drawn up such a clause which attempted to codify the circumstances under which use might be considered fair.
E. Proposal by the Netherlands delegation

10. At the Working Party's meeting on 3 and 4 May, the Netherlands delegation tabled a proposal for Articles 5, 5a and 5b (see Annex IV to this document). With regard to reverse engineering (Article 5b) this proposal was based on the proposals made by the French delegation and the Commission services at the Working Party's April meeting and attempted to improve on them; it also took account of discussions with interested circles in the Netherlands.

F. Proposal by the German delegation

11. During the Working Party's May meeting, the German delegation proposed orally that no specific provision on reverse engineering be included in the Directive; in its view, Articles 4(a) and 5(3) of the consolidated text in document 6040/90 PI 21 should remain, possibly with adaptations to the wording, and the second sentence of Article 1(2) of the consolidated text should be transferred to the preamble.¹

G. Examination of the various proposals

12. The Working Party did not discuss in detail the proposals made by the Commission services and the Irish, Netherlands and German delegations. It limited its examination of them to clarifying a number of points.

¹ See doc. 6040/90, page 3, footnote 4.
It was agreed that these proposals and the proposal by the French delegation would be examined at the Working Party's June meeting in the order in which they had been tabled.

H. Article 5(3) and its relationship to Article 5(1)

13. At the Working Party's March meeting, the Commission services had proposed a text for Article 5(3) (see doc. 5266/90, point 5.1). At the April meeting, the Commission representatives maintained this proposal, rather than the slightly modified version appearing in the consolidated text in document 5223/90, with the proviso that the term "lawful acquiror" should read "lawful possessor" (in French: "détenteur légitime").

14. The Commission representatives explained that Article 4(a) and (b) make a number of acts, including reproduction of a computer program, subject to authorization by the copyright holder. In order to avoid any doubt as to whether the term "reproduction" covers only the creation of permanent copies of a computer program or extends to transient reproduction of the program, the second sentence of Article 4(a) makes it clear that the transient acts of loading, displaying, running, transmission or storage of a computer program are to be considered restricted acts insofar as they necessitate a reproduction of the program; at the present state of computer

2 In the meantime, a revised consolidated text has been circulated under reference 6040/90 PI 21.

3 The Commission representative pointed out that the term "displaying" (in French, "affichage") was more appropriate than "viewing" (in French, "visualisation").
technology, these acts do necessitate a reproduction of the program and therefore are to be considered as restricted acts, but it cannot be excluded that future developments make it possible to perform these acts without having to reproduce the program, in which case they would no longer be restricted acts. Article 5(1) provides an exception to the general rule of Article 4(a) and (b) by stating that the acts referred to in those provisions shall not require the authorization of the right holder where they are necessary for the use of the program in accordance with its intended purpose, and since a certain amount of doubt had arisen, the Commission services had proposed Article 5(3) to make it clear that where a lawful possessor of a program is performing the acts referred to in the second sentence of Article 4(a) under the circumstances of Article 5(1), he will not require the authorization of the right holder to observe, study or test the functioning of the program.

15. The Belgian, Greek, French, Irish, Netherlands and United Kingdom delegations expressed doubts whether Article 5(3) was indispensable, but considered that it was useful for the avoidance of doubt.

The Spanish delegation considered that it was unnecessary.

16. The Danish delegation suggested that Article 5(3) be incorporated into Article 5(1). The French, Portuguese and United Kingdom delegations supported this suggestion.
The German and Irish delegations had doubts as to this suggestion, since Article 5(1) provides an exception from Article 4(a) and (b), while Article 5(3) provides an exception from Article 4(a) only.

The Commission representatives were asked to examine the possibility of incorporating Article 5(3) into Article 5(1) and if possible to propose a draft for a combined provision.

17. During the discussion of Article 5(3) and its relationship to Article 5(1), the Netherlands and French delegations suggested that the words "In the absence of any contractual stipulations to the contrary," be deleted from Article 5(1).

The Danish delegation opposed this suggestion.

The Commission representatives suggested replacing these words by the words "Where a copy of a computer program has been sold,".

18. The Netherlands delegation suggested that a reference to archival and audit purposes be added to Article 5(1) (see in this context the proposal by the Netherlands delegation in Annex IV).

The Commission representative considered that such an addition was not necessary in the light of the terms "use of the program in accordance with its intended purpose".
19. At the Working Party's May meeting, the Commission representative drew attention to the fact that the Commission still had a reservation on the words "or necessary as a back-up in connection with such use" in Article 5(1).

II. PROTECTION OF INTERFACES

20. At the April meeting, the Commission services tabled a proposal for a new paragraph 3 of Article 8 and a corresponding new recital (see Annex V to this document).

The Commission representatives explained that Community Directives already enacted in the telecommunications sector placed an obligation on telecommunications network operators to publish telecommunications interfaces; since the proposal for a Directive under discussion contained no obligation on authors of computer programs to publish the interfaces of their programs, the Commission services wished to avoid a situation where telecommunications network operators might invoke the Directive on computer programs to avoid their obligation to publish their telecommunications interfaces where these interfaces were in the form of a computer program; the new Article 8(3) therefore made it clear that the computer programs Directive could not be invoked to remove the obligation to publish telecommunications interfaces.

The delegations entered scrutiny reservations on this proposal pending consultation of telecommunications experts.
21. The Commission representatives stated at the May meeting that they could lift their reservation on Article 1(2) as set out in the consolidated text (see doc. 6040/90, page 3, footnote 2), subject to it being made clear that programming languages would not be protected under the Directive.

III. RENTAL RIGHT

22. At its meeting on 19 and 20 April, the Working Party was informed that the Permanent Representatives Committee, after discussing the question of rental right on 28 March 1990, had instructed the Working Party to continue its examination of the question, taking account of the individual legal arrangements in the Member States. The Working Party was also informed of the contents of the provisions on rental rights in the Community's submission to the GATT negotiations in respect of trade related aspects of intellectual property rights (doc. 5605/90 GATT 52, Annex, Part 2.A., Article 3(1) and (2)).

23. The Commission representatives stated that they maintained their position that the Directive should provide for an exclusive rental right. They asked the delegations to consider the text contained in Annex VI to this document.

The German and Netherlands delegations maintained their position that the question of rental should be discussed in a broader framework encompassing other areas of copyright. The Netherlands delegation also maintained its position in favour of a remuneration right rather than an exclusive right with regard to computer programs. The German delegation stated that if this question were to be regulated in this Directive, it
would prefer a provision corresponding to Article 3(1) and (2) of the Community submission to the GATT negotiations to the text put forward by the Commission representatives.

The French delegation withdrew its reservation against dealing with rental right in this Directive.

The Spanish and Italian delegations preferred the text of Article 4(c) in the consolidated text (doc. 6040/90 PI 21) to the text put forward by the Commission representatives.

24. In the light of these reactions, delegations were asked whether they would have fundamental objections if the question of rental right in respect of computer programs were not to be dealt with at all in this Directive, but were to be left to a more general instrument on rental right in the copyright field. The Spanish, Irish and Italian delegations stated that they would have such objections.

25. The Commission representatives noted that the Working Party remained divided on this issue. They pointed out that the European Parliament was unlikely to propose removing the rental right from the Directive, as no amendments to that effect had been put forward in any of the Parliament’s committees. The Commission representatives therefore maintained their position that the Directive should provide for an exclusive rental right, and proposed the text contained in Annex VII to this document, which delegations were asked to consider for the Working Party’s June meeting.
IV. ARTICLE 6

26. On the basis of suggestions by the Netherlands, Italian and United Kingdom delegations, the Working Party made a number of amendments to the first variant of Article 6; the text of this variant as amended is set out in Annex VIII to this document.

The Greek, Spanish and Netherlands delegations entered scrutiny reservations on the addition of "the possession for commercial purposes" in paragraph 1(c), and the Danish and Netherlands delegations entered scrutiny reservations on the addition of "articles referred to in paragraph 1(c)" in paragraph 2.

27. The German delegation entered a reservation on the whole of the first variant. Its main difficulties were with paragraphs 1(b) and (c) and with paragraph 2 as amended. It explained that the structure of German law was such that the only way of transposing these provisions into German law was by amending the criminal law, but the Community had no competence in respect of criminal law.

The German delegation therefore continued to support the second variant of Article 6, and was prepared to align paragraph 2 of that variant on paragraph 2 of the first variant as set out in 6040/90.

28. The Danish delegation asked the Commission services to reconsider the title of Article 6.
V. ARTICLE 7

29. At its May meeting, the Working Party examined a proposal by the Spanish delegation to include in Article 7 a reference to the situation where a legal person is designated as the author by national legislation (Annex IX to this document).

30. A proposal by the French delegation to replace the Spanish amendment by a reference to collective works was opposed by several delegations and consequently withdrawn.

31. A proposal by the Danish delegation that a reference to Article 2(1) be added to the proposal by the Spanish delegation was accepted by the Working Party. Article 7 would therefore read:

"Protection shall be granted for the life of the author and fifty years after his death; where the computer program is an anonymous or pseudonymous work, or where a legal person is designated as the author by national legislation in accordance with Article 2(1), the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public".

32. The reservation by the German delegation on Article 7 (see doc. 6040/90, footnote 14) remains.
ANNEX I

Proposal by the French delegation

ARTICLE 5

Qualification of the author's prerogatives

2. Notwithstanding any contractual provisions to the contrary, the prohibitions laid down in Article 4(a) and (b) cannot be invoked by the author to stop actions being carried out which are necessary for the interoperability of computer programs.

The possibility in question may be exercised only by or on behalf of the licensee and solely if the following conditions are fulfilled:

(a) the information enabling interoperability with the original program to be achieved has not already been published or made available;

(b) the right holder for the original program has been notified of the other author's intention of searching for that information;

(c) the information search relates only to that part of the original program concerned by interoperability;

(d) the information obtained cannot be passed on to third parties;

((e) the information obtained cannot be used for the purpose of creating a [substantially similar] or [substitute] computer program.

The possibility provided by this paragraph cannot be invoked to thwart legal action based on Article 4(a) and (b) if the person invoking it distributes the program without reference to the searching carried out.
Proposal by the Commission services

New recital and new Article 5a

Whereas, although the reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes a violation of the exclusive rights of the author, under certain circumstances a modification of the form of the code performed by a legitimate possessor of a copy of the program must be considered legitimate and must therefore be authorized; whereas such circumstances exist when a modification of the form of the code of a computer program is essential to obtain the information necessary to ensure that interoperable programs can be created or can function, i.e. to ensure the full functioning of the program with the other elements of a system enabling these products to function together in all the ways such products are intended to function.

Article 5a
(New Article)

Modification of the form of the code in which the copy of a program has been made available

1. When a modification of the form of the code in which a copy of a program has been made available is essential for ensuring that interoperable programs can be created, can be maintained or can function, and insofar as such a modification performed by the legitimate possessor of a copy of that program has been strictly limited to the parts of the program necessary to attain this goal, such a modification shall be authorized notwithstanding contractual provisions to the contrary, unless the right holder proves that such a modification unreasonably prejudices his legitimate interests or that it conflicts with a normal exploitation of the computer program.

2. Paragraph 1 shall not sanction the use of the information obtained through its application for the marketing of a substantially similar program.
Subject: Proposal by the Irish delegation

(a) Member States shall provide that the performance of the restricted acts under Article 4 of this directive shall be considered fair use of a copyrighted computer program,

- if such performance is essential and exclusively to obtain information necessary to allow another computer program to interoperate, i.e. to exchange data and/or instructions with the copyrighted computer program, and

- if such performance does not impair the actual or potential market for or the value of the copyrighted computer program and complies with Article 9(2) of the Berne Convention.

(b) An otherwise restricted act shall not be considered fair unless it is performed:

(i) on a non-infringing copy of the copyrighted computer program by the [lawful acquiree] [lawful owner and user] of that copy, and

(ii) only on those interfaces or parts of the copyrighted computer program intended by their design for the exchange of data and/or instructions with other computer programs and only to the extent necessary to make such exchanges possible, and

(iii) only when it is necessary because there are no non-infringing means of obtaining the information needed to make such exchange of data and/or instructions possible. Such non-infringing means include:

- the use of information that has been made publicly available or that has been published, and

- requesting the information from the rightholder, and

- observing, studying and testing the functioning of a copyrighted program as provided for in Article 5(3) of this directive.
Proposal by the Netherlands delegation

Subject: Draft for Articles 5, 5a and 5b

- Article 5

1. The lawful user shall not require the authorization of the owner of the rights for the acts referred to in Article 4(a) and (b), where these acts are necessary for the use of a copy of the program in accordance with the purpose envisaged by the owner of the rights.
2. The lawful user of a copy of the program shall not require the authorization of the owner of the rights for the acts referred to in Article 4(a) where these acts are necessary for security, archival or audit purposes.
3. The lawful user of a copy of the program shall not require the authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) where these acts serve the purpose of improving the program for his own use in accordance with the purpose envisaged by the owner of the rights. Without the authorization of the owner of the rights a copy of a program adapted accordingly may not be given to others, except for the purpose of legal proceedings.

- Article 5a

The lawful user shall not require the authorization of the owner of rights for the acts referred to in Article 4(a), where these acts fall within the scope of private exercise or study for non-commercial purposes.

- Article 5b

1. The authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) shall not be required where these acts are necessary (or: indispensable) to realize the interoperability of a program, provided:
   a. these acts are performed by the lawful acquirer of a copy of the program;
   b. the information necessary (or: indispensable) cannot be obtained otherwise within a reasonable time or on reasonable conditions;
   c. these acts are strictly limited to those parts of the program necessary to attain this goal;
d. the information thus obtained is not given to others, except for the purpose of legal proceedings.

2. The burden of proof of the exception laid down in the first paragraph rests upon said acquiror.
Proposal by the Commission services

New recital and new Article 8(3)

New recital no 8 bis

Whereas in order to ensure open and efficient access to public telecommunications networks and services, including the provision of transmission and switching equipment for those networks, it is necessary that the provisions of this Directive shall be without prejudice to specific requirements of Community law enacted in respect of the publication of interfaces in the telecommunications sector.

New Article 8(3)

The provisions of this Directive shall be without prejudice to specific requirements of Community law enacted in respect of the publication of interfaces in the telecommunication sector.
Proposal by the Commission services

Subject: Rental right

Amend the text in document 5223/90 PI 13 as follows:

1. Article 4(c)
   "(c) the rental of a copy of a computer program."

2. Article 5(2)
   Delete this paragraph.
Proposal by the Commission services

Article 4

c) the distribution to the public of the original computer program or of 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;

d) the rental of a copy of a program which has previously been sold.
Article 6 - First variant as amended on 4 May 1990

Article 6

[Enforcement of Protection]

1. Without prejudice to the provisions of Article 4(a), Member States shall provide, in accordance with their national legislations, appropriate remedies against a person committing the acts listed in sub-paragraphs (a), (b), and (c) below:

(a) any act of putting into circulation of a copy of a computer program knowing or having reason to believe that it is an infringing copy;

(b) the possession for commercial purposes of a copy of a computer program knowing or having reason to believe that it is an infringing copy;

(c) the possession for commercial purposes of or any act of putting into circulation of articles the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program.

2. An infringing copy of a computer program or articles referred to in paragraph 1(c) shall be liable to seizure in accordance with the national legislation of each Member State.
Article 7 (Term of protection)

Proposal by the Spanish delegation

Protection shall be granted for the life of the author and fifty years after his death; where the computer program is an anonymous or pseudonymous work, or where a legal person is designated as the author by national legislation, the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public.

Grounds

This is the text given in 5223/90, with the addition of the specific case of the term where the author is a legal person according to national law.

This addition is justified by the fact that Article 2 of the draft Directive (consolidated text) states that the author is the natural person or group of natural persons or the legal person designated as the author by national legislation.