SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 24 and 25 July 1989
No. Cion prop.: 5682/89 PI 25
Subject: Proposal for a Council Directive on the legal protection of computer programs

The Working Party held a first reading of Articles 4 to 10 of the proposal for a Council Directive on the legal protection of computer programs (*)

1. RESTRICTED ACTS (Article 4)

1.1. The reproduction of a program (Article 4(a)). Some delegations expressed doubts about the wording of the first sentence of this point. The second sentence lists a series of acts which cannot be carried out without reproduction of the program and which are subject to authorization. Most of the delegations expressed doubts about this text. The Spanish delegation expressed a reservation on the need to authorize the loading of a program into the computer memory for use. The German delegation proposed improving the wording of this text by substituting the words "screen presentation" for "viewing".

1.2. The adaptation of a program (Article 4(b)). Adaptation requiring authorization includes translation, as shown in the Commission's explanatory memorandum. Most of the delegations were prompted by the wording of this point to comment on the difficulty of accurately interpreting the concept of translation of computer programs in this context. The delegations suggested referring to the provisions of the Berne Convention (hereinafter referred to as BC) (Article 12). (1)

1.3. The distribution of a program (Article 4(c), first sentence). Some delegations (D/NL) suggested referring in this first part to "the distribution of a copy of a computer program". It was pointed out that account should be taken of the non-material aspects of distribution (NL).

1.4. Distribution: Exhaustion of the right to control (Article 4(c), second sentence). The great majority of delegations criticized the present wording of this text, mainly on the following grounds:

(a) Exhaustion of the right to control meant that a computer program could be sold following its first marketing by the rightholder. However, if the concept of first marketing is defined, this could include licensing, lease, etc., with the result that the program would no longer be protected. The delegations proposed referring to the copy or copies of the program and not to the program itself.

(b) Exhaustion of the right to control would make it difficult to harmonize that right, since it would be possible as things stood to deny the right of the author to control distribution of his own work even though he was selling it (right of destination), a right that was recognized under certain national legislations (B/F). These delegations, plus UK, pointed out the possible effects of including exhaustion of the right to control not only Community-wide but also internationally.

(c) The restrictive nature of the aspects of distribution listed.

(1) "Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works." (Article 12, BC).
1.5. **Back-up copies (Article 4(a))**

Since the text of the Directive makes no explicit mention of back-up copies, these remain subject to authorization. A number of delegations said that such copies should be explicitly authorized (I/GR/E). Other delegations thought that this was a problem to be solved in the context of legally valid licensing (NL/UK/B). It was suggested that reference be made to Article 9.2 BC (D). (1)

2. **EXCEPTIONS TO THE RESTRICTED ACTS (Article 5)**

2.1. **Sale of a program to the public other than by a written and signed licence agreement (paragraph 1).** All the delegations commented on this paragraph, as they thought it was difficult to understand. They made the following points:

(a) other types of licence which did not take the form of a written agreement signed by both parties already existed or might evolve in the future;
(b) some national legislations allowed the making of reserve copies if the licence agreement did not explicitly prohibit this (DK);

The French delegation thought that in the absence of contractual provisions it would be possible to authorize the making of a single back-up copy. The Italian delegation agreed with recognition of the purchaser's rights as indicated in the text but would add "except where the parties have agreed otherwise".

2.2. **Special exception to the right of distribution (paragraph 2).** The delegations expressed doubts about the interpretation of some of the terms such as "use", "use by the public" and "public libraries". Some delegations asked for this exception to be limited to rental and not to be extended to other forms of exclusive right to distribution.

(1) "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." (Article 9.2)
3. **INFRINGEMENT** (Article 6)

Although they did not object to its principles and aims, some delegations expressed doubts about paragraph 1. The Italian delegation put forward some ideas about national activities which might come to mind in examination of this Article.

The Greek and Portuguese delegations queried whether possession of an infringing copy implied an infringement of exclusive rights in cases not involving application or use of the illegally copied or imported program.

Regarding paragraph 2 of this Article, a number of delegations had strong reservations about such a provision, which they felt might introduce serious difficulties into national legislations.

4. **TERM OF PROTECTION** (Article 7)

Delegations' reactions fell into two categories:

(a) **Alignment of the period of protection on that provided for in the BC.**

(Article 7.1) (D/B/NL/DK/UK/P), mainly on the grounds of compatibility with the BC and (if it were ever revised), in order not to prejudice a tendency in third countries towards shorter periods of protection. Consideration was also given to introducing varying periods of protection for the countries which were signatories to the BC and for computer programs and auxiliary documentation.

(b) **Flexibility in setting the period (I/E/F/GR), on the grounds that**

Article 7.4 of the BC allowed for a shorter period of protection and full reference to Article 2 of the BC would allow a margin of manoeuvre in selecting the period of protection. Having a shorter period might constitute an incentive to third countries to protect computer programs in accordance with the BC.
With a view to resolving some of the difficulties raised, it was considered that reference could be made to Article 7.3 of the BC. If this were done, the period of protection granted to pseudonymous or anonymous works would expire 50 years after the date on which the work was made available to the public with the consent of the rightholder.

A text reading as follows could be considered: "Where the author of a program is not identified, or the individual contribution of an author to a program created by a group of authors cannot be identified, the program shall be considered a pseudonymous or anonymous work. The term of protection for such pseudonymous or anonymous works shall be 50 years from the date of first making available of the work to the public".

5. COMPATIBILITY WITH OTHER LEGAL PROVISIONS (Article 8)

Paragraph 1 lists other forms of protection which should not be affected by the provisions of the Directive. Most of the delegations thought that this should be an open-ended list in order not to exclude other matters from protection (designs, semiconductors).

Most of the delegations suggested deleting the final part of this paragraph: "insofar as such provisions do not conflict with the principles laid down in the present Directive". The German delegation pointed out that the purpose of the Directive was to provide a form of exclusive protection, but there were other kinds of exclusive protection and the priority of a given form of protection should not be prejudged in cases of dispute. The delegation went on to suggest that the explanatory memorandum should make clear that patent law was limited to patented products, since it was possible to protect by
patent an invention which included among its components a computer program that could also be protected, together with the non-technical components of the invention (formulae, algorithms, etc.).

Regarding paragraph 2, a number of delegations (DK/F/UK/I) indicated that they would prefer to delete it, because for one thing it depended on the duration of protection and for another it was out of the question to revive protection of a program which had expired at the end of a set period (Article 18.1 and 2 of the BC). (1)

6. FINAL PROVISIONS (Article 9)

6.1. Entry into force (Article 9(1))

The Chairman of the Working Party suggested that delegations should propose the date they thought most suitable for transposing the Directive into national legislation. There was much to be said in favour of 1 January 1993.

Similarly, the Chairman suggested that there was an obligation to communicate the texts of the provisions of national law - referring directly or relating to the relevant provisions of the Directive - not only to the Commission, but also to the other Member States in their various languages. A number of delegations agreed that it would be a good idea to promote specific initiatives by economic operators, and in particular by small and medium-sized undertakings, by means of adequate distribution and familiarity with the legal standards.

(1) "(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew." (Article 18.1 and 2 of BC)."
During a second reading, the Working Party considered Articles 1 and 2 of the Directive.

7. **OBJECT OF PROTECTION** (Article 1)

7.1. **Extent of protection conferred** (paragraphs 1 and 2). Delegations' positions fell into two categories:

(a) **Definition of works in the same way as or differently from the Commission, but complying with the period of protection laid down in the BC** (Article 7.1). Under this approach, the United Kingdom and Danish delegations said that they were in favour of the expression **literary works** in order to avoid any ambiguity which would arise from protection differing from that laid down in the said Convention.

The Netherlands, Belgian and Portuguese delegations thought it sufficient to make a general reference to works, under the BC, provided that there was compliance with the period laid down in Article 7.1 thereof. The German delegation proposed using the expression **linguistic works** as a subdivision of literary works while noting the link which existed between the definition of works (Article 1 of the Directive) and the term of protection (Article 7 of the Directive).

(b) **Generic reference to the BC, allowing for greater flexibility in applying the provisions of the Directive, with particular reference to the term of protection.** This view was taken by the Italian, French and Spanish delegations, which proposed a phrase such as: **"works within the meaning of the Berne Convention"** (1).

The Commission representative's criterion was that acceptance of a different definition for programs would affect the contents of Articles 4 and 5 of the Directive and introduce an element of distortion into the body of national law. The Commission representative pointed

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(1) "Literary and artistic works within the meaning of the Berne Convention" (1).
out that computer programs should be given the same protection as was conferred on literary works under copyright law.

7.2. Protection of auxiliary documentation (paragraphs 1 and 2). A number of delegations repeated their positions on the way documentation should be treated (7938/89 Pr 53 of 20 July 1989, p. 5, point 3.1.4.). Although they agreed with the clarifications provided by the Commission in the explanatory memorandum regarding the extent of protection conferred on preparatory materials and documentation, a number of delegations proposed referring explicitly to documentation; the Italian delegation proposed adding: "and auxiliary documentation"; the French delegation proposed: "Computer programs shall include preparatory technical documentation."; the Spanish delegation suggested: "technical documentation".

The Commission representative agreed to consider making it clear that the term "program" as used in the Directive included adequate preparatory materials.

7.3. Proposal to combine paragraphs 1 and 2. This proposal was made at the first meeting (7938/89, p. 5, point 3.1.4.): "The Member States shall confer copyright protection on computer programs as literary works".

7.4. Limit on extending protection (paragraph 3, first and second subparagraphs). About not extending protection to the ideas, principles, logic, algorithms or programming languages underlying the program, the delegations maintained the views they had expressed at the previous meeting (7938/89, p. 5, point 3.1.5.).

Most of the delegations (D/UK/DK/F/I/E/P) repeated their criterion that interfaces could be protected under copyrights if the specifications they contained involved original presentation. The current wording of the text might leave room for the interpretation that interfaces were not protected. Interfaces, as an expression of ideas, principles and specifications, should not be left unprotected.
As for extending the protection under paragraph 3, the Commission representative said that he was continuing to examine this with a view to introducing clarifications and would like further suggestions. He also stressed the obvious link between protection of interfaces and Community policy on competence.

7.5. **The concept of originality** (subparagraph 4(a)). It was pointed out that there was a need to define and harmonize the concept of originality in order to avoid the drawbacks of referring to varying national legislations. The Danish delegation repeated the wording submitted at the Working Party's previous meeting (7938/89, p. 7, first paragraph and footnote 4), which was supported by the German, United Kingdom, Italian, Greek and Spanish delegations, to varying degrees. The French delegation expressed doubts about the appropriateness of this proposal and suggested referring to the idea of individual effort. The Working Party repeated its wish that the Directive should include a definition of originality which added the aspect of individuality to the concept of a creator's intellectual powers.

8. **AUTHORSHIP OF PROGRAM** (Article 2)

8.1. **Natural author of the program** (paragraph 1). The German delegation suggested that the most suitable wording would be: "The author of a computer program is the natural person or group of natural persons who has created the program".

8.2. **Collaborative works** (paragraph 2). The French, Spanish and Italian delegations pointed out the difficulties raised by this provision. The German delegation pointed to the importance of stressing the exercise of common ownership rights.

8.3. **Contractual relationship** (paragraph 3). Delegations' positions on this paragraph comprised the possibility of an alternative wording, deleting the paragraph or maintaining the text.
8.4. **Employment contract** (paragraph 4). Some delegations pointed out that the program should be created "within the framework of a work contract", in order to avoid any possible abusive interpretation of the employer's rights.

8.5. **Programs generated by the use of other programs** (paragraph 5). A number of delegations (D/F/I/E/P) said that they would prefer to delete this paragraph.
ANNEX I

In order to facilitate discussion at the next meeting, delegations will find annexed suggestions for improvements to the drafting of Articles 1.1., 1.2., 1.4(a), 1.4(b), 2.1., 2.2., 2.3., 2.4., 2.5., 4 (title), 4(a), 4(b), 4(c), 5.1., 5.2., 6(title), 8.1.

These suggestions reflect the views articulated by a number of delegations and the agreement by the representative of the Commission to consider improvements to the drafting where appropriate. The Working Group is asked to confirm that this wording adequately expresses the views put forward.

1.1. In accordance with the provisions of this Directive, Member States shall grant copyright protection to computer programs as literary works within the meaning of the Berne Convention.

1.4(a) A program shall be protected if it is the result of the author's own [creative/intellectual] effort.

1.4(b) A program which is generated by means of a computer program shall be protected if it demonstrates [creative/intellectual] effort. Such protection shall be without prejudice to rights existing in the generating program.

2.1. The natural person or group of natural persons who created the computer program shall be considered the author of the program and shall be entitled to exercise exclusively all rights in respect of the program.

2.2. 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.

2.3. Where a computer program is created under a contract, the natural or legal person who commissions the program shall be entitled to exercise exclusively all economic rights in respect of the program, unless otherwise provided by contract.

2.4. Where a computer program is created in the course of employment under a labour contract, the employer shall be entitled to exercise exclusively all economic rights in respect of the program, unless otherwise provided by the labour contract.

2.5. In respect of a program generated by means of a computer program, the natural or legal person who causes the generation of subsequent programs shall, subject to rights existing in the generating program, be entitled to own and exercise all rights in the program so generated.
4. **Restricted acts [Acts subject to control by the right holder] (Actes soumis à l'autorisation de l'auteur).**

The exclusive rights of the author or his successor in title 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 translation, adaptation, arrangement and other alteration of a program, and the reproduction of the results thereof.

c) the distribution, including importation, of a computer program. The first sale of a copy of a program shall exhaust the right of the author to control further sale of that copy, but shall not exhaust the right to control its rental.

**Exceptions to the restricted acts (actes soumis à autorisation)**

5.1. Where a copy of a computer program has been sold [or in the absence of any contractual provisions to the contrary], the acts enumerated in Article 4a and 4b above shall not require the authorization of the right holder insofar as they are technically necessary for the intended use of that copy of the program by its lawful acquirer.

5.2. Performance of the acts enumerated in Article 4a and 4b above other than for the purposes of such use shall require the authorization of the right holder.

5.3. 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.

6. **Further restricted acts [Acts subject to control by the right holder] (Autres actes soumis à l'autorisation de l'auteur)**

8.1 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.
As regards substance, the representative of the Commission notes the concerns expressed in relation to Articles 2.3., 3.2., 6.2., 7., and agrees to reflect on her position.

As regards the substance of Article 1.3., the representative of the Commission notes with regret the strength of view expressed against the present proposal, but maintains the position taken, and will reflect further on possible clarifications to the present text.