REPORT

from: Permanent Representatives Committee
to: Internal Market Council

No. prev. docs: 9647/89 PI 73
10376/89 PI 85
No. Cion prop.: 5682/89 PI 25

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

1. The Commission sent the Council the above proposal for a Directive on 11 January 1989. The proposal is based on Article 100a of the Treaty establishing the European Economic Community.
The Working Party on Intellectual Property referred to the Permanent Representatives Committee a number of questions which had emerged from a first reading of the Commission proposal (9647/89 and 10376/89). The Committee proposed to give the problems submitted to it by the Working Party close consideration at a later stage. It nonetheless felt that the following two basic questions could now usefully be placed before the Internal Market Council for a policy debate:

- reverse engineering of computer programs,

- interface protection.

2. Reverse engineering of computer programs

In its proposal, the Commission submitted no specific provision designed to settle the question of the extent to which a user could analyse a computer program without the right holder’s consent. Views on this question differ widely even within the computer program industry. Accordingly, the Commission preferred at this stage not to endeavour to introduce harmonization on this
point via the Directive, preferring to let doctrine and case law produce an appropriate approach.

Some delegations believed that the question of reverse engineering of computer programs should be dealt with in the Directive, so that harmonization regarding this key feature of protection could be carried through from the outset.

Other delegations, however, preferred a neutral arrangement which would not anticipate the course of events as regards both doctrine and case law. To this end, they wanted all the provisions of the Directive to be genuinely neutral vis-à-vis this problem. From this viewpoint, the question of access to interface specifications takes on special importance, as it is on this question that the degree of accessibility of program analysis depends.

The Council is called upon to decide between the following options:

- work out in future proceedings a solution harmonizing the rules governing reverse engineering of computer programs, or
- adopt a Directive which is entirely neutral as regards this issue, so as not
to prejudge the development of doctrine and case law on this point.

3. **Interface protection**

Article 1 of the Commission proposal provides that computer programs are to enjoy copyright protection as literary works. This principle involves protecting the expression in any form of a computer program, without going as far as the ideas or principles underlying the program. This rule applies to all parts of a program, particularly to interface specifications (Article 1(3) of the Commission proposal).

Discussions within the Council's subordinate bodies have revealed a trend towards deletion of this clarification concerning interfaces, on the grounds that it would be superfluous to reaffirm the general principle of copyright, under which ideas and principles do not qualify for protection.
The Commission has pointed out, however, that such a solution would fail to respond to one of the fundamental problems raised by the Directive, viz. the need to strike an appropriate balance between:

- protection of computer program manufacturers against excessively easy access by competitors to analysis of their programs and, hence, to copying and counterfeiting, and

- the advisability of encouraging the interconnection of programs available to the public, which necessarily involves some freedom as regards access to interface specifications.

It has suggested that a suitable wording be sought for Article 1(3) so as to resolve this problem.

The Council is asked to adopt a position on the approach suggested by the Commission.