SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 25 January 1990

No. prev. doc.: 4344/90 PI 4
No. Cion prop.: 5682/89 PI 25 COM(88) 816 final - SYN 183

of computer programs

1. At its meeting on 25 January 1990 the Working Party on
Intellectual Property (Computer programs) gave a further
reading to the proposal for a Council Directive on the legal
protection of computer programs on the basis of the consolidated
text contained in document 9304/1/89 PI 68 REV 1, leaving aside
the questions on which the Council, at its 1382nd meeting held
on 21 and 22 December 1989, had asked the Commission to provide
an in-depth study (see doc. 11018/89 EXT 1 + COR 1 PV/CONS 89
PI 97 (Marché Intérieur)). Consequently, the Working Party
postponed examination of the two statements set out on page 2 of
the consolidated text and Articles 1(2), 4(a) and 5.

1 The Belgian and Luxembourg delegations were not represented at this
meeting.
2. **Article 1(1)**

Subject to a reservation by the Spanish delegation, the Working Party agreed to remove the square brackets from the term "literary".

3. **Article 1(3)(a)**

3.1.1. With regard to the first sentence of Article 1(3)(a), the German delegation suggested returning to the text originally proposed by the Commission for Article 1(4)(a) with slight modifications.

The French, Netherlands and United Kingdom delegations opposed this suggestion on the grounds that this text used the term "original" without attempting to define it, whereas it had been pointed out at previous meetings that originality in relation to copyright was assessed in different ways in different Member States; these delegations considered that some attempt should be made in the Directive to harmonize the concept of originality with regard to computer programs. The Danish delegation also pointed out that the term "original" was not used in this sense in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

3.1.2. The French delegation suggested replacing the terms "own creative intellectual effort" by the terms "personalized intellectual activity" ("activité
intellectuelle personnalisée"). The German, Spanish and Portuguese delegations were prepared to accept this suggestion.

Several delegations, on the other hand, drew attention to the advisability of not introducing terminology which differed from that used in the Berne Convention.

3.1.3. The Spanish, Italian and United Kingdom delegations were prepared to accept the consolidated text of the first sentence.

3.1.4. The Italian delegation suggested adding to the consolidated text of the first sentence the idea that any computer program should be considered to be original until proof was provided to the contrary.

The German delegation considered that it was unnecessary to make such an addition if the first sentence contained the criterion that the program was the result of the author's own creative intellectual effort.

3.1.5. The Netherlands delegation, while defending its proposal that the first sentence be worded "A computer program shall be protected if it is original in that it is the result of the author's own intellectual effort"², was prepared to consider any proposal which attempted to harmonize the concept of originality.

2 See doc. 9840/89 PI 75, point 4.1.
3.1.6. The Chairman noted that several delegations considered that a mere reference to originality would be insufficient, and that some attempt should be made to harmonize this concept. He pointed out that the idea of "personalized" suggested by the French delegation was already contained in the word "own" appearing in the English version of the consolidated text. He also pointed out that the term "intellectual creation" was used in Article 2(5) of the Berne Convention. The Chairman therefore proposed that the Working Party continue its work on the basis of the following wording for the first sentence of Article 1(3)(a):

"A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation."

3.2.1. With regard to the second sentence of Article 1(3)(a), the United Kingdom delegation considered that the wording of the consolidated text was inaccurate, as at least the criterion of Article 3 should be applied in determining whether a computer program was eligible for protection. In the view of the United Kingdom delegation, it should be made clear that criteria such as the degree of inventiveness should not be taken into account; the United Kingdom delegation had therefore proposed the wording "No assessment of its merit shall be applied in determining its eligibility for protection."3

3 See doc. 9840/89 PI 75, point 4.2., fourth paragraph.
The Danish and German delegations considered that the criterion of Article 3 concerned the eligibility of the author for protection, whereas Article 1(3)(a) was concerned with the substantive criteria which a computer program must meet; they therefore disagreed with the criticism of the consolidated text made by the United Kingdom delegation. Moreover, these delegations and the Netherlands delegation considered that the wording proposed by the United Kingdom delegation was misleading, as in their view some assessment of merit would be involved in applying the first sentence of this paragraph.

3.2.2. The Danish, Italian, Netherlands and Portuguese delegations considered that the second sentence was superfluous; however, the Netherlands and Portuguese delegations were prepared to accept it as proposed in the consolidated text if a consensus emerged in favour of it.

3.2.3. The Greek and Spanish delegations considered that this sentence as set out in the consolidated text contained a useful clarification and were in favour of maintaining it, while the German, French and United Kingdom delegations and the Commission representative were in favour of a sentence expressing the idea that beyond the requirement of an intellectual creation no criteria of quality or aesthetics should be applied.

3.2.4. In the light of the discussion, the Chairman concluded that no delegation was fundamentally opposed to the principle of a second sentence and, taking up an earlier
suggestion which had been supported by the German delegation and the Commission representative, proposed the following wording: "No other qualitative or aesthetic criteria shall be applied to determine its eligibility for protection."

4. Article 1(3)(b)

The Working Party agreed to delete Article 1(3)(b).

The Irish and United Kingdom delegations and the Commission representative entered a reservation with regard to this deletion.

5. Article 2(1)

The Working Party agreed to this paragraph as proposed in the consolidated text, subject to details of drafting.

6. Article 2(2)

A consensus emerged in favour of the principles behind the first two sentences of the suggestion made by the German delegation in document 9840/89 PL 75, point 7.2., namely that the moral and economic rights in a program created jointly should be owned jointly and that the rights should be exercised jointly, unless agreed otherwise between the joint authors by contract. In view of the different provisions in force in the

---

4 See doc. 9013/89 PI 64, Annex, suggestion for Article 1(4)(a) and doc. 9840/89 PL 75, point 4.2., second paragraph.
various Member States, it was agreed not to adopt the solution contained in the last sentence of the suggestion made by the German delegation, but to leave to national law the ways in which the joint rights were exercised.

It was further agreed that, as joint exercise of the rights was to be subject to national provisions, it was not necessary to include a statement to this effect in the Directive; it was therefore sufficient to limit this paragraph to the following text:

"In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly."

7. **Article 2(3)**

The Working Party agreed to delete Article 2(3).

The Italian delegation and the Commission representative entered a reservation with regard to this deletion.

8. **Article 2(4)**

8.1. The Working Party agreed to delete the words "or at the request of his employer".
8.2. The Working Party further agreed to make drafting changes in order to make it clear that, in the absence of contractual provisions to the contrary, the employer alone would be entitled to exercise the economic rights in respect of the program.

9. Article 2(5)

The Working Party agreed to delete Article 2(5).

The Irish and United Kingdom delegations and the Commission representative entered a reservation with regard to this deletion.

10. Article 3(1)

The Working Party agreed to this paragraph as proposed.

11. Article 3(2)

The Working Party agreed to delete this paragraph.

The Commission representative entered a reservation with regard to this deletion.
12. **Article 4(b)**

12.1. The German and Netherlands delegations entered a reservation on this paragraph in conjunction with Article 4(a).

12.2. The United Kingdom delegation reserved its position on this provision in conjunction with Article 5(1)\(^5\).

13. **Article 4(c)**

13.1. The Working Party agreed that the first sentence of Article 4(c) should be worded "the distribution to the public of the original computer program or of copies thereof".

13.2.1. With regard to the second sentence, the Netherlands delegation, supported by the German delegation, raised the question whether exhaustion of rights should result from the first sale anywhere in the world or solely from the first sale in one of the Member States (see document 4344/90 PI 4, point 8.2.).

The United Kingdom delegation and the Commission representative pointed out that the doctrine that the first sale in the Community by the right holder or with his consent exhausts the right in the Community is an established principle of Community law, and it would

---

\(^5\) See doc. 9840/89 PI 75, points 14.2 and 17.5.
therefore not be necessary to restate this doctrine in the Directive; this provision affirmed rather that the first sale of a computer program by the right holder or with his consent anywhere in the world would exhaust his right to control further sale. However, the Commission representative stated that the main purpose of this provision was to establish a right to control the rental of a computer program which would not be exhausted by the first sale.

13.2.2. The Spanish and Irish delegations expressed their support for a rental right in respect of computer programs.

The German, French and Netherlands delegations drew attention to the request made to the Commission at the informal meeting of Ministers of Culture held in Blois on 2 November 1989 to draw up a work programme for measures to be taken in the field of copyright and considered that the question of a rental right should be dealt with in this broader context of copyright protection in general, rather than in the context of this specific Directive.

The United Kingdom delegation, while indicating that its national law provided for a rental right, stated that it was prepared to accept the majority view on whether or not this Directive should provide for a rental right.

13.2.3. The Working Party agreed that the Permanent Representatives Committee would be asked to decide whether the Directive should provide for a rental right for
computer programs or whether the question of rental right should be dealt with in the wider context of copyright protection in general; if it were to decide in favour of a rental right in this Directive, the Committee would also be asked whether this should take the form of a right of complete control over rental, or whether it should be limited to a right of remuneration for rental. In the light of the answers given, the Working Party would re-examine the exhaustion aspects of this provision.

14. **Article 4(d)**

Several delegations questioned what was intended by the terms "communication to the public of a computer program". The Netherlands delegation pointed out that the term "communication to the public" was used in several provisions of the Berne Convention (Articles 2bis(2), 10bis, 11(1), 11bis, 11ter, 14(1), 14bis(2)(b)); it was intended to cover ephemeral communication to the public, for instance by broadcasting, as opposed to the material distribution to the public referred to in Article 4(c).

In the light of these explanations, the United Kingdom delegation asked whether it would be clearer to refer specifically to broadcasting and cable distribution, rather than use the term "communication to the public". The German delegation considered that, in addition to the acts mentioned by the United Kingdom delegation, this provision
should also cover the showing of a computer program on a screen to an audience in a room, and expressed a preference for the wording proposed by the Netherlands delegation.

The Greek, French and Italian delegations considered that the acts referred to were already covered by Article 4(a), (b) and (c), and that there was therefore no need for a separate provision.

The Danish delegation considered that if this provision were to be maintained, exceptions would have to be provided for in Article 5.

The Working Party agreed to put this provision in square brackets and to continue to reflect on it.

15. **Article 6(1)**

15.1. The Spanish, French, Italian, Portuguese and United Kingdom delegations confirmed that they were in favour of the principle of this provision.

15.2. The Danish, Greek and Netherlands delegation expressed reservations with regard to the terms "infringement of the author's exclusive rights" being used in relation to the acts mentioned in this provision.

The French delegation drew attention in this respect to the wording it had proposed at a previous meeting: "an offence constituting liability in respect of the holder of
the copyright" ("une faute constitutive de responsabilité à
l'égard du titulaire du droit")\(^6\). The Portuguese delegation
expressed a preference for this wording.

15.3. **Several delegations** drew attention to the difficulty
of expressing adequately in other languages the English term
"deal with".

The German delegation expressed a reservation with
regard to the acquisition aspects of this term, and suggested
replacing it with "distribution and use"\(^7\). The Italian
delegation similarly suggested referring to "acts of
distribution", and the French delegation had previously
suggested "participation in the distribution" ("participation
à la circulation")\(^8\).

15.4. The German delegation expressed a reservation with
regard to the term "possess".

15.5. The Spanish and United Kingdom delegations argued in
favour of keeping the words "or having reason to believe",
while the Portuguese delegation entered a reservation with
regard to these words, expressing a preference for the
wording proposed by the French delegation: "or unable not to
know" ("ou en ne pouvant ignorer")\(^9\).

---

\(^{6}\) Doc. 9840/89 PI 75, point 19.4.
\(^{7}\) These terms occur in a suggestion for rewording the whole of
Article 6(1): see doc. 9840/89 PI 75, point 19.1.
\(^{8}\) Doc. 9840/89 PI 75, point 19.4.
\(^{9}\) Doc. 9840/89 PI 75, point 19.4.
16. **Article 6(2)**

16.1. The observations under points 15.1., 15.2., 15.3. and 15.4. above also apply in respect of this paragraph.

16.2. The Danish, German, Greek and Netherlands delegations maintained a reservation on this provision.

17. **Article 7**

The Chairman proposed that this Article should state specifically that the term of protection would be the life of the author and fifty years after his death or, where the author is not an identifiable natural person, fifty years from the date when the computer program was first made available to the public.

The Danish, Greek, French, Irish, Netherlands, Portuguese and United Kingdom delegations supported this proposal.

The Spanish delegation expressed a preference for the second variant in the consolidated text, but was prepared to join the majority.

The Italian delegation expressed a preference for the third variant in the consolidated text.
The German delegation stated that under the legislation of the Federal Republic of Germany, copyright protection lasts for the lifetime of the author and seventy years after his death for all literary works; since all authors have to be treated alike under the German Constitution, the German delegation wished to be allowed to keep this term of protection for computer programs by using the words "at least fifty years" in the Chairman's proposal, despite the fact that it was highly unlikely that protection would be claimed so long after the death of the author of a program.

The Chairman concluded that he would maintain and formalize his proposal and noted the reservations expressed.

18. **Article 9(2)**

The Greek, Netherlands, Portuguese and United Kingdom delegations maintained reservations in respect of the second sentence of this provision.

It was agreed that this question would be submitted to the Permanent Representatives Committee, as its implications extended beyond the scope of this Directive.