SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 1 and 2 March 1990

No. prev. doc.: 4490/90 PI 6
No. Com prop.: 5682/89 PI 25 COM(88) 816 final - SYN 183

of computer programs

1. At its meeting on 1 and 2 March 1990 the Working Party on
Intellectual Property (Computer programs) re-examined Articles
1(2), 1(3)(a), 4(d), 5(3), 6 and 7 of the proposal for a
Council Directive on the legal protection of computer programs
on the basis of the consolidated text contained in
doc. 4533/90 PI 7 and 9304/1/89 PI 68. It was agreed that the
issues concerning rental right (Article 4(c)) and
communication of provisions of national law to the other
Member States (Article 9(2)) were to be discussed at other
levels in the Council.
2.1. The Commission representative said that the Commission services, in accordance with the Council mandate of 21 December 1989, had made an in-depth study concerning the issues of interfaces and reverse engineering, and that on the basis of this study, they felt that it should be explicitly stated in the text of the Directive that ideas underlying interfaces are not copyrightable. He added that the entire industry, manufacturers as well as users of computer programs, are in favour of mentioning this principle in the text of the Directive and that, especially in the light of the objective of free competition in the Community, access to interfaces would be essential for software industries to be able to continue their activities.

2.2. All delegations maintained their position, i.e. that it would not be necessary to repeat a basic principle of copyright law in the text of this Directive. They feared that this might lead to a contrario interpretations causing confusion for national legislators and for industry. Consequently, they asked that this paragraph be limited to the following sentence:

"Protection in accordance with this Directive shall apply to the expression in any form of a computer program" (see first part of first sentence in doc. 9304/1/89).
They underlined that big computer firms might abuse copyright law to develop marketing strategies which are forbidden under competition law. In this context they referred to the complaints of a number of small software firms which are afraid that, because of copyright protection, they would no longer have access to the interfaces produced by big computer firms and this lack of access would hinder them in their activities.

In order to avoid abuse of copyright protection, some delegations suggested application of the Anglo-Saxon concept of "fair use" for access to interfaces.

Other delegations felt that this concept would be difficult to apply in the commercial field.

2.3. With a view to reaching a compromise solution, the Chairman proposed the following text for Article 1(2):

"Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."
The following recital would have to be added in the Preamble:

"Whereas to the extent that logic, algorithms or programming languages constitute ideas and principles which underlie a computer program, they are also not protected by copyright under this Directive."

The French, Greek, Italian, Irish, Luxembourg, Portuguese and United Kingdom delegations felt that this text proposal constituted an improvement on the text contained in doc. 9304/1/89.

The Luxembourg delegation, however, considered that the problem of access to interfaces was not clearly settled.

The German, Spanish, Netherlands and United Kingdom delegations were in favour of ending Article 1(2) after the first sentence. In addition, the German delegation, supported by the Spanish and Netherlands delegations, suggested replacing the second sentence by a statement in the Preamble that the normal principles of copyright apply.

The Italian delegation reserved its position on the text of Article 1(2) until the problem of reverse engineering (Article 5(3)) had been resolved.
The Belgian, Danish and German delegations asked for a period of reflection before taking a final position on this new text proposal.

Article 1(3)(a)

3.1. The Working Party agreed to remove the square brackets and to delete the words "other" and "as an original work" from the text contained in doc. 4533/90, so that this provision reads as follows:

"A computer program shall be protected if it is original in the sense that it is its author’s own intellectual creation. No qualitative or aesthetic criteria shall be applied to determine its eligibility for protection."

The Belgian, Danish and German delegations felt that the reference to "original" in the first sentence was redundant.

Article 4(d)

4.1. The Working Party agreed to delete Article 4(d) considering that communication to the public was covered by Article 4(a).

The Netherlands delegation reserved its position on the deletion of this provision arguing that immaterial communication was not covered by Article 4(a).
Article 5(3)

5.1. On the basis of a study concerning the problem of reverse engineering carried out in accordance with the Council mandate of 21 December 1989, the Commission services proposed the following text for Article 5(3):

"Notwithstanding the provisions of Article 4(a), the lawful acquiror of a copy of a program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright if he does so while loading, displaying, running, transmitting or storing the program in execution of his contract."

The Commission representative explained that the right-holder of a copyright should not be entitled to prevent, by means of any contractual stipulations (Article 5(1)), the lawful acquiror of a copy of a program from carrying out the acts mentioned in this paragraph.

It was suggested that the words "lawful acquiror" be replaced by "legitimate user" and that the words "in execution of his contract" be deleted.

5.2. The French and the United Kingdom delegations considered that this text proposal was more acceptable than the text contained in doc. 9304/1/89. However, they thought that only a
carefully circumscribed form of reverse engineering should be allowed. They felt that they needed more reflexion on the question where to draw the limit between non-protected ideas and principles underlying a computer program and the expression of these ideas and principles which should be copyrightable.

The German delegation felt that there should be no provision in the Directive which would specifically permit reverse engineering. It argued that it would not be possible to allow observing, studying or testing the functioning of a computer program in order to determine the ideas underlying this program without risking the copying of the whole program which could then be commercialized.

The Danish, Italian and Irish delegations suggested introducing a general clause into the Directive referring to the principle of fair use for research activities, which would not cover commercial production activities (cf. Section 107 of United States Copyright Act).

While reserving its position, the Netherlands delegation felt that the text of this paragraph should distinguish between normal users of a computer program and manufacturers who want to produce software which is compatible with other programs.
5.3. The Chairman suggested that the Working Party consider introducing a mechanism whereby the operation of Articles 4 and 5 of the Directive and any problems for interoperability, etc. could be monitored and reviewed within 3 to 5 years. He also asked the Commission to respond to his assessment.

Delegations were asked to consider the following questions put forward by the Commission services in preparation for the next meeting of the Working Party:

(a) What is the purpose of reverse engineering?
(b) Which persons should be allowed to perform reverse engineering?
(c) Should there be remuneration of the right holder?
(d) Should reverse engineering be limited to the extent necessary to achieve the purpose?
(e) What use should be made of the information gained?
(f) Should it be possible to publish or communicate the results of reverse engineering to third parties?
(g) Could the information being sought be obtained by published material, standards bodies, contractual means or in other non-infringing ways?

Article 6

6.1. In the light of the reservations on the Commission text (doc. 4490/90, pages 12 and 13), the Chairman proposed that consideration be given to the alternative wording suggested by
the French delegation (doc. 4533/90, p.6) and to a new paragraph to be added concerning seizure1 (cf. Berne Convention, Article 16).

The French delegation explained that its proposal would leave Member States free to choose between civil, administrative or criminal provisions of national law to combat piracy.

6.2. The United Kingdom delegation could accept the French proposal but suggested adding the word "importation" in both paragraphs.

The Belgian delegation considered that possession of an infringing copy is not forbidden according to Article 4(a) of the Directive but could, nevertheless, accept the French proposal.

The German delegation, supported by the Danish and Netherlands delegations, felt that although the possession of an infringing copy could lead to its distribution, mere possession as such is not one of the restricted acts mentioned in Article 4 of the Directive and it could therefore not accept the French proposal. It suggested either that only the distribution of an infringing copy should be mentioned as an infringement of the author's exclusive rights, or that it

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1 It was also suggested that this new paragraph might be added to Article 4 rather than to Article 6.

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should be left to the Member States to determine which acts constitute an infringement of the author's rights according to Article 4 and therefore should be forbidden.

The Italian and Spanish delegations could not accept the French proposal because they felt that it did not maintain a link with Article 4 of the Directive. The Italian delegation could not accept the element of guilty knowledge contained in the French proposal because it would introduce a subjective qualifying element into the Directive. It thought that it should be left to Member States to establish penalties and that it would be unacceptable if these penalties were to be dictated by a Directive. Therefore the Italian delegation was in favour of the text of Article 6 contained in doc. 9304/1/89.

The Netherlands delegation was in favour of the proposal by the German delegation in document 9840/89, page 18.

The Greek delegation could accept either the German proposal contained in doc. 9840/89, p. 18 or the French proposal.

6.3. On the basis of the comments on the French proposal, the Commission services and the German delegation proposed alternative texts (cf. Annex).

Both text proposals provide the possibility of seizure of an infringing copy in accordance with Article 16 of the Berne Convention.
6.4. The United Kingdom delegation felt that the possession of an infringing copy should be considered as an act against which Member States should provide appropriate remedies. It also attached great importance to remedies against persons committing the acts mentioned in sub-paragraph (c) of the Commission proposal. It therefore considered that the German proposal was too general and that the Commission proposal could be accepted subject to some minor drafting points.

The Italian delegation considered that the Commission proposal was more complete than the German one, because the German proposal does not provide remedies against the possession of an infringing copy or against the acts mentioned in sub-paragraph (c) of the Commission text. This delegation also suggested adding remedies against acts of selling or buying of infringing copies. Although the Italian delegation thought that the Commission proposal was a more helpful step forward than the German proposal, it expressed a preference for the text of Article 6 contained in doc. 9304/1/89.

The French, Irish and Spanish delegations thought that the German proposal did not add anything to Article 4(a) of the Directive. They also considered that the provision contained in sub-paragraph (c) of the Commission proposal should be maintained. They therefore expressed a preference for the Commission proposal. The French delegation suggested starting paragraph 2 with the wording "Without prejudice to the provisions of Article 4 of the Directive ...".

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6.5. The Netherlands and Greek delegations felt that the possession of an infringing copy and the acts mentioned in sub-paragraph (c) of the Commission proposal do not constitute an infringement of copyright law. They considered that these acts should be dealt with in criminal law. They therefore expressed a preference for the German proposal.

6.6. The Belgian delegation could not accept the element of guilty knowledge contained in the Commission text. It felt that it would be difficult for a person who had acted in good faith to prove that he had had no reason to believe that the copy concerned was an infringing copy. On the other hand, it felt that the provision contained in sub-paragraph (c) of the Commission proposal should be maintained. This delegation therefore expressed a preference for the German proposal but had an open mind concerning the Commission proposal and suggested putting the first paragraph of this proposal at the end of it.

6.7. The Danish delegation considered that both proposals constituted progress. It therefore could accept either of them. It suggested, however, adding the provision contained in Article 16(3) of the Berne Convention according to which seizure shall take place in accordance with the legislation of each country.
6.8. The Commission representative agreed to add a sub-paragraph (d) providing remedies against the selling or buying of infringing copies, as suggested by the Italian delegation. He also agreed on the drafting suggestions made by the Belgian, Danish and French delegations.

The Presidency concluded that a majority of delegations was in favour of the Commission proposal and suggested looking for a consensus on the basis of the Commission text.

**Article 7**

7.1. All delegations maintained their positions concerning this Article as contained in doc. 4490/90, page 14.

It was agreed that the wording of the second sentence be adapted to the wording of Article 7(3) of the Berne Convention.
Article 6
Enforcement of Protection

First Variant (Commission proposal)

1. An infringing copy of a computer program shall be liable to seizure.

2. Member States shall provide appropriate remedies against a person committing acts listed in sub-paragraphs (a), (b) and (c) below:

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

   (c) the putting into circulation of articles the sole intended purpose of which is to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.
Second Variant (Proposal by German delegation)

1. Member States shall provide appropriate remedies against a person who reproduces a computer program without the consent of the right holder or who brings into circulation or distributes such copies.

2. An infringing copy of a computer program shall be liable to seizure.