Brussels, 3 April 1989

WORKING DOCUMENT
of the Section for Industry, Commerce, Crafts and Services
on the
the legal protection of computer programs
(COM(88) 816 final)

Rapporteur: Mr MORELAND

Sent on: 3 April 1989

To the Members of the Study Group
on Computer Programs
(Section for Industry, Commerce,
Crafts and Services)

N.B.: This document will be discussed at the meeting on 19 April 1989.

R/CES 358/89
1. **Summary of the Proposal**

The draft Directive introduces the concept of copyright into Community law for the protection of computer programs. The proposal does not introduce a specific law but rather proposes that Member States should accord computer programs the same copyright protection that they accord to literary works. In addition the term of protection is to be 50 years from the date of creation of the program.

However, the proposal goes on to exempt from protection "ideas, principles, logic, algorithms or programming language underlying the program". It also makes lawful the use of programs used by the public in non-profit making public libraries.

The proposal gives rights to the commissioner of programs rather than the creator and to the employer rather than the employee (unless otherwise provided by contract).

2. **Initial General Comments**

The Commission has produced its proposal before the Committee gave its Opinion on the "Copyright Green Paper". Perhaps the Commission should be commended on its power of prophesy as regards certain of the comments of the Committee - particularly as regards the "literary works" basis of its proposal!

Nevertheless, lack of clarity and dubious drafting underlines the haste in which the Directive was compiled after the publication of the Green Paper. The Rapporteur foresees some difficulty over certain clauses within the Council.
The priority given to this Directive is not disputed nor is the legal basis upon which protection is to be given to computer programs. However members may wish to bear in mind the balance required between adequate protection to encourage initiative and fair reward and the concern that restrictive protection of computer programs may limit the ability of European business to make the fullest use of modern technology, particularly to compete against third country competitors. Complicated and restrictive copyright licences are not at all helpful as incentives to industry.

3. Initial Specific Comments on Questions

Article 1. Object of Protection

Paragraph 1

The key clause. Is protection as "literary works" acceptable? It is based not so much on its own merits, but on the absence of any other basis that would not take considerable time and effort to establish. Does it allow for the situation, as recommended in our Opinion on copyright, for a separate code for copyright, as operates in France? In other words, should it require computer programs simply to be protected, or to be protected specifically as copyright works?

Paragraph 3

This appears to be in line with the Committee's comments on the Green Paper (see page 8, clause c) but the drafting in unhappy. The principle on which this provision is based should be, perhaps, that the ideas which underlie the program should not be protected but that the way those ideas are expressed in coding and structure should be.
The second sentence is redundant as the point is covered by the first sentence and should either be deleted or proceeded with "For the avoidance of doubt".

Paragraph 4a

The Commission does not define "originality" as the interpretation of this word in law differs from Member State to Member State (for example, the Federal Republic has a stiff test of originality). This clause does not harmonize anything, particularly as the Court of Justice, if tested, would probably uphold the validity of different degrees of originality as it has upheld the validity of different terms of protection.

Article 2 - Authorship of Programs

Paragraph 3

This paragraph (and the next) are likely to create problems for some Member States, particularly (but not exclusively) ones with a strong "droit d'auteur" philosophy as the legal rights are given not to the "author" or company employing the "author" but to the commissioner. Also how will the use of "subordinates" be tackled, e.g. a consultant develops a program for one client as part of an overall consultancy project. Can he develop that program (or use routines first developed for that program) for another customer? Perhaps this area should be left entirely to freedom of contract?

Paragraph 4

Should the employee who has devised the program have rights particularly as it may have been his skill which has produced a program that could be used outside his own company and make it a substantial "windfall" profit?
Article 4 - Restricted Acts

Is this article too "protectionist" of the computer industry?

Again drafting could be tighter. "Transmission" and "Storage" need more precise definition. In 4b, what is meant by "adaptation"? Does "exhausted in respect of sale" mean that the draftsman intended to prohibit the control by a licensor over his licensees sub-licensing? Anyway, very few computer programs are "sold": either they are licensed or they are simply made available for use, with the copyright owner reserving all intellectual and physical property rights.

Article 5 - Exceptions to the Restricted Acts

Paragraph 2

Presumably this is intended to allow use of programs for educational reasons. If so it should say this or, at least, add, for example, a list of appropriate bodies such as schools, universities, rather than the curious "non-profit-making public libraries". In any event, presumably a rented program would not necessarily have to be used "in non-profit-making public libraries".

Article 7 - Term of Protection

The life of a computer program is invariably short. Therefore 50 years is complete protection. But, in effect so is 25-20 years which is the more common length of protection for industrial products. Perhaps this is to follow the recent UK Copyright Act. If so it is to misinterpret the position of the UK which gives protection not from the "date of creation" but from the end of the year in which the author dies. (This was done
(somewhat questionably) to encourage other countries to regard computer programs as covered by the Berne Convention on international copyright protection). In other words the Commission appears to have either fallen between two stools or simply made a mistake.

Other Consideration

Because this breaks new ground for the Community should there be an automatic review period for the Directive, say, after five years, particularly to review whether or not continued existence of different copyright laws in different Member States is having an adverse impact on the development of the single market?