COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS AND INDUSTRIAL POLICY

OPINION

for the Committee on Legal Affairs and Citizens' Rights

on

the proposal for a Council directive on the legal protection of computer programs
(COM(88) 816 final - SYN 183 - Doc. C 3-56/89)

Draftsman: Mr K. PINXTEN

22 March 1990
OPINION

of the Committee on Economic and Monetary Affairs and Industrial Policy

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The Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Pinxten draftsman on 20 September 1989.

It considered the draft opinion at its meeting of ............... and at the latter meeting adopted the opinion's conclusions by ...........

The following took part in the vote: Beumer, Chairman; Desmond and de Montesquiou, Vice-Chairmen; Pinxten, draftsman; Barton, Bernard-Reymond, Cassidy, Caudron, Cox, Falconer (for Crawley), Fitzgerald (for Ruiz Mateos), Herman, McCartin (for Hoppenstedt), Mattina, Negret, Merz, Metten, Patterson, Porto (for Visentini), Read, Roth (for Ernst de la Graete), Siso Cruellas, Smith, A. (for Seal), van der Waal (for Lataillade) and von Wogau.
1. There can be no doubt as to the importance of computer software for the EC economy. The Commission's Green Paper on copyright estimated the Western European market for system software at US $ 9.5 billion in 1985. Our main suppliers of software, however, are American in origin; in 1985 American companies accounted for between 65% and 85% of the Western European market for system software, and about 55% of the market for application software. US imports of software, by contrast, are minimal. As a result of the 'computerization' of our society this sector is still expanding, and the demand for software within the EC is greater than that in the US at the moment. The development of the Community software industry is therefore of great importance for the economy of the European Community, and particularly for its industrial and technological future. To this end it is essential to create an appropriate legal framework within which the sector can develop. In this respect European producers of software have hitherto been at a disadvantage as regards competition with countries with a long-standing computer industry (particularly the US), which have had appropriate legal measures for the protection of their software industry for some considerable time now. After all, the authors of computer programs are very vulnerable without legal protection for their creations, given the lack of technical anti-copying devices. In view of the considerable investments and the creativity and research to which computer programs owe their existence, the lack of proper legal protection against unlawful copying severely hinders and discourages the marketing of such programs. Accordingly a number of Member States have taken statutory measures for the legal protection of computer programs, while others are in the process of developing similar initiatives.

2. The purpose of the directive in question is to establish the necessary legal protection for computer programs throughout the Community. Naturally the Committee on Economic and Monetary Affairs and Industrial Policy gives its fullest support to this aim. The present opinion will examine the extent to which the proposal for a directive provides for the necessary legal protection for the software industry in the Community, while maintaining enough flexibility to promote innovation through competition.

3. In theory there are a number of different ways of protecting computer programs: patent protection, contracts, legal protection tailored specifically to computer programs, and protection by copyright. If the software industry in the Community is to be given the legal security which it needs, then protection measures must be made as uniform as possible throughout the Community. Discrepancies in the legislation of the various Member States could lead to distortion of competition and thus have an adverse effect on the operation of the internal market. However, the choice of an appropriate form of legal protection should also take into account the need for protection outside the Community. After all, a form of legal protection confined to the EC, with no legal force beyond the borders of the Community, would be limited in its field of application and ineffective, given that it could be circumvented outside the EC. It is therefore important to bear in mind the need to guarantee a certain degree of reciprocity. In view of this, copyright protection would seem to be the best solution. Copyright protection is laid down in the Berne Convention, which has now been ratified by 89 countries, a recent accession being that of the US. This Convention provides for the protection of the works of authors who are nationals of one of the states party to the Convention, who are normally resident there or who first published their work there. Such a choice would guarantee maximum international protection, while avoiding potential trade policy problems.
4. The decision to opt for copyright protection as laid down in the Berne Convention will, however, involve a number of problems. A number of terms relating to copyright are inadequately defined and may give rise to differences of interpretation and hence to discrepancies in the administration of justice and the enforcement of the Convention in the various Member States. Efforts should therefore be made to define the technical terms and measures as precisely as possible in the directive, in order to ensure that the law is administered as uniformly as possible. It is important to limit the scope for variations in interpretation as far as possible, although it is inevitable, given the decision to opt for copyright protection, and the powers of the national courts, that the courts of the various Member States will to some extent put their stamp on the mode of enforcement in each country.

5. Article 1(2) of the proposal for a directive confers copyright protection on computer programs as literary works. This means that — as stated in paragraph 3 of the same Article — protection is accorded to the expression, but not to the ideas and principles. Paragraph 3 lists other exclusions: logic, algorithms, programming languages and interface specifications, inasmuch as these represent ideas and principles. These do not, in fact, add anything to the general exclusion of ‘ideas and concepts’. However, reactions already received to the proposal for a directive indicate that these terms are susceptible of different interpretations, so that their inclusion may result in discrepancies in the administration of justice. It is for this reason that one of the amendments proposed deletes these additional exclusions.

6. A big advantage of applying copyright protection to computer programs as literary works is that it enables a balance to be maintained between, on the one hand, necessary protection against unlawful reproduction through protection of the means of expression and, on the other, innovation which is a product of competition, as no protection is conferred upon ideas and principles. However, the precise definition of the terms ‘expression’ and ‘ideas and principles’ is also open to different legal interpretations.

7. Refusal to make available the information regarding the interfaces and access protocols needed in order to produce a compatible system and to guarantee interoperability is not generally in the interest of hardware and software producers. This accounts for the prevailing policy of openness and the companies’ willingness to introduce certain sections of their programs into the public domain, in order to achieve greater compatibility between the various systems. A genuine internal market will not exist until the best possible provision has been made to ensure the compatibility of hardware and software. With this aim in mind, every effort should be made to advance progress towards standardization under the auspices of the International Organization for Standardization (ISO), to whose activities the producers make a voluntary contribution. In the light of efforts to achieve compatibility and interoperability, then, the introduction of more thorough protection specifically for interfaces and access protocols is quite out of the question. However, those interfaces and access protocols which consist of computer programs must enjoy the protection for which provision is made in the present directive. As no specific protection for interfaces is included in the directive, the general rule on the protection of computer programs being applicable to those consisting partly of such a program, there is no reason to refer specifically to interfaces in the directive. It is therefore proposed that the specific reference in question be deleted.
Those producers who enjoy a position of power in the fields of software and hardware alike have a particular interest in keeping information about interfaces secret. However, if they were to abuse the protection accorded to them under the copyright, the regulations on fair competition would come into play and an investigation would need to be held to ascertain whether they were abusing their dominant position.

8. Paragraph 4 of Article 1 stipulates that protection be made conditional upon the criterion of originality as it applies to literary works. The interpretation in law of the concept of 'originality ... (as it applies to) ... other literary works' varies considerably at international level and between the various Member States. In this connection the Commission observes in its explanatory memorandum that 'the only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied. No other aesthetic or qualitative test should be applied'. Although we can agree with this interpretation, the interpretation of the term in law is far more restrictive in certain cases (such as the Inkasso case). It therefore seems advisable to incorporate a more precise definition of the term 'originality' in the directive, in order to avoid differences of interpretation under the law.

9. The inclusion in paragraph 4(b) of Article 1 of specific provisions for programs generated by computers does not add anything of substance. Since the result would be the same without this specific provision, it is proposed that it be deleted.

10. Article 4 contains provisions governing restricted acts. The second sentence of paragraph (a) of Article 4, 'in so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts', adds nothing to the general rule and should therefore be deleted. Opinions on restricted acts vary widely. Certain parties are very much in favour of authorizing reverse engineering under certain circumstances. If this is made legal, however, legal protection for computer programs will virtually cease to exist.

11. Article 5 deals with exceptions to the restricted acts described in Article 4. The aim of this article is to enable users to use their computer programs in the normal ways. As the only article in the directive whose purpose is to protect users, it ought to ensure that all users who have acquired a computer program in a legal manner can carry out all the operations associated with the normal use of a computer program without having to obtain authorization. Such operations include making a back-up copy and adapting a program to some degree to the user's particular needs. The draft directive draws a distinction between computer programs issued on licence and those which the user has acquired in some other legal manner, such as purchase of a copy of a program with or without a written contract, lease, hire, etc. It is only for users who have not concluded a written licence agreement in respect of the computer program which they have acquired that the directive guarantees the right to carry out all the operations necessarily associated with the normal use of a computer program, without the need to obtain authorization for such use. The users of computer programs which are subject to a written licence agreement are not protected in any way by the directive, nor are they guaranteed the right to use their computer programs in the normal ways. The Commission itself acknowledges in its explanatory memorandum that: '... in some areas, the balance of power between producers and users of computer
programs may not permit the latter to negotiate equitable contract conditions, due to the market strength of some software suppliers'. To protect users against the dominant position of some suppliers of software, the directive should therefore incorporate provisions guaranteeing the right to normal use of computer programs supplied on the basis of licence agreements and prohibiting the incorporation into licence agreements of clauses under which acts associated with the normal use of a computer program are made subject to authorization from the rightholder.

12. The right to use computer programs in public libraries must not be restricted to programs acquired other than by a written licence agreement; it should be extended to all computer programs acquired in a legal manner.

In the light of these considerations the rapporteur proposes that Article 5 be amended.

13. Article 6, which relates to secondary infringements, states, inter alia, that a person who knows or has reason to believe that he is in possession of an infringing copy of a program is guilty of infringement. However, if such a person was genuinely unaware of this at the time he acquired the program and did not learn that the program was an infringing copy until it was in his possession, he cannot be said to be guilty of infringement and cannot be punished for that offence. An amendment to rectify this situation is accordingly proposed.

14. Article 7 proposes that protection be accorded for a period of fifty years: this is the period of copyright protection laid down for literary works in the Berne Convention. It may be argued that a shorter period of protection might be more appropriate for computer programs. However, the period of protection laid down in the Berne Convention must, of necessity, be respected. A change in the length of the period of protection laid down in this Convention may be considered in the near future, and it would therefore be preferable to refer to the period of protection laid down in the Convention rather than to stipulate an absolute period of time. The Commission's proposal that the period of protection should start on the date of creation of the computer program should likewise be taken up. In the case of computer programs it would be inappropriate for the period of protection to start on the date of the author's death, and this would unnecessarily prolong the period of protection.

CONCLUSIONS

15. In view of the above considerations the Committee on Economic and Monetary Affairs and Industrial Policy requests the Committee on Legal Affairs and Citizens' Rights, as the committee responsible, to make the following amendments to its report:
3. Protection in accordance with this directive shall apply to the expression in any form of a computer program but shall not extend to the ideas, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

ARTICLE 1(4)

Amendment No. 2

Delete 4(b)

4(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in 4(a) above.

ARTICLE 4(a)

Amendment No. 3

Delete rest of paragraph

(a) the reproduction of a computer program by any means and in any form, in part or in whole. In so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts;
ARTICLE 5(1)

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the rightholder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purpose of its use shall require the authorization of the rightholder.

Amendment No. 4

1. Where a computer program has been made available to the public in a legal manner, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the rightholder, in so far as they are necessary for the use of the program. (Delete second sentence).

ARTICLE 5(2)

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

Amendment No. 5

2. Where a computer program has been made available to the public in a legal manner, the rightholder may not prevent the normal use of the program by the public in public libraries.

Amendment No. 6

Article 5(3): add the following new paragraph:

3. A licence agreement or other written agreement must not contain any clauses which conflict with the provisions laid down in paragraphs 1 and 2.
ARTICLE 6(1)

1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

Amendment No. 7

1. It shall be an infringement of the author's exclusive rights in the computer program to import, acquire or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

ARTICLE 7

Protection shall be granted for fifty years from the date of creation.

Amendment No. 8

The period of protection shall be that for which provision is made in the Berne Convention, from the date of creation.