1. At its meeting on 7 and 8 June 1990 the Working Party on Intellectual Property (Computer programs) continued its examination of the issues of reverse engineering, protection of interfaces and rental right, as well as Articles 5 and 6 of the proposal for a Council Directive on the legal protection of computer programs.
I. REVERSE ENGINEERING AND THE PROTECTION OF INTERFACES

A. Proposal by the Italian delegation

2. Following the presentation of a number of proposals on reverse engineering at the Working Party’s two previous meetings (see doc. 6381/90 PI 24, points 4 to 12 and Annexes I to IV), the Italian delegation presented a proposal for an Article 5bis on reverse engineering (see Annex I to this document), which attempted to synthesize the contents of those proposals.

B. Principles to be contained in a solution to the problem of reverse engineering

3. The Working Party discussed, taking into account the various proposals which had been submitted, the principles to be contained in a solution to the problem of reverse engineering of computer programs.

4. The Chairman considered that the discussion of the question of reverse engineering in the Council on 14 May 1990 had indicated that the majority of delegations were in favour of seeking a solution along the lines of the third option suggested in the Presidency’s report to Council (an exemption from copyright which would specifically allow reverse engineering for defined purposes under defined circumstances), or a combination of that option with the

1 Document 6179/90 PI 22.
second option (a "fair use" provision). He therefore suggested that a provision on reverse engineering should take the form of a derogation from copyright, if possible incorporating "fair use" aspects.

The majority of delegations and the Commission representatives agreed with this principle. The Danish delegation considered that further consideration should be given to the "fair use" option before a decision was taken in favour of this principle. The German and Netherlands delegations reserved their positions as to which option should be adopted.

5. With regard to the question in respect of which acts a derogation should be provided, there was general agreement that the derogation should be limited to the passage from machine code to source code, and that this would involve the acts referred to in Article 4(a) and (b) of the proposal for a directive.

6. With regard to the question how the persons who would be able to benefit from the derogation should be defined, the Working Party agreed on the terms "by or on behalf of a person having a right to use a copy of the program"; these terms would cover both a purchaser of a copy of a program and a licensee, as well as a person acting on their behalf, such as a service engineer, while making the entitlement to perform reverse engineering subject to the right to use the program.
7. It was agreed that the main condition for performing reverse engineering was that the acts concerned should be **indispensable** (and not merely necessary) for interoperability. In order to fulfil this condition, the following requirements *inter alia* would have to be met:

- all non-infringement means of attaining interoperability had been reasonably exhausted;

- reverse engineering must be confined to the relevant part of the program;

- there must be an actual need for interoperability.

8. With regard to the *selection* of the *points* on a copyright protected program at which an independently created program may interoperate with the first program, the Working Party noted that

- allowing the rightholder to select these points could lead to rightholders being excessively restrictive in the points which they select;

- allowing the creator of the second program to choose freely the points of interoperation would have the disadvantage that the first program might be changed at these points (with the consequence that the programs were no longer interoperable), as the only points of attachment which the
rightholder in the first program is obliged to maintain unchanged are those which he discloses in manuals and other published material;

- an intermediate solution would have to be sought.

9. With regard to the question whether the copyright holder should be entitled to remuneration from a person performing reverse engineering, the Commission representatives considered that any right of the copyright holder to remuneration should be preserved, and therefore could accept the wording suggested by the Italian delegation in paragraph 3 of its proposal, while the Belgian, Danish, German, Netherlands and United Kingdom delegations considered that there could be no basis for remuneration in respect of acts which were the subject of a derogation from copyright.

10. The Working Party agreed that the information obtained as a result of reverse engineering should not be given to others, except when necessary for interoperability of the program created as a result of reverse engineering with the program which had been engineered in reverse.

11. The German, French, Netherlands and United Kingdom delegations considered that it was not necessary to include the terms of Article 9(2) of the Berne Convention on the Protection of Literary and Artistic Works in a provision on reverse engineering. The Italian delegation suggested that
if these terms were not included in the provision on reverse engineering, they should be mentioned in the preamble to the Directive.

12. The Spanish, Netherlands and Portuguese delegations considered that it was not necessary to state that the information obtained from reverse engineering could not be used for purposes other than interoperability. These delegations and the German delegation also considered that it was not necessary to state that the information obtained from reverse engineering could not be used for the marketing of a program substantially similar in expression (paragraph 2 of the proposal by the Italian delegation).

The Italian delegation and the Commission representatives considered that it was necessary to make both these statements.

C. Compromise proposal by the Presidency

13. In the light of the discussion on the principles to be contained in a solution to the problem of reverse engineering of computer programs, the Presidency presented a compromise proposal covering both reverse engineering and protection of interfaces (see Annex II to this document), incorporating provisions on reverse engineering in a redraft of Article 5 of the proposal for a Directive. The Chairman asked delegations whether they could accept this

2 With regard to the parts of Article 5 which are not directly concerned with reverse engineering, see section II below.
compromise proposal as a package, on the understanding that a definition of the term "interoperability" would have to be further elaborated (see point 8 above) and that questions of drafting could be considered at a later stage.

14. The initial reaction of the Belgian, German, Greek, Spanish, French, Irish, Italian, Portuguese and United Kingdom delegations and the Commission representatives was favourable to the compromise proposal as a package, subject to detailed examination.

The Danish delegation stated that it could not adopt a position on this compromise proposal until further consideration had been given to the other options mentioned in document 6179/90 PI 22, particularly the "fair use" option. It also feared that Article 5(3) and (4) of this compromise proposal would lead to a reduction in the level of protection for computer programs.

The Netherlands delegation, while indicating its willingness to examine this compromise proposal constructively, stated that it could not accept it without substantial amendments.

15. The Netherlands and United Kingdom delegations considered that the second sentence of Article 1(2) was superfluous. The Chairman pointed out that the corresponding recital was intended to make it clear that this sentence was necessary for the avoidance of doubt. The Commission representatives offered to prepare a statement.
for the Council minutes with a view to removing the
misgivings of the Netherlands and United Kingdom
delagations on this point.

16. The Commission representatives reserved their position
on the question whether the issue of remuneration (see
point 9 above) was covered adequately by the terms "on
reasonable conditions" in Article 5(3)(b).

17. The wording of Article 8(3) in the Presidency's
compromise proposal was taken from a proposal by the United
Kingdom delegation to add to the text proposed by the
Commission services (document 6381/90 PI 24, Annex V) a
reference covering Council Decision No. 87/95/EEC of 22
December 1986 on standardization in the field of
information technology and telecommunications.

The Danish and German delegations entered scrutiny
reservations on this provision.

The Danish delegation doubted whether there was any
legal basis in the Berne Convention for such a provision.
The Commission representative replied that as this
provision did not constitute a derogation from copyright
law, there was no need for a legal basis in the Berne
Convention.

---

3 Official Journal No. L 36 of 7.2.87, pages 31 to 37.
The German delegation considered that this provision was superfluous and might lead to a contrario interpretations.

18. The Chairman informed the Working Party that the Presidency intended to forward the compromise proposal to the Permanent Representatives Committee\(^4\) for approval at its next meeting and for a decision whether or not it should be submitted to the Council (Internal Market) at its meeting on 20 June 1990.

II. ARTICLE 5

19. With regard to the consolidated text of Article 5(1) in document 6040/90 PI 21, the Netherlands and French delegations had suggested at a previous meeting that the words "In the absence of any contractual provisions to the contrary" be deleted, and the Commission representatives had suggested replacing these words by the words "Where a copy of a computer program has been sold," (see document 6381/90 PI 24, point 17).

The Working Party noted that this provision contained two derogations from the requirement of authorization by the right holder to perform the acts referred to in Article 4(a) and (b):

---

\(^4\) The Presidency report to the Permanent Representatives Committee, with the compromise proposal annexed, was circulated under reference 6970/90 PI 31.
(i) where those acts are necessary for the use of the program in accordance with its intended purpose, and

(ii) where those acts are necessary for producing a back-up copy.

It also noted that there was general agreement that where the right holder had sold the program or where he had licensed it and the licensing agreement was silent in respect of these derogations, these derogations would apply; there was not agreement, however, whether or not these derogations could be overruled by contractual provisions.

The Danish, French and United Kingdom delegations considered that the derogation under (i) above could be overruled by contractual provisions, while the German, Greek, Spanish, Italian and Netherlands delegations considered that it could not.

The Danish, German and United Kingdom delegations considered that the derogation under (ii) above could be overruled by contractual provisions, while the Greek, Spanish, Italian and Netherlands delegations considered that it could not.

20. The Presidency compromise proposal on reverse engineering and the protection of interfaces (see section I C. above and Annex II) included a proposal for Article 5(1) which attempted to take account of the
discussion of this provision. The Greek, Spanish, Italian and Netherlands delegations opposed this element of the Presidency proposal as it would allow contractual provisions to overrule the derogations contained in Article 5(1).

There was general agreement that it could be misleading to refer to the case where a copy of a computer program has been sold, as there are areas where the licensing of a copy of a computer program involves the sale of that copy. The words "When a copy of a program has been sold or" were therefore deleted from the Presidency proposal.

21. In an attempt to find a compromise solution to the question whether or not the derogations contained in Article 5(1) could be overruled by contractual provisions, the Italian delegation submitted a proposal (see Annex III to this document) whereby the derogation in respect of use of the program in accordance with its intended purpose would apply in the absence of specific contractual provisions, while the derogation in respect of back-up copies could not be overruled by contractual provisions to the contrary.

After adaptation of the wording of the proposal by the Italian delegation to ensure that this solution would not allow the making of an unlimited number of copies on the pretext that they were back-up copies, the majority of
delegations were able to agree to Article 5(1) as set out in the Presidency compromise proposal in the Annex to document 6970/90 PI 31.

The Netherlands delegation entered a reservation on this provision since it would allow contractual provisions to override the derogation in respect of use of the program in accordance with its intended purpose and since that delegation's proposal that a reference to archival and audit purposes be added (see doc. 6381/90 PI 24, point 18) had not been included in Article 5(1).

22. The Presidency compromise proposal (Annex II) included Article 5(3) from the previous consolidated text (document 6040/90 PI 21) as Article 5(2), replacing the term "the lawful possessor of a copy of a program" by the term "the person having the right to use a copy of a program" (see point 6 above).

The Working Party accepted this provision.

23. The Danish delegation submitted a proposal concerning reproduction and alteration in writing of computer programs which have been made available to the public in a written form (see Annex IV to this document) for discussion at a subsequent meeting.

---

5 The original Article 5(2) had been withdrawn in the meantime - see doc. 6381/90 PI 24, Annex VI.
III. RENTAL RIGHT

24. At the Working Party's previous meeting, the Commission representatives had maintained their position that the Directive should provide for an exclusive rental right (document 6381/90 PI 24, point 25) and had proposed the text set out in Annex VII to document 6381/90 PI 24.

25. The French, Irish and Italian delegations supported the Commission's position.

The German and Netherlands delegations maintained their position that the question of rental should be discussed in a broader framework encompassing other areas of copyright, and that this Directive should not set a precedent which might prejudice the broader discussion.

The Danish delegation was inclined to support the position of the German and Netherlands delegations. However, if a provision on rental right were to be included in this Directive, it would have difficulty in accepting the text as proposed in Annex VII to document 6381/90.

The United Kingdom delegation was also inclined to support the view that the issue of rental right should not be dealt with in this Directive, but it had doubts whether an instrument encompassing other areas of copyright would be appropriate.
The Spanish and Portuguese delegations, while supporting the Commission services' proposal, would not oppose a postponement of this issue to a broader framework if the majority of delegations were to favour that approach.

26. The Chairman considered that this issue should be referred to the Permanent Representatives Committee.

IV. ARTICLE 6

27. At the Working Party's previous meeting the majority of delegations had accepted the first variant of Article 6 as set out in Annex VIII to document 6381/90 PI 24, while the German delegation had supported the second variant.

28. The Netherlands delegation withdrew its scrutiny reservations on the first variant.

The Greek delegation maintained a scrutiny reservation on the inclusion of "the possession for commercial purposes" in paragraph 1(c) of the first variant.

The Danish delegation maintained a reservation on the devices referred to in paragraph 1(c) being liable to seizure (paragraph 2 of the first variant), as it considered this sanction to be too severe.
The German delegation maintained its reservation on the whole of the first variant and continued to support the second variant. The Spanish delegation also supported the second variant.

29. It was agreed that the title of Article 6 should read "Special measures of protection" and that the term "articles" in paragraphs 1(c) and 2 of the first variant should be replaced by "devices".

V. OTHER BUSINESS

30. It was noted that point 30 in document 6381/90 PI 24 should be amended to read as follows:

"A proposal by the French delegation to supplement the Spanish amendment by a reference to collective works was opposed by several delegations and consequently withdrawn."

---

6 Article 6 as amended appears in the latest consolidated text in document 7010/90 PI 32.
Proposal by the Italian delegation

ANNEX I

Article 5bis

1. The authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) shall not be required (notwithstanding contractual provisions to be contrary) - where these acts are indispensible to realize the interoperability of a program, provided:

(a) these acts are performed by the lawful possessor of a copy of the program;

(b) the information necessary for interoperability is not given directly by the owner of the rights within a reasonable time and on equitable conditions, nor are otherwise freely available;

(c) these acts are strictly limited to those parts of the program necessary to attain this goal;

(d) the information thus obtained is not given to others, except when it is necessary for interoperability;

(e) these acts do not conflict with a normal exploitation of the program and do not unreasonably prejudice the legitimate interests of the owner of the rights.

2. The provisions of paragraph 1 of this Article shall not permit the information obtained through its application to be used for goals other than interoperability and for the marketing of a program substantially similar in expression.

3. The provisions of paragraphs 1 and 2 are without prejudice to the right of the owner to an equitable remuneration.

4. Notwithstanding the provisions of Article 4(a) and (b), the lawful possessor 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.
Compromise presented by the Presidency

1. Interfaces

a) a new recital shall be added as follows:

"Whereas for the avoidance of doubt it has to be made clear that only the expression of a computer program is protected and that 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; whereas to the extent that logic, algorithms and programming languages constitute ideas and principles which underlie a computer program, they are not protected by copyright under this directive."

b) Article 1(2) shall read:

"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."

2. Restricted Acts

Article 4 a) and b) shall read:

"The exclusive rights of the author or his successor in title include the right to do or to authorize:

(a) the reproduction of a computer program by any means and in any form, in part or in whole. Insofar as they necessitate a reproduction of the program in part or in whole, loading, displaying, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the program."
3. Exceptions

a) A new recital shall be added as follows:

"Whereas, although the unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available, constitutes an infringement of the exclusive rights of the author, it has to be considered that under the following circumstances performance of any of these acts in order to modify the form of the code, by or on behalf of a person having a right to use a copy of the program, is legitimate and consistent with fair practice and must therefore be deemed to be authorised; whereas such circumstances exist when a modification of the form of the code of a computer program is indispensable to obtain the necessary information to ensure that interoperable programs can be created or can function, that is to ensure the functioning of an independently created program with an existing program enabling these programs to function together in the ways such programs are intended to function(1); whereas Member States must ensure that such a modification does not conflict with a normal exploitation of the program and does not unreasonably prejudice the legitimate interest of the rightholder.

b) Article 5 shall read:

1. When a copy of a program has been sold or in the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require the authorization by the rightholder where they are necessary for the use of the program by the lawful acquirer in accordance with its intended purpose or necessary as a back-up in connection with such use.

2. Notwithstanding the provisions of article 4(a) the person having a right to use 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's execution or his Contract.

3. The authorization of the owner of the rights for the acts referred to in article 4(a) and (b) shall not be required - notwithstanding contractual provisions to the

(1) A definition of the term "interoperability" has to be further elaborated.
contrary - where performance of these acts to modify
the form of the code is indispensable to achieve the
interoperability of an independently created program,
provided:

a) these acts are performed by or on behalf of a
person having a right to use a copy of the program;

b) the information necessary cannot be obtained
otherwise within a reasonable time or on
reasonable conditions;

c) these acts are strictly limited to those parts of
the program necessary to attain interoperability;

d) the information thus obtained is not given to
others, except when necessary for the
interoperability of the independently created
program.

4. The provisions of paragraph 3 of this article shall
not permit the information obtained through its
application to be used:

a) for goals other than to achieve interoperability
of the independently created program;

b) for the development, production or marketing of a
program substantially similar in its expression, or

c) for any other act which infringes copyright.

4. Article 5(2) of the consolidated text is deleted.

5. Article 6(3) shall read:

The provisions of this Directive shall be without prejudice
to specific requirements of Community law already enacted in
respect of the publication of interfaces in the
telecommunication sector or Decisions of the Council relating
to standardization in the field of information technology and
telecommunications.

--------
PROPOSAL BY THE ITALIAN DELEGATION

Subject: Article 5(1)

1. (a) In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require the authorization by the rightholder where they are necessary for the use of the program by the lawful acquirer in accordance with its intended purpose.

(b) Notwithstanding contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization by the rightholder where they are necessary as a back-up in connection with the use of the program by the lawful acquirer in accordance with its intended purpose.
ANNEX IV

Proposal by the Danish delegation concerning Article 5

The Danish delegation proposes the following new provision in Article 5 of the directive:

"Notwithstanding the provisions of Article 4(a) and (b), Member States may permit reproduction and alteration in writing of computer programs which have been made available to the public in a written form."

7417/90  cs  EN  - 22 -