NOTE

from : Presidency

to : Permanent Representatives Committee

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No. Cion prop.: 5682/89 PI 25 COM(88) 816 final – SYN 183

Subject: Proposal for a Council Directive on the legal protection of computer programs
        - consolidated text

The Permanent Representatives Committee will find attached a consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party.
Statements

The two following statements would serve to clarify the scope of the Directive and thus meet the concerns of certain delegations:

"The Council and the Commission confirm that the present Directive does not oblige Member States to grant to computer programs protection beyond the minimum protection granted under the Berne Convention for the Protection of Literary and Artistic Works."

"This Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive."

Article 1
Object of Protection

1. Member States shall protect computer programs by copyright as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term "computer programs" shall include their design material.

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1 Reservation by the Spanish delegation on the term "literary".
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. ²

3. (a) 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.

(b) Deleted. ³

Article 2
Ownership of rights

1. The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

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

² This paragraph forms part of the Presidency's overall compromise proposal on protection of interfaces and reverse engineering.
³ Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this sub-paragraph.
3. Deleted.  

4. Where a computer program is created by an employee in the execution of the duties entrusted to him, the employer exclusively is entitled to exercise the economic rights in respect of the program in the absence of contractual provisions to the contrary.

5. Deleted.

**Article 3**

**Beneficiaries of Protection**

1. Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

2. Deleted.

**Article 4**

**Restricted Acts**

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

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4 Reservation by the Italian delegation and the Commission representative on the deletion of this paragraph.

5 Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this paragraph.

6 Reservation by the Commission representative on the deletion of this paragraph.
(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; ⁷

(c) [the distribution to the public of the original computer program or of copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy;

(d) the rental of a copy of a program which has previously been sold.] ⁸ ⁹

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⁷ Subparagraphs (a) and (b) form part of the Presidency’s overall compromise proposal on protection of interfaces and reverse engineering.

⁸ Reservation by the Danish, German, Netherlands and United Kingdom delegations, which consider that the question of rental should be discussed in a broader framework encompassing other areas of copyright.

⁹ Reservation by the Netherlands delegation on the absence of a further subparagraph with the wording: "the communication to the public of a computer program in whole or in part."
Article 5
Exceptions to the restricted acts. 10

1. In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require the authorization by the right holder where they are necessary for the use of the program by the lawful acquiror in accordance with its intended purpose. The making of a back-up copy by a person having a rights to use the program may not be prevented by contract insofar as it is necessary for that 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 in execution of 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 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:

10 This Article forms part of the Presidency’s overall compromise proposal on protection of interfaces and reverse engineering.
(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.
Article 6
Special measures of protection

[First Variant] 11

1. Without prejudice to the provisions of Article 4(a), Member States shall provide, in accordance with their national legislations, appropriate remedies against a person committing the acts listed in sub-paragraphs (a), (b), and (c) below:

(a) any act of 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 for commercial purposes of a copy of a computer program knowing or having reason to believe that it is an infringing copy;

(c) the possession for commercial purposes of or 12 any act of putting into circulation of devices the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program.

11 Variant supported by the Commission services and the majority of delegations.
12 Scrutiny reservation by the Greek delegation on the words "the possession for commercial purposes of or".
2. An infringing copy of a computer program or devices referred to in paragraph 1(c)\(^{13}\) shall be liable to seizure in accordance with the national legislation of each Member State.\[Second Variant\]¹⁴

1. Member States should provide appropriate remedies against a person, reproducing a computer program without the consent of the right owner or who brings into circulation or distributes such copies.

2. An infringing copy of a computer program shall be liable to seizure in accordance with the national legislation of each Member State.

**Article 7**

**Term of Protection**

Protection shall be granted for the life of the author and fifty years after his death; where the computer program is an anonymous or pseudonymous work, or where a legal person is designated as the author by national legislation in accordance with Article 2(1), the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public.\(^{15}\)

\(^{13}\) Reservation by the Danish delegation on the words "or devices referred to in paragraph 1(c)."

\(^{14}\) Variant proposed by the German delegation and supported by the Spanish delegation.

\(^{15}\) Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.
Article 8
Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of contract and protection of semi-conductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any acts concluded and rights acquired before that date.

3. 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.\(^{16}\)

Article 9
Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive not later than two years after its notification.

\(^{16}\) Scrutiny reservation by the Danish and German delegations on this paragraph, which forms part of the Presidency's overall compromise proposal on protection of interfaces and reverse engineering.
2. Each Member State shall communicate to the Commission the provisions of national law which it adopts in order to transpose this Directive.

**Article 10**

This Directive is addressed to the Member States.
The following new recitals should be added to the Directive:

(a) 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) 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

17 The recitals form part of the Presidency’s overall proposal on protection of interfaces and reverse engineering.
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; 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.

18 A definition of the term "interoperability" has to be further elaborated.