SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)

on: 17 and 18 July 1990

No. prev. doc.: 7417/90 PI 38
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

1. At its meeting on 17 and 18 July 1990 the Working Party on Intellectual Property (Computer programs) (1) held a preliminary discussion on the amendments proposed by the European Parliament to the proposal for a Council Directive on the legal protection of computer programs (Part I below); it also continued examining questions concerning Article 4(c) and (d) (Part II) and measures against piracy (Section III).

(1) The Luxembourg delegation was not represented at this meeting.
I. AMENDMENTS PROPOSED BY THE EUROPEAN PARLIAMENT

2. The Working Party held a preliminary discussion on the Opinion of the European Parliament, which was delivered on 11 July 1990 (2). For every amendment, the Commission representative stated the position adopted by Mr BANGEMANN, Vice-President, at the Parliament's plenary sitting. Since certain delegations had not been informed of the Parliament's proposed amendments, before the Working Party meeting, their reactions were only provisional.

3. Article 1(1) and (2)

The Commission had accepted this amendment.

The Spanish delegation upheld its reservation on the expression "literary work".

Although the other delegations agreed in principle to the European Parliament's amendments, they preferred the wording of the provision set out in 7010/90 PI 32.

(2) This Opinion is given in 7897/90 PE-RESOL 30, pages 25 to 32.
4. Article 1(2)(a) (new)

The Commission had rejected this amendment on the grounds that it was not compatible with the Berne Convention for the Protection of Literary and Artistic Works in that it stipulated that users' manuals should enjoy the same protection as the programme itself, whereas the Berne Convention specified separate protection for such manuals.

All delegations supported the Commission position. Furthermore, the majority of delegations expressed serious misgivings as to the wisdom of incorporating in the Directive the definition of a computer program proposed by the Parliament.

5. Article 1(3)

The Commission had accepted this amendment. Nevertheless, the Commission representative thought that the wording of the corresponding provision (Article 1(2)) appearing in 7010/90 PI 32 was more specific.

A majority of delegations shared the Commission representative's view.
The Netherlands delegation remained opposed to the second sentence of this paragraph and the United Kingdom delegation said that its agreement to this sentence was subject to entry in the Council minutes of the statement which the Commission representatives had proposed drawing up (see 7417/90 PI 38, point 15).

6. Article 1(4)

The Commission had accepted this amendment.

A number of delegations, while agreeing in principle to the Parliament's amendment, said that they preferred the wording of the corresponding provision (Article 1(3)(a)) appearing in 7010/90 PI 32.

After agreeing in principle to the Parliament's amendment, the Commission representative and the United Kingdom and Irish delegations withdrew their reservations on the deletion of paragraph 4(b) from the Commission proposal.
7. Article 2(1)

The Commission had agreed to this amendment.

Delegations accepted this amendment as well, although some of them would prefer the wording of the provision set out in 7010/90 PI 32.

8. Article 2(2)

The Commission had rejected this amendment on the grounds that it no longer referred to exclusive rights.

Delegations supported the Commission position.

9. Article 2(3)

Since the European Parliament had proposed no amendments to this provision, the Commission representative and the Italian delegation changed their reservation on the Working Party's deletion of this paragraph to a provisional reservation.
10. Article 2(4)

The Commission had agreed to this amendment.

While accepting in principle the Parliament's amendment, the majority of delegations said they preferred the wording of this provision set out in 7010/90 PI 32.

The Netherlands delegation was opposed to the amendment by the European Parliament, as it favoured the text given in 7010/90 PI 32.

11. Article 2(5)

The Commission had accepted the deletion of this paragraph as proposed by the European Parliament; the Commission representative therefore withdrew his reservation.

Delegations supported the position of the Commission.

The United Kingdom and Irish delegations withdrew their reservations.
12. Article 3(2)

Since the European Parliament had not proposed any amendments to this provision, the Commission representative changed his reservation on the Working Party's deletion of this paragraph to a provisional reservation.

13. Article 4, introductory sentence

The Commission had rejected this amendment on the grounds that it no longer mentioned exclusive rights.

The delegations endorsed the Commission's position.

14. Article 4(a)

The Commission had agreed to this amendment.

A number of delegations objected to the expression "and for whatever purpose" in the first sentence. The Commission representative said he was willing to use the corresponding sentence in 7010/90 PI 32.
The Commission representative said that the expression "viewing" in the second sentence should be replaced by "displaying".

Subject to that clarification, the Belgian, Danish, Spanish, French, Netherlands, Portuguese and United Kingdom delegations accepted the amendment to this sentence proposed by the European Parliament and in particular the clarification "permanent or temporary reproduction".

The German and Italian delegations objected to this last clarification since they preferred the wording in 7010/90 PI 32.

The Greek and Irish delegations also preferred that text.
15. Article 4(b)

The Commission had accepted this amendment.

The majority of delegations preferred the text given in 7010/90 PI 32 on the grounds that the amendment proposed by the Parliament made no mention of the rights of the person who translated the programs.

16. Article 5(1)

It was pointed out that the amendment proposed by the Parliament corresponded to the wording given in 7010/90 PI 32, at least in the English version, and that the other language versions should be aligned on that text.

The Commission had accepted this amendment.

The majority of delegations supported the Commission's position.

The German and Netherlands delegations tabled reservations on this paragraph which they considered should be amended to read: "Notwithstanding any contractual provisions to the contrary, the acts ..."
The Netherlands delegation's reservation also extended to the absence of an exemption for the use of programs for archiving or financial auditing.

17. **Article 5(2)**

See Section II below.

18. **Article 5(2a) (new)**

The Commission had rejected this amendment on the grounds that it omitted the words "in execution of his contract", at least in the French version, which appeared in the corresponding text (Article 5(2)) in 7010/90 PI 32; however, the Commission had noted in the meantime that the words "in the execution of his contractual duties" appeared in the English version of the Parliament's amendments which contained further discrepancies with the French version. In these circumstances, the Commission representative proposed seeking clarification from the European Parliament as to the precise wording of the amendment proposed and he reserved his position pending such clarification.

The majority of delegations preferred the version of Article 5(2) in 7010/90 PI 32.
The Danish, Spanish and Netherlands delegations, on the other hand, preferred the European Parliament's amendment, but without the words "in the execution of his contractual duties".

19. Article 5a (new)

The Commission had not adopted a position on this amendment as such; it had, on the other hand, stated that it was in favour of two further proposals for amendments which had not been adopted by the European Parliament but which corresponded to various points in Article 5(3) and (4) as given in 7010/90 PI 32.

Several delegations said they preferred the amendment proposed by Parliament; other delegations preferred the text given in 7010/90 PI 32.

A number of delegations had misgivings regarding the expression "the maintenance of the programme" in the opening section of Article 5a as proposed by the Parliament.

The majority of delegations said they preferred Article 5a(a) in the Parliament's text to the version of Article 5(3)(b) in 7010/90 PI 32.
The majority of delegations felt that the final paragraph of Article 5a as proposed by the Parliament should appear in the recitals to the Directive rather than in its enacting terms.

20. **Article 7**

The Commission had rejected this amendment on the grounds that it was not in line with Article 7 of the Berne Convention.

All delegations endorsed the Commission's position. With the exception of the German delegation, they supported the wording in 7010/90 PI 32.

The German delegation upheld its reservation regarding the latter wording for the reasons stated at previous meetings of the Working Party. A compromise suggestion made by the Netherlands delegation to insert the words "for at least" before the words "50 years after his death" would have been acceptable to it.

The Commission representative could not agree to this suggestion on the grounds that it would mean that the term of protection would be only partially harmonized within the Community; under Court of Justice case
law, differences in the term of protection from one Member State to another might justify goods being held up at frontiers between Member States, which would conflict with the aims of the Single Market. It would therefore be essential to have full harmonization of the term of protection in the Community and not merely to have a minimum term as allowed by the Berne Convention.

21. Article 8(1) and (2)

The Commission had accepted the amendments proposed by the European Parliament to the two paragraphs.

Most delegations preferred the text contained in 7010/90 PI 32, in particular as regards paragraph 2.

22. Article 9

The Commission had rejected this amendment on the grounds that the setting up of a consultative committee to formulate proposals was contrary to the Commission's policy concerning committee procedure.

Delegations were in favour of the amendments proposed to paragraphs 1 and 2. With regard to paragraphs 2a, 2b and 2c, they either rejected
these provisions or reserved their positions on them.

23. The Commission representative said that the Commission intended to submit its amended proposal for a Directive before the Working Party's next meeting.

II. DISTRIBUTION, RENTAL AND COMMUNICATION TO THE PUBLIC

24. The European Parliament did not propose any amendment to Article 4(c) of the Commission proposal. However, it did propose an amendment to Article 5(2).

25. On the basis of the Working Party's earlier discussions, the Commission representative had proposed separating the right to distribute to the public and the right to rent (Article 4(c) and (d) respectively in 7010/90 PI 32 + COR 1(f)).
(a) **Right of distribution**

26. Delegations agreed on the principle underlying Article 4(c) as proposed in 7010/90 PI 32.

27. The United Kingdom delegation asked whether the exhaustion of rights in the second sentence of subparagraph (c) was to apply on a Community level or world-wide. All the delegations were of the opinion that it should apply on a Community level in that the first sale in the Community of a copy of a program by the author or with his consent would exhaust the right of the author to control the sale of that copy in the Community.

(b) **Right of rental**

28. As the European Parliament had not proposed any amendment to Article 4 as regards right of rental, the Commission representative said the Commission intended to retain an exclusive right of rental in its amended proposal for a Directive. Furthermore, since the Commission had agreed to the need to strengthen copyright, an exclusive right of rental
for authors would be proposed in the proposal for a Directive on rental which the Commission was preparing. The Commission representative therefore retained Article 4(d) as proposed in 7010/90 PI 32 + COR 1(f).

The Danish, German and Netherlands delegations thought that the question of rental should be covered in the new Directive announced by the Commission rather than in the present Directive, which covered only computer programs. In addition, the German and Netherlands delegations pointed out that the Member States should be able to choose between an exclusive right and a right to payment.

While the United Kingdom delegation's position was more in line with that of the Danish, German and Netherlands delegations, it could accept the Commission's position if a majority were to emerge in that direction.
The Belgian, Greek, French, Irish, Italian and Portuguese delegations backed subparagraph (d) as proposed in 7010/90 PI 32 + COR 1(f).

While subscribing to the views of the latter delegations, the Spanish delegation could accept the position of the Danish, German and Netherlands delegations if it obtained a majority.

(c) **Right of communication to the public**

29. The Netherlands delegation had tabled a reservation on the absence of a further subparagraph in Article 4 with the wording: "the communication to the public of a computer program in whole or in part" (see 7010/90 PI 32, footnote 9 on page 5).

The German, Spanish, French, Irish and Portuguese delegations were willing to agree to the new subparagraph if a consensus could be reached.
The Belgian, Danish, Greek, Italian and United Kingdom delegations, on the other hand, voiced doubts as to the practical significance of such a provision and hence preferred not to accept it.

The German delegation pointed out that the absence of such a provision in the Directive would not prevent a corresponding provision being retained in Netherlands law; it consequently asked whether the Netherlands delegation could waive its reservation. The Netherlands delegation would look into that suggestion.

III. ANTI-PIRACY MEASURES

30. The European Parliament had not proposed any amendment to Article 6; it rejected an amendment replacing the word "possession" by "acquisition". In the circumstances the Commission representative said he was obliged not to depart too much from the Commission's original proposal.

31. The Working Party resumed its examination of the two variants of Article 6 contained in 7010/90 PI 32 + COR 1(f).
32. The Greek delegation withdrew its scrutiny reservation on paragraph 1(c) of the first variant.

33. The Danish delegation explained its reservation on paragraph 2 of the first variant: it thought that when the means mentioned in paragraph 1(c) and paragraph 2 were press articles, seizure would be too severe a penalty and would not be compatible with the freedom of the press.

In response to the Danish delegation's concern,

(a) The United Kingdom delegation suggested that the devices referred to in paragraph 1(c) and in paragraph 2 should be described as "technical means" and that a new subparagraph (d) in paragraph 1 should require Member States to take appropriate remedies against persons publishing information which facilitated the unauthorized removal or circumvention of any technical means which may have been applied to protect a computer program.
(b) the French delegation suggested that the following be added to paragraph 2: "except where national laws on freedom of communication prevent this".

(c) the Italian delegation suggested that paragraph 2 be confined to the seizure of infringing copies of a computer program and that a new paragraph 3 simply provide for the possibility of seizing the technical means referred to in paragraph 1(c) and the information published.

34. The German delegation thought that the first variant of Article 6 was not consistent in that it imposed measures against the acts mentioned in paragraph 1(c) but did not impose any measures on persons reproducing a computer program without the authorization of the right-holder.

35. At this stage of the discussions the Chairman of the Working Party circulated a text of Article 6, the aim of which was to try to take account of the different points raised; the text is set out in the Annex hereto.
This text elicited the following reactions:

(a) Most delegations took the view that the reference in the introduction to paragraph 1 to Article 4 should be confined to Article 4(a).

(b) Several delegations thought that the word "instruments" in paragraph 1(c) was too vague and should be replaced by a word which expressly mentioned the publication of information.

(c) The French, Irish and United Kingdom delegations asked that paragraph 3 be made compulsory subject, in the case of the French delegation, to the addition concerning freedom of communication mentioned in point 33(b) above; the Portuguese delegation had doubts about the need for such a paragraph.

(d) The German delegation said it was willing to agree to the text subject to the comments in (a) and (b) above and with the exception of paragraph 1(c).
(e) The Spanish delegation maintained its preference for variant 2 of Article 6 in 7010/90 PI 32.

(f) The Belgian delegation said it preferred variant 1 in 7010/90 PI 32 subject to the addition suggested by the French delegation to paragraph 2 (point 33 (b) above).

The Commission representative took note of the various comments.
Article 6 - Presidency proposal

(1) Member States shall provide, in accordance with their national legislations, appropriate remedies against persons committing, without the authorization of the rightholder, the acts listed in Article 4 as well as the acts listed in subparagraphs (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 any acts of putting into circulation of technical devices or instruments 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.
(2) An infringing copy of a computer program shall be liable to seizure in accordance with the national legislation of each Member State.

(3) Member States may provide for the seizure of the technical devices or instruments referred to in paragraph 1(c).