At its meeting held on 18 and 19 October 1990 the Working Party on Intellectual Property examined the Commission’s amended proposal for a Council Directive on the legal protection of computer programs. Since delegations had not received the amended proposal before the meeting, they could express only provisional positions, subject to further consideration; the positions summarized below are therefore subject to a general scrutiny reservation. The Working Party was unable to examine the preamble to the Commission’s amended proposal through lack of time, half a day of meeting time having been lost following the last-minute assignment of the interpreters to another meeting. The Presidency, delegations and Commission representatives regretted these circumstances.

2. The Presidency informed the Working Party that the amended proposal would be the subject of a policy debate in the Council (Internal Market) at its session on 8 November 1990, which would be prepared by the Permanent Representatives Committee on 31 October 1990. A report to the Permanent

1 The Luxembourg delegation was not represented at this meeting.
2 Doc. 9397/90 PI 62 COM(90) 509 final SYN 183.
Representatives Committee would be drawn up, to which a consolidated text of the amended proposal resulting from the Working Party's meeting would be annexed.\(^3\)

**Article 1(1)**

3. The Working Party approved the Commission's amended proposal subject to a reservation by the Spanish delegation on the term "literary". While agreeing that computer programs should be protected by copyright under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), it did not agree that computer programs should be referred to as "literary works".

**Article 1(2)**

4. At the request of the United Kingdom delegation, the Commission representative proposed a statement relating to this paragraph to be included in the Council minutes.\(^4\) The Working Party approved the paragraph and the accompanying statement, although the Greek delegation would have preferred the wording proposed by the European Parliament in its opinion to that contained in the Commission's amended proposal with regard to interfaces.

**Article 1(3)**


**Article 2(1)**

6. Although a number of delegations would have preferred the text of this provision as set out in document 7010/90, all were prepared to accept the Commission's amended proposal.

---

3 Doc. 9398/90 PI 63.  
4 see footnote 3 on page 13 of doc. 9398/90 PI 63.  
5 Doc. 7897/90 PE-RESOL 30, pages 25-32.
Article 2(2)

7. All delegations were in favour of replacing this paragraph by the text set out in document 7010/90. The Commission representative was prepared to accept this amendment.

Article 2(3)

8. All delegations were in favour of deleting this paragraph. The Commission representative was prepared to accept this deletion.

Article 2(4)

9. Although a number of delegations would have preferred the text of this provision as set out in document 7010/90, a compromise solution was reached whereby the Commission's amended proposal was accepted, subject to the addition of the word "exclusively".

Article 2(5)

10. All delegations welcomed the deletion of this paragraph.

Article 3(1)


Article 3(2)

12. All delegations were in favour of deleting this paragraph. The Commission representative was prepared to accept this deletion.

---

6 See doc. 9398/90 PI 63, page 14.

9664/90
Article 4 - Title

13. The French delegation reserved the right to propose an amendment to the French version of the title of Article 4.

Article 4 - Opening wording

14. Following observations by the Italian and United Kingdom delegations that the term "the author" was too restrictive in the light of Article 2, the Commission representative agreed to replace this term by the words "the rightholder within the meaning of Article 2". The Working Party agreed to this amendment.

Article 4(a)

15. The German delegation entered a scrutiny reservation on the inclusion of temporary reproduction of a computer program among the acts requiring authorization. The other delegations and the Commission agreed that it would be clearer to move the reference to "permanent or temporary reproduction" to the beginning of this provision.

16. Several delegations having objected to the inclusion of the words "and for whatever purpose", it was agreed that they would be deleted.

Article 4(b)

17. The Working Party agreed to add to this provision the words "without prejudice to the rights of the person who alters the program". It was noted that the terms "translation, adaptation, arrangement and any other alteration", as well as the verb "alters", should correspond in all the language versions to the terms used in Article 2(3) of the Berne Convention.
Article 4(c)

18. Although the Commission had not proposed any amendment to Article 4(c) in its amended proposal, since the European Parliament had not adopted any amendment in respect of this provision, the Commission representative indicated that the Commission services were prepared to take account of previous discussions in the Working Party by amending this provision along the lines of Article 4(c) and (d) in document 7010/90 PI 32.

19. A number of delegations reiterated the view that the question of rental right should be left to the forthcoming proposal for a directive on rental of copyrighted works in general, and that therefore the Directive under discussion, which was limited to computer programs, should not contain any provision on rental right which might prejudice the contents of the broader directive. In an attempt to meet this concern, the Commission representative proposed a compromise solution whereby:

(a) the Directive under discussion would contain a provision making it clear that the rightholder would have an exclusive right to control rental of his computer program;

(b) a statement in the Council minutes would make it clear that this provision would be without prejudice to the positions of the Commission and of the Member States in relation to the broader instrument, and that the Commission undertook to propose an amendment to this provision if this were to be necessary in the light of the solution adopted in the broader instrument.7

The majority of delegations were able to accept this compromise proposal.

7 See the statement in footnote 6 on page 16 of doc. 9398/90 PI 63.
The German and Netherlands delegations maintained a reservation, however, as they considered that Member States should remain free to choose between an exclusive right for the rightholder to control rental and a right for the rightholder to receive remuneration in return for rental.

20. The Danish delegation considered that the separation of rental right from distribution right resulting from Article 4(c) and (d) in document 7010/90 would pose problems, as rental is a form of distribution; it therefore proposed that (c) and (d) be replaced by a single provision which would make it clear that the exclusive right to distribute the computer program to the public includes the right to rent it out, but that the right to control rental of the program would not be exhausted, as the general distribution right would, by the first sale of the program in the Community by the rightholder or with his consent.

This proposal was accepted by the Working Party, subject to the reservation by the German and Netherlands delegations mentioned above.

21. In reply to a request by the French delegation that it be made clear what effect the new Article 4(c) had on the lending of computer programs by non-profit making public libraries, the Commission services agreed to add a new recital drawing a clear distinction between rental and public lending, and making it clear that public lending remains outside the scope of the Directive under discussion, with the result that Member States remain free to determine whether and how public lending of computer programs should be regulated.

22. In the light of the explanations given by the German delegation at the Working Party's previous meeting (see doc. 8216/90, point 29), the Netherlands delegation withdrew its

---

8 The resulting text appears on page 16 of doc. 9398/90 PI 63.
9 See the recital in footnote 5 on page 16 of doc. 9398/90 PI 63.
reservation on the absence of a provision which would include the communication to the public of a computer program among the exclusive rights of the rightholder.

The Working Party agreed not to include such a provision.

Article 5(1), (2) and (3)

23. In its amended proposal, the Commission has proposed separate paragraphs to cover:

(a) the case where a copy of a computer program has been sold (Article 5(1)),

(b) the case where a copy of a computer program has been licensed (Article 5(2)), and

(c) the making of a back-up copy (Article 5(3)).

The majority of delegations considered that this separation into three paragraphs created more problems than it solved and left uncertainty as to which paragraph would apply where the sale involved a licensing agreement; objections were raised against the second sentence of Article 5(2) in particular. They therefore preferred to replace these three paragraphs by a single paragraph as previously approved by the Working Party in document 7010/90 PI 32.

The Commission representative entered a scrutiny reservation on the text preferred by the majority of delegations, to the extent that it does not refer explicitly to the case where a copy of the computer program has been sold, and to the extent that it does not refer specifically to error correction. The majority of delegations consider that error correction is covered by the term "use of the program by the lawful acquirer in accordance with its intended purpose" and need not be mentioned specifically.
Article 5(4)

24. In the light of the recital concerning public lending proposed in relation to Article 4(c) (see point 21 above), the Commission representative agreed to the deletion of this paragraph.

Article 5(5)

25. The Working Party agreed that the words "Subject to the provisions of Article 4(a)" were not necessary and deleted them.

26. The Working Party agreed to align the words "ideas, principles and other elements which underlie the program and which are not protected by copyright" on the wording of Article 1(2).

27. The German delegation expressed doubts with regard to the words "which he is entitled to do" at the end of this paragraph. The Commission representative explained that this restriction was necessary for example in the case where the user had a licence to use a computer program on a specific number of terminals: without this restriction, there was a danger that the user might take advantage of this provision to use the program on terminals not covered by his licensing agreement.

Article 5bis (1) and (2)

28. The Danish and Portuguese delegations expressed scrutiny reservations on the inclusion of Article 5bis (1) and (2) in the proposed Directive.

29. With regard to the introductory wording of Article 5bis (1), a difference of opinion emerged in respect of decompilation for the purpose of maintenance. The European Parliament proposed a text whereby the exclusive rights could
"not be exercised by the author to prevent any act essential to ensure the maintenance of the program and the creation or operation of interoperable programs". The Commission considered this wording to be too broad with regard to maintenance and therefore open to abuse; accordingly it proposed wording in its amended proposal which restricted "maintenance" to the maintenance of an independently created interoperable program. A number of delegations considered that the wording proposed by the Commission was still too broad.

The majority of delegations were prepared to support wording proposed by the United Kingdom delegation which omits any explicit reference to maintenance, although the German, French and Netherlands delegations expressed scrutiny reservations on this point. The Danish and Portuguese delegations, while maintaining their scrutiny reservations in respect of Article 5bis (1) and (2), considered the wording proposed by the United Kingdom delegation to be an improvement on the wording proposed by the Commission. The Commission representative also expressed a scrutiny reservation on this departure from its amended proposal, while the Greek delegation expressed a substantive reservation, preferring the broader wording proposed by the European Parliament.

30. The Working Party agreed to replace the wording of Article 5 bis (2)(c) by the wording of Article 5(4)(b) and (c) in document 7010/90.

Article 5bis (3)

31. The majority of delegations considered that this provision should appear in the preamble to the Directive, not in Article 5bis. The Commission representative entered a reservation on the transfer of this provision to the preamble,

10 "... indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program."
11 "... indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program".

9664/90 cs EN - 9 -
on the grounds that the inclusion of this paragraph in Article 5bis represented a compromise between the various political groups in the European Parliament.

Article 6

32. Although the Commission had not proposed any amendment to Article 6 in its amended proposal on the grounds that the European Parliament had not adopted any amendment to this Article, the Commission representative indicated that the Commission services could accept changes to this Article which had been proposed in the Working Party with a view to overcoming a number of difficulties raised by the text of the Commission's original proposal (see Annex to document 8216/90 PI 46). The majority of delegations and the Commission were therefore able to agree to Article 6 as set out in the Annex to document 9398/90 PI 63.

The German delegation maintained a scrutiny reservation on paragraph 1(c) of this Article on the grounds that its transposition into national law would affect German criminal law and that it was not clear how this provision would relate to the making of back-up copies authorized under Article 5(1).

The Greek and Netherlands delegations also entered scrutiny reservations on parts of paragraph 1(c): the Greek delegation on the words "or the possession for commercial purposes" and the Netherlands delegation on the words "any means".

Article 7

33. The German delegation maintained its reservation on the absence of an option for Member States to grant a term of protection longer than fifty years after the death of the author, while recognizing that this is a hypothetical problem. It suggested that consideration be given to the following as possible compromise solutions:
(a) a second paragraph would be added to Article 7 to the effect that Member States which already have a term of protection of longer than 50 years after the death of the author would be allowed to maintain their present term until such time as the term of protection for copyrighted works in general is harmonized by Community law (the Commission is preparing a proposal in this respect);

(b) the text of Article 7 would remain as approved by the majority of delegations and the Commission, and would be accompanied by a statement in the Council minutes similar to the statement in respect of Article 4(c) (see point 19 above).

The Commission representative undertook to examine these suggestions, indicating that it was unlikely that it could accept the suggestion under (a) unless the German delegation were to withdraw all its reservations on other aspects of the proposed Directive.

34. At the request of the Spanish delegation, it was agreed that the words "or where a legal person is designated as the author by national legislation in accordance with Article 2(1)" should be added after "pseudonymous work", as previously agreed by the Working Party (see doc. 7010/90 PI 32).

35. At the suggestion of the Chairman of the Working Party, it was agreed that the case of joint ownership provided for in Article 7bis of the Berne Convention should be covered by adding "or after the death of the last surviving author" after the words "after his death".

12 Wording taken from Article 7bis of the Berne Convention.
Article 8

36. The Commission representative explained that in making its amended proposal, it had transferred to the last recital of the preamble a provision which had been included in document 7010/90 PI 32 as Article 8(3). While the majority of delegations were able to accept this transfer, the Belgian, French, Netherlands and United Kingdom delegations entered scrutiny reservations, pending consultation with the relevant authorities.

Articles 9 and 10

37. No observations were made in respect of Articles 9 and 10 of the Commission's amended proposal.

Statements concerning the relationship between the Directive and the Berne Convention

38. The Working Party agreed that the two statements set out on page 2 of document 7010/90 PI 32 would be appended to Article 1.

39. In this context, the Danish delegation asked for clarification whether the normal rules of copyright relating to the copying of literary works by means such as photocopying would apply to the copying of source code of a computer program appearing in written form, or whether the rules of the Directive would apply.
The Commission representative explained that the manuals accompanying computer programs were not covered by the protection afforded to the computer programs, but enjoyed their own protection under the Berne Convention; therefore they did not come within the scope of the Directive. Where the source code of a computer program had been published in a book or a journal with the consent of the rightholder, making photocopies of the text concerned would be regulated by national law, not by the Directive.