REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 8216/90 PI 46
No. Cion amended prop.: 9397/90 PI 62 COM(90) 509 final SYN 183

Subject: Amended proposal for a Council Directive on the legal protection of computer programs

I. Introduction


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\(^1\) Official Journal No C 91 of 12.4.89, pages 4 to 16.
The Economic and Social Committee and the European Parliament gave their opinions on this proposal on 18 October 1989\(^2\) and 11 July 1990\(^3\) respectively.

The Commission sent the Council an amended proposal under cover of a letter dated 18 October 1990\(^4\).

2. The Working Party on Intellectual Property (Computer Programs) examined the Commission's amended proposal at its meeting held on 18 and 19 October 1990\(^5\). Since delegations had not received the amended proposal before the meeting, they could express only provisional positions, subject to further consideration. 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.

3. Part II of this report sets out the main points on which problems of substance remain; part III sets out other points on which problems remain\(^6\); and part IV states the action

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\(^3\) Doc. 7897/90 PE-RESOL 30, pages 25-32.
\(^4\) Doc. 9397/90 PI 62 COM(90) 509 FINAL SYN 183.
\(^5\) The Luxembourg delegation was not represented at this meeting.
\(^6\) Points on which agreement has been reached are not discussed in this report.
which the Permanent Representatives Committee is requested to take.

The text of the amended proposal as it results from the Working Party's discussions is set out in the Annex to this report; all delegations have a general scrutiny reservation on this text for the reasons explained under point 2 above.

II. Main points on which problems of substance remain

4. Rental right

The Commission representatives have maintained from the outset that the proposed Directive should contain an exclusive right for the holder of copyright to control rental of his computer program, and that this right should not be exhausted by the first sale of the program by the rightholder or with his consent (Article 4(c)). Several delegations consider that the Directive should remain silent on this point on the grounds that the Commission is preparing a proposal concerning rental of copyrighted works in a broader context, and that the present Directive should not prejudice the contents of the broader instrument. Since the European Parliament did not propose any amendment in this respect, the Commission maintained its original proposal on this point. However, in the interests of finding a compromise solution that would be satisfactory to all concerned, the Commission representative has proposed that:
(a) the text of Article 4(c) would maintain the principle of the Commission’s proposal, and

(b) a statement in the Council minutes would make it clear that this would be without prejudice to the positions of the Commission and the Member States in relation to the broader instrument, and that the Commission undertook to propose an amendment to Article 4(c) if this were to be necessary in the light of the solution adopted in the broader instrument (see Annex hereto, page 16).

The majority of delegations are prepared to accept this compromise proposal. The German and Netherlands delegations maintain a reservation on Article 4(c), as they consider 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.

5. Decompilation

Subject to scrutiny reservations by the Danish and Portuguese delegations, there is now broad agreement on Article 5bis, which provides an exception to the rightholder’s exclusive rights for the purpose of creating an interoperable program: decompilation, or “reverse engineering”, may be carried out under carefully defined conditions by a person having a right to use the protected program where the information necessary to achieve interoperability is not otherwise available to him. However,
there is still a difference of opinion with regard to 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 and preferred to use wording which omits any explicit reference to maintenance.

The majority of delegations were in favour of this last form of words, although the Danish, German, French, Netherlands and Portuguese delegations expressed scrutiny reservations. 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.

7 "... indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program."
8 "... indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program."
6. Term of protection

The Commission and the majority of delegations are in favour of a term of protection of the life of the author and fifty years after his death (Article 7), which is in conformity with Article 7 of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The German delegation has a reservation on this Article, as it considers that Member States should have the option (also allowed by the Berne Convention) of granting a longer term of protection: German copyright law has a term of protection of the life of the author and seventy years after his death. The Commission and the majority of delegations are opposed to such an option on the grounds that they consider that it is necessary to harmonize the term of protection throughout the Community.

There is general agreement that this is a hypothetical problem, as computer programs are outdated long before fifty years after the death of the author. The following possible compromise solutions have been suggested for consideration:

(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): in return the German delegation would drop all its reservations on other aspects of the proposed Directive:

(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 to the effect that this Article would be subject to review in the light of the solution to be adopted in relation to Community harmonization of term of protection for copyrighted works in general.

III. Other points on which problems remain

7. Protection given

The Commission proposes that computer programs should be protected by copyright as literary works within the meaning of the Berne Convention (Article 1(1) of the Commission's amended proposal). The majority of the delegations support this proposal. The Spanish delegation, however, has entered a reservation as it takes the view that computer programs should be protected as works within the meaning of the Berne Convention, without specifying that they are literary works.
8. Temporary reproduction of a computer program

The Commission’s amended proposal has taken over a suggestion made by the European Parliament that it be made clearer that both permanent and temporary reproduction of a computer program require the authorization of the rightholder (Article 4(a)). This amendment is supported by the majority of the delegations. The German delegation, however, has entered a scrutiny reservation on inclusion of temporary reproduction among the acts requiring authorization.

9. Exceptions to the restricted acts

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. They
therefore preferred to replace these three paragraphs by a single paragraph as previously approved by the Working Party and set out as Article 5(1) in the Annex hereto.

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 terms "use of the program by the lawful acquiror in accordance with its intended purpose" and need not be mentioned specifically.

10. Reference to Article 9(2) of the Berne Convention

The Commission's amended proposal takes over a provision proposed by the European Parliament which makes it clear that the derogation permitting decompilation may not be interpreted in such a way as to allow it to be applied contrary to Article 9(2) of the Berne Convention (Article 5 bis (3)). The majority of delegations consider that this provision should appear in the preamble to the Directive, not in Article 5 bis. The Commission representative has entered a reservation on the transfer of this provision to the preamble, on the grounds that the inclusion of this paragraph in Article 5 bis represented a compromise between the various political groups in the European Parliament.
11. Special measures of protection

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. The majority of delegations and the Commission were therefore able to agree to Article 6 as set out in the Annex hereto.

The German delegation maintains 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).

12. Reference to Community law in respect of telecommunications

The Commission's amended proposal transferred to the last recital of the preamble a provision which had earlier been inserted in the proposed Directive by the Working Party as
Article 8(3)\(^9\). While the majority of delegations were able to accept this transfer, the Belgian, French, Netherlands and United Kingdom delegations entered scrutiny reservations on this transfer, pending consultation with the relevant authorities.

IV. Action which the Permanent Representatives Committee is requested to take

13. The Presidency requests the Permanent Representatives Committee to:

(a) attempt to resolve the outstanding problems set out under parts II and III of this report;

(b) consider whether any problems which it is unable to resolve should be submitted to the Council (Internal Market) at its meeting on 8 November 1990 for a policy debate;

(c) note with approval the progress made on the other aspects of the proposed Directive;

(d) note that the Working Party will examine the recitals of the amended proposal and any other outstanding questions at its meeting on 21 and 22 November 1990.
CONSOLIDATED TEXT OF THE AMENDED PROPOSAL DRAWN UP FOLLOWING THE PROCEEDINGS OF THE WORKING PARTY ON 18 AND 19 OCTOBER 1990

CHAPTER 1

Article 1

Object of protection

1. In accordance with the provisions of this Directive Member States shall protect computer programs, by copyright, as literary\(^1\) works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works\(^2\). For the purposes of this Directive the term "computer programs" shall include their preparatory design material.

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

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

Article 2

Authorship of programs

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

Declaration related to Article 1(2)

The Council and the Commission agree that the second sentence of Article 1(2) has been included for the sake of clarity. It therefore does not have to be explicitly taken over in national law where the legal situation in the Member State concerned already corresponds to this provision.
2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Deleted.

4. Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

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

Subject to the provisions of Article 5, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. In so far as they necessitate such reproduction of the program, loading, displaying, running, transmission or storage of the computer program shall be subject to authorization by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

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4 Scrutiny reservation by the German delegation on temporary reproduction.
(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.  

5 The Commission services agreed to add the following recital in respect of Article 4(c):

"Whereas for the purposes of this Directive the term "rental" means the making available for use, for a limited period of time and for profit making purposes of a computer program or a copy thereof; this term does not include public lending which accordingly remains outside the scope of this Directive."

6 The following statement would be entered in the Council minutes in respect of Article 4(c):

"The Council and the Commission agree that the provision of Article 4(c) is without prejudice to the consideration of any Community legislative proposal relating to the rental of copyrighted works in a broader context. The Commission accepts that if necessary, it will make a proposal to amend Article 4(c) in the light of the solution which will be retained in a future Community Directive concerning rental in a broader context."

7 Reservation by the German and Netherlands delegations on the inclusion of an exclusive rental right in this Directive.
Article 5

Exceptions to the restricted acts

1. In the absence of specific contractual provisions\(^8\), 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\(^9\). The making of a back-up copy by a person having a right to use the program may not be prevented by contract insofar as it is necessary for that use.

2. )
   ) Incorporated into paragraph 1.

3. )

4. Deleted.

5. The person having a right to use a copy of a program shall be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element

\(^8\) Scrutiny reservation by the Commission representative on the absence of a provision dealing separately with the case where a copy of a computer program has been sold (see Article 5(1) of the Commission's amended proposal).

\(^9\) Scrutiny reservation by the Commission representative, who considered that "including for error correction" should be added, as in the Commission’s amended proposal.
of the program, if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Article 5 bis

1. Notwithstanding contractual provisions to the contrary, the authorization of the rightholder shall not be required where reproduction of the code and translation of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program\(^{10}\), provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been published, or made available to the persons referred to in subparagraph (a); and

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10 Scrutiny reservation by the Danish, German, French, Netherlands and Portuguese delegations and by the Commission representatives on this text, which differs from the Commission's amended proposal. The scrutiny reservation of the Danish and Portuguese delegations extends to the whole of paragraphs 1 and 2. The Greek delegation has a reservation on this text, preferring the wording of the European Parliament's amendment.
(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 of this Article shall not permit the information obtained through its application:

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

(b) to be given to others, except when necessary for the interoperability of the independently created program; or

(c) to be used for the development, production or marketing of a program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.\[11\]

\[11\] The Danish, German, Greek, French, Italian, Netherlands, Portuguese and United Kingdom delegations consider that paragraph 3 should be transferred to a recital. The Spanish delegation is in favour of leaving it in Article 5 bis. The Commission representative expressed a reservation on its transfer to a recital.
Article 6

Special measures of protection

1. Without prejudice to the provisions of Articles 4, 5 and 5 bis, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of 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) any act of putting into circulation or the possession for commercial purposes\textsuperscript{12} of any means\textsuperscript{13} whose sole intended purpose is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a program\textsuperscript{14}.

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

\textsuperscript{12} Scrutiny reservation by the Greek delegation on the words "or the possession for commercial purposes."
\textsuperscript{13} Scrutiny reservation by the Netherlands delegation on the words "any means".
\textsuperscript{14} Scrutiny reservation by the German delegation on paragraph 1(c).
3. Member States may provide for the seizure of any means referred to in paragraph 1(c).

Article 7

Term of protection

Protection shall be granted for the life of the author and for fifty years after his death or after the death of the last surviving author; 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. The term of protection shall be deemed to begin on the first of January of the year following the above mentioned events.\(^\text{15}\)

CHAPTER II

Article 8

Continued application of other legal provisions

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

\(^{15}\) Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.
2. The provisions of this Directive are applicable also to programs created prior to 1 January 1993 without prejudice to any acts concluded and rights acquired before that date.

CHAPTER III
Article 9

Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive by the 1st of January 1993.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in order to transpose this Directive.

Article 10

This Directive is addressed to the Member States.

Done at Brussels For the Council

The President

16 Scrutiny reservation by the Belgian, French, Netherlands and United Kingdom delegations on the question whether the last recital of the preamble should appear in the preamble or as a third paragraph of Article 8.