REPORT

from: Permanent Representatives Committee

to: Council (Internal Market)

No. prev. doc.: 9398/90 PI 63
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


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 Permanent Representative Committee has examined the Commission's amended proposal and submits to the Council (Internal Market) for a policy debate the three main issues on which problems of substance remain; these are set out under part II below.

A number of other points are not completely resolved; endeavours will be made to settle those other points at the appropriate level with a view to enabling the Council to adopt a common position at its December session.

3. A consolidated text of the amended proposal reflecting the Permanent Representatives Committee's discussions is set out in the Annex to this report; all delegations have a general scrutiny reservation on this text, which will be re-examined at the appropriate level.

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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.
II. Issues submitted to the Council for a policy debate

4. Rental right (Article 4(c))

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. 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 would undertake 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 14).

The majority of delegations are prepared to accept this compromise proposal. The German and Netherlands delegations, which 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, maintain a reservation on this question but are considering the compromise proposal.

The Council is invited to discuss this question.

5. Decompilation (Article 5bis)

5.1. The Commission's original proposal did not explicitly regulate the question whether decompilation, or "reverse engineering", of a computer program should be permissible without the authorization of the holder of copyright in the program. (Decompilation is the act of reproducing and translating the object code version of the program, which is the version normally supplied to the public, back into a language representing something more like the original source code in which the programmer devised the program). In response to concerns expressed by the European Parliament and by part of the computer industry, the Commission's amended proposal contains an Article 5bis which allows decompilation, for the purpose of creating an interoperable program, under the conditions carefully defined in that article.

Subject to scrutiny reservations by the Danish and Portuguese delegations, there is a strong tendency by delegations to favour the principles underlying the new Article 5bis. However, there are still differences of opinion on a few aspects of this Article.
5.2. The first point concerns maintenance of a computer program. The European Parliament has 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 considers this wording to be too broad with regard to maintenance and therefore open to abuse; accordingly it has proposed wording in its amended proposal which would restrict maintenance to the maintenance of an independently created interoperable program ("... indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program."). A number of delegations consider that the wording proposed by the Commission is still too broad and prefer to use wording which omits any explicit reference to maintenance ("... indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program.").

The majority of delegations are in favour of this last form of words, although, in addition to the general scrutiny reservation by the Danish and Portuguese delegations, the German, French and Netherlands delegations and the Commission representative have expressed scrutiny reservations. The Commission representative and the French delegation prefer the wording of the Commission's amended proposal as they fear that the wording favoured by the majority
of delegations would be too restrictive: whereas this wording would cover the case of decompilation for the purpose of enabling an independently created program to interoperate with the program being decompiled (interconnection), they fear that it would not cover the case of decompilation for the purpose of enabling both programs to interoperate with one or more other programs (compatibility). The Greek delegation has expressed a substantive reservation, preferring the broader wording proposed by the European Parliament.

5.3. The second point concerns Article 5bis (1)(b). The United Kingdom delegation considers that the term "published" should be qualified, otherwise the rightholder could abuse the provision by invoking publication in an obscure place or in an obscure language of the information necessary to achieve interoperability to oppose the justification for decompilation.

5.4. The third point concerns paragraph 2 of Article 5bis. The United Kingdom delegation considers that this paragraph is unnecessary in the light of the limits set on the decompilation exception in paragraph 1.

5.5. The Council is invited to discuss the provisions on decompilation contained in Article 5bis.
6. **Term of protection (Article 7)**

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, 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 for all works protected by copyright, and the German delegation does not wish computer programs to be treated differently from other copyrighted works in this respect. The Commission and the majority of delegations are opposed to such an option on the grounds that they consider that the term of protection should be harmonized 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 for such harmonization);

(b) the text of Article 7 would remain as approved by the majority of delegations and the Commission (see Annex hereto, page 19) 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.\(^5\)

The Commission representative would prefer the second of these solutions, but would also be prepared to consider the first if it were to form part of an overall solution on the whole Directive which was satisfactory in other respects.

The German delegation is giving positive consideration to these suggestions for solutions, as well as to the possibility of a combination of both of them.

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\(^5\) The statement might be worded as follows:
"The Council and the Commission agree that the provision of Article 7 is without prejudice to the consideration of any Community legislative proposal relating to the term of protection for copyrighted works in a broader context. The Commission accepts that if necessary, it will make a proposal to amend Article 7 in the light of the solution which will be retained in a future Community Directive concerning term of protection in a broader context."
III. Action which the Council is requested to take

7. The Permanent Representatives Committee requests the Council to:

(a) hold a policy debate on the issues set out under points 4, 5 and 6 above;

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

(c) instruct the Permanent Representatives Committee actively to continue work on the Directive with a view to a common position being adopted at the Council's session on 13 December 1990
CONSOLIDATED TEXT OF THE AMENDED PROPOSAL DRAWN UP FOLLOWING THE
PROCEEDINGS OF THE PERMANENT REPRESENTATIVES COMMITTEE
ON 31 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 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 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.

3 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. 4

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.

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4 The Belgian delegation questions whether it is necessary to include the provision contained in this paragraph in the Directive.
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.

5 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. 6 7 8

6 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."

7 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."

8 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 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. 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

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9 Reservation by the Netherlands delegation on the words "In the absence of specific contractual provisions".
10 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).
11 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\(^\text{12}\), 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\(^\text{13}\), or made available to the persons referred to in subparagraph (a); and

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\(^{12}\) 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.

\(^{13}\) The United Kingdom delegation considers that the term "published" should be qualified.
(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. 14

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. 15

14 The United Kingdom delegation considers that paragraph 2 is
superfluous.

15 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 5bis. 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 of any means 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.

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

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.¹⁶

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.

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.¹⁷

¹⁶ Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.

¹⁷ 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.
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