SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 21 and 22 November 1990

No. prev. doc.: 10294/90
No. Com. 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

1. At its meeting held on 21 and 22 November 1990 the Working Party on Intellectual Property (Computer programs) examined the questions relating to the amended proposal for a Council Directive on the legal protection of computer programs which remained unresolved following the discussion of this subject at the meeting of the Council (Internal Market) held on 8 November 1990, as well as the preamble to the Directive. It based its examination on the Commission's amended proposal (doc. 9397/90 PI 62) and on the consolidated text annexed to the report from the Permanent Representatives Committee to the Council (doc. 9713/90 PI 69).

2. In accordance with the conclusions of the Council (Internal Market) at its meeting on 8 November 1990, the Chairman of the Working Party announced his intention to report to the Permanent Representatives Committee on the questions on which reservations remained at the end of the meeting, with a view to enabling the Council to reach a common position on the proposed Directive at its meeting on 13 December 1990. The
The Presidency's report is contained in document 10294/90 PI 78; a consolidated text of the Directive as it results from the meeting is set out in document 10259/90 PI 77.

3. The Commission representative protested against the fact that the confidentiality of the Working Party's proceedings at its previous meeting had not been respected, with the result that the representative of one Member State had been subjected to unwarranted attacks in outside circles for having attempted to formulate a text corresponding to views expressed by a large number of delegations.

The Working Party concurred with the sentiments expressed by the Commission representative.

Article 1

4. The Working Party noted that the Spanish delegation no longer maintained its reservation on the term "literary".

Article 2

5. In the absence of the Belgian delegation, the Working Party was unable to resolve the question raised by that delegation in the Permanent Representatives Committee as to the possibility of making Article 2(4) optional.

Article 4(a)

6. The Working Party noted that the German delegation was able to withdraw its scrutiny reservation on temporary reproduction of a computer program.
Article 4(c)

7. The German and Netherlands delegations stated that they were prepared to accept the solution proposed by the Commission at the Council meeting on 8 November 1990, whereby Article 4(c) would be accompanied by two statements in the Council minutes, one relating to this provision and the other to Article 8(2)¹.

The German delegation explained that the result of the statement relating to Article 8(2) would be that, although under Article 4(c) no new rental business could be set up once the Directive entered into force, rental businesses already operating at the time of the entry into force of the Directive in Member States (such as Germany) which allow rental of computer programs at present, would be allowed to continue to operate. At the request of the German delegation, drafting improvements were made to this statement.

The Netherlands delegation maintained a reservation relating to the manner in which the terms "the right to control further rental" in Article 4(c) would be transposed into national law.

Article 5(1)

8. The Netherlands delegation maintained its reservation on the words "In the absence of specific contractual provisions" at the beginning of Article 5(1) in the Annex to document 9713/90. In its view, it should not be possible to limit by contractual provisions the right of the lawful acquiror of a computer program to use that program in accordance with its intended purpose.

¹ See statements 3 and 4 in Annex II to document 10259/90.
The other delegations and the Commission representative maintained that these words were necessary, as the rightholder should have the possibility of ensuring certain limitations by contractual means, such as limiting the number of terminals on which the acquiror is authorized to use the program.

9. The Commission representative stated that he was prepared to withdraw his scrutiny reservation on the absence of a provision dealing separately with the case where a copy of a computer program has been sold (doc: 9713/90, page 15, footnote 10), provided that this point was clarified in the recitals; he proposed that the words "whereas this should apply in the absence of specific contractual provisions, including when a copy of the program has been sold" be added to the relevant recital.  

The Working Party accepted this proposal, subject to the reservation by the Netherlands delegation with regard to the words "in the absence of specific contractual provisions" (see point 8 above).

10. The Commission representative maintained his view that the words "including for error correction" should be added at the end of the first sentence of Article 5(1). The Working Party agreed to this addition.

Article 5bis and Article 8(1)

11. The Spanish delegation considered that the words "Notwithstanding contractual provisions to the contrary" at the beginning of Article 5bis(1) were not sufficient to convey the idea that any contractual provisions attempting to override the provisions of Article 5bis would be null and void; this point had been made by the Spanish Minister at the Council meeting on 8 November 1990.

2 The recital as completed appears at the top of page 5 in document 10259/90.
The majority of the delegations and the Commission representative considered that the words "Notwithstanding contractual provisions to the contrary" were satisfactory; nevertheless, in an attempt to meet the concern of the Spanish delegation, it was suggested that an addition be made to Article 8(1), which refers to the law of contract, to the effect that any contractual provisions contrary to Article 5bis would be without effect and void, and that consequently the words "Notwithstanding contractual provisions to the contrary" could be deleted from the beginning of Article 5bis(1). Since Article 5(1) second sentence and Article 5(5) also contain provisions which may not be overridden by contract, it was further suggested that references to these be included in the addition to Article 8(1). For ease of reference, the suggestion was also made that the second sentence of Article 5(1) become a separate paragraph of that Article.

These suggestions were accepted by the Working Party, albeit with reluctance by some delegations, and subject to a scrutiny reservation by the Netherlands delegation, which feared that the specific references made in the addition to Article 8(1) to Article 5bis and to the exceptions provided for in Article 5(3) and (5) could be interpreted a contrario as meaning that contractual provisions contrary to other provisions of the Directive, could not be considered to be without effect and void.

12. At the suggestion of the Netherlands delegation, it was agreed that the terms "reproduction of the code and translation of its form" in the opening part of Article 5bis(1) be clarified to read "reproduction of the code and translation of its form within the meaning of Article 4(a) and (b)".

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3 As this provision corresponds to Article 5(3) in the Commission's amended proposal, it appears as Article 5(3) in the consolidated text in document 10259/90.
13. At the Working Party's previous meeting, the majority of delegations had considered that the wording contained in the Commission's amended proposal for the opening part of Article 5bis(1) ("... indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program") was too broad, and a suggestion had been put forward to replace this by the following wording: "... indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program ...". The Commission representative had entered a scrutiny reservation on this suggestion, as it considered it to be too narrow.

The Commission representative stated that he would be able to withdraw his scrutiny reservation either if the words "with the original program" were replaced by the words "with another program", or if these words were deleted and it was made clear in the preamble that interoperability for the purposes of this Directive was between an independently created program and any other program; it must be clear in any event that the derogation allowing decompilation could not be used for the purpose of making substitute products.

After discussion, it emerged that the majority of the delegations could accept a text replacing the words "with the original program" by "with other programs". The Commission representative stated that his Institution maintained the wording contained in its amended proposal (doc. 9397/90), but he too was prepared to accept this text.

The German and Greek delegations entered a reservation on this result. They considered that the derogation in Article 5bis allowing decompilation should not be limited to interoperability between programs, but should also extend to interoperability between programs and hardware; the German delegation suggested the wording "... indispensable to obtain
the information necessary to achieve the interoperability of an independently created product (hardware or software) with other programs ...

The Commission representative and the other delegations opposed this extension on the grounds that technically it is not necessary to decompile programs in order to create compatible hardware, and that such an extension would broaden the derogation allowing decompilation to the extent that it would no longer be clear that this derogation could not be used to make substitute products.

The German delegation undertook to re-examine its position with a view to the lifting of its reservation, if possible at the Permanent Representatives Committee level; to this end it would remain in contact with the Commission representative.

14. The United Kingdom delegation explained that the term "published" in Article 5bis(1)(b) could be used unfairly by a rightholder if he were to publish the information necessary to achieve interoperability in an obscure language or in an obscure journal and invoke this publication against a person who decompiled his program. The United Kingdom delegation suggested that the terms "has not previously been published or made available" be replaced by the terms "has not previously been readily available".

This suggestion was accepted by the Working Party.

15. The United Kingdom delegation did not pursue its objections to Article 5bis(2).

16. The Working Party agreed that Article 5bis(3) should not be transferred to the preamble as had been suggested at the previous meeting, but should remain as part of this Article.
17. The German delegation stated that it was able to accept the new paragraph 2 of Article 7 proposed by the Commission at the Council meeting held on 8 November 1990, and could therefore withdraw its reservation on this Article.

The Spanish delegation considered that the new paragraph 2 was not in conformity with the aim of harmonization, and stated that it would have preferred either that its contents appear solely in a recital, or that there be a statement in the Council minutes to the effect that Article 7 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. However, if the new paragraph 2 were to be approved by the overwhelming majority of delegations, the Spanish delegation would not oppose its adoption.

The Commission representative explained that as Germany at present had a term of protection longer than that provided for in the Directive, the absence of the new paragraph 2 could pose problems for those who had acquired rights when the shorter term came into force; these problems would be exacerbated if the solution adopted in relation to Community harmonization of term of protection for copyrighted works in general were to be longer than the term provided for in this Directive. The new paragraph 2, which allows Germany to maintain its present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way, would deal more effectively than the suggested minute statement with the problem of acquired rights.

In the light of these explanations, the Working Party agreed on the addition of the new paragraph 2 to Article 7.

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4 See doc. 9713/90, point 6(b) and the accompanying footnote.
Recitals

18. The Working Party approved the recitals contained in the Commission's amended proposal (doc. 9397/90) subject to the following changes and observations:

(a) the Greek delegation entered a reservation on the last recital on page 17 of the English version\(^5\), preferring the wording in the Commission's original proposal;

(b) the recital relating to rental and public lending\(^6\) was inserted after the first recital on page 18;

(c) an addition was made to the following recital as mentioned in point 9 above;

(d) adaptations were made to the three recitals on page 19 to take account of the changes made to Article 5bis in relation to the Commission's amended proposal;

(e) an addition was made to the second recital on page 20 corresponding to the addition made to Article 8(1) (see point 11 above);

(f) the second statement relating to Article 1(1)\(^7\) was inserted as the last recital.

Fair dealing, study and research

19. The Commission representative explained, in reply to questions from delegations, that the defence of "fair dealing" or "fair use" could continue to be invoked in those Member States where it is recognized, insofar as it relates to matters not covered by the Directive; it could not however be invoked

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5 The pagination is not the same in the different language versions of document 9397/90 PL 62; the page references in point 18 are to the English language version.
6 See doc. 9713/90, page 14, footnote 6.
7 See doc. 9713/90, page 10, footnote 2, second statement.
to obtain different results from those provided for in the Directive, in particular in Articles 5 and 5bis; the defence of "study" could be invoked only if the act concerned fell within the terms of Article 5(5); the defence of "research" could not be invoked.

The Working Party accepted these explanations.

20. The Chairman of the Working Party and the Commission representative thanked all the delegations for their cooperation in bringing the work on the Directive to the point where it could reasonably be expected that a common position would be adopted by the Council on 13 December 1990.

OTHER BUSINESS

21. The Commission representative informed the Working Party that a number of points relating to intellectual property had been raised in the negotiations with the countries of the European Free Trade Association (EFTA) on a European Economic Area; of particular interest to the Working Party was the question whether the EFTA countries would be allowed to maintain the principle of international exhaustion in relation to copyright and neighbouring rights. The Commission would shortly prepare and submit to the Member States a position paper on the points raised.