REPORT

from: Permanent Representatives Committee

to: Council (Internal Market)

No. prev. doc. : 10294/90 PI 78
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


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).

(1) OJ No C 91, 12. 4.1989, pp. 4 to 16.
(3) 7897/90 PE-RESOL 30, pp. 25 to 32.
(4) 9397/90 PI 62 COM(90) 509 final SYN 183.
2. As agreement has been reached on most of the questions raised, the Permanent Representatives Committee is submitting this proposal for a Directive to the Council with a view to the adoption of a common position. The questions on which there are still reservations are set out in this report.

The text of the proposal as it stands after the discussions of the Permanent Representatives Committee is contained in 10259/90 + COR 1 (5).

II. QUESTIONS ON WHICH THERE ARE STILL RESERVATIONS

3. Decompilation (Article 5a)

The majority of delegations and the Commission were able to accept Article 5a as set out in 10259/90 PI 77 + COR 1; this Article allows decompilation of a computer program without the authorization of the rightholder in clearly defined circumstances, where decompilation is "indispensable to obtain the information necessary for the interoperability of an independently created programme with other programs".

The German, Greek and Spanish delegations entered reservations on the grounds that this text covered only interoperability between one program and others: in their view it should also cover interoperability between hardware and one or more programs.

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(5) The text finalized by the Working Party of Legal and Linguistic Experts will be circulated under reference 10652/90 PI 82.
The majority of delegations and the Commission opposed extending coverage, on the grounds that it was technically unnecessary: this Directive was concerned with the legal protection of computer programs, while the protection of hardware was covered by other instruments. Article 5a provided for an exception to the provisions in preceding articles on the scope of the author's rights in the programs: taking into account the fact that the Directive placed no limits on the possibility of analysing the material as such, there was no need to make provision for an exception in this connection. In addition, the amendment requested by the German, Greek and Spanish delegations might disrupt the delicate balance of the compromise achieved on this article.

4. **Rental right (Article 4(c))**

The Netherlands delegation maintained a provisional reservation on the words "with the exception of the right to control further rental of the program or a copy thereof". It took the view that a person who lawfully acquires a computer program should have the option, subject to making adequate payment to the rightholder, of hiring out the program to third parties without that rental being subject to control by the rightholder. To this end it proposed adding the following sentence to the end of Article 4(c):

"This right to control shall not apply, however, where the purchaser of the program is willing to offer the rightholder appropriate payment for the rental."

The other delegations and the Commission opposed the Netherlands delegation's request. In their view, renting a computer program without control by the
rightholder would open up too many risks that the rented program would be copied unlawfully.

5. Exceptions to the restricted acts
(Article 5(1))

The Netherlands delegation maintained a reservation on the words "in the absence of specific contractual provisions" in Article 5(1), on the grounds that it should not be possible to restrict, by contract, the right of the lawful acquirer of a computer program to use the program in accordance with its intended purpose.

The other delegations and the Commission believed that the rightholder should indeed be entitled to do so, in particular the rightholder should be entitled to limit the number of terminals on which the program could be used.

6. Nullity of certain contractual provisions
(Article 8(1))

The Netherlands delegation entered a scrutiny reservation on the second sentence of Article 8(1), which stipulates that all contractual provisions contrary to Article 5a or to the exceptions provided for in Article 5(3) and (5) shall be null and void. It feared this would lead to an a contrario interpretation, which would allow other provisions of the Directive to be nullified by way of contract.
7. Protection of ideas (Recital)

The Greek delegation entered a scrutiny reservation on the fifth recital on page 4 of 10259/90 PI 77, which is worded as follows:

"Whereas in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive;".

It would have preferred the wording of the original Commission proposal, which does not refer explicitly to logic, algorithms and programming languages:

"Where the specification of interfaces constitutes ideas and principles which underlie the program those ideas and principles are not copyrightable subject matter;".

8. The United Kingdom delegation entered a Parliamentary scrutiny reservation on the amended proposal for a Directive as a whole.

9. At the request of the German delegation, the Commission indicated its readiness to make a statement for entry in the Council minutes to the effect that it would undertake to submit a report on the implementation of the Directive in the years immediately following its entry into force.