REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 5266/90 PI 15
No. Cion prop.: 5682/89 PI 25 COM(88) 816 final - SYN 183

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

1. Under cover of a letter dated 11 January 1989 the Commission sent the Council a proposal for a Council Directive on the legal protection of computer programs\(^1\). This proposal is based on Article 100A of the Treaty establishing the European Economic Community.

The Economic and Social Committee gave its opinion on this proposal on 18 October 1989\(^2\). The European Parliament has not yet given its opinion.

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\(^1\) Published in Official Journal No C 91 of 12.4.89, pages 4 to 16.
Reason for submission of the dossier

2. The Presidency is submitting the matter of the proposed Council Directive on the legal protection of computer programs for a general consideration of the work done to date on this dossier. It is not proposed that the Council should, at this stage, undertake a detailed appraisal of particular texts; pending receipt of Parliament's opinion, the Council is being asked to take stock of the work done since this matter was last before the Council on 21 December 1989 and to give orientations for the continuation of that work.

Progress in the Council Working Party

3.1. The consolidated text of the draft directive contained in document 6040/90 PI 21 sets out the considerable progress made in achieving a common approach to the drafting of the Articles of the directive, although on a number of issues a consensus has yet to be attained. The issues that were discussed at the Internal Market Council on 21 December 1989 remain, however, the most important outstanding matters. They are (i) the specification of interfaces as dealt with at Article 1(3) of the Commission's original proposal and now at Article 1(2) of the consolidated text and (ii) reverse engineering to obtain interoperability. As a result of its further studies the Commission has reported that

(a) the directive should state explicitly that ideas and principles underlying interfaces are not copyrightable (as in Article 1(2) of the consolidated text), and

(b) that it should be made clear also that it is not an infringement of copyright for a lawful possessor to observe, study or test the functioning of a computer
program while loading, displaying, running, transmitting or storing it (as in Article 5(3) of the consolidated text). By such means a lawful possessor of a program could legitimately obtain information that would enable him to determine ideas and principles that underlie the program.

The Commission also reported that the two matters at (a) and (b) above are considered by the enterprises consulted to be a most important part of a solution in ensuring that there is access to the information needed to obtain the interfaces required for the interoperability of programs.

3.2. (a) **On interfaces** (Article 1(2) of the consolidated text): the Working Party is agreed that interfaces, like any other part of a program, should have the protection of copyright and is considering a draft which would make it clear that while interfaces are protected, the ideas and principles that underlie them are not.

(b) **On observing the functioning of a program:** the Working Party is considering a draft text at Article 5(3) of the consolidated text, which makes the clarification indicated at paragraph 3.1(b) above.

3.3. The Presidency considers that solutions along the lines of draft Articles 1(2) and 5(3), mentioned above, would cater for the vast majority of situations that could arise where information is needed to obtain the interfaces required for the interoperability of programs. Nonetheless, in very few instances, it could happen that all of the information needed cannot be obtained from public or published sources, from the right holder or from studying the functioning of a program in a legitimate way. There may be, then, no other option than to reverse engineer or decompile to get needed interface information that cannot be got by other means. But the
Commission's proposal as originally drafted would have the effect that reverse engineering or decompiling a copyright protected program would be a restricted act (except, perhaps, in the United Kingdom and Ireland, where "fair dealing" (see paragraph 5.2 below) may be permitted). Authorisation of the right holder would, consequently, be required. If reverse engineering without authorisation were carried out, it would be an infringement of copyright under the Commission's proposal. It is on this question that the Presidency invites the Council to concentrate its discussion.

Reverse engineering

4.1. Reverse engineering of a computer program would involve acts such as the reproduction, translation, alteration, arrangement, etc. of the program (i.e. restricted acts under Article 4). While such acts may, very occasionally, be the only means by which to get information needed for interoperability, they will yield, as well, a very considerable amount of other information about a program, including valuable information that is the result of research and development outlays by the author. The objective in this directive is to find a solution that safeguards the interests of authors and right holders, while ensuring that reasonable access to information about interfaces is not hindered by copyright in those, probably quite few, circumstances where reverse engineering is the only way to obtain that information. Whatever solution is adopted:

(i) it should represent as small a departure as possible from the present environment of protection, and

(ii) there should be periodic reviews of the problems for interoperability and of how developments of computer technology may require amendment of the directive.
4.2. These two considerations seem all the more justified by the fact that the evidence of extensive problems of access to interfaces under the existing legal order for copyright has not been adduced, and by the probability that the solution envisaged at Article 5(3) will remove significant apprehensions about the possible effects of the directive.

Options

5.1. First Option

The Commission's original proposal, while containing no explicit provision on reverse engineering, had the effect of making reverse engineering subject to the authorization of the right holder. No Member State has specific provisions in its copyright law either permitting or prohibiting the reverse engineering of computer programs. The authorities of the USA and of Japan have advised that their laws have no such provisions either.

Firms have been able to live with such a legal environment in the EC Member States, in the USA, in Japan and, it is believed, in other countries also. Therefore, one option would be to retain this approach in Articles 4 and 5 of the consolidated text and not to make any specific reference to reverse engineering. The disadvantage of this option would be that Article 4 as drafted in the consolidated text would have the effect of tipping the balance in favour of making reverse engineering subject to the authorization of the right holder.

The Working Party therefore considered that other approaches should be investigated. These approaches would have to be compatible with Article 9(2) of the Berne Convention.
5.2. Second Option

This was to see if "fair use" provisions as in the law of the USA, of Japan, of the United Kingdom and of Ireland might help. Nowhere in such fair use provisions is it stipulated that reverse engineering is either permitted or prevented. It is, instead, left to the courts to decide if a particular infringing use of a protected work has been fair. Use that is considered fair and reasonable in the sense that it is not judged to harm either the right holder's enjoyment of the normal exploitation of his work or his other legitimate interests, is not considered to infringe his exclusive rights. Fair use is unauthorised and free. To safeguard a right holder's interests and for the guidance of courts in legal actions, laws can, as in the USA, provide guidelines setting out factors that may be taken into account by courts in hearing legal actions.

The main objection to this option, particularly by those Member States which have a civil law tradition, is that it leaves the matter entirely to judicial interpretation without a sufficient codification of conditions and circumstances.

5.3. Third Option

This is the question whether there should be an exemption (in Article 5) that would specifically allow reverse engineering for defined purposes (e.g. for commercial decompilation with the declared aim of achieving or maintaining interoperability) under defined circumstances. The Commission services have indeed recently indicated their support for a solution that would give the lawful possessor of a program a positive right to reverse engineer (i.e. he would be authorised by law to do so) under certain circumstances.
If the EC were to introduce such a provision it would be the first in the world to give express authorisation for reverse engineering. Under the current international legal environment, from which a derogation along the lines of this third option would be a departure, there have been instances of the reverse engineering of protected programs with the authorisation of the right holder. Such decompilation has been done (a) under contract, (b) under controlled conditions and (c) against remuneration. If the EC were to authorise by law the free reverse engineering of computer programs, there are evident consequences for the negotiation of such contracts, controls or remuneration within the EC. There would also be consequences for the industry as a result of the change in the legal framework of protection. But it cannot be excluded that such a derogation would bring about important changes in thinking (and practice?) on the regulation of reverse engineering in other jurisdictions also, and would have consequences in international negotiations. The Presidency therefore thinks it advisable that the Council consider whether the promotion of the particular option now favoured by the Commission services as a solution would be timely or advisable.

Conclusions

6. The Presidency proposes to ask the Council to give an orientation to the Working Party as to which of the above options - or what others - it should pursue. One example of an alternative would be a fair use provision (Second Option) that could be adapted to meet the needs of civil law tradition countries by the inclusion of a more precise statement of the circumstances under which use might be considered fair. The Presidency is concerned that alternative solutions should not be ruled out at this stage.
In any event, the Council may wish to consider counselling prudence in connection with any very significant departures from the framework of protection that has existed until now. Any suggestion that acts that are considered to be restricted by the laws of Member States and of trading partners should now be authorised by Community law is a most serious matter, requiring most careful consideration.