REvised Preliminary Draft Opinion
of the Section for Industry, Commerce, Crafts and Services
on the
on the legal protection of computer programs
(COM(88) 816 final - SYN 183)

Rapporteur: Mr MORELAND

Sent on: 22 August 1989

To the Members of the Study Group
on Computer Programs
(Section for Industry, Commerce, Crafts and Services)

N.B.: This document will be discussed at the meeting on 11 September 1989.

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On 23 January 1989, the Council decided, in accordance with Article 100 A of the Treaty establishing the European Economic Community, to consult the Economic and Social Committee on the


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The Section for Industry, Commerce, Crafts and Services was instructed to prepare the work on this topic and adopted its Opinion on .... The Rapporteur was Mr MORELAND.

The Economic and Social Committee, at its .... Plenary Session, meeting on ...., adopted .... the following Opinion:

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1. Summary of the Proposal

1.1. The draft Directive introduces into Community law the concept of the protection of computer programs through the law of copyright. This concept already exists in the law of several Member States. The proposal does not introduce a specific law but rather proposes that Member States should accord computer programs the same copyright protection that they accord to literary works. In addition the term of protection is to be 50 years from the date of creation of the program.

1.2. However, the proposal goes on to exempt from protection “ideas, principles, logic, algorithms or programming language underlying the program”. It also makes lawful the use by the public of programs in non-profit making public libraries.

1.3. The proposal gives rights to the commissioner of programs rather than the creator and to the employer rather than the employee (unless otherwise provided by contract).

2. General comments

2.1. The Section believes that the Commission’s approach has two significant advantages:

1. In according computer programs the same protection as literary works use can be made of a "ready made" copyright law. The lengthy process of adaptation and development of the new law that a "sui generis" approach would bring is avoided.

2. This could be made more explicit in the directive: The approach is intended to bring computer programs within the definition of "literary works" in the Berne Convention. The

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advantage of this approach is that it encourages States outside the Community to treat Community programs as copyright works entitled to the protection of the law.

Indeed, the more closely Community law is assimilated to the Berne Convention the greater this advantage becomes. If the Member States are all in closer harmony with the Berne Convention then, in the opinion of the Section, the ability of the Member States to influence the forthcoming discussions on the revision of the Convention will be enhanced.

2.2. However, the Section accepts that some Member States’ laws on “literary works” diverge in detail from the Berne Convention and that judgement has to be applied as to the necessity of being as close to the Berne Convention as possible in order to obtain its advantages. Further, computer programs have specific characteristics and some special rules have to be formulated.

Nevertheless the Section stresses that the most important objective is to be as close as possible to the provisions of the Berne Convention.

2.3. The Section recognizes that absolute precision in the wording is extremely difficult for the first draft of a directive on this complex subject. It believes that a number of drafting changes are required as specified under part 3. That detailed changes are in some places recommended should not detract from the Section’s overall approval of the draft.

2.4. One matter of concern, however, is that the proposal still leaves open the possibility of the continuation of barriers to the free movement of computer programs within the Community through, for example, the co-existence of different definitions of “originality” in Member States’ laws.

It should be noted that there is a translation error in the German version as “originality” is translated in Article 1 paragraph 4 wrongly as “Individualität”.

2.5. If concern exists that the enactment of the Directive may limit the spread or advance of information technology, then the Section believes the answer lies not in restricting the law of copyright but in the enforcement of the competition provisions of the Treaty.

2.6. The Section supports the need to ensure that computer programs receive adequate protection and believes that there are clear advantages in the establishment of a copyright law regulating the protection of computer programs in Community legislation.

2.7. Consequently the Section welcomes the proposal from the Commission, subject to the following specific comments.
3. Specific comments

3.1. Preamble: Eighth Recital

3.1.1. It should be made clear whether the "interfaces" referred to in this recital are the interface programs themselves, or the specifications for those programs.

3.1.2. It is not in dispute that "ideas and principles" are not susceptible to copyright protection. It is, therefore, superfluous to state that the ideas and principles behind the interface programs are "not copyrightable subject matter", because ideas and principles behind any program are "not copyrightable subject matter".

3.1.3. To take these two points into account, the whole recital could be deleted in its entirety without affecting the substance of the proposal. Alternatively, the recital could be amended to read as follows:

"Whereas for this purpose a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. Any such means of interconnection and interaction are generally known as 'interfaces'. Interfaces are protectable in the same way as any other copyright computer program."

3.2. Preamble: Ninth Recital

In view of the importance of the international copyright conventions to the means of protection chosen for copyright programs, it might be useful to add to the end of this recital

"... and to the principle of compliance by each Member State to the provisions of the International Convention for the Protection of Literary and Artistic Works (the Berne Convention)"

3.3. Article 1: Paragraph 2

As stated in part 2 above, the Section considers that the protection of computer programs through the medium of the "literary works" provisions of the Berne Convention should be explicitly referred to in the draft. Therefore the paragraph should conclude with the words:
"In the context of the Berne Convention".

3.4. Article 1: Paragraph 3

3.4.1. The Section supports the exclusion of ideas and principles from copyright protection as computer programs.

3.4.2. The terms "logic" and "algorithms" are unclear, frequently interchangeable with each other, and are covered adequately by the concepts of "ideas" and "principles". Their inclusion may only serve to confuse rather than clarify and the Section therefore recommends that they be excluded from the paragraph.

3.4.3. Programming languages are not computer programs and therefore would not be protected as such without specific legislation. Consequently the inclusion of a reference to "programming languages" in this Article only causes confusion and should be removed.

3.4.4. As has been stated above, it is not in dispute that "ideas and principles" are not susceptible of copyright protection. It is superfluous here, just as in the preamble, to state that the ideas and principles behind the interface programs are "not copyrightable subject matter". The second sentence could be deleted. The Section understands and supports the concern that the proprietors of the copyright in interface programs may exercise their rights in an anti-competitive matter. The Section, however, remains convinced that the second sentence of Article 1.3. adds nothing to the control of anti-competitive practices which it is the clear responsibility of the Commission to enforce through the Competition rules of the Community.

3.4.5. The paragraph could therefore read as follows:

"Protection in accordance with this Directive shall apply to the expression in any form of a computer program but shall not extend to the ideas or principles as such which underlie the program."

3.5. Article 1: Paragraph 4

3.5.1. The Commission does not define "originality" as the interpretation of this word in law differs from Member State to Member State. This clause does not harmonize anything, particularly as the Court of Justice, if the matter were tested before it, would probably uphold the validity of different degrees of originality as it has upheld the validity of different terms of protection. Hence, the continued existence of different degrees of originality in different Member States could act as a barrier to trade in computer programs between Member States.
3.5.2. The Section recognizes that this problem of "originality" is not unique to the law of copyright in computer programs and extends to many more aspects of copyright. However, it stresses that failure to address the problem in the first attempts to harmonize the law of copyright will only perpetuate a barrier to trade in the Community and simply delay a solution.

3.5.3. Consequently, the Section proposes the following alternative wordings for a definition of "originality" (it should be noted that both derive from the explanatory memorandum).

"A computer program is protected if it is original. For the purpose of this Directive, a work is original if it is the product of a degree of creativity (it is immaterial how much) contributed by the author when compared with any programs or with any other material from which it is derived."

or

"A computer program is protected if it is original. For the purpose of this Directive, a work is original if it is not an exact copy of any work from which it is derived."

3.5.4. If, for any reason, it is decided not to have a definition of originality then paragraph 4(a) would be better drafted if it were expressed positively rather than negatively, and the following is suggested:

"A computer program shall be protected if it satisfies the same conditions as regards its originality as apply to any other literary work."

3.5.5. As stated in 2.4. the German text needs revision.

3.6. Article 2: Paragraph 3

3.6.1. It is questionable whether the draft complies with the "moral rights" provisions of the Berne Convention. The Section considers that these provisions are more relevant to the more traditional forms of literary work copyright, not to computer programs.

3.6.2. It is for this reason that the Section supports this paragraph as drafted. The Section believes that it is right that the first owner of the copyright in commissioned works should be the person who has ordered and paid for them. There is a difference between computer programs and any other sort of literary work. The concepts that have made Member States' legislatures reluctant to vest the copyright in commissioned works in the commissioner, rather than the commissionee (as in the recent UK Copyright Act) apply to more traditional forms of literary work, not to computer programs.
3.7. Article 2: Paragraph 4

The Section supports the principle of this paragraph, but proposes that it be amended by the addition of the words

"(or in accordance with legally enforceable collective bargaining agreements)".

(Again the German text "während der laufzeit des Arbeitsvertrages" is not an accurate translation of the words "in the course of employment").

3.8. Article 2: Paragraph 5

The Section believes that it is important to protect the rights of the owner of the copyright in the program which generates the subsequent program. For that reason, the Section suggests the following changes of wording:

Add after "contract":-

"This Article does not affect the copyright in the computer program which generates the subsequent programs."

3.9. Article 4(a)

3.9.1. For the avoidance of doubt, the Section considers that the restricted acts should expressly include the reproduction of adaptations of a computer program and the authorization of reproduction, etc.

3.9.2. "Viewing" a program is difficult to define technically, and should be replaced by "displaying".

3.10. Article 4(b)

In order to conform as closely as possibly to the Berne Convention, the Section proposes that 4(b) reads:-

"The adaptation, translation, modification and arrangement of a computer program and the reproduction of such adaptation, translation, modification or arrangement".

The Section proposes that, for the complete avoidance of doubt over the meaning of the word "adaptation", a definition should be added:

"For the purposes of this Directive, 'adaptation' includes, but is not limited to, the conversion of the program into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program."
3.11. Article 4(c)

3.11.1. Although the media upon which a computer program is carried can be "sold" it is inappropriate to use the word "sale" of computer programs themselves.

3.11.2. Clearly copyright law is not a vehicle to prohibit parallel importing from outside the Community. Any judgement on this should be elsewhere. Consequently to avoid any misinterpretation the Section proposes that the words "anywhere in the world" be added after the words "first marketing" or whatever replaces them. This will make clear that the position of EC individuals and companies taking licences of programs from copyright proprietors outside the Community is protected.

3.11.3. The word "marketing" is difficult to define accurately. The Section proposes certain changes to the drafting of 4(c) to overcome this difficulty.

3.12. Redraft of Article 4

It is therefore proposed that Article 4 should read as follows:

"Subject to the provisions of Article 5, the exclusive rights referred to in Article 1 shall include the right to do or to authorize:

a) the reproduction of a computer program by any means and in any form, in part or in whole. Insofar as they necessitate a reproduction of the program in part or in whole, loading, displaying, running transmission or storage of the computer program shall be considered restricted acts;

b) the adaptation, translation, modification and arrangement of a computer program and the reproduction of such adaptation, translation, modification or arrangement of a computer program (for the purposes of this Directive, ‘adaptation’ includes, but is not limited to, the conversion of the program into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program);

c) the distribution of a computer program by means of licensing, lease, rental and the importation for these purposes. The right to control the distribution of a copy of a program shall be exhausted in respect of the sale or importation of a copy following the first sale of the copy to any person anywhere in the world by the rightholder or with his consent."

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3.13. Article 5: Paragraph 1

3.13.1. The paragraph needs more precise drafting. There are many ways of licensing computer programs which do not involve the signature of a written agreement by both parties. There will be fewer such written agreements as technology develops. The Section proposes that the reference to written agreement signed by the parties be deleted and replaced by the words "any legally enforceable licence agreement"; further the words "acts enumerated in Article 4(a) and (b) above" should be replaced by the more limited "reproduction by loading, displaying, running, transmission or storage".

3.13.2. The Commission should also consider including the right to make backup copies of a program as one of the general rights of the user.

The following text is suggested:

"(a) The copyright in a computer program is not infringed by the making of a reproduction of the work, or of a computer program being an adaptation of the work, if:

(i) the reproduction is made by, or on behalf of, the owner of the copy (the "original copy") from which the reproduction is made; and

(ii) the reproduction is made for the purpose only of being used, by or on behalf of the owner of the original copy, in lieu of the original copy in the event that the original copy is lost, destroyed or rendered unusable.

(b) Sub-clause (a) above does not apply if there is a clear statement in writing upon the original copy or upon any media or packaging in or with which it is supplied that the right to make backup copies is excluded or if the media upon which the original copy is supplied are not such as would in normal use be lost, destroyed or rendered unusable."


The Section proposes that, for the sake of clarity, the paragraph should read:

"Where a copy of a computer program has been sold or made available to the public by means other than a legally enforceable licence agreement, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent the use as reference material of that copy of the program to the public on the premises of non-profit making organizations which make available programs as reference material for the public, such as public libraries."

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3.15. Article 6

The Commission should examine the translation in various languages of the word “infringement” to make sure that no criminal sanctions are necessarily implied.

3.16. Article 7

3.16.1. The Article lays down a term which differs from the term of protection prescribed in the Berne Convention because, as the Commission states in its explanatory memorandum, “attaching the term of protection to the life of a human author might cause some hesitations in the light of joint authorship of computer-generated works and the length of term which will result”. As the life of a computer program is invariably far shorter than 50 years, this concern of the Commission’s is academic and should not be allowed to weigh against the need to adhere to the provisions of Berne as closely as possible. The same argument applies to any suggestion of any other period of years, e.g. 25 or 30. The Section must emphasize the advantage of adhering closely to the Berne Convention. Consequently, the Article should in the Section’s view read as follows:

“The term of protection under this Article shall be the life of the author (or, if there is more than one author, the life of the last author to die) plus fifty years. The term of protection for a computer generated work shall be fifty years from the date upon which it was generated.”

The Convention permits “at least 50 years”. Nevertheless, to use such wording would invite Member States to impose different terms of protection, i.e. further barriers to trade. In any event use of 50 years clearly complies with the Berne Convention.

3.16.2. If the Commission is also concerned that the wording of the Berne Convention may be changed at some time in the future so that the term will be fifty years “from the date of creation”, then the Section still maintains its view that Berne as it is now drafted should be complied with (so far as possible) until it is altered, at which point the Commission could put forward a proposal to alter the wording of the Directive.

However, agreeing to this position now does not mean a commitment to maintain the principles behind this clause at meetings to revise the Berne Convention.

3.16.3. It may be considered that there is a need for a provision laying down the term of the copyright in anonymous works. Bearing in mind the extent of the redrafting required and the minimal number of works to which this would apply, the Section does not consider this to be necessary.

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3.17. Article 8

The Section considers that the drafting would be clearer if the words “relating to the protection of computer programs” were added after “principles”. This would ensure that those who are to enforce the Directive know what principles are to override Member States’ intellectual property laws.

Alternatively - and to be consistent with the Directive on the protection of semi-conductor topography - the phrase: “insofar ... Directive” could be deleted.

3.18. Article 9

The latest date to be filled in this Article should of course be 1 January 1993 and the Section hopes that the Council can set an earlier date.

In any event the Section would emphasize the importance of a Council decision on this Directive as soon as possible so that the Member States have a clear and common position for negotiations to revise the Berne Convention.

4. Further comments

4.1. While welcoming this proposal from the Commission, the Section believes that there are other issues in the Green Paper on Copyright that also require legislative proposals and looks forward to receiving these proposals, so that a clear position is established by 1 January 1993 of the Community’s position on the whole law of copyright.

4.2. While in no way suggesting that an agreed Directive should be provisional, the Section concludes that in the light of technology which is changing rapidly and to ensure that the Directive does not operate to the detriment of the dissemination of technology in the Community, there should be an automatic review of the Directive by the Commission after a period of, say, five years.

4.3. It is clear that there is a serious problem across the Community of unauthorized access to computer programs and data (“hacking”). Of course, this is not an issue of copyright as such but it is an issue which affects the use of computer technology and has implications for the regulation of the single market. The Section recommends that the Commission give this issue serious examination with a view to making legislative proposals.